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CASES REPORTED

IN THIS VOLUME.

WORDS AND PHRASES

JUDICIALLY CONSIDERED IN THIS VOLUME.

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CASES REPORTED, VOL. X., PART 1.

GOLD MEDAL FURNITURE CO. v. STEPHENSON.

(Decision No. 2.)

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Mar. 17.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. March 17, 1913.

1. EVIDENCE (§ II E 7—197)—BURDEN OF PROOF AS TO UNDUE INFLUENCE.

In an action by a creditor of a limited liability company, upon a guarantee signed by a married woman, who was the secretary of, and a shareholder in the debtor company, the burden of proving undue influence in respect of her signature thereto obtained by her husband lies upon those who allege it.

[*Bank of Montreal* v. *Stuart*, [1911] A.C. 120, followed; *Euclid Avenue Trust Co.* v. *Hohs*, 24 O.L.R. 447, referred to.]

2. HUSBAND AND WIFE (§ I B 2—35)—LIABILITY OF WIFE AS SURETY—INDEPENDENT ADVICE—CHANGE OF POSITION OF PARTIES.

A creditor, without notice of any undue influence on the part of the husband in procuring his wife's signature to a security for the amount of an indebtedness due by a company of which the wife was secretary and also a shareholder, given at the instance of the husband who was manager of the company, is not bound to see that she understood the document and had proper independent advice, particularly in a case where, in consideration of the delivery of the security, the creditor extended the time of credit to the debtor, advanced other goods and materially changed his position.

[*Gold Medal Furniture Co.* v. *Stephenson* (No. 1), 7 D.L.R. 811, varied; *Chaplin* v. *Brammall*, [1908] 1 K.B. 233, doubted; *Bischoff's Trustees* v. *Frank*, 89 L.T. 188, and *Talbot* v. *Van Boris*, [1911] 1 K.B. 854, followed; *Turnbull* v. *Duval* [1902] A.C. 429, distinguished.]

3. GUARANTY (§ I—3)—WIFE AS SURETY—SIGNING GUARANTY AT HUSBAND'S REQUEST.

In a transaction between a creditor and a limited liability company by which the indebtedness of the company was secured by a guaranty which was signed by a married woman at the request of her husband, the married woman cannot escape liability where it appears that she had a personal interest as the secretary and a shareholder in a company by pleading that she signed the guaranty at her husband's request without reading it over, where there was no misrepresentation and the creditor received it in good faith from the company as represented by the husband.

[*Bank of Montreal* v. *Stuart*, [1911] A.C. 120, followed; *Chaplin* v. *Brammall*, [1908] 1 K.B. 233, doubted; *Gold Medal Furniture Co.* v. *Stephenson* (No. 1), 7 D.L.R. 811, varied.]

Statement

APPEAL and cross-appeal from the judgments of Metcalfe, J., 17 W.L.R. 651, 7 D.L.R. 811, and 22 W.L.R. 633.

The judgment below was varied.

D. H. Laird and *F. J. G. McArthur*, for plaintiffs.

C. P. Fullerton, K.C., and *F. M. Burbidge*, for several defendants.

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HOWELL, C.J.M.:—I do not think that the judgment of Mr. Justice Metcalfe in this case should be disturbed, except as to the defendant Tina Stephenson. The learned Judge, in a careful and well considered judgment, has referred to the recent cases very fully. There is really no contradictory evidence to be considered, and the inferences to be drawn from the undisputed testimony are as open to this Court as to the trial Judge.

The Stephenson Furniture Company, Limited (which I shall hereafter refer to as the company), I infer from the evidence, was a close corporation having as shareholders practically only the individual defendants, and apparently the family gave the name to the company. Tina Stephenson's statement of defence shows that she was secretary of the company, of which her husband, the defendant J. A. Stephenson, was president and manager, and from statements of counsel at the trial and her own vague evidence on the subject, I infer she was a shareholder to a considerable extent.

The company owed the plaintiffs about $2,600, and the latter refused to give any more credit, and were pressing for payment, when the president offered to give the security which is now impeached, which offer was accepted. There was delay in the matter and the plaintiffs pressed the president to carry out his promise. Accordingly, the president instructed Mr. Moore, one of the employees of the company, to draw up, and he did draw up, the written document, the subject-matter of this suit, which is set out in full in the judgment of the trial Judge.

The defendant J. A. Stephenson took this document to Mr. Remington, the plaintiffs' agent in Winnipeg, and asked him if that form would do and, after reading it over, the agent said it was all right. At that time the amount, $2,600, had not been filled in at the beginning and the end of the document. It was apparently filled up later, but before signature. The agent then knew that the defendant J. A. Stephenson was about to procure the signature of his wife, Tina Stephenson, as well as the other defendants, to this document. The only evidence as to the execution of the document by her is her own evidence—she having been called by the plaintiff. She admits her signature to the document, but will not tell us anything more about it. She says her husband must have asked her to sign it, but she does not remember when or where or what took place, or what, if anything, was said. Three weeks after the date of the document she gave birth to a child. At the time she signed the document she was looking after a sick child in her house, and she says she was not well. She said she signed papers just because her husband asked her to, and she never knew what they were, that she had confidence in him and signed them when he handed them to her.

The evidence of Clara Cable shews that Tina was at the store

the night when William Stephenson signed the document, and at that time, apparently, all the defendants were present, and perhaps she then signed it there.

There is not the slightest evidence that she knew anything about the financial position of the company at that time. The learned trial Judge, as to the then financial standing of the company, states as follows:—

> The husband was the president and apparently the general manager of the concern. It was on its last legs. The husband and the creditors knew this.

There is no direct evidence to support this statement of fact. The husband did not give evidence, and there was no evidence as to his or the creditors' belief in this matter, further than the fact that the plaintiffs were pressing for payment, and the fact that six months later the company assigned and probably paid only fifteen per cent.

A witness Moore, a man in the employ of the company, was called, and he swore that before William Stephenson signed, he asked the witness as to the business prospects of the company and the answer was:—

> Well, I told him I thought the business was all right, and he said that Bert wanted him to go on this guarantee.

I should infer from this that the witness Moore, one of the company's buyers, thought that matters were not then in a bad condition; indeed, in another part of his evidence, he says he thought the business was quite sound. I would not infer from the assignment six months later that the company was necessarily insolvent when the document was signed. Perhaps they had a trading name, or a goodwill, which was valuable to a going concern and yet of no use under the hammer.

There is no evidence that the husband knew the company was insolvent, or that it in fact was insolvent at that time. One would think it difficult to believe that he had any such thought, and that he deliberately tried to entrap his wife and his father and mother into such a financial loss.

After re-reading the evidence of the wife, I can only conclude, if her evidence is true, that she would have signed the document if her husband had fully explained it to her and told her the true state of the business, and had expressed a belief that, with the guarantee, the business could float, and her stock might thereby be made worth something. There is no evidence that he had not such a belief, nor that such a belief might not be a reasonable one.

For some reason the husband was not called as a witness, and, in my mind, this raises a suspicion, perhaps he could have jogged her memory; but, as it is, we do not know when, where or why it was signed.

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Upon this evidence it is claimed that she has proved the absence of independent advice and undue influence on the part of her husband.

By the statute law of Manitoba a married woman can deal with her property as fully and as uncontrolled as a *feme sole*, and she can enter into any contracts of any kind and make herself liable thereon, regardless of her husband, quite as freely as if she were unmarried, and she can bring an action in her own name for the protection of her property even against her husband.

It is not to be overlooked that in this case she had a financial interest in the company and in its success, and was one of its officers.

The law involved in this case has recently come up for discussion in the highest Courts in the realm. The case of *The Bank of Montreal* v. *Stuart*, [1911] A.C. 120, decides that in a case like this the onus is upon Tina Stephenson, and it seems to me the language of Sir Charles Moss in *Euclid Avenue Trusts* v. *Hohs*, 24 O.L.R. 447, at 450, epitomizes that decision. He says:—

> It must now be accepted as settled by authority that in a case like the present the absence of independent advice is not in itself a sufficient reason for treating a security given by a wife for the benefit of her husband as a void transaction. If undue influence on the part of the husband is relied upon the burden of proof lies upon those who allege it.

In the case before the Privy Council, the peculiar relationship existing between the husband and wife and her feeble condition were well known to the solicitor of the bank before she signed the document there impeached. In this case there is no pretence that the plaintiffs knew anything about any supposed influence the husband had over the wife or of her condition.

I am very much troubled in this matter by language used by Lord Justice Vaughan Williams in *Chaplin* v. *Brammall*, [1908] 1 K.B. 233, at 237. It is a decision of the English Court of Appeal, and of course prior to the Privy Council decision above referred to. In that case he uses the following language:—

> But the result is that the plaintiffs, who, through their agents, were undoubtedly aware that the execution of this guarantee was to be procured through the guarantor's husband, who was living with his wife at the time and would presumably have the influence of a husband over her, failed to show that the document was properly explained to her.

I take that language to mean that if the plaintiff knew, as in this case he did know, that the execution of the document was to be procured by the husband from his wife with whom he was then living, he would be presumed to have an undue influence over her, and that it would be upon the plaintiff to shew that the document was properly explained to her. To support that

view of the law, he cites *Bischoff's Trustee* v. *Frank*, 89 L.T. 188; but his attention seems not to have been called to the fact that the language of Mr. Justice Wright reported there, was not approved of when the case was heard in appeal.

If I read the above case in the Privy Council correctly, then I think this principle laid down by Lord Justice Vaughan Williams has been overruled.

It will be observed that this case differs widely from *Turnbull* v. *Duval*, [1902] A.C. 429. In that case Mrs. Duval was strongly urged and pressed by her husband to sign the document, and the document was wholly different from what she thought it was when she signed it; and there is a further great difference in that case—her trustee was the agent of the plaintiff and used his influence in the matter. In this case there is not the slightest evidence that the wife was pressed or persuaded by her husband to sign the document, nor that the document was different from what she had expected.

The last-mentioned case was referred to in *Howes* v. *Bishop*, [1909] 2 K.B. 390, 402, and the *Turnbull* case, above referred to, was also there discussed and explained. It might be pointed out that in the *Chaplin* case the document was prepared by the plaintiff and was given to the husband with instructions to get his wife, the defendant, to sign it; and that aspect of the case is dwelt upon by the learned Judge in that case. It was found in that case as a fact that she did not understand what she was signing.

From the facts proved in this case I cannot say that the transaction brought about was immoderate or irrational. She was an officer of the company and it was her duty to assist in looking after the affairs of the company; she was a shareholder, and there is no evidence to shew that she might not fairly think that the carrying on of this account might benefit the company and help them through their present difficulty.

As to undue influence, the only evidence we have is her own testimony, in which she tells us that she knows nothing whatever about the matter, and that she simply signed what her husband asked her to sign. The husband could, no doubt, have told us the whole story, and he is not called, and no excuse of any kind is put forward to account for his absence from the witness-box. This certainly to me looks suspicious.

There is another aspect to this case. The plaintiffs refused to go on any further with the account without security, and, acting upon that, the manager of the company deliberately brought to them a document signed by all the parties, and the plaintiffs had no notice or knowledge of any undue influence or want of information of any of the parties. The plaintiffs acted upon that, extended the time of credit, and advanced other

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goods, and materially changed their position. It seems to me under the principles laid down in *Talbot* v. *Von Boris*, [1911] 1 K.B. 854, the plaintiff who had no knowledge of any undue influence would be entitled to succeed.

It is true that in that case the action was upon a promissory note, but at 863, Lord Justice Farwell holds that the same principles would apply if it were a simple contract.

I concur with Mr. Justice Perdue as to the disposition of the various appeals and the costs.

Perdue, J.A.

PERDUE, J.A.:—This is an action on a guarantee by the defendants given to secure to the plaintiffs the then existing and the future indebtedness of the Stephenson Furniture Co., Ltd., the liability on the guarantee being limited to $2,600. The guarantee purports to be signed by the defendants James Albert Stephenson, his wife, Tina Stephenson, and William and Margaret Stephenson, the father and mother of James Albert Stephenson.

The Stephenson Furniture Co. had been doing business with the plaintiffs for a number of years. The company seems to have been largely owned by the members of the Stephenson family. James Albert Stephenson was president and manager. His wife was the secretary of the company and a shareholder in it. William Stephenson, the father of James Albert, was a shareholder, and Margaret Stephenson's money, to the extent of $10,000, was invested in the company, her money having purchased the shares held by her husband, William Stephenson.

Prior to 1st November, 1908, the company had been slow in making its payments and appeared to have difficulty in meeting its obligations. The plaintiffs about that date informed J. A. Stephenson, who was the president of the company, that unless payments were made more satisfactorily they would stop supplying goods. The plaintiffs did in fact cease to supply goods to the company except for cash. J. A. Stephenson then proposed to Remington, the plaintiff's manager in Winnipeg, the giving of a guarantee to the plaintiffs by his father and mother in order to procure an extension of six months on his account. This proposal was transmitted to the head office of the plaintiffs at Toronto, and agreed to by them. I cannot find any mention of Tina Stephenson's name as a proposed guarantor at that time. After the plaintiffs had agreed to the proposal, J. A. Stephenson had the guarantee prepared in his office by one of his employees. The form of it was submitted to Remington, who expressed himself satisfied with it. Some delay took place in getting it executed, but finally it was handed to Remington by J. A. Stephenson on 21st November, 1908, with the names of the four guarantors appended.

On receiving the guarantee the plaintiffs continued to supply

the Stephenson Company with goods, the amount supplied after that time being some $1,300 or $1,400. On 27th April, 1909, the business of the company went into liquidation.

The name of Margaret Stephenson was signed by her husband, the words "per Atty." being placed underneath the name. William Stephenson says he signed for himself and his wife. He held a power of attorney from her, but it did not authorize him to sign a document of the nature of the guarantee in question. There is no evidence to shew that she in any other way empowered her husband to execute it for her, or that she ever ratified his action in so doing. I agree with the learned trial Judge that the plaintiff's case fails as against Margaret Stephenson.

The question of Tina Stephenson's liability presents great difficulty. The defence set up in the pleading is, in effect, that she signed the guarantee under the influence of her husband and without any legal or other advice, believing that she was signing a formal document for the purposes of the company and without the intention of rendering herself liable by way of guarantee. She further alleged that she was induced to sign it by the fraud of the plaintiff and its agent, her husband, without disclosing to her the fact of the company's indebtedness to the plaintiff, and that the company was then unable to pay its obligations. At the trial she was called by the plaintiff in order to prove her signature to the document. She was then cross-examined by her own counsel. Much of her evidence was elicited by questions put to her by her own counsel in such form that the question suggested the answer. Evidence obtained in that way must be taken with some suspicion, especially where it is not supported or corroborated by any other testimony whatsoever. One should be particularly careful in scrutinising evidence procured in that way when it is the only evidence adduced to support allegations of undue influence and fraud. She could not remember where she signed the document or who asked her to sign it, but she thought it must have been her husband. She stated that it was not read to her or explained to her, and that she did not understand its effect. She said she would sign papers when her husband asked her to sign them and never questioned them. On re-examination she admitted that she had no recollection whatever as to signing the document.

Since the decision of the Privy Council in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, it must be taken as established that in the case of husband and wife the burden of proving undue influence lies upon those who allege it. It is therefore incumbent upon Tina Stephenson to establish that she was induced to sign the document by undue influence on the part of her husband, or that she was so deceived or misled that it is not binding

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upon her. No evidence except her own was offered in support of her contention. She had no recollection of what took place when the document was signed. She did not positively state that her husband asked her to sign it. She inferred that her husband must have asked her to sign it. She was willing to sign anything he would ask her to sign. There is no evidence of duress or undue influence or deception having been made use of to procure her signature. The most that can be made of her evidence is that she had complete confidence in her husband and would sign any document he asked her to sign, without inquiry and quite reckless as to what it contained.

In *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, Lord Macnaghten said:—

> It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational . . . proof of undue influence is complete.

If we accept Tina Stephenson's statement as to her husband's influence over her, and the complete confidence she reposed in him, was the transaction in question immoderate and irrational? Tina Stephenson was the secretary of the Stephenson Company. She was a shareholder in it. Money belonging to her had been invested in it. It was to her interest that the company's business should continue, and that it should be saved from going into liquidation. Her husband evidently believed that if the difficulties in which the company found itself in November, 1908, could be tided over, it would pull through. Moore, who was buyer for the Stephenson Company and who had charge of its sales departments, informed William Stephenson at the time the guarantee was given that he thought the business was all right. Moore watched the record of sales and the profits made, and did not consider the company was in bad shape. He says that its last statement shewed a large surplus. The giving of the guarantee procured an extension of time from the plaintiffs and a further supply of goods was sold to the company on credit. It appears to me that the giving of the guarantee was a reasonable transaction by which the shareholders hoped to save their property. I cannot find that it was immoderate or irrational. It cannot be regarded as a voluntary gift on the part of Tina Stephenson. She had a personal interest in saving the company, and if, by giving the guarantee, the company succeeded in re-establishing itself, she would profit along with the other shareholders.

Even if the circumstances under which Tina Stephenson executed the guarantee afforded evidence of undue influence on her husband's part, can that defence prevail against the plaintiff's unless knowledge that undue influence was exercised is brought home to them?

In *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, the bank was fixed with notice through the solicitor who acted for the bank, and was instrumental in obtaining the guarantee, and who also, as the Court held, acted on behalf of Mrs. Stuart when the guarantee was obtained. It is urged that the present case is similar to *Chaplin & Co.* v. *Brammall*, [1908] 1 K.B. 233. The facts of that case are more fully reported in 97 L.T. 860. The husband of the defendant desired to purchase goods from Chaplin & Co. The latter, after some verbal negotiations, wrote to him stating that if his wife became his surety in £300 they would allow him cash discount on goods to that amount and treat it as a deferred debt. With this letter a form of guarantee was sent for the wife's signature. The husband obtained his wife's signature by fraud. He covered up the instrument when it was placed before her for signature and when she asked him what it was he said she would not understand it and that it was only a formality. In giving the judgment of the Court of Appeal, Vaughan Williams, L.J., said:—

> Those who, as representing the plaintiffs, prepared and sent to the defendant's husband the document sued upon, in order that he might procure his wife's signature to it, so that the plaintiffs might have security in respect of the business transactions into which they were about to enter with him, were, when they did so, clearly cognizant of the fact that the influence of a husband was being employed to obtain the signature of his wife to that document. That being so, I am sorry for the plaintiffs that they turn out not to be in a position to prove that any proper explanation of the instrument which she was about to sign was given to the defendant before she signed it . . . It is unfortunate that the plaintiffs did not take care to see that the defendant had independent advice in the matter.

It is clear that that eminent Judge took the view that the burthen of proof that the wife had independent advice lay upon the plaintiffs. This is contrary to the principle laid down in *Nedby* v. *Nedby*, 5 DeG. & Sm. 377, and approved by the Privy Council in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120. He followed the decision of Wright, J., in *Bischoff's Trustee* v. *Frank*, 89 L.T. 188, who approved *Huguenin* v. *Baseley*, 14 Ves. 273, and declined to follow *Nedby* v. *Nedby*, 5 DeG. & Sm. 377. *Bischoff's Trustee* v. *Frank*, 89 L.T. 188, was reversed in the Court of Appeal; the decision in the latter Court was not reported, but a full note of it appears in *Howes* v. *Bishop*, [1909] 2 K.B. 390, 402. Vaughan Williams, L.J., in *Chaplin & Co.* v. *Brammall*, [1908] 1 K.B. 233, relied greatly upon language used by Lindley, L.J., in *Turnbull* v. *Duval*, [1902] A.C. 429, 434. In that case Lindley, L.J., said:—

> It is, in their Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign the document which was very different from what she supposed it to be, and a document of the

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true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences.

But the real principle upon which *Turnbull & Co.* v. *Duval*, [1902] A.C. 429, was decided was that a document had been obtained by Campbell, who was the plaintiff's agent, and was also Mrs. Duval's trustee, from her, his *cestui que trust*, by pressure through her husband, who also misled her as to the nature of the document. The Court declined to say whether the security could have been upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice.

The remarks of Collins, L.J., in giving judgment on the appeal in *Bischoff's Trustee* v. *Frank*, 89 L.T. 188, cited in *Howes* v. *Bishop*, [1909] 2 K.B. at 390, 402, are, it seems to me, particularly applicable to the present case. In the *Bischoff's Trustee* case there was considerable pressure exerted by the husband upon the wife to induce her to sign the guarantee. It was a complicated document, and was read over to her by her husband's solicitor, but its contents were not explained to her and she had no independent advice. Collins, L.J., said:—

> It seems to me that the burden is upon the lady in this case, and the facts standing as they do her evidence is worth nothing. . . . The burthen is thrown upon you to shew that there is some element, with which, I think, you must connect the plaintiff, to fraudulently induce this lady to give the guarantee.

In the same case, Romer, L.J., said:—

> The learned Judge says that the husband is to be treated as a voluntary donee from the wife, because the wife was going to guarantee the husband's debts. That being so, the plaintiff must be taken as a person who knows that, and therefore has the onus of proving that there was no undue influence. I never heard of such a thing.

I cannot find that the broad statement made in *Chaplin & Co.* v. *Brammal*, [1908] 1 K.B. 233, that a creditor taking from a debtor a security signed by the wife of the latter is bound to see that she understood the document and had proper independent advice has been followed in any subsequent case. With deference, it seems to me that if the creditor had no notice of any improper influence on the part of the husband in obtaining the signature of his wife, and in consideration of the document, had given value or changed his position, the wife would be bound by it. A different result might, no doubt, follow if the creditor employed the husband to obtain the security and made him his agent in so doing, and the husband used improper means to obtain his wife's signature. It may well be that the view was taken in the *Chaplin & Co.* case that the creditors had made the husband their agent so as to be bound by his acts. It was also the fact that the wife in that case had been deceived by the husband as to the nature of the document she was asked to

sign. He did not let her read it, she enquired what it was and he told her it was only a formality. Her signature was therefore procured by fraud.

The opinions expressed by Collins and Romer, L.JJ., in *Bischoff's Trustee* v. *Frank*, 89 L.T. 188, above referred to, strongly support the view that notice of undue influence exercised by a husband to induce his wife to sign a document must be brought home to the third party, to whom the document is negotiated, and who gives value upon the faith of it, in order to make such a defence available as against such third party. Upon this point the very late decision of the Court of Appeal in *Talbot* v. *Von Boris*, [1911] 1 K.B. 854, is instructive, and, to my mind, conclusive. That was an action against a wife upon joint and several promissory notes of her husband and herself, signed by her as surety for the repayment of sums advanced by the plaintiff to her husband. The wife pleaded that she was induced to sign the notes by duress on the part of her husband and that the plaintiff knew of that duress. Evidence was given by the defendant of the duress and the jury found that there was such duress. No evidence was given on the defendant's part to shew the plaintiff knew of the duress, on the contrary she said she did not think the plaintiff knew of it. The plaintiff was not called and gave no evidence, denying knowledge of the duress. It was held that the onus of proof with regard to the knowledge of the duress lay upon the defendant. A question was raised as to the effect of section 30 of the Imp. Bills of Exchange Act. That section was held not to apply and the question raised does not affect the authority of the decision in so far as the present case is concerned. The action was between payee and maker of the note, and the principle applied in that case would be applicable to an ordinary guarantee given by a wife to a creditor of her husband to secure the debt of the latter.

In giving judgment in *Talbot* v. *Von Boris*, [1911] 1 K.B. 854, Vaughan Williams, L.J., said:—

> Really the only substantial ground of defence in this case appears to be that based on duress. As to that it is true that the defendant succeeded in getting a finding of the jury in her favour that her signature to the note was procured by duress, but she failed to get a finding in her favour as to knowledge by the plaintiff of that duress, for the jury found he did not know of it.

He then goes on to say that the only way the defendants' case could be put was on the contention that under section 30 of the Bills of Exchange Act the onus was thrown upon the plaintiff of proving that he gave value for the notes in good faith. That section, however, was shewn not to apply.

Farwell, L.J., in the same case thus expressed his view:—

> In my opinion the law as to onus of proof as regards duress is the same as between the maker of a promissory note and the payee who ad-

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vances money upon it, as in the case of any other contract in respect of which duress is set up. To support such a defence, where the alleged duress is that of a person other than the person contracted with, *it must be shewn that the duress by which the contract was procured was known to the plaintiff when he entered into the contract.* Therefore, if the jury negative knowledge on the part of the plaintiff, the plaintiff must succeed.

Kennedy, L.J., was of the same opinion.

In the present case there is no pretence that the plaintiffs or their agent Remington were aware of any undue influence or improper action on the part of J. A. Stephenson in procuring his wife's signature to the guarantee. On the facts as given in evidence, Stephenson was in no sense the agent of the plaintiffs in obtaining her signature.

Tina Stephenson, however, contends that, apart from undue influence, she did not know the contents or nature of the document she signed, that she did not read or hear it read, and that therefore it is not binding upon her. But the evidence does not shew that her husband in any way deceived her or misrepresented the nature and contents of the document. If she was not aware what the writing contained when she signed it, she had only herself to blame for failing to read it, or to enquire what it meant. She abstained from all enquiry and signed the document, being quite reckless as to what it contained or what use would be made of it. Taking her own testimony, she admits she signed the instrument, but has no recollection as to when or where she signed it or what took place when it was signed. She does not remember who asked her to sign it, but thinks it must have been her husband. The remarks of Buckley, L.J., in *Carlisle Co.* v. *Bragg*, [1911] 1 K.B., at p. 489, 495, are appropriate in considering the present case. He says:—

> The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains; he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying, "This is a conveyance of your property," or "This is your lease," and he does not enquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatever they are. If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed.

In the present case we are left in the dark as to what was said or what took place when the document was signed. That Tina Stephenson signed it is the only fact in connection with the signing that is clearly proven. It is for her to shew that she was so misled and deceived as to its actual contents that the signing was not binding upon her. This she has failed to shew.

By the law of this province,

a married woman shall be capable of entering into and rendering herself liable on any contract and of suing and being sued in contract, or in tort, or otherwise, in all respects as if she were a *feme sole*:

R.S.M. 1902, ch. 106, sec. 11. She is also capable of acquiring, holding, and disposing of, by will or otherwise, any of her property in the same manner as if she were unmarried: sec. 3. An enormous quantity of property in Manitoba is owned by married women. They are frequently shareholders and directors of companies, and they engage in almost every class of business. It would be disastrous if a married woman could disregard or evade a contract entered into by her, upon which value has been given in good faith, merely by saying—

it is true I put my name to the document, my husband asked me to sign it and I signed it, but I did not read it or hear it read, and I did not enquire, or find out, or care what it meant, therefore I am not bound.

This is in brief the contention of Tina Stephenson in this case.

In my opinion she failed to prove undue influence, but even assuming she proved it, she has failed to bring home to the plaintiff's knowledge that it had been used. She has also failed to shew that her signature was obtained by fraud or deception or concealment, so as to render the document void as against her.

I agree with the learned trial Judge's finding that the two male defendants are liable. The judgment should be amended so as to make Tina Stephenson liable along with them. The nonsuit as to Margaret Stephenson should stand. J. A. Stephenson, William Stephenson and Tina Stephenson should pay the plaintiff's costs of suit. The first two should pay the costs of the appeal brought by them. Tina Stephenson should pay the costs of the plaintiffs' appeal as against her, and the plaintiffs should pay Margaret Stephenson her costs of their appeal against her.

Cameron, J.A. (dissenting).

CAMERON, J.A. (dissenting):—Legislation affecting and extending the rights of married women in this province is first to be found in ch. 25, 38 Viet. (1875), "An Act respecting separate rights of property of Married Women." Following this we find the Consolidated Act of 1880, ch. 65, further enlarging the rights and liabilities of married women and the amendments of 1881, ch. 11, secs. 72-81, in which it is provided, amongst other things, that tenancy by the curtesy be abolished (sec. 73), that "Any married woman shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*" and that she can be sued on such contracts separately from her husband.

Then followed the provisions respecting real estate to be found in 52 Viet. ch. 16, secs. 31-33, and those in the Act (ch. 17,

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53 Viet.), respecting Conveyances of Real Estate by Married Women. All the foregoing are consolidated in the Revised Statutes of 1892, ch. 95.

There was a short amendment in ch. 9, 56 Viet., and by ch. 27, 63-64 Viet., the law was consolidated and amended and the rights and liabilities of the married woman further amplified. By sec. 3 she is declared capable of holding and disposing of property as if she were unmarried, and by sec. 11 is made capable of entering into and becoming liable on any contract "in all respects as if she were a *feme sole*." This last Act was repealed and re-enacted in the Revised Statutes of 1902, ch. 27.

The English Married Woman's Act of 1882 is in many respects similar to our own, but a comparison shews that our own legislation has gone, in some respects, further in the emancipation of married women than has the law in England.

The married woman, like the unmarried woman, is, it need hardly be stated, protected by our laws against fraud, misrepresentation and unfair dealing.

The status of the married woman in respect of property at common law, and the progressive legislation of the Province of Ontario dealing with her enfranchisement (legislation similar to our own) were dealt with in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, by Mr. Justice Idington in the Supreme Court, 41 Can. S.C.R. 516, 530, *et seq.*, *sub nom. Stuart* v. *Bank of Montreal*, both as to her property rights and her power to contract. "What right," he asks at 532, "have we to cut down the express power so given?" The effect of this legislation was discussed by Mr. Justice Mabee, who tried that case, 17 O.L.R. 436, 444.

> If any such rule (i.e., that requiring independent advice) is applicable to transactions between husband and wife, the sooner the legislature repeals the Married Woman's Property Act, and reverts to the old law of requiring examination apart from the husband, the better for the security of the public.

Chief Justice Moss of the Ontario Court of Appeal, who held that the judgment of Mabee, J., dismissing the action, should be vacated, said, at 453:—

> Having regard to the freedom now accorded to married women in this province to deal with their separate estate as freely and effectually as a *feme sole*, it may seem strange that safeguards are to be adopted which are not required and could not be called for in the case of a *feme sole*.

Nevertheless he holds that "she must be protected not only against her husband but against herself": p. 452. In the argument before the Privy Council, counsel for the bank referred to the legislation as inconsistent with the decision in *Huguenin* v. *Baseley*, at p. 123.

The effect of the Married Woman's Property Act in England upon the restrictions was discussed in *Howes* v. *Bishop*, [1909]

2 K.B. 390, 402, as that case is reported in 78 L.J.K.B. 796. The matter is raised by counsel at p. 804, and is referred to by Lord Justice Farwell at p. 809. In the same case in [1909] 2 K.B. 390, 394, Farwell, L.J., says:—

> I do not see how, at any rate since the Married Woman's Property Act, 1882, the rule in *Huguenin* v. *Baseley* can be said to cover the relation of husband and wife.

Now the rule at common law was that a married woman cannot bind herself by contract at all. If she attempts to do so "it is altogether void and no action will lie against her husband or herself for the breach of it": Pollock on Contracts, 83; *Liverpool* v. *Fairhurst*, 9 Ex. 422, 429.

I would say that anyone, having this conception of the rights and status of a married woman as they were prior to the legislation referred to, and then perusing that legislation from 1875 down to the last revised statute on the subject, would, not unreasonably, I submit, come to the conclusion that it was the intention of the legislature that a married woman should be at liberty to enter into a lawful contract of any kind free from any restrictions or disabilities, and to bind herself effectively thereby, and that that intention had been adequately expressed by the legislature. That is to say, such might fairly be the reader's conclusion if he avoided a consideration of the decisions of the Courts bearing on contracts of a character such as that now before us.

Counsel for the defendant Tina Stephenson, wife of the defendant J. A. Stephenson, rely upon *Turnbull* v. *Duval*, [1902] A.C. 429, 434, and *Chaplin* v. *Brammall*, [1908] 1 K.B. 233. In the former case the security given by Mrs. Duval for the benefit of her husband was open to attack on two grounds, viz., first, because of the want of independent advice on her part, it having been obtained from her by one who was a trustee for her, acting through her husband, and, second, in that it was obtained from her by her husband through pressure and by concealment of material facts. The judgment of the Privy Council did not finally pass upon the first ground, but was based upon the second. "It is, in their Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences."

In *Chaplin* v. *Brammall*, supra, Lord Justice Vaughan Williams, who delivered the judgment of the Court, refers to the judgment in *Turnbull* v. *Duval*, [1902] A.C. 429, 434, and says:

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So here the plaintiffs left everything to the defendant's husband; they furnished him with the document that he might get his wife's signature to it, and they must take the consequences of his having obtained it without explaining to her or her understanding what she was doing.

The circumstances of this case now before us seem, to my mind, closely to resemble those which gave rise to *Chaplin* v. *Brammall*, [1908] 1 K.B. 233. Tina Stephenson's evidence, which is not disputed, is to the effect that she did not remember when she signed the document, that it must have been her husband who asked her to do so, that there was no explanation of it given, that it was not read over to her and that she did not know she was signing a document that might make her liable for a large amount. It is true that in the *Chaplin* case the document was furnished by the plaintiffs, while here it was prepared and submitted to them by J. A. Stephenson, who suggested the names of those whose signatures he would procure to it. But whether the plaintiffs prepared the document and furnished it to the husband, or whether they adopted a document prepared and submitted to them by the husband is, to my mind, not material. It is as if they said to the husband:—

That document you have prepared and the names you have suggested are good enough for us. Now you get that signed for us by your wife and the others and we will accept it as satisfactory and continue your credit.

That is to say, from the moment they accepted the document as sufficient in form, they left everything to the husband, authorized him to procure his wife's signature with the others, took the benefit and the risks attendant on the guarantee, whatever they were, when they received and accepted it as a completed document, and became, thereupon, affected with knowledge of the circumstances surrounding its execution. Can the transaction, in this phase, be looked at in any other light? In my humble judgment, it cannot.

I am unable, for my part, to attach material importance to the fact that, in this present case, the married woman was interested in the company as an official and shareholder. Had she not been such, she would still have had a manifest interest in the resources and means of livelihood of her husband, which he sought to protect by this guarantee. It is impossible to say that the fact that she was a shareholder influenced her action in the slightest. In fact it may be deduced from her evidence in this case that she was ready and willing to sign any document presented to her by her husband without asking any explanation of it. But, taking that for granted, was not the existence of that unlimited confidence a cogent reason why she should have been made fully aware of the nature and effect of the contract the husband was asking her to enter into?

In the *Turnbull* case it is to be noted that Campbell said Duval first suggested the security of the wife, while Duval said the contrary. The Privy Council does not appear to have regarded the point as of importance (p. 432), but found the arrangement was that Campbell (the agent) should have the security prepared, and that Duval should get his wife to sign it. Here the arrangement was that Stephenson should prepare a security to be satisfactory to the plaintiffs and, after its approval by the plaintiffs, that he should get his wife's signature to it. Here, as there (in the *Turnbull* case) the plaintiffs knew that the relationship of husband and wife existed and that the husband was, with their authority, to procure the signature of his wife to a document imposing a liability on her for their benefit. Surely in these respects there is no material difference between the two transactions, no such distinction between them in the facts as deprives the Privy Council judgment of applicability to this present case.

In *Talbot* v. *Von Boris*, [1911] 1 K.B. 854, a wife was held liable upon a joint and several promissory note signed by her with her husband for advances made by the plaintiff to him, the defence being duress of the wife by the husband, which the jury found as a fact. It was held that the onus of proof with regard to knowledge by the plaintiff of the duress alleged lay upon the defendant, and was not shifted by sec. 30, ss. 2, of the Bills of Exchange Act, and that, in this respect, there is no difference between a promissory note and any other contract (*per* Farwell, L.J., at p. 862). The action was brought in respect of two promissory notes, one for £100 and the other for £400. As to the £100 note the jury found that the substance of the transaction was explained to the wife, that as to the £400 it was not, but that she did know she was incurring a liability for the benefit of her husband. These findings are stated in the report of the trial proceedings, 27 T.L.R., p. 95, and apparently disposed of this defence, as appears by the judgment of Mr. Justice Phillimore, at the trial. In the report of the case on appeal at p. 266 of the same volume, the following appears:—

> Lord Justice Vaughan Williams, after going through the facts of the case and reading the questions put to the jury with their answers thereto, said it was clear that the defendant, when she signed each of these promissory notes, knew what she was doing, in the sense that she knew that what she was signing was a promissory note, and that it was a document which would give the plaintiff a claim on her.

The foot-note at p. 855 of the appeal report, shews that the defence that the transaction had not been sufficiently explained to the wife was unsuccessful and was considered as finally disposed of by the findings of the jury.

It can well be argued that, if the defence that the defendant was not made aware by her husband of the nature of the docu-

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ment which she signed at his request, was established the knowledge or want of it, of those facts by the plaintiff was immaterial. This inference is deducible inasmuch as the question as to the knowledge of the plaintiff submitted to the jury referred to duress only and not to insufficient explanation and knowledge. The distinction may lie in this—a contract, entered into by a married woman under pressure from her husband and in ignorance of its contents, is wholly void, there being no consensus on her part and therefore no more a contract binding on her than if her signature had been forged; while, on the other hand, a written contract signed by her under the duress of the husband, she being aware of its nature and the liability imposed by it, is voidable only, and existing in full force until impeached, and hence the knowledge of those facts, or want of it, by a holder for value, or by a party taking a security and thereby changing his position, becomes a vital question; at any rate it would appear that some such distinction was present in the mind of Mr. Justice Phillimore when he framed the questions to be submitted to the jury.

Be that as it may, it is not necessary to go so far in this case now before us, because I cannot, for my part, avoid the conclusion that by acts, words and acquiescence, the plaintiffs authorized the husband to secure to the guarantee the signatures suggested by him, including that of his wife. If J. A. Stephenson had not received that authorization, he would have dropped the matter then and there, and that would have been an end of it.

In *Howes* v. *Bishop*, [1909] 2 K.B. 390, 402, Lord Alverstone refers to *Chaplin* v. *Brammall*, [1908] 1 K.B. 233, with approval:—

> In that case there was a finding that the wife's signature was obtained without sufficiently informing her of, and explaining to her, the contents of the document, and that she did not understand it when it was signed by her.

Farwell, L.J., at 402, says:—

> In that case Vaughan Williams, L.J., said, with reference to the facts, "Ridley, J., has come to the conclusion that in fact no sufficient explanation of it was given to her, and that she did not understand it." On these facts that case was a perfectly plain one, and I fail to see why it was reported.

In other words, Lord Justice Farwell held that *Chaplin* v. *Brammall* was an accurate statement of an elementary and perfectly clear principle of law.

I quote the following from Halsbury, XV., para. 1017:—

> Though a creditor is not bound in every case to inquire into the facts under which a third person becomes surety to him for another, he must do so when the circumstances of the case or the dealings between the parties are such as to suggest the existence of fraud, or a fiduciary relation subsists between the principal debtor and the surety. He must apparently

also inquire when the intending surety is the wife of the principal debtor, though there is no general rule of universal application that the rule of equity as to confidential relations necessarily applies to the relation of husband and wife, so as to throw on the husband or on the person who is suing the wife the onus of disproving an allegation of undue influence.

The present state of the law on the subject is thus summarised in Lush on Husband and Wife (1910), at p. 206:—

> In case of a disposition by a wife in favour or for the benefit of her husband, it is necessary that she should understand the effect of her disposition, but, save as a means to that end, it does not seem necessary that she should have independent advice.

I think the conclusion must be that, whatever may be the rule as to other contracts, where it is a case of suretyship by the wife for the benefit of the husband, if, in fact, the wife signs the document at the request of her husband, if no sufficient explanation of it is given to her and she does not understand it, and if the creditors taking the security have "left everything" concerning the obtaining of the wife's signature to the husband, then, given those facts, those creditors, in an action against the married woman on the security, must fail. If creditors, in such cases, choose to enlist, or adopt, the services of the husband in obtaining security for their claims from his wife, they do so at their peril. But it is open to them to put themselves in a safe position by seeing to it that the married woman, before entering into the contract, has the advantage of impartial legal opinion, or at any rate, that she understands, beyond any peradventure, the nature of the obligation that she is assuming and the circumstances giving rise to it.

The English Courts have apparently had in mind that husbands are prone, in hours of financial need, to turn to their wives (if and when the wives are possessed of independent means) and, imposing on their confidence, persuade or procure them to become liable as sureties for their (the husbands') debts, carelessly or carefully neglecting to disclose to their life partners the cash responsibilities imposed by the instruments the wives are asked to sign. No doubt there have been many such transactions where the devotion of the wife has been abused and she has become involved in poverty or serious loss without ever that, if it be shewn by the married woman that she was not given sufficient information to understand fairly the purport of and reasons for the document she is asked by her husband, at the instigation of his creditors, to sign, then she is freed from any reponsibility thereon. It is true that the existence of the relation of husband and wife is no longer sufficient, as to this defence, to divest the wife of the *onus probandi*. But if the defence be established that the wife was asked or urged by the husband, with the authority of creditors, to sign, and did sign, an instrument of suretyship which was not sufficiently explained to her, as to the material facts in connection with which she was

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left uninformed, and without understanding her possible ultimate responsibilities, then she is absolutely incapacitated to contract. It is instructive to note that this rule laid down by the Courts for the purpose of protecting married women from their husbands, their husbands' creditors and themselves, has been put in statutory form in several of the United States, where a married woman is expressly prohibited by law from becoming surety for her husband: Cyc. XXI., 1321.

The rule in question is a rule of equity in the opinion of Farwell, L.J., in *Howes* v. *Bishop*, [1909] 2 K.B. 390, 394. If the rule first found authoritative expression in *Turnbull* v. *Duval*, [1902] A.C. 429, as it seems to me it did, it became grafted on the English law long after the Married Women's Property Act of 1882.

At any rate, once it affected our jurisprudence, it can hardly be said, with absolute accuracy, and without qualification, that a married woman is capable of entering into any contract in all respects as if she were an unmarried woman, notwithstanding the statute.

There may be a question as to whether *Turnbull* v. *Duval* is closely in point, though, to my mind, it is; but, in any event, there is not, in my opinion, any material difference between the facts here and those in the *Chaplin* case. The judgment of the Privy Council in *Trimble* v. *Hill*, 5 A.C. 342, 344, enjoins us to follow the decisions of the English Court of Appeal in cases such as this. There are differences, as I have stated, between the English statute law and that of this province relating to married women and their property, but they are not sufficiently important to enable us to consider this injunction inapplicable. I consider that we must hold ourselves bound by the judgment in *Chaplin* v. *Brammall*.

I think the appeal against the judgment of nonsuit in favour of Tina Stephenson must be dismissed. In other respects I concur in the judgment of the Court.

Haggart, J.A.

HAGGART, J.A., concurred with PERDUE, J.A.

Judgment varied; CAMERON, J.A., *dissenting.*

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ROBERT v. HERALD COMPANY, Limited.

Quebec Superior Court, Beaudin, J. March 7, 1913.

1. PLEADING (§ VII C—375)—WHAT DEMURRABLE—LIBEL ACTION — DEFENCES.

A defendant sued for a newspaper libel may plead that the publication of the matter upon which the plaintiff relies was a part only of a series of articles of a similar tenor which had appeared in the newspaper both before and after the article complained of, and that they were published in the public interest without malice, were substantially true and were notoriously known by the public, and that they were a fair criticism of the plaintiff's conduct; such plea is

not demurrable as it discloses grounds which may either defeat the action or mitigate the damages.

2. PLEADING (§ III A—303)—DENIALS—DEFAMATION ACTION — DENYING INNUENDO.

A defendant is entitled to set up in his pleading in a libel action that the words relied upon by the plaintiff have not the meaning assigned in the innuendo.

3. LIBEL AND SLANDER (§ III C—114)—DEFENCES—EXPLANATION OF ALLEGED LIBELLOUS MATTER BY SAME OR OTHER ARTICLES.

A defendant in an action of libel is entitled to plead and prove in mitigation of damages that the remainder of the articles not set out in the plaintiff's statement of claim modify the words sued upon or that other passages in the same publication qualify them.

4. LIBEL AND SLANDER (§ III C—108)—DEFENCES—ABSENCE OF MALICE.

The absence of malice in making the publication, though it may not be a bar to an action for libel, may reduce the quantum of damages; and the defendant is entitled to plead in mitigation of damages that he acted in good faith and with honesty of purpose.

5. LIBEL AND SLANDER (§ I—9)—REPETITION—MATTERS OF PUBLIC NOTORIETY.

That the libellous statements were matters of public notoriety in the community previous to their publication may properly be pleaded in mitigation of damages.

[*Patterson* v. *Edmonton Bulletin Co.*, 1 A.L.R. 477, referred to.]

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HEARING of a demurrer filed by plaintiff to certain portions of the plea of the defendant.

The demurrer was dismissed.

The main allegations of the action necessary to examine for the decision of the demurrer are paragraphs 3 and 4, which read as follows:—

3. On the 31st day of December, 1912, the defendant knowing that the words hereinafter quoted were untrue, falsely and maliciously and without legal justification or excuse, printed and published concerning the plaintiff in its said newspaper, the *Montreal Herald*, the words following, that is to say: "What did they" (meaning thereby the plaintiff and the persons who were and are his co-directors in the Montreal Tramways Co.) "do? Raise new capital for development work? Not they. They had other purposes to which they could put the money. Their own pockets were itching. So they put another mortgage on the property." (meaning thereby the property of the Montreal Tramways Co.), "and shoved the proceeds, nearly ten millions of dollars, in their trousers' pockets; that is what these gentlemen did. . . ." Meaning thereby that the plaintiff was and is guilty of the criminal offence of theft, and had, jointly with his said co-directors, stolen or fraudulently converted to their own use and put in their own pockets the sum of ten million dollars.

4. The words complained of and above quoted were thus printed and published by the defendant in its newspaper the *Montreal Herald* out of special malice, hatred and odium against the plaintiff, personally and with the special intention of hurting him as a public and financial man, of ruining him and to satisfy a sentiment of spite and vengeance.

And plaintiff claims the sum of $100,000 as general damages.

The defendant admits that the company is the owner of the *Montreal Herald*, and that, on December 31, 1912, it printed

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and published an article in the *Montreal Herald* of which the words complained of by the plaintiff formed part, denies otherwise the said paragraph and denies also the other paragraphs of the declaration; and it goes on to plead specially:—

7. That the article in question, a portion of which is complained of by the plaintiff, was never intended to mean and does not bear the meaning which the plaintiff seeks to put upon it.

8. That at the time the said article was written and published it was a matter of public notoriety that the plaintiff, and others who, with him, had acquired the control of the Montreal Street Railway Co. had, by means of such control, caused certain moneys approximating ten million dollars to be realized on a mortgage placed upon the property of the Montreal Tramways Co. and further caused such moneys to be distributed among the shareholders of the Montreal Street Railway Co., as part of the consideration arising from the transfer of assets by the Montreal Street Railway Co. to the said Montreal Tramways Co.

9. These facts were previously stated by the defendant itself in an article appearing in its issue of August 3, 1912, and were at all times well known to the public.

10. The article appearing in the issue of December 31, 1912, taken as a whole does no more than restate the said facts and the same were subsequently referred to in terms by the defendant in its issues of the 3rd, 4th and 6th of January, 1913, which articles were given as much, if not greater, publicity than the article complained of.

11. The article of December 31, 1912, is one of a series of articles published by the defendant company, in the public interest, with the object of obtaining for the public an improvement in the existing street car service in the city of Montreal, and with the object of calling public attention to the fact that the Montreal Tramways Co. is not fulfilling the undertaking and pledges given by it to the legislature of the province of Quebec, when applying for its charter powers and privileges.

12. The statements contained in the said article of December 31, 1912, taken in their entirety and in the sense above contended for, are substantially true and were published by the defendant in good faith and in the public interest.

Plaintiff inscribes in law against the words of par. 7, which reads as follows: "Was never intended to mean," and the whole of pars. 8, 9, 10, 11 and 12 of the plea, and alleges as reasons: As to par. 7, that the intention of the defendant has nothing to do, inasmuch as the words used by defendant and complained of are in themselves damaging and injurious to plaintiff; and as to pars. 8, 9, 10, 11 and 12 of said plea, that they are irrelevant, setting up facts entirely different from those alleged in the portion of the article complained of by plaintiff, and quoted in his declaration, and defendant seeks to justify other and different matters as pleaded by him; it is immaterial that the defendant had previously published other articles in its newspaper or that it subsequently published articles relating

to the said subject-matter; the defendant does not plead justification of the portion of the article complained of by plaintiff in his declaration, but alleges other facts and other articles published by it, and seeks to justify the same; the defendant is not entitled to attach to the words complained of by plaintiff meaning of its own, different from that alleged by plaintiff, and to plead that, taken in such different sense and meaning, such words are true and published in the public interest.

J. L. Perron, K.C., for plaintiff.

E. Lafleur, K.C., (*Aimé Geoffrion*, K.C., counsel), for defendant.

Beaudin, J.

BEAUDIN, J.:—Before examining the merits of the demurrer, it is important to bear in mind the procedure to be followed and as we find it in our Code of Civil Procedure and the general practice followed by this Court, I think that I can lay as an elementary principle that the Court, on a demurrer such as this, is obliged to take as true the facts alleged by the defendant; in the second place, that the Judge cannot take cognizance of the articles referred to in the action and plea: *Lewis* v. *Cunningham*, 7 Que. P.R. 238. Mathieu, J., says: "L'inscription en droit doit être dirigée contre les faits allégués, et les pièces produites ne doivent pas être prises en considération"; and thirdly, under art. 192 of the Code of Civil Procedure, no ground which is not alleged in the demurrer can be urged at the hearing, and it is not in the power of the Court to eliminate from a paragraph demurred to as a whole a part of such allegation, unless subsidiary conclusions have been taken: *Angers* v. *Moreau*, 1 Que. P.R. 110. Archibald, J., held that to entitle a party to a preliminary hearing on an issue, such a party must specify the particular legal objections upon which he relies, and none other can be argued on his inscription: *Gravel* v. *Ouimet*, 8 Que. P.R. 240. The Honourable Chief Justice Davidson held: It is not competent on a demurrer to a whole paragraph of a plea to strike out one or more words of it; in the same manner as in a general demurrer, a part or parts or one or more words of a pleading cannot be struck out.

I now proceed to the examination of the demurrer on its merits. The main contention of the plaintiff is that the defendant must answer to the libel as charged in the declaration, but cannot change the sense or meaning of said article in taking other articles into consideration and say that if this libel complained of is taken as a whole with the other articles published before and after, the words complained of have not the meaning which plaintiff gives to those words; and that, taken in that sense, the articles were published in good faith, in the public interest, without malice, and were substantially true.

On the other hand, the defendant contends that the article

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complained of must be taken as a whole, and also in conjunction with other articles published before and after the libel complained of, but before the institution of the action, and that the article appearing in the issue of December 31, 1912, taken as a whole, does no more than re-state the said facts which were a matter of public notoriety, to wit, that the plaintiff and others who with him had acquired the control of the Montreal Street Railway Co., had, by means of such control, caused certain moneys approximating ten millions of dollars, to be realized on a mortgage placed upon the property of the Montreal Tramways Co., and further caused such moneys to be distributed amongst the shareholders of the Montreal Street Railway Co., as part of the consideration arising from the transfer of assets by the Montreal Street Railway Co. to the said Montreal Tramways Co.

And it goes on to say that the article of December 31, 1912, is one of a series of articles published by the defendant company in the public interest, with the object of obtaining for the public an improvement in the existing car service in the city of Montreal, and with the object of calling public attention to the fact that the Montreal Tramways Co. is not fulfilling the undertaking and pledges given by it to the Legislature of the Province of Quebec when applying for its charter, powers and privileges; the statement contained in the said article of December 31, 1912, taken in their entirety and in the sense above contended for, are substantially true and were published by the defendant in good faith and in public interest.

Counsel for plaintiff have cited a great many authorities, which they claim sustain their contention: 18 Halsbury's Laws of England, 643 and 670; Folkard, 7th ed., 247 and 248; Odgers, 5th ed., 341, 342, 344, 398; Cooper on Defamation, 108; King on Defamation, 416; *Bassam* v. *Budge*, [1893] 1 Q.B. 571, 62 L.J.Q.B. 312; *Brembridge* v. *Latimer*, 10 L.T. 816; *Jones* v. *Hulton & Co.*, 101 L.T. 330; [1909] 2 K.B. 444; *Hulton & Co.* v. *Jones*, 101 L.T. 831; *Wood* v. *Durham* (*Earl*), 21 Q.B.D. 501, 59 L.T. 142; *Watkin* v. *Hall*, 37 L.J.Q.B. 125, 129.

And in our jurisprudence they refer to the following cases: *Phillips* v. *Laviolette*, 4 Que. P.R. 396; *Balthazard* v. *Ethier*, 7 Que. P.R. 337; *Langlier* v. *Brousseau*, 6 Q.L.R. 198; *Garneau* v. "*La Vigie*," 10 Que. P.R. 370; *Bouchard* v. *Chartier*, 31 Que. S.C. 535; *Lemieux* v. *La Compagnie du Journal* "*La Monde*," 2 Que. P.R. 106.

I may add, however, that the cases taken from our own jurisprudence, as far as my opinion goes, have very little resemblance to the present case, but the English cases cited would have more application if it is not possible to distinguish them from the present. Defendant's counsel, however, pretend that

those cases cannot have any application to the present, inasmuch as the articles pleaded by the defendant comprise a series of articles extending for some months before the libel complained of, and a few days after, which preceded the action, while the libel complained of in the English cases were contained in one document or were slanderous words pronounced on the one occasion only. They also contended that the plaintiff having in his declaration specifically charged the defendant with malice, they were entitled to refer to the whole of the article of the 31st December, and also to the other articles, to rebut this accusation of malice. And finally they contended that the plea was good at any rate as a plea for mitigation of damages.

As a matter of fact, plaintiff alleges in par. 3 of his declaration, by way of innuendo, that the words reproduced in the declaration meant that the plaintiff was and is guilty of the criminal offence of theft, and had, jointly with his said co-directors, stolen or fraudulently converted to their own use and put in their own pockets the sum of ten million dollars.

I may mention, however, that the authorities are all agreed that even if plaintiff does not prove the innuendo charged in his pleadings, he might still have the right to recover, if the words were actionable, *per se*, as I believe they are in the present case, and that the defendant has to plead to the action the same as if the plaintiff had not alleged an innuendo.

In par. 4 of the declaration, as we have already seen, plaintiff complains that the libel charged in par. 3 was printed and published by defendant out of special malice, hatred and odium against plaintiff personally, and with the special intention of hurting him as a public and financial man, of ruining him and to satisfy a sentiment of spite and vengeance.

If we look at the plea, we find first of all, that defendant pleads, that the article quoted by plaintiff has not the meaning given by plaintiff in his innuendo, and it seems to me that the defendant has a perfect right to answer to this special paragraph of plaintiff in the way he has done.

Then plaintiff, as we have seen, charges defendant with malice, and if it was true, then the defendant would lose the benefit of the privilege which he claims further on in his plea to write on a topic of public interest and for the public benefit and without malice; and the defendant adds that the facts which were published before and after in that series of articles were similar and of the same tenor as the one of the 31st December, which is the only one complained of by plaintiff, and that these facts were a matter of public notoriety. If it is true, as the defendant alleges, that the article of the 31st December forms part of a series of articles similar in terms and of the same tenor, that they were published in the public interest

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and were a fair criticism of the conduct of plaintiff, that they were published without malice, and were substantially true, and were notoriously known by the public, then it seems to me that it is a good plea, and could even defeat altogether the action of the plaintiff, and at least would surely tend to mitigate the damages which plaintiff claims.

In a case of *Marcotte* v. *Bolduc*, 30 Que. S.C. 222, the Honourable Mr. Justice Langelier held as follows:—

1. C'est le droit anglais, en vertu duquel la liberté constitutionnelle de la presse existe au Canada, qui s'applique aux actions pour diffamation dans les journaux et aux défenses fondées sur l'immunité (privilege) ou la critique légitime (fair comment).

2. Sous l'empire de ce droit le concours de trois éléments est nécessaire pour soustraire l'auteur d'un écrit diffamatoire à la responsabilité civile: premièrement, il faut que l'écrit soit vrait deuxièmement qu'il porte sur des faits qui intéressent le public; et troisièment qu'il ait été publié pour servir l'intérêt public et sans mauvaise intention (malice).

And at page 224 he adds:—

Bien que le droit qui régit l'action d'injure soit le droit français et non le droit anglais, c'est au droit anglais, qu'il nous faut recourir pour qu'il s'agit de justifier une diffamation qui a été commise dans un article de journal. La liberté de la presse était inconnue dans l'ancien droit français, mais elle est consacrée par botre droit public actuel, qui est le droit anglais. C'est donc dans ce droit qu'il faut chercher les règles qui limitent la liberté de la presse en matières de diffamation. Ce droit permet de publier dans les journaux tous les faits, quelque dommageables qu'ils soient pour quelqu'un, qu'il peut être dans l'intérêt public de faire connaitre; mais c'est à condition qu'ils soient publiés exclusivement dans le but d'être utiles au public, et non pas dans le but de satisfaire la vengeance ou la malice de celui qui les public. Cela a été décidé dans les causes suivantes: . . .

And he refers to a great many cases which it is not necessary to reproduce here.

The Court of Appeal, in the case of the *Montreal Light, Heat and Power Company* v. *Clearihue*, 20 Que. K.B. 529, held as follows:—

Celui qui se sert d'un langage diffamatoire dans l'exercise de fonctions publiques, par exemple, un echevin dans un débat à une séance d'un conseil municipal, est présumé le faire sans intention de nuire, et partant sans engager as résponsabilité civile. Cette présomption rejette sur la partie atteinte par le langage incriminé le fardeau de la repousser par la preuve contraire de mauvaise intention (malice).

Honourable Justice Archambeault, who rendered the judgment of the Court, at p. 533, quotes the English and American Encyclopædia, 2nd ed., vol. 18, p. 129:—

The meaning in law of a communication of qualified privilege is a communication made on such an occasion as rebuts the *primâ facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon plaintiff the onus of prov

ing actual malice or malice in fact. The generally accepted rule is that a communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter which, without this privilege, would be actionable; and this though the duty is not a legal one, but only a moral and social duty of imperfect obligation. Such communications are protected for the common convenience and welfare of society.

Les Pandectes Françaises, Rep., vol. 27, Vo. Diffamation, No. 412:—

L'élément moral du libel ou diffamation c'est l'intention de nuire. Par ces mots "intention de nuire" il ne faut pas entendre exclusivement le dessin de causer à autrui un dommage plus ou moins immédiat, soit dans sa fortune, dans son honneur ou sa considération. L'intention de nuire doit être envisagé dans un sens plus moral, plus indépendant du préjudice qui peut en résulter et de la personne qui peut en souffrir. C'est un fait de conscience, que le droit romain appelait invariablement "dolus" et que les interprètes ont exprimé par "animus injuriandi," c'est-à-dire l'esprit de dénigrement, de malice, de méchanceté, le désir de satisfaire une mauvaise passion, un ressentiment.

No. 413:—

L'absence d'intention de nuire met l'auteur de l'imputation à l'abri de toute peine:

No. 422:—

Il est de jurisprudence constante que la seule publication du fait diffamatoire est une présomption de droit de l'intention coupable.

No. 424:—

La présomption posée par la jurisprudence peut être combattue par la preuve contraire.

Nos. 431 et 433:—

Il en est ainsi lorsque l'auteur d'un écrit injurieux, tout en se rendant compte du mal que son écrit peut produire, n'a fait qu' abéir à un devoir de sa fonction ou à un intérêt sérieux, pressant et légitime qui a écarté de son esprit toute autre pensée.

The Honourable Chief Justice Davidson, in the case of *Kavanagh* v. *The Norwich Union Fire Insurance Company*, 28 Que. S.C. 506, held:—

1. The rule of qualified privilege of the law of England, in the matter of libel and slander, corresponds to and is the same as that of our law in the same matter, that no action will lie for statements made by a party in the exercise of a right, unless actual malice is proved.

2. As in England, the question of privilege or no privilege is one of law for the Court and not for the jury to determine; so with us it is for the Court and not for the jury to see whether the defendant in making a statement is in the exercise of a right.

3. Where in a trial by jury of an action for defamation, the jury finds that a statement caused to plaintiff damage to a fixed amount, but was

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made without actual malice, the Court holding the defendant to have been in the exercise of a right, or to employ the English equivalent, holding the occasion to have been privileged, will dismiss the action.

Patterson v. *Edmonton Bulletin Company*, 1 A.L.R. 477, held:—

That the jury may take into consideration the fact that the libellous statements were matters of public notoriety in the community previous to their publication by the defendant, in mitigation of damages.

Patterson v. *The Plaindealer Company*, 2 A.L.R. 29, held:—

That if truth of an alleged libellous statement is proven, the defendant is not liable for damages resulting to the plaintiff from any improper inference drawn from the facts stated, and the facts alleged in support of the plea of justification will be taken into consideration in awarding damages.

American Encyclopædia, 2nd ed., vol. 18, p. 1021:—

Every one has a right to comment on matters of public interest and concern, providing he does so fairly and with an honest purpose; and this rule applies though the publication is made to the general public by means of a newspaper or otherwise. Such comments and criticism have sometimes been spoken of as privileged, but there is an important distinction to be noticed between the so-called privilege of fair criticism upon matters of public interest and the privilege existing in a case, for instance, of answers to enquiries about the character of a servant, since in the latter case a *bonâ fide* statement, not in excess of the occasion, is privileged, though it turns out to be false; but in the former, what is privileged is criticism, not statements, and if a person takes upon himself to allege facts otherwise actionable, he will not be privileged, however honest his motives, if those allegations are not proved. A better view, therefore, of the matter would be that it is only when the publisher goes beyond the limits of fair criticism that his language passes into the region of libel at all, and the question whether those limitations have been transcended is one for the jury.

Page 1077:—

In an action or prosecution for libel or slander, it is proper to admit in evidence the entire conversation or publication in the course of which the words alleged to be defamatory were used. And where the publication upon which the action is based refers to some other publication, the latter should also be admitted, to explain the meaning. It is also competent in an action of slander to shew all the facts and circumstances attending or leading up to the speaking of the words, or in reference to which the words were spoken as they are material in determining the meaning.

Halsbury's Laws of England, vol. 18, "Libel and Slander," p. 71:—

Either party may, with a view to the damages, give evidence to prove or disprove a malicious motive in the mind of the publisher of defamatory matter. The defendant cannot indeed be held to say, on the issue of publication, that he did not intend the true meaning of his words as interpreted by relevant surrounding circumstances. But such is admissible in

mitigation of damages as negative express malice. On this principle the defendant is allowed to give evidence palliating, though not justifying his act in publishing a libel. On the other hand, the plaintiff may give in evidence any words as well as any acts of the defendant to shew *quo animo* he spoke the words or made the statement which are the subject of the action. If the evidence given for that purpose establishes any cause of action, the jury should be cautioned against giving any damages in respect of it, though the omission of the Judge to give such warning is not such a misdirection as will be a ground for a new trial. If such evidence is offered merely for the purpose of obtaining damages for such a subsequent injury, it will be properly rejected.

Odgers, on Libel, 5th ed., p. 398:—

As a rule, unless the occasion be privileged, the motive or intention of the speaker or writer is immaterial to the right of action, and the Court looks only at the words employed and their effect on plaintiff's reputation. But in all cases the absence of malice, though it may not be a bar to the action, may yet have material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury which he has sustained; but if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given. In every case therefore the defendant may in mitigation of damages give evidence to shew that he acted in good faith and with honesty of purpose, and not maliciously. He may shew that the remainder of the article, not set out in the record, modifies the words sued on or that other passages in the same publication qualify them.

But plaintiff's counsel said that plaintiff would never have thought to take an action against the defendant if it had simply published the matters alleged in the plea, to wit, the realization of a mortgage on the property of the company, and the distribution of these or part of these moneys among the shareholders of the Montreal Street Railway Co.; but that the article of the 31st of December goes much beyond what is alleged in the plea. As I already remarked, for the purpose of this demurrer, I am obliged to take as true the allegations of the plea; it is elementary to say that if the jury does not find that the articles published before and after the 31st of December, but before the institution of the action, were not similar in terms or not of the same tenor as the article of the 31st December, and that even if the defendant's other articles were true, that of the 31st December went beyond the bounds of a fair criticism, the jury might allow damages to the plaintiff.

It is sufficient to say that our law regarding jury trials gives, in my opinion, all the safeguards necessary for the protection of the plaintiff. Article 474 says that it is the province of the Judge to declare whether there is any evidence and whether that evidence is legal, and art. 475 says:—

The jury finds the facts and must be guided by the direction of the Judge as regards the law.

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I must assume that the Judge will guide the jury on the question of law, and that the jury will be guided by the instructions which will be given to them by the presiding Judge.

If it had not been a case to be tried by jury, I would have reserved the demurrer; but I believe that it is in the interest of the plaintiff himself that this should not be done, because he may be deprived of an appeal to the Court of King's Bench if I reserve the demurrer; and under the circumstances it will be dismissed with costs.

In an action where such a large amount is claimed, I think the Court should give the parties the fullest opportunity to have the issue properly defined before going to trial, and by dismissing the demurrer instead of reserving it, the plaintiff ought to be able to obtain from a higher Court, if he so desires, the right to appeal from the present judgment.

Demurrer dismissed.

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Mar. 20.

PROCTOR v. PARSONS BUILDING CO.

(Decision No. 2.)

Saskatchewan Supreme Court, Newlands, J. March 20, 1913.

1. PLEADING (§ I I—65)—ORDERING PARTICULARS—EMPLOYER'S LIABILITY ACTION.

In a workman's action to recover from his employer damages for personal injuries due to the alleged defective conditions of a crane used in building operations, the plaintiff may be ordered to give particulars of what he was doing at the time the accident occurred and, to the extent of his knowledge thereof, particulars also of the alleged breakage causing the injury.

[*Proctor* v. *Parsons Building Co.* (No. 1), 9 D.L.R. 692, reversed.]

2. PLEADING (§ I I—65)—PARTICULARS—RES IPSA LOQUITUR.

The principle upon which an order for particulars may be refused where the case depends upon the doctrine of *res ipsa loquitur* does not apply to prevent the order being made where the plaintiff has not framed his pleadings on that doctrine exclusively, but has voluntarily set out a statement in the nature of particulars of negligence leading up to the accident; in such case if the statement of particulars in the pleading is insufficient further particulars should be ordered.

[*Proctor* v. *Parsons Building Co.* (No. 1), 9 D.L.R. 692, reversed.]

MOTION by way of appeal from the order of Parker, Master, *Proctor* v. *Parsons Building Company, Ltd.* (No. 1), 9 D.L.R. 692, dismissing the defendants' motion for further particulars of the 1st, 2nd, 3rd, and 4th paragraphs of his statement of claim.

The paragraphs objected to as insufficient are as follows:—

1. The plaintiff was, on the 26th day of July, A.D., 1912, employed as a carpenter by the defendant to do certain work for the defendant upon a certain building then in the course of construction by the defendant at

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the corner of 5th avenue and Broad street in the city of Regina, Province of Saskatchewan. The said work was in the upper part of the building and the plaintiff was required by the defendant to assist in the hoisting of building material to position by means of a crane, operated by and under the control of the defendant.

2. By the negligence and default of the defendant the said crane with its equipment was defective and in an unsafe condition and unfit to be used for the said work, which the defendant well knew or ought to have known, but of which the plaintiff was ignorant. To wit: the said crane was badly constructed, of poor material and too light to be used for the said work and the chain of said crane was defective and unfit and unsafe for the said work.

3. By reason of the premises whilst the plaintiff was so employed in the said work in connection with the said crane the same broke and gave way and the plaintiff was thereby thrown to the ground and seriously injured and rendered unfit for work and put to great expense. The plaintiff fell from a great height and was seriously and permanently injured in the back. He has lost the sight of an eye and has sustained permanent injury to his right arm and shoulder, and has seriously injured his left hand and forearm and also his hip and shin. His face has also been injured and his nervous system has been seriously deranged and he has suffered much pain and is otherwise injured.

4. The plaintiff was and will be hereafter unable and unfit to work or gain a livelihood for himself. He has lost the wages which he would otherwise have earned and he was and is otherwise injured.

Medical expenses	$ 162.00
Medical and hospital expenses	8.50
Loss of wages from the 26th day of July, A.D. 1912, to the 24th day of January, A.D. 1913, being 26 weeks, each of 58 hrs. at 45 cents per hour	678.60
General damage	10,000.00
	$10,849.10

J. N. Fish, for appellant.
Anderson, Bagshaw & Amyot, for respondents.

Newlands, J.

NEWLANDS, J., upon the hearing of the appeal, ordered that the plaintiff furnish the defendants with particulars of what the plaintiff was doing at the time the accident occurred; and in specific detail, as far as he could furnish it, what was the nature of the alleged breakage whereby the plaintiff claimed to have been injured. His Lordship stated that he would make an order, if such were necessary, for the medical examination of the plaintiff. He held that *res ipsa loquitur*, which the plaintiff invoked in opposing the motion for further particulars, is not applicable where, as in this case, the plaintiff had voluntarily set out an insufficient statement of the circumstances under which, and the means by which, his alleged injuries were occasioned.

Appeal allowed.

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Feb. 24.

THE RURAL MUNICIPALITY OF VERMILLION HILLS, No. 195, v. SMITH.

Saskatchewan Supreme Court, Newlands, J. February 24, 1913.

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

The interest of the lessee under a "grazing lease" from the Crown of public lands is taxable under the Local Improvement Act, R.S.S. 1909, ch. 88.

[*Calgary & Edmonton Land Co.* v. *Attorney-General*, 45 Can. S.C.R. 170, applied.]

Statement

THE plaintiffs, who are the successors of local improvement district No. 195, bring this action for the collection of certain taxes assessed by the said local improvement district No. 195 against certain lands, the property of the Crown leased to the defendant under a grazing lease.

Judgment was given for the plaintiffs.

H. Y. MacDonald, for the plaintiffs.
J. F. Hare, for the defendant.

Newlands, J.

NEWLANDS, J.:—The right of the plaintiffs to tax the defendant's interest in these lands and that such interest only is taxed under the Local Improvement Act was decided by the Supreme Court of Canada in *Calgary & Edmonton Land Company* v. *Attorney-General*, 45 Can. S.C.R. 170, under the Alberta Local Improvement Act, which is similar to our own. That the defendant has an interest in the lands in question is shewn by the leases put in, which are in fact leases and not licenses as the defendant claims. The value of the defendant's interest is not in question, as this is not an appeal against his assessment.

As to the rate imposed under the Supplementary Revenue Act, and which is made to apply expressly to the holders of grazing leases, the only question that could arise is whether the Act is *intra vires*, and that question is also decided by the above mentioned case.

There will, therefore, be judgment for the plaintiffs with costs.

Judgment for plaintiffs.

MAPLE LEAF PORTLAND CEMENT CO. v. OWEN SOUND IRON WORKS CO.

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Jan. 31.

Ontario Supreme Court. Trial before Kelly, J. January 31, 1913.

1. ESTOPPEL (§ III E—71)—BY CONDUCT—TO REPUDIATE AGENCY—RATIFICATION—DUTY TO REPUDIATE.

Where one learns that another without authority had purported to act in his name, he owes a duty to the third person with whom the transaction has taken place, to inform him that the transaction was without authority, and a failure in this duty may operate as an estoppel against a subsequent denial of authority.

[*Keen* v. *Priest* (1858), 1 F. & F. 314, 315; *Weidemann* v. *Walpole*, [1891] 2 Q.B. 534, 541; *Freeman* v. *Cooke*, 2 Ex. 653, 663; *Carr* v. *London & North Western R. Co.*, L.R. 10 C.P. 307, 316, 317, referred to; see also *Wiggin and Elwell* v. *Browning*, 7 D.L.R. 274; *Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133, [1904] A.C. 806; *Thomson* v. *Playfair*, 2 D.L.R. 37, 6 D.L.R. 263; *Rogers* v. *Hewer*, 1 D.L.R. 747.]

2. PRINCIPAL AND AGENT (§ II D—26)—RATIFICATION OF AGENT'S CONTRACTS—WHAT CONSTITUTES—ESTOPPEL.

Where, upon a sale, with implied warranty, of certain machinery, the alleged principal, in whose name the sale was effected, received for confirmation a copy of the agreement and held it for a protracted period without repudiation and accepted specific part payments on the purchase price, and took part in correspondence assuming the relationship of principal and agent, he is thereby estopped, in an action on the warranty, from denying the agency.

Statement

ACTION for damages for breach of a contract for the sale and delivery by the defendants to the plaintiffs of an Emerick pulverizer and an Emerick separator, for use in the plaintiffs' cement business at Atwood, Ontario, and for a return of the money paid and a promissory note given by the plaintiffs.

The defence of the defendant company was, that there was no contract between it and the plaintiffs; that the plaintiffs' dealings were with the defendant Moyer only, who, the defendant company alleged, had a contract with the defendant company to do certain work upon such machines as were sold to the plaintiffs, and that Moyer was not their agent.

The defendant Moyer's defence (as delivered) was, in effect, that the contract for the sale and delivery of the machines had been fulfilled. Moyer was not represented at the trial.

Judgment was given for the plaintiff.

W. G. Thurston, K.C., for the plaintiffs.

R. McKay, K.C., for the defendant company.

Kelly, J.

KELLY, J.:—Moyer, who held himself out as representing the defendant company, had several interviews with the plaintiff Pearson, president of the plaintiff company, with a view to inducing that company to purchase machines such as were afterwards purchased, and of which, as he stated, the defendant company was the maker.

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On the 16th December, 1910, he made a written proposal to Pearson to supply these machines for $3,000; the machines to be shipped on the 1st March, 1911; payment to be made by promissory note for $1,000 at sixty days from the 1st January, 1911; and a further note for $2,000 to be dated on the date of the delivery of the machines, and to be payable on the 20th May, 1911.

Three copies of the proposal were made, one of which was signed by Moyer for himself and the defendant company, and the others by the name of Moyer only. All these were accepted in writing by Pearson, "subject to confirmation by the Owen Sound Iron Works Company Limited." Pearson then gave to Moyer his promissory note, dated the 1st January, 1911, for $1,000, payable to the order of the defendant company at sixty days on which was written, "On account of one Emerick grinder to be delivered 1st March, 1911." Moyer took the three copies of the acceptance to have them confirmed by the defendant company.

On the 15th March, the $1,000 note not having been paid, the defendant company drew on Pearson for the amount, and he, on the 23rd March, accepted the draft. That draft not having been paid, the defendant company, on the 27th March, again drew on him at thirty days. He did not accept this draft. On the 11th April, the machinery about that time having been delivered at the plaintiffs' works (but not installed), Moyer went to Pearson and received from him a cheque payable to the defendant company for $1,000, expressed on the face to be "account Maple Leaf Portland Cement Company, Emerick coal grinder," in payment of his note of the 1st January, and his acceptance of the 23rd March. Pearson also then gave to Moyer his promissory note to the defendant company for $2,000, representing the balance of the purchase-money.

Delay having occurred in the delivery of the machinery to the plaintiffs, Pearson, on the 6th April, wrote to the defendant company complaining that there was delay, and stating that "according to our arrangement" the time for delivery had passed, threatening to cancel the contract immediately if delivery was not made, and adding, "If you are not going to deliver the one you agreed to, just say so immediately." The reply of the defendant company, dated the 7th April, was this:—

Mr. Jas. Pearson, Toronto, Ont.

Dear Sir,—We have yours of the 6th inst. to hand, and in reply would say that we are shipping your pulverizer together with the separator on Monday, 10th inst.

We would say that we would have made the shipment weeks ago, were it not that we only received the steel parts from the Bethlehem Steel Co. only three weeks ago, and we have used every possible means

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to forward the construction of the outfit since the time the steel parts came to hand.

We remain, yours truly,
THE OWEN SOUND IRON WORKS CO., LTD.
Per —. —. Wilson.

Letters were sent by Pearson to the defendant company on the 21st April, 29th April, and 10th May, to none of which was any reply made. In the letter of the 21st April, he again complained of the delay in delivery, and drew attention to the serious loss the plaintiff company would sustain through not being able to fill their customers' orders, for which loss he declared his intention of holding the defendant company liable, and he referred to a statement made by "your Mr. Moyer when selling the mill."

About this time (10th May), the machinery was installed; and, its operation being unsatisfactory, Pearson, on the 27th May, again wrote the defendant company, referring to this and to the damage he asserted that the plaintiffs were sustaining, and adding: "I think your conduct in refusing to send me back one copy of the agreement is reprehensible," etc. This brought from the defendant company a letter of the 28th May (the first communication of any kind from them to the plaintiffs from the 7th April), in which they, in effect, repudiated any liability to the plaintiffs, on the ground that they were working under a contract with Moyer to supply him with cement grinders and separators and had nothing to do with the sale or installation of machinery, and assumed no responsibility for its operation to any one but Moyer.

The offer and acceptance by Pearson were not returned to him until after the 27th May, when they were brought to him by Moyer. The other copies were left with the defendant company by Moyer about the end of December, 1910, and remained in their possession until the time of the trial. The managing director of the company admits that they were left with the company for the purpose of their being confirmed by the company, and that no notice was sent to the plaintiffs of the neglect or refusal to confirm.

The machines which were delivered were second-hand, and not manufactured by the defendants; they were not such as the contract called for, and were unfit for the purposes for which they were intended; they were useless in the plaintiffs' business; and, for that reason, they were discarded after having been subjected to a test of several weeks during which they were under the control of Fry, who for vendors superintended their installation and their operation for several weeks afterwards. He failed to make them work and the evidence further establishes that it was impossible for anyone to make them work properly. It became necessary for plaintiffs to replace them by others. It

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is under these circumstances that defendant company now seeks to escape liability to the plaintiffs.

Some evidence of damages was given at the trial, but that branch of the case was not fully gone into until the question of liability should be determined.

I am unable to see how the defendant company can escape liability, in view of the combination of circumstances which is found in these dealings. When it is considered that that company from December, 1910, until after the machines were delivered and installed, had in their possession Pearson's acceptances of the proposal to see which were stated to be subject to confirmation by the company; that the company, at the time they received the proposal and acceptance, also received Pearson's $1,000 note, payable to their order, and bearing on its face the statement that it was on account of machinery agreed to be purchased; that the draft for $1,000 was made upon Pearson by the defendant company; that the $1,000 payment made by Pearson was by cheque payable to them; that the $2,000 note also was made payable to them; that the several letters clearly intimated that the plaintiffs believed that they were dealing with the defendant company; and that there was no repudiation of contractual relationship, or even a reply to many of these letters, until it became apparent that the machinery was not satisfactory—no other conclusion can be reached but that the defendant company must have known, and did know, that the plaintiffs were dealing on the understanding and in the belief that they were contracting with the defendant company.

On these facts, the defendant company is, in my opinion, liable.

In *Keen* v. *Priest* (1858), 1 F. & F. 314 (at p. 315), Bramwell, B., says, "silence may sometimes be conduct," the meaning of which I assume to be that there must be some act or circumstance which can be considered in connection with silence. This is borne out by what is said in *British Linen Co.* v. *Cowan* (1906), 8 F. 704 (at p. 710):—

> Passivity can never constitute an unreal obligation into a real, can never make a man into a debtor who has neither said nor done anything to make him a party to the obligation, which has no existence apart from some action on his part. What action might be sufficient is a different question. It is possible that very little in the way of overt action, if it was unmistakable, might be sufficient.

Kay, L.J., in *Weidemann* v. *Walpole*, [1891] 2 Q.B. 534 (at 541), lays it down that

> the only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission.

Reference may also be made to *Freeman* v. *Cooke*, 2 Ex. 653

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(particularly at 663); *Carr* v. *London & North Western Railway Co.*, L.R. 10 C.P. 307 (at 316 and 317).

In the present case there was much more than mere passivity; there were positive acts of the defendant company which have estopped them from denying liability.

The manager of the defendant company stated that he turned over to Moyer all communications which were received from the plaintiffs; Moyer did not in any way communicate this to the plaintiffs, and did nothing to remove any impression they had that they were contracting with the defendant company. I think I am not going too far in holding Moyer liable, as well as his co-defendants.

There will, therefore, be judgment in favour of the plaintiffs for re-payment of the $1,000 paid by Pearson to the defendant company, and interest thereon from the date of such payment; for a return of the $2,000 promissory note made to the defendant company, with costs of the action to the present time; and a reference to the Master in Ordinary to ascertain the damages sustained by the plaintiffs. Further directions and further costs are reserved until the Master shall have made his report.

Judgment for plaintiff.

William PARKER, guardian of the estate of Jennie Parker (plaintiff) v. McARA BROS. & WALLACE (defendants).

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Saskatchewan Supreme Court. Trial before Brown, J. January 25, 1913.

1. FRAUD AND DECEIT (§ VII—31)—MISINFORMATION BY THIRD PERSON—CERTIFYING IDENTITY IN GOOD FAITH.

Where an applicant for a loan fraudulently represents himself to be the person named in the certificate of title which he produced to a firm of real estate brokers and thereby induced them to negotiate on his behalf a loan on the land upon a mortgage which was thereupon executed by the applicant in the name of the person whom he represents himself to be, the express and formal representation of the brokers to the lender as to the identity of the mortgagor with the person named in the certificate of title will make them liable for the loss occasioned by the fraud although they were themselves imposed upon and were innocent of any intentional wrong.

[*Bank of England* v. *Cutler*, [1908] 2 K.B. 208, referred to.]

TRIAL of action to recover a sum of money entrusted for investment. Statement

J. A. Allan, for plaintiff.

G. F. Blair, for defendants.

BROWN, J.:—The defendants carry on a real estate, loan and insurance business in the city of Regina. In or about the month of July, 1911, James F. Bryant, solicitor, held one thousand dollars of the plaintiff's money for investment. Mr. Bryant informed Fenton Munro, the manager of "Western Agencies, Brown, J.

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Limited," a company that also carried on a brokerage business very similar to that of the defendants, that he held this money for investment, and requested Mr. Munro to invest the same. Munro, not having any place at that time for investing the money, communicated with W. L. Wallace, a member of the defendant firm, asking his firm to place it. Shortly afterwards one Horavitch came to the office of the defendants and saw Wallace, representing himself as John Bogoyer, and asking for a loan of one thousand dollars on the security of lots 17 and 18, block 248, and lot 38, block 361, in the city of Regina, producing, and leaving with Wallace at that time, the duplicate certificates of title for these lots. Wallace informed Munro of the application, giving him the duplicate certificates of title, and Munro in turn got the approval of Mr. Bryant to the loan. Bryant paid the money to his solicitors, Messrs. Allan, Gordon and Bryant, and left it with them to do all else necessary to put the loan through. A form of application for the loan was drawn up, and by it the applicant applied to the Western Agencies, Limited, for the sum of one thousand dollars on the terms and security agreed upon. A mortgage in duplicate of the lots in question was also prepared. It happened that the duplicate certificate of title for lot 38 in block 361 shewed that that lot stood in the name of "John Bogie" in mistake for "John Bogoyer," and it was therefore necessary to prepare a statutory declaration, and such declaration was prepared to be made by the applicant identifying the party named in such duplicate certificate of title with the intended mortgagor, and those papers (that is, the application, the mortgage, and the statutory declaration) were forwarded by the solicitors through the Western Agencies, Limited, to the office of the defendants for execution and completion. The applicant subsequently attended the defendants' office, and these documents were executed and completed by him in the name of John Bogoyer, whom he fraudulently represented himself to be. Horavitch could not speak English, and he was not sufficiently educated to write his own name. It therefore became necessary to have the papers all explained to him, and in signing them he did so by making his mark. When Horavitch first came to the defendants' office he was a complete stranger to Wallace, but he came in the company of one Michael Buhler, who acted as interpreter. Buhler also acted as interpreter when the documents above referred to were subsequently executed. The application for the loan, in addition to what I have already stated with reference to it, was made out in the name of John Bogoyer; purported to be signed by John Bogoyer; represented the applicant as the registered owner of the lots in question; and requested the Western Agencies, Limited, in the event of the loan being granted, to

remit the money to the applicant in the care of McAra Brothers and Wallace. This application form was signed in the presence of Wallace, who witnessed the same by his signature and certified that the application had first been read over and explained to the applicant. The mortgage was also made out in the name of John Bogoyer, and disclosed the name of the plaintiff as the mortgagee and as the party advancing the one thousand dollars on the mortgaged security. The mortgage was signed in the presence of Wallace, who witnessed the same and who made the affidavit of execution thereto. This affidavit of execution was in the following form, which is the usual form for such a document:—

Canada:
Province of Saskatchewan.
To wit:

I, William Leslie Wallace of the City of Regina, in the Province of Saskatchewan, agent, make oath and say:

1. That I was personally present and did see John Bogoyer named in the within instrument and duplicate thereof, who is personally known to me to be the person therein named, duly sign, seal and execute the same for the purposes therein named, after the contents had been read over and explained to him.
2. That the same was executed at the ..... in the Province of Saskatchewan, and that I am the subscribing witness thereto.
3. That I know the said John Bogoyer, and he is, in my belief, of the full age of twenty-one years.

Sworn before me at the City of Regina, in the Province of Saskatchewan, this 4th day of July, A.D. 1911.

W. L. WALLACE.

E. A. McCALLUM,
A Commissioner for Oaths.

The declaration of identification which was made necessary by virtue of the wrong description in the title deed of lot 38, in block 361, represents the applicant as John Bogoyer; as being the owner of lot 38, block 361; as being described therein as "John Bogie"; and as being the John Bogoyer mentioned in the mortgage in question. This declaration was made before Mr. Wallace as a commissioner for taking oaths in this Province, and after having been read over and explained to the deponent. These papers, when executed, were forwarded by Wallace to the firm of solicitors, Messrs. Allan, Gordon and Bryant, either direct or through the Western Agencies, Limited. The mortgage, accompanied by the declaration of identification, was then by the solicitors registered in the proper registry office, and, relying on the correctness of the documents and the satis-

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factory condition of the title, the solicitors advanced the one thousand dollars, full proceeds of the loan, as follows:—

Solicitors' fees and disbursements	$	13.80
Western Agencies, Limited, valuation fee	5.00	
Loan fee	10.00	15.00
City of Regina, arrears of taxes		13.61
McAra Bros. & Wallace, on account of John Bogoyer		957.59
		$1,000.00

It appears that Wallace, the day before his firm received the cheque for $957.59, advanced the applicant $900 on an understanding from Munro that the cheque for the proceeds of the loan would be paid direct to his firm. It was necessary that insurance against loss by fire should be put on the buildings that were situated on the lots in question, and at Munro's request Wallace had the applicant put on insurance, to the amount of $2,300 in two companies represented by the defendants, and making the loss, if any, payable to the plaintiff. The premiums on this insurance amounted to $30, and this amount was charged against the $57.59 remaining in the defendants' hands as belonging to the applicant; and there still remains in the defendants' hands to the credit of John Bogoyer the sum of $27.59. The applicant never returned to the defendants' office after getting the $900, and apparently immediately made good his escape. It was not, however, until about the 12th day of October, 1911, that the forgery was discovered. The duplicate certificates of title had evidently been stolen by Horavitch, and all the documents on which the loan was made forged by him.

When John Bogoyer, the actual owner of the lots in question, discovered that a mortgage had been fraudulently executed and registered against his property, he brought action against the plaintiff Parker to compel him to remove the mortgage. The defendants were brought in as third parties to that action, and by consent of Parker and the defendants an order was made removing the mortgage from Bogoyer's title. I am now called upon to decide as to the liability of the defendants for the loss thus suffered by Parker. It is contended on the part of the defendants that there was no privity of contract as between the plaintiff and the defendants and therefore no liability. I cannot, however, agree with that contention. The applicant was a client of the defendants; he never came in contact at all with the plaintiff or his solicitors or the Western Agencies, Limited. He saw Wallace, and dealt through Wallace and him alone. The plaintiff was the party advancing the money; the papers shewed him to be the party advancing the money; and Wallace knew that he was the party advancing the money. When the application form, the mortgage, and the declaration of identification were forwarded by Wallace to the plaintiff's solicitors,

he knew that the money was to be advanced on the strength of the representations therein contained. He, Wallace, by witnessing the documents, and more especially by making the affidavit of execution of the mortgage, and by forwarding the documents to the solicitors, undertook or warranted to the plaintiff that the person executing the documents was John Bogoyer, the owner of the land in question. It is true that the defendants got no commission on the loan; the Western Agencies got the commission, but the defendants did get consideration in the fact that the money was advanced to their client, and further, they got whatever benefits were to be derived by having the insurance placed with their companies. Munro's evidence shews that it is customary, when a broker places a loan, that he places the insurance as well; and in any event that course was followed in this case. If the defendants had wished to escape liability they could easily have turned their client over to the Western Agencies, Limited, to be dealt with direct by them. They naturally, however, preferred to retain him. I am of opinion that for the aforesaid reasons the defendants are liable. See *Collen* v. *Wright*, 8 E. & B. 647, 120 Eng. R. 241; *Starkey* v. *Bank of England*, [1903] A.C. 114; *Bank of England* v. *Cutler*, [1908] 2 K.B. 208; *Bank of England* v. *Cutler*, 25 Times L.R. 509. But even admitting that the defendants did not receive any actual consideration, they would on another principle of law be liable, the principle that "if a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it." See *Coggs* v. *Bernard*, and the notes thereto as reported in 1 Smith's L.C. 173. To find the defendants liable under this principle it must appear that there was negligence on their part. There is some conflict of testimony as between Wallace and Buhler with reference to what took place in the defendants' office. I prefer to accept, and do accept, Wallace's version as the correct one where there is any conflict. This man Horavitch was known to Buhler, and although Wallace knew Buhler he had never before seen or heard of the man who accompanied Buhler, Horavitch. Wallace does not suggest that Buhler in any way tried to mislead him. As a matter of fact Buhler, I think, was perfectly honest in any part that he took in the proceedings, and it was only due to his own ignorance and incapacity that he allowed all the papers to go through in the manner in which they did, and Wallace was not made aware of the fraud that was being perpetrated. I am also of opinion that the documents could not have been explained as fully as they should have been, otherwise, it seems to me, either Buhler or Wallace would have discovered the fraud. Neither Buhler nor Wallace appeared to have had any idea that anything was wrong. As far as I can see, the only evidence that

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Wallace had of the applicant being John Bogoyer was the production of the duplicate certificates of title from his possession; the fact that he came with Buhler, a man whom Wallace knew —he was not introduced by Buhler as John Bogoyer, or at all— and the representations made by Horavitch in the various documents that were executed by him. Surely a person with such slight knowledge is not justified in making an affidavit such as Wallace made in this case. On that slight knowledge he pledges his oath that he knows the applicant and knows him to be the person named in the mortgage. It may be difficult to state just how much evidence of identification is necessary before a man is justified in making such an affidavit, but in my judgment it must be a great deal more than Wallace had on this occasion. Wallace, by virtue of his position in the defendants' firm, and also by virtue of the fact that he was a commissioner for taking oaths, has no excuse for carelessness in a matter of this kind. I think, therefore, that having undertaken the proper execution of these documents, and having been very negligent in reference thereto, the defendants must be held liable on this ground also. The plaintiff will, therefore, have judgment against the defendants for $1,000 and interest thereon from July 14th, 1911, the date when the money was advanced, at legal rate, and costs of action, including the costs which the plaintiff has been compelled to pay, or is liable to pay, to John Bogoyer.

Judgment for plaintiff.

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STRONG v. CROWN FIRE INSURANCE CO.

Ontario Supreme Court. Trial before Sutherland, J. January 10, 1913.

1. INSURANCE (§ III D 1—65a)—FIRE—STATUTORY CONDITIONS — VARIATION, WHEN UNREASONABLE.

A variation of statutory condition No. 22 in a policy of fire insurance as follows: "Every suit, action, or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred unless commenced within the term of six months next after the loss or damage shall have occurred," is unjust and unreasonable and has no application where the original writ was issued within six months, but a new action was commenced more than six months after the loss occurred.

[*Merchants Fire Insurance Co.* v. *Equity Fire Insurance Co.*, 9 O.L.R. 241, followed.]

2. STATUTES (§ II D—125)—CONSTRUCTION—RETROACTIVE OPERATION — MATTERS OF PROCEDURE—FIRE INSURANCE.

The amendments to Insurance Act, R.S.O. 1897, ch. 203, made by sec. 194, sub-sec. 22, of the Ontario Insurance Act, 1912, 2 Geo. V. ch. 23, making the loss under a policy of fire insurance payable in sixty days after the completion of the proofs of loss, unless a shorter period is provided by the contract, and by sec. 199 to the effect that no objection to the sufficiency of such proof shall be allowed as a defence by the insurer, are retroactive and apply to an action commenced before such amendments were passed, since they are mere matters of procedure.

[Maxwell on Statutes, 5th ed., pp. 363, 364, 367; *Gardner* v. *Lucas*,

3 App. Cas. 603; *Kimbray* v. *Draper*, L.R. 3 Q.B. 160; *Rex* v. *Chandray*, [1905] 2 K.B. 335, referred to.]

3. INTEREST (§ I A—6)—WHEN RECOVERABLE—INSURANCE—TIME OF PROOF OF LOSS.

Under the provisions of sec. 194, sub-sec. 22, of the Ontario Insurance Act, 1912, 2 Geo. V. ch. 23, the loss under a policy of fire insurance being payable in sixty days after the completion of the proofs of loss unless a shorter time is provided by the contract of insurance, interest from the time of such completion of the proof of loss should be allowed.

[*Toronto R. Co.* v. *City of Toronto*, [1906] A.C. 117, followed.]

4. INSURANCE (§ III E 1—78)—PREVIOUS FIRES—CONCEALMENT — MATERIALITY TO THE RISK—CONTINUANCE OF OLD RISK.

In a fire claim under a policy of fire insurance, where the plaintiff in his application for the policy had answered in the negative the question as to whether he had had a fire previously; and where it appears that some years prior to the application he had had a fire loss on other property on which, however, the insurance was promptly adjusted and paid and that the risk was continued by the insurer, such non-disclosure in the application was not under the circumstances material to the risk.

Statement.

THE above and three other actions were brought upon policies of fire insurance issued by the four defendants respectively; and afterwards a second action was brought against each defendant. This was the second trial of the actions.

N. W. Rowell, K.C., and *George Kerr*, for the plaintiffs.

E. E. A. DuVernet, K.C., *A. H. F. Lefroy*, K.C., and *A. C. Heighington*, for the defendants.

Sutherland, J.

SUTHERLAND, J.:—This action was tried before me, and my judgment previously delivered is reported, *Strong* v. *Crown Fire Insurance Co.*, 1 D.L.R. 111, 3 O.W.N. 481.

An appeal was made to the Court of Appeal, and upon the argument exception was taken by the defendants to a paragraph in the judgment as formally settled.

After the argument before the Court of Appeal, and while judgment was still pending, an application was made to me to strike out of the judgment the paragraph in question. Under the circumstances, I declined to make any order: see *Strong* v. *Crown Fire Insurance Co.* (No. 2), 3 D.L.R. 882, 3 O.W.N. 1378.

In consequence of the point so raised before the Court of Appeal, a new trial was ordered, *Strong* v. *Crown Fire Insurance Co.*, 4 D.L.R. 224, 3 O.W.N. 1534.

Clause 3 of the formal certificate of the judgment of the Court of Appeal was in part as follows: "And it is further ordered and adjudged that the parties in the secondly above intituled action shall be entitled to deliver pleadings in the said action, and that both the above said intituled actions shall be reheard or retried . . . upon the evidence already given . . . and such further evidence (if any) as the parties hereto may offer, without prejudice to any order which the trial Judge

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may make as to consolidation under sec. 158 of the Ontario Insurance Act, 1912, upon the completion of the pleadings in the later action."

Pleadings were then delivered in the said secondly intituled action, and a motion under sec. 158 made by the plaintiffs to consolidate the actions. In consequence, I made an order on the 17th October, 1912, from which I quote as follows: "It is ordered that the above actions be and they are hereby consolidated and that they be hereafter carried on as one action; that the pleadings in the secondly above intituled action, including any defences raised in the first intituled action, and not included in the secondly intituled action, do stand as the pleadings in the consolidated action, and that the action do proceed to trial in the manner provided in said certificate. . . ."

While there has been a considerable amount of new evidence offered at the second hearing, I am unable, after a careful perusal and consideration thereof, to see that the defendants' case has been made substantially stronger.

On the whole evidence, I see no reason to modify my former findings as to the reliability of the stock-taking and its accurate record in exhibit 6, and to the effect that at the time of the fire there was in the store approximately $25,000 of goods estimated at cost price; and I accordingly re-affirm those findings. Nor am I able, from the new evidence offered, to come to the conclusion that my previous findings that 25 per cent. was a reasonable deduction on cost for estimated profits on sales for the assignee to make in arriving at the amount of merchandise sold and for the purpose of making a valuation thereof, and that 10 or 12 per cent. was a fairly liberal reduction on the $25,000 for depreciation of stock, should now be varied. I also re-affirm them. . . .

Upon the second trial considerable evidence was given as to the place in the store at Blenheim where a former fire had occurred, and which, it was contended on behalf of the defendants, Jeffrey had concealed from the defendant companies when applying for insurance by answering in the negative a question whether he had or had not had a former fire. It was sought to shew that in his former evidence Jeffrey had made inaccurate statements both as to the amount he had claimed he had been paid in connection with that fire, and as to the character of the fire and the place in the store where it had occurred. His evidence at the former trial was to the effect that he had received for his damages from the insurance company in connection with the former fire something over $200, he was not sure of the amount (see page 65). At the second trial he was shewn to have claimed $800 for damages for smoke, and to have received $375 in settlement. I was asked to find from the new evidence that the for-

mer fire was something material to the risk, which was undisclosed and would have affected the question of defendants issuing the policies in question. It was, however, also disclosed that the company which then had the insurance upon Jeffrey's stock had sent a representative to Blenheim to look into the question of the fire, and the amount, if any, to be paid by it to the insured and that having done so the amount of $375 was fixed upon and promptly paid, and that the insurance company continued "on the risk" as it was called in the evidence.

Under these circumstances, I cannot help thinking that if the facts had been known to the defendant companies they would not have considered the former fire as a matter which would have materially affected the risk. That view is in accordance with important expert evidence given at the trial. I find, therefore, that, under the circumstances, it was not material to the risk. See *Re Universal Non-Tariff Fire Insurance Co.*, L.R. 19 Eq. 485, at 493.

There is also the fact that the previous fire occurred in connection with other property than that in question. This was dealt with in my former judgment. See *Stott* v. *London and Lancashire Fire Insurance Co.*, 21 O.R. 312.

This is one of four actions tried together, against insurance companies. Two of the other companies are the Anglo-American Fire Insurance Company and the Montreal-Canada Fire Insurance Company. In the variations in conditions in each of their policies this clause is found: "Condition No. 22 is varied to read: 'Every suit, action, or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred unless commenced within the term of six months next after the loss or damage shall have occurred.'"

The fire in question in these actions occurred on the 25th December, 1910. The writs in the original actions were issued on the 26th April, 1911, and in the new actions on the 20th December, 1911. The defendants, therefore, contend that, the new writs being issued more than six months after the loss occurred, the aforesaid condition of the contracts applies and the plaintiffs cannot recover as to these two companies. In the case of the *Merchants Fire Ins. Co.* v. *Equity Fire Ins. Co.* (1905), 9 O.L.R. 241, at 247, Meredith, C.J., held that "Statutory Condition No. 22 allows a year after the loss has occurred in which to bring the action, and I am not only unable to hold the variations which the defendants have attempted to impose upon the assured by reducing the time allowed for bringing an action to six months to be just and reasonable, but I am clearly of opinion that on the contrary it is both unjust and unreasonable."

Following that authority, I find to the same effect in this case. See also *May* v. *Standard Fire Insurance Co.*, 5 A.R. 605,

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622; *Peoria Sugar Refinery Co.* v. *Canada Fire and Marine Insurance Co.*, 12 A.R. 418; *Marshall* v. *Western Canada Fire Insurance Co.*, 18 W.L.R. 68.

The plaintiffs also claim interest from the 1st April, 1911. In my former judgment I said nothing about any allowance for interest. Before the judgment was settled, on being spoken to about the matter, I intimated to counsel that I thought that I would make no order for the allowance of interest. The Insurance Act, R.S.O. 1897, ch. 203, sec. 168, sub-sec. 17, prescribes that "the loss shall not be payable until sixty days after the completion of the proofs of loss unless otherwise provided by the contract of insurance." That was the statute in force when the former action was commenced and tried and where judgment was pronounced on the 2nd January, 1912.

Subsequently, the Ontario Insurance Act, 1912, 2 Geo. V. ch. 23, was passed. Section 247 is as follows: "Sections 162 to 201 of this Act shall come into force on the 1st day of August, 1912, and the remaining sections of this Act shall come into force forthwith." Section 194, sub-sec. 22, is as follows: "The loss shall be payable in sixty days after the completion of the proofs of loss unless a shorter period is provided by the contract of insurance."

It was contended before that the proofs of loss referred to in sec. 168, sub-sec. 13 (*a*), (*b*), (*c*), of R.S.O. ch. 203, above referred to, were the proofs of loss relied on by the plaintiffs, dated the 1st April, 1911, and apparently furnished to the defendants on the 4th of that month, and did not include proofs which the defendants might require under (*d*) and (*e*).

I dealt with this before, and came to the conclusion that that was not the true view of the matter, and that I could not find that the proofs were reasonably complied with until the 17th March, 1911. That finding was based largely on the fact that up till that time certain invoices and a commissioner's certificate, which, if required by the defendants under (*d*) and (*e*), were to be produced, had not been. I had thought before and determined that it would be inequitable under sec. 172 (1) for the insurance contracts to be held to be void or forfeited in consequence of the original actions being prematurely brought, or the companies effectually discharged from their liability otherwise under the contracts.

If it is necessary, I repeat that finding. It is however, to be noticed that the last portion of sec. 199, of the present Act goes farther than the old sec. 172 (1), and that it enacts that "no objection to the sufficiency of such statement or proof or amendment or supplemental statement or proof, as the case may be, *shall be allowed as a defence by the insurer*, or a discharge of his liability on such policy whenever entered into."

The defendants were also objecting to the loss on other grounds than imperfect compliance with the conditions as to proofs of loss.

It is now contended by the plaintiffs that the Act of 1912 applies to the present action, and that the result of the variations in the sections referred to by the Act of 1912 is, that the original actions were not prematurely brought.

I am inclined to think that this contention is sound, and that I must, upon the statute and authorities, allow the claim for interest as from the 4th April, 1911, being sixty days after the date when the initial proofs were supplied to the defendant companies.

The contention is, that, the amendments referred to being matters of procedure, the sections, though coming into force after the actions were commenced, were retroactive and applicable at the time of the trial.

"The general principle, indeed, seems to be that alterations in the procedure are always retrospective unless there be some good reason against it": Maxwell on Statutes, 5th ed., 365; *Gardner* v. *Lucas*, 3 A. & C. 603; *Kimbray* v. *Draper*, L.R. 3 Q.B. 160.

In *Wright* v. *Hale*, 6 H. & N. 226, it was held that an English statute which provided that "if the plaintiff in any action for an alleged wrong recovers by the verdict of a jury less than five pounds he shall not be entitled to any costs, if the Judge certifies to deprive him of them," enabled a Judge to certify in an action commenced before the passing of that Act. At page 230, Pollock, C.B., says:—

> There is a considerable difference between new enactments which affect vested rights, and those which merely affect the procedure in Courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts.

And Wilde, B., at 232:—

> But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act.

See also *The King* v. *Chandray*, [1905] 2 K.B. 335 (*a*): "The prisoner was convicted under sec. 5, sub-sec. 1, of the Criminal Law Amendment Act, 1885, of an offence committed on July 15, 1904. The prosecution was not commenced until December 27, more than three months, but less than six months after the commission of the offence." Lord Alverstone, C.J., at page 339, says:—

> It is a mere matter of procedure and according to all the authorities it is therefore retrospective: *The Ydum*, [1899] P. 236; *Leroux* v. *Brown*, 12 C.B. 800, at 803, 826, and 827. See also Maxwell on Statutes, 5th ed., 364, 373; and *Hilliard* v. *Lenard*, Moo. & M. 297, and *Towler* v. *Chatterton*, 31 R.R. 411.

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It would seem that in such a case it is appropriate to allow interest, and perhaps, indeed, incumbent upon me to do so. See *Toronto R. Co.* v. *City of Toronto*, [1906] A.C. 117.

Upon the former evidence I could not find that any misrepresentation had been made by Jeffrey as to the value of the stock. I repeat that finding.

There will, therefore, be judgment against the Rimouski Fire Insurance Company on their two policies for $3,000 and $5,000, in all $8,000; against the Anglo-American Fire Insurance Company and the Montreal-Canada Fire Insurance Company for $4,000 each; and against the Crown Fire Insurance Company for $5,000; and in each case with interest from the 4th April, 1911.

As in the former judgment, so in this, I have come to the conclusion that I should make no order as to costs up to the time of the delivery of the judgment of the 2nd January, 1912. The plaintiffs will have the costs of all proceedings subsequent thereto.

Judgment for plaintiff.

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(Decision No. 2.)

KEARNEY v. JACK.

New Brunswick Supreme Court, Barker, C.J., Landry, White, Barry and McKeown, JJ. June 21, 1912.

1. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES—FAMILY SETTLEMENT.

A family settlement whereby a father conveys land to his son in consideration of the son transferring to his brother land belonging to him, reserving life support to the father and mother, where no actual fraud is shewn and there is no intent to hinder, delay or defraud creditors, is a valid transaction, as against a creditor seeking to set it aside as fraudulent under the statute 13 Eliz. ch. 5, especially where such arrangement was made before the debt upon which the creditor obtained his judgment was contracted; such a conveyance from the father to the son is based upon a good and valuable consideration and is an honest family arrangement which will be protected in equity where it appears to have been made *bonâ fide*.

[*Jack* v. *Kearney*, 4 D.L.R. 836, 10 E.L.R. 298, reversed.]

2. EVIDENCE (§ II E 7—191)—FRAUD—FRAUDULENT TRANSFERS—ONUS.

The burden of proving fraud in a conveyance by a debtor as against the statute 13 Eliz. ch. 5, is on those seeking to set aside the transfer.

[*Jack* v. *Kearney*, 4 D.L.R. 836, 10 E.L.R. 298, reversed.]

3. EVIDENCE (§ II E 7—191)—FRAUD—FRAUDULENT TRANSFERS—CONSIDERATION—SUFFICIENCY—PRESUMPTIONS.

In an action to set aside a conveyance by a debtor as fraudulent under the statute, 13 Eliz. ch. 5, the mere fact that the consideration is of less value than the property conveyed by the debtor or that the consideration is paid to a third party, does not in itself establish fraud, but these are merely circumstances to be considered in determining whether or not there was actual intent to defraud. (*Per* White, J.)

4. EVIDENCE (§ II E 7—191)—PRESUMPTION AS TO FRAUDULENT INTENT—CONSIDERATION.

The doctrine of constructive fraud cannot be successfully invoked in favour of a creditor to deprive the grantee of the debtor of property conveyed to him by the debtor for valuable consideration, though the consideration which the grantee gave was the transfer of some of his property to a third person designated by the debtor, and though the effect of the conveyance, combined with business reverses was to impoverish the debtor, where no intent to defraud or knowledge thereof existed on the part of the grantee.

[*Jack* v. *Kearney*, 4 D.L.R. 836, reversed.]

5. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTION BETWEEN PARENT AND CHILD—VALIDITY—PRESUMPTIONS AS TO FRAUD.

In order to determine whether a disposition of property by a debtor, under a family settlement, is void as to creditors under the statute 13 Eliz. ch. 5, the state of circumstances at the time the conveyance is executed must be regarded and not subsequent events, except such as must have been in the contemplation of the transferor at the time of transferring the property, and from which a fraudulent intent at that time may be gathered. (*Per* Barry, J.)

6. FRAUDULENT CONVEYANCES (§ II—5)—INADEQUACY OF CONSIDERATION—FAMILY SETTLEMENT.

Under a family settlement, mere inadequacy of consideration is not sufficient ground to set aside a transfer of property from a debtor to a third person at the instance of a creditor under the statute 13 Eliz. ch. 5, unless there is such inadequacy as to induce the presumption of collusion, or such, in fact, as might have invalidated the sale as between the vendor and purchaser without the interposition of creditors.

[*Jack* v. *Kearney*, 4 D.L.R. 836, reversed.]

7. FRAUDULENT CONVEYANCES (§ VI—30)—CONVEYANCE BY PARENT TO CHILD—SERVICE RENDERED BY CHILD DURING MINORITY—CONSIDERATION.

Services rendered by a child during minority may constitute a consideration in support of a conveyance of land by the parent to the child as against the creditors of the parent.

[*Jack* v. *Kearney*, 4 D.L.R. 836, reversed.]

8. FRAUDULENT CONVEYANCES (§ II—8)—VOLUNTARY CONVEYANCE—AGREEMENT TO SUPPORT GRANTOR—CONSIDERATION.

An agreement to support a grantor and his wife during their lives may constitute, as against the grantor's creditors, a consideration upholding a conveyance of land under a family settlement.

[*Jack* v. *Kearney*, 4 D.L.R. 836, reversed.]

9. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES, FAVOURED WHEN—CONSIDERATION — "NATURAL LOVE AND AFFECTION."

Where a conveyance of lands under a family settlement is attacked by creditors, for alleged inadequate consideration, deeds under such settlements are exempt to some extent from the ordinary rules which affect other deeds, the consideration being there composed partly of value and partly of natural love and affection, not easily estimated on a scale of dollars and cents, yet favoured by the courts. (*Per* Barry, J.)

[*Persse* v. *Persse*, 7 Cl. & F. 279, 318; *Baker* v. *Bradley*, 7 DeG. M. & G. 597, 620, referred to.]

Statement

THIS is an appeal from a decree, *Jack* v. *Kearney*, 4 D.L.R. 836, made by McLeod, J., setting aside two conveyances on the ground that they were fraudulent under the

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statute 13 Eliz. ch. 5, as against the plaintiff, a judgment creditor.

The appeal was allowed.

W. P. Jones, K.C., for defendants, appellants.
M. G. Teed, K.C., for plaintiff, respondent.

BARKER, C.J.:—Robert Kearney, the judgment debtor and two of his sons, Frederick, the eldest, and Roy, the youngest, about 16 years of age, are the defendants. There is another son, James, who is not a party to this suit.

There seem to be three classes into which cases of this kind are divided. In the first class is the case of a conveyance made for the purpose of delaying, hindering, or defrauding creditors. In the second class we have the case of a debtor making the transfer of his property for valuable consideration with the *bonâ fide* intention of disposing of it to the transferee and not with any intent to delay, hinder or defraud his creditors though that may be the result of it. In the third class is the case of a debtor denuding himself of all or substantially all of his property by transfers voluntarily made without any fraudulent intent in fact, but, where as a necessary result of the transfers, his creditors must be delayed or hindered. In the first two cases the question of intention is to be determined from the facts and circumstances under which the transfers were made, and in the last case the law will presume an intent to defraud under the statute and the conveyance will be set aside at the instance of creditors. *Freeman* v. *Pope*, L.R. 5 Ch. 538, supports the last proposition and *Wood* v. *Dixie*, 7 Q.B. 892; *Alton* v. *Harrison*, L.R. 4 Ch. 622; *Dalglish* v. *McCarthy*, 19 Grant 578, and *Whelpley* v. *Riley*, 7 N.B.R. (2 All.) 275, support the second. The statute, however, has no reference to transfers made *bonâ fide* for good consideration unless there is fraud of which the transferee has notice. This present case must range itself in the second or third class, because the Court below has found on evidence which seems to me inconsistent with any different conclusion, that the parties to these transfers were not in any way acting with any fraudulent intent or notice. On that point, McLeod, J., says:—

> In the present case I do not think that it has been proved that there was an actual intent to defeat or delay the creditors, but the effect of the deed was to do that very thing, and the Court will, therefore, presume an intent to defeat or delay the creditors.

This case must, therefore, come under the third class I have mentioned, and in order to sustain the decree it must appear that Robert Kearney, the father, denuded himself substantially of all his property which could be made available for the payment of his debts, by transferring it to his sons voluntarily and

without consideration, in which case a fraudulent intent under the statute will be imputed to him though it was altogether foreign to the real object he had in view. I am unable to agree with McLeod, J., in holding that the conveyance from Robert Kearney to Frederick Kearney was without consideration or in any way voluntary so as to bring it within the scope of the statute. It seems to be admitted that in 1907 the Hamilton farm was purchased and a conveyance of it made to Frederick, who was then some twenty-two years of age. He was unmarried and living at home with his brothers. He worked in the woods in the winters and by pressing hay and in other ways he earned money for himself. This Hamilton farm with some personal property included in the purchase was bought for $3,100. It was incumbered by two mortgages for $1,550. The arrangement which was made is not very clearly stated, but it would seem that Hamilton the vendor took a mortgage from Frederick direct for $1,050. This left $500 coming to the vendor and this was paid in part by money borrowed by Frederick on a life policy of insurance and the balance from money earned by him or him and his brother James in pressing hay. The sum borrowed on the insurance was $120. I cannot make out from the evidence that Robert Kearney contributed anything in the purchase of the Hamilton farm. Nothing was abstracted from his property which could have been made available for his creditors, so far as this purchase was concerned. Frederick's title to this farm was not disputed, and the validity of the transaction is not questioned though it would seem from the plaintiffs' counsel that he only admits the payment by Frederick to be the $120 instead of the whole $500 of the purchase money. Now what took place in 1909? Robert the father, had for some years been unable to do more than light work about the farm. James, the other brother, was about being married and was anxious to secure a separate home for himself, and his father was desirous of assisting him. Robert, therefore, made a proposal to Frederick that if he would convey the Hamilton farm to James, he, Robert, would convey the homestead property to him, subject to these conditions; that he, Robert, should have for his own use that year's crop off the homestead farm, less enough for seed and home use, that the son, Roy, was to continue to work for Frederick on the homestead farm until he became of age some six years later when Frederick was to convey to him a one-half interest in the farm; and in case Roy died before reaching twenty-one years, or in case he ceased to work on the farm, his interest was to belong to Frederick. And the remaining condition was that Robert and his wife were to have their support furnished them on the farm for life. This proposal was accepted. The conveyance by Robert to Frederick was made

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and the conveyance by Frederick to James of the Hamilton farm was also made and James took possession. And, in anticipation of Roy's becoming entitled to his half Frederick executed a conveyance of it to him which was delivered to his mother in escrow. The effect of setting aside the two conveyances is that James has the Hamilton farm, Frederick has lost the Hamilton farm and the interest which he acquired in the homestead farm in its place is made liable for the plaintiffs' debt, and costs. I do not understand the plaintiff to dispute the proposition that if there was a consideration for the conveyance by Robert to Frederick his action must fail. His complaint here is that Robert got no benefit and no return for the conveyance. The property was parted with and nothing received in its place for the creditors. In his argument as reported in the Court below and repeated here is this: "Voluntary means given by the grantor without consideration to him. Otherwise you can get over the statute every day in the week. If a man who is indebted all he has to do is to go to someone else and say, 'I want to settle my property on my son but I can't, but you give him your property and I will give mine to you,' I venture to state you will find no authority to support this." In other words if the conveyance of the Hamilton farm had gone first to Robert and then to James instead of direct to James as Robert directed, the case would have been different. I have no desire to prejudice any remedy sought to be pursued against James who is not here to look after his rights, but in the absence of other facts than these we have here, I venture to say that in equity the plaintiff's remedy as to the Hamilton property is quite as complete in the one case as the other.

In *Townend* v. *Toker*, L.R. 1 Ch. 446, at p. 458, Turner, L.J., says:—

> The substantial question, however, in this case, is, whether the settlement in question was voluntary, and fraudulent and void against the plaintiff. The Master of the Rolls was of opinion that it was, and has decided the case accordingly, but with all respect to His Lordship, I differ from him in opinion upon this point. The question as I apprehend, in cases of this description is, whether there was consideration for the settlement. The Court not entering into the quantum of consideration, in effect the question is, whether the transaction was one of bargain or of gift merely, and I am of opinion that there was consideration for this settlement, and that the case is one of bargain and not one of gift merely.

Surely this transaction was one of bargain. It was not Robert's intention to give anything to Frederick, whatever he may have intended to do as to James and Roy. Frederick parted with his own property bought and paid for by himself and at his father's request conveyed it to James, and his father conveyed the homestead to him, subject to conditions as to his

support for life and Roy's right to receive one-half of it. In his reasons for judgment, McLeod, J., said:—

> It is true that he (Robert) said that he and his wife were to have a home and living on the place during their lives. This agreement was, however, not in writing and even if it was in such a condition that it could be enforced it is not in my opinion a consideration sufficient to support the deed against the plaintiff. A man indebted cannot convey his property simply for the purpose of supporting himself and his wife, if need be, and thus defeat his creditors.

In *Doe dem. Keith* v. *Corey*, 29 N.B.R. 287, decided by this Court in 1890, a somewhat similar point arose. A verdict was found for the defendant, and the Attorney-General in moving for a new trial, said:—

> The evidence shews that the defendant knew at the time the deed was given him by Clark that he was taking the whole of Clark's property, real as well as personal. This of itself was sufficient to put the defendant upon his guard. It is also submitted that the defendant knew that Clark had creditors and that the taking of the deed to himself would prevent the creditors from recovering their claims. The learned Judge should have directed the jury that the conveyance by a debtor of his entire estate for the purpose of securing future maintenance and support is fraudulent and void, under the Statute of Elizabeth, as being made to defeat, hinder and delay creditors.

Freeman v. *Pope*, L.R. 5 Ch. 538, and other cases were cited. Tuck, J., in delivering the opinion of the Court (Allen, C.J., Wetmore, Palmer, King and Tuck, JJ.), said (at 293):—

> In my opinion the Judge would have been wrong had he told the jury, as an abstract proposition, that a conveyance of the debtor's whole estate for the consideration, wholly or substantially, of the future support of the debtor, is fraudulent and void as against creditors. Equally wrong would it have been had he directed that such a deed is void even against subsequent creditors and that the jury might, from such a deed, infer an intention to defeat and delay creditors. And yet it was contended that this is the law. Cases were cited as authorities for this proposition; but they apply only to voluntary settlements or conveyances. Such cases are *Freeman* v. *Pope*, L.R. 5 Ch. 538; *Spirett* v. *Willowes*, 3 DeG.J. & S. 293; *Doe dem. Parry* v. *James*, 16 East 212, and *Dewey* v. *Bayntun*, 6 East 257. If the consideration of a deed is to support and maintain the grantor, and is made *bonâ fide*, with no intention to defeat and delay creditors, such a deed is a good one, even if the making of it has prevented creditors getting their pay. The intention of the parties under all the circumstances is the fact to be determined by the jury, and this is what the learned Judge left to them.

See also *Gale* v. *Williamson*, 8 M. & W. 405.

In *Ex parte Berry*, 19 Ves. 218, it was held by Lord Eldon that a voluntary bond, though void against creditors, being valid as between the parties, its surrender was a consideration that

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would sustain a substituted bond against creditors unless made with a fraudulent intent. See also *Ex parte Hookins*, 13 Jur. 114, and *Gilham* v. *Locke*, 9 Ves. 613. It is true these cases were cases in bankruptcy but the principles upon which decisions are governed as to conveyances being voluntary or for value are alike in bankruptcy cases and those under the Statute of Elizabeth. I am unable in this transaction to see any way in which Frederick Kearney was benefited. He certainly obtained a contingent interest in the one-half interest that would otherwise go to Roy, but he assumed the responsibility of supporting his parents. In substance and effect James Kearney and Roy were benefited by gifts for which, at all events, James gave no consideration to any one at that time. If it was a gift of the Hamilton farm, who was the donor, who was the settlor? Surely not Frederick but the father Robert. The gift was from him to the son; it was concluded and carried out by the father's directions in the way I have mentioned as a mere matter of convenience. The substance of the matter must be looked at, not the form, and I am unable to see any reason why this plaintiff should not have precisely the same remedy against James now as he would have if the title had gone to the father first and then to the son.

In *Stone* v. *Van Heythuysen*, 18 Jur. 344, A. purchased land which the vendor by his directions conveyed to B. and C. upon trust to sell and hold the moneys upon certain trusts declared in a separate indenture for the benefit of A.'s wife and family. Wood, V.-C., says (p. 346):—

> The deed by which this settlement is made, expressly recites that A. had agreed to buy the estate of the vendor; from that moment he was owner in equity, that had the equitable interest in the real estate. That like all other equitable interest is clearly within the Statute of Elizabeth. He agrees to purchase it, and it is under his direction that the estate is conveyed in a particular way and upon a particular trust.

In *French* v. *French*, 6 DeG. M. & G. 95, it appeared that a trader in insolvent circumstances agreed to sell his business and stock in trade in consideration of a money payment and that the purchaser should during the joint lives of the trader and his wife pay the former an annuity equal to ¼ of the profits and a contingent annuity to the wife, if she survived her husband, equal to one-sixth of the profits. The Lord Chancellor says, (p. 102):—

> I consider the annuity so payable to the widow just in the same light as if it was taken and applied to his own purposes and abstracted from his creditors and in my opinion it amounts to a voluntary settlement in favour of his wife. It formed clearly a portion of the consideration which, instead of keeping himself for the benefit of his creditors, he chose to keep for the benefit of his wife. The

law is clear that such a transaction is fraudulent as against creditors, that is to say, it is an attempt to abstract from creditors what they are entitled to look to for payment of their debts.

I am unable to see that the fact of the Hamilton farm going direct to James prevented Robert from getting anything in return for his conveyance of the homestead. He secured all he had in view in making the proposal. He was desirous of giving or getting the Hamilton farm for James and he did so. If that part of the transaction in substance and effect was an abstraction of so much property which otherwise would have been available for creditors, it would not cease to be so because the debtor who was making the gift had one conveyance made instead of two.

It was strongly contended on the part of the defendants that this whole transaction was a family arrangement made in good faith and therefore for well-understood reasons entitled to special protection even as against creditors. As between the members themselves no doubt such arrangements are sustained upon grounds and for reasons not applicable to transactions between mere strangers. In *Penhall* v. *Elwin*, 1 Sm. & G. 258, Stuart, V.-C., after alluding to these arrangements and the circumstances under which they will be upheld, says (p. 270):—

> But where the rights of existing creditors as directly interfered with by such an arrangement, and property to which the creditors might resort, is removed from their reach, a more severe rule must be applied. And if such circumstances of suspicion as occur here from the embarrassed circumstances of the grantor the pressure of creditors and the appearance of a voluntary arrangement originating in the necessity and fear induced by this pressure, the case is carried beyond the principle which sanctioned and supports a deed as a mere family arrangement, and not on actual valuable consideration. Therefore, it is that post-nuptial settlements made for the most laudable purposes and meritorious consideration have by the policy of the law, been declared void against creditors.

Entertaining the views which I have expressed, I have not thought it necessary to discuss a question which was raised at the argument as to the defendants' rights resulting from an alleged arrangement made in 1907 when the Hamilton farm was purchased. It was said and there seems some evidence to support it that the sons Frederick and James intended leaving home and going to work for themselves elsewhere and that in consideration of their agreeing to remain their father agreed to make these or similar arrangements for them. The Judge below does not seem to have made any finding on the subject or noticed it in any way. So far, therefore, as the conveyance to Frederick is concerned it seems to me there is a valuable consideration, and the learned Judge was wrong in setting it aside, at all events, so far as the intent and rights which he acquires

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for himself are concerned. In that case that part of the decree setting aside the conveyance from Frederick to Roy is unimportant because the effect of that is simply to place the parties where they were before that conveyance was made, leaving the title in Frederick and no interest in the debtor Robert. I notice in the argument before the Court below that the plaintiffs' counsel claimed, in the event of his failing in establishing his contention as to Frederick's interest, that the conveyance was void as to Roy's interest. It was said that as to him, the transaction was a mere gift and therefore within the scope of the statute. It is clear that a part of a transaction can be impeached. In *French* v. *French*, 6 DeG. M. & G. 95, at p. 102, the Lord Chancellor says:—

> If the Vice-Chancellor assumed that part only of the transaction could not be impeached, I differ from him.

In the argument before us not much importance seemed to be attached to this particular relief. My brother White has gone fully into this branch of the case; and as the opinion of a majority of the Court at all events is that the plaintiffs' action must fail as to both defendants any doubts I may entertain on the point are unimportant. It seems to me, however, that this branch of the case could not be intelligently dealt with until a decree had been settled with the necessary declarations of right. The true consideration of the conveyance does not appear on its face, but it is established by outside evidence. In my opinion if the relief sought had relation to the defendant Roy alone, a formal decree should be drawn up embodying the declarations necessary to shew precisely what part of the transaction is set aside as being fraudulent as against the plaintiff and exactly what interest or rights in the property, legal and equitable, would as a result of the decree enure to the benefit of the plaintiff and be made available for the payment of his judgment against Robert Kearney.

Appeal allowed with costs and judgment for defendants with costs.

White, J.

WHITE, J.:—In all cases where it is sought, as is in the case before us, to set aside a conveyance, as being fraudulent within the statute, 13 Eliz. ch. 5, and there is proven only constructive, as distinguished from moral or actual, fraud, it becomes vitally important to determine whether the conveyance impugned is one which the law regards as voluntary, or is one made for valuable consideration. Evidence which, in the case of a voluntary conveyance, may suffice to sustain a finding of intent to defraud, or may even be sufficient to require the Court to infer fraud as a matter of law, may, where the conveyance is made for a valuable consideration, utterly fail to establish the actual intent to defraud which it is essential to establish in such case, in order

to have the conveyance set aside under the statute. It has been many times decided that where a debtor, by a voluntary conveyance, divests himself of so much of his property that there is not left to him sufficient to satisfy his debts outstanding at the date of the conveyance, the Court will imply a fraudulent intent on the part of the debtor, and set aside the conveyance, and will do this regardless of what may have been the actual intent of the debtor, and even despite the fact that it appear the debtor really acted *bonâ fide*, and without any actually dishonest or fraudulent intent. That this is law has been held so often, and by such high authority, that it is too late now for any Court, other than one of last resort to call it in question, even although the result clearly is, that, as pointed out by Lord Esher, in *Ex parte Mercer*, 55 L.J.Q.B. 558, a Court may frequently be compelled to find as true what they believe to be false. In the case mentioned, Lord Esher says (at p. 560):—

> It is said that because the necessary consequences of what he (the debtor) did was to defeat and delay creditors, therefore, you must find as a fact he did intend to defeat and delay them. . . . But if other circumstances make you firmly believe that a man did not intend what you are asked to find he did intend, to say that because the necessary result of what he did would have a particular effect, you must then find, contrary to the other circumstances, that he did actually intend it, would be asking one to find that which one would believe to be a lie; and no jury, and no Court ever can be degraded or can be compelled to degrade themselves to such an extent as to have to find what they do not believe to be true.

It is true that these remarks must be regarded as *obiter* under the facts in that case, and the view the Court there took as to the legal effect of the evidence, and that Lord Esher himself goes on to point out that the Court was not, in the case then before it, called upon to decide whether or not the rule as to constructive fraud could be successfully invoked; but, nevertheless, Lord Esher's words seem to me, if I may venture to say so, to be a just criticism of the doctrine of constructive fraud. Since this rule of constructive fraud binds the Court to hold that certain circumstances shall always, and conclusively, be deemed to establish an intent to defraud, regardless of whether or not such intent did in fact exist, its effect is to compel the Court, practically to legislate within the statute, a case which, but for such rule, and if the Court were free simply to judicially determine upon the evidence, whether or not an intent to defraud really existed, would not come within it. Such being the effect of this rule, we would be justified in believing, even if there were not, as there is, abundant authority to confirm such belief, that the Courts, in adopting this rule, were impelled to do so for the natural and just feeling that the rights of a creditor are paramount to those of a mere donee who took the

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debtor's property, honestly it may be, but without value given, and thereby left the debtor insufficient assets to meet his liabilities.

In such a case the rule may be justified, as, without it, the paramount rights of creditors must often be subordinated to the far inferior rights of the mere donee. But where the debtor's grantee, in good faith, and without any actual intent to defraud, has paid value, his rights are, from the standpoint of justice and equity, at least equally as strong as those of creditors; and it would be as repugnant to one's sense of justice that he should lose his property, through the application of the doctrine of constructive fraud, as it is that without the application of such rule, a donee, taking without value, should be able to retain the gift, and thereby defeat his donor's creditors. Therefore, it is, that in applying this doctrine of constructive fraud, the Courts have drawn a clear distinction between cases of voluntary conveyance and those for value; and, while they adopt the rule in favour of creditors as against a mere donee, refuse to apply it where to do so would deprive a purchaser for value of that which in good faith he has bought and paid for.

Another important distinction between the case of a voluntary conveyance and one made for value, which should be kept in mind in deciding this appeal is, that where the conveyance is voluntary, if the Court finds there was an intent to defraud on the part of the debtor, it will not regard the fact that his donee had no such intent; and this for the reason already pointed out, that creditors' rights, regarded from the viewpoint of equity and justice, are paramount to those of a mere donee; while on the other hand, where the conveyance is for value, it will not be set aside because of a fraudulent intent on the part of the debtor unless the grantee had knowledge of the fraud, and was *particeps criminis*.

In *Re Reis*, [1904] 2 K.B. 769, at p. 774, Vaughan Williams, L.J., says:—

> I think there is no case in which a deed has been held void under the statute of Elizabeth, when it was not shewn that the grantee was *particeps criminis*, and you must prove fraud at the date of the deed.

And see. 6 of the statute of Elizabeth, expressly provides that, where the conveyance is made upon good consideration, and *bonâ fide*, to one not having at the time of such conveyance knowledge of the fraud, the statute shall not render the conveyance void. One other principle of law, which we must not lose sight of in considering this case, is that when a deed is for valuable consideration, the burden of proving fraud is on those who seek to set it aside: *Golden* v. *Gillam*, 51 L.J.N.S. Ch. 503.

The learned Judge, whose decision is now before us on appeal, came to the conclusion that the conveyance of the home-

stead farm to Frederick A. Kearney must be regarded as a voluntary conveyance. I am unable to concur in that conclusion. The facts in the case are so fully and clearly stated by my brother Barry, that I need not re-state them. These facts shew, to my mind, beyond question, that the deed to Frederick A., from his father, which the Court below orders to be set aside, was made, not only for good, but for valuable consideration. The Hamilton place which Frederick A. conveyed to his brother James was unquestionably his own property, subject only to the outstanding mortgages upon it. It is not even suggested that either the father, or the creditors of the father, had any title to, or claim upon, that farm after it had been conveyed to Frederick A. in 1907. Two contentions are, however, made by the plaintiff in respect to the deed by Frederick A. of this farm to his brother. One is, that as the farm was not conveyed directly by Frederick to his father, but was conveyed to James, it would not be a valuable consideration so as to support the deed of the homestead to Frederick as against the creditors of the father, because, it is argued, the creditors, who could have taken it in execution, if it had been conveyed directly to the father, could not do so when it was conveyed, as it was, to James. The answer to this contention is, that if the debtor simply acquires one property in fair exchange for another of like value, so that the creditors are not, in the words of the statute, "in any wise disturbed, hindered, delayed or defrauded," then no question as to fraudulent intent will arise. It is only when the consideration given to the debtor is not fairly equal in value to the property conveyed, or when that consideration is paid to a third party, that the question of fraudulent intent against creditors becomes important. And then it is that, if no actual intent to defraud is proven, the purchaser for value is accorded protection from that rule of constructive fraud which is applied against a mere donee. This does not mean that where the consideration is of less value than the property conveyed, or where the consideration is paid to a third party, these circumstances are not to be considered in determining whether or not there was actual intent to defraud, but merely that they do not in themselves conclusively establish fraud. Hence, while the circumstance that the Hamilton farm was conveyed by Frederick to James, instead of to his father, is a material one, to be considered in conjunction with all the evidence, in determining the question whether or not there was an actual intent on Frederick's part to defraud his father's creditors, it cannot alter the fact that the farm was valuable and was conveyed by Frederick as the consideration of the conveyance made to him by his father.

Having given a valuable consideration for the property con-

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veyed to him, Frederick's rights in respect to the homestead place are, at least, equal in equity and justice to those of the plaintiff, so that the doctrine of constructive fraud cannot be successfully invoked to deprive him of what he honestly bought and paid for. It is true, that as the result of the conveyance made pursuant to the family arrangement, James acquired and claims the Hamilton farm, while the consideration for the deed to him came from his father. But, while this may affect James' right to hold that farm against his father's creditors, it does not, I think, impair Frederick's right to the homestead of which he is the *bonâ fide* purchaser for value. I further think that in contemplation of law, Frederick's deed to James was, under the circumstances, a consideration moving from Frederick to his father. If A. purchase property from B. for, let us say, $1,000, and instead of paying the money directly to B., pays it, by B.'s request, to C., can it for a moment be contended that A. is not a purchaser of such property for value from B.; and would not the consideration in such a case be, unquestionably, considered by law as paid to B.? If it were not so, then it must follow that B. could sue and recover the price from A., notwithstanding A. had paid it over to C. As between B. and C. can there be any doubt that, in contemplation of law, the payment made by A. would be deemed a payment by B. to C.? In like manner, it seems to me clear that the conveyance of the Hamilton place by Frederick to James was, in effect, a consideration moving from Frederick to his father, and upon which his father conveyed the homestead to him; and that the deed of the Hamilton place is to be regarded, in its legal effect, as a conveyance from the father to James.

The second contention put forward by the plaintiff in respect to the Hamilton place is, that, even if Frederick gave a consideration for the deed made to him by his father, it was not of sufficient value to support such deed. My brother Barry has dealt so fully with this contention, and, I think, has so effectually and completely answered it, that I will only add, upon the question as to the relative value of the equities in the homestead and Hamilton places, that James, who was given his choice between the Hamilton farm and the property Frederick received in exchange for it, preferred to take the place he did. It must likewise be borne in mind that Frederick took the homestead subject to his mother's right of dower, and to the agreement under which Roy is to have half the farm if he stays home and works upon the place till he is of age.

For the reasons stated, I think that Frederick A. Kearney acquired the deed which is attacked and sought to be set aside in this action, as a purchaser for value, and that his rights as against the plaintiff are to be determined upon that basis. The

learned Judge in the Court below, found that there was no actual fraud proven as distinguished from constructive fraud, and I gather from his reasoning that he would not have set aside the conveyance to Frederick had he reached the conclusion that Frederick was a purchaser for value. To my own mind, the *bona fides* of Frederick A. and the absence of any actual intent on his part to defraud his father's creditors, is abundantly established by the evidence. Therefore, I think the learned Judge erred in deciding that the conveyance to Frederick A. should be set aside. I have already stated that in my view the conveyance of the Hamilton place to James, must, under the circumstances, be regarded as a conveyance to him by his father. If this suit were brought to set that conveyance aside as void within the statute the case would, possibly, stand in a somewhat different position from that which it now holds; but we are not in this case called upon to consider that position, not only because James is not a party here, but because no such question is raised by the plaintiff in this suit. As to that half of the homestead which, for convenience, I will call the Roy half of the farm, and as to which the plaintiff claims that the conveyance from the father to Frederick A., and from Frederick A. to Roy are voluntary, and, therefore, void, even if the deed of Frederick's half of the farm to him be good, the evidence shews that, although a deed to Roy has been executed by Frederick and handed to his mother, it is, by the agreement under which all those conveyances were executed, not to be delivered to Roy, nor is the land to pass to him, unless he continues to work on the farm for Frederick till he is twenty-one years of age. If he fail thus to work, the whole homestead farm is to belong to Frederick. When the father conveyed the homestead farm to Frederick, the consideration given by Frederick covered the whole farm. He acquired from his father the right to one-half of this absolutely, and as to the other half, acquired a right to hold it absolutely if Roy fail to work on the place till he comes of age. In other words he bought the right to the use of the Roy half for some five years at least, together with the services of Roy for the same period, or, failing such service, to hold the whole farm absolutely. The consideration he gave—that is to say, the Hamilton place—extends to, and was paid in respect of, the entire property and rights which he thus purchased. The deeds of the Roy half cannot be set aside without depriving Frederick of what he has honestly bought and paid for. In the absence of any intent to defraud on Frederick's part, the plaintiff has no right in respect to the Roy half, paramount to those Frederick acquired by purchase. Roy, on the other hand, gets no title to the land unless he pays Frederick for it by some five years' labour. The suggestion

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that the father is entitled to the fruits of Roy's labour till he comes of age, and that, therefore, the father is, in effect, donating Roy's half to him, is not, I think, sustained. It was held in *Rex* v. *Chillesford*, 4 B. & C. 94, that a minor may enter into a valid contract of service with his parent for payment of wages; and in Eversley's Domestic Relations, 3rd ed. (1906), at 552, it is stated that the father cannot legally claim the earnings of his child when such child is over sixteen years of age. By statute in this province, a minor may sue for wages in the same way as if of full age. But even if the father could claim the fruit of Roy's labour, and were bound to do so in the interests of his creditors, it would still continue true that Frederick, for a valuable consideration acquired by purchase the right to these services, or failing them, to the Roy half of the farm.

I, therefore, think this appeal should be allowed with costs, and that the plaintiff's action should be dismissed with costs.

Barry, J.

BARRY, J.:—A consideration of the facts in this case, which are not disputed, leads me to conclude that the arrangement proved to have been made between the family—the father (Robert H. Kearney) and the two sons (Frederick A. and Roy), defendants here, and another son, James Kearney, who is not a party to the suit—before the debt upon which the plaintiff obtained his judgment was even contracted, was made *bonâ fide* and not with intent to defeat or delay creditors, and that the rights of the defendant Frederick A. Kearney have been either overlooked or disregarded. Upon the *bona fides* of the settlement, the plaintiff casts no doubt. Indeed it was found by the Court below, and admitted by counsel for the plaintiff here, that the settlement was not affected by actual, as distinguished from constructive, fraud. I do not think that by the settlement, Robert H. Kearney denuded himself of all his property as claimed by the plaintiff; on the contrary he seems to have retained in his possession and under his control property, if not sufficient to meet the demand of the plaintiff, which at the date of the conveyances had not accrued due, at least property of considerable value, which might, and should have been realized on by the sheriff after the plaintiff's claim had been converted into a judgment, and an execution placed in that officer's hands.

With the general proposition enunciated in the judgment appealed from, that is, that where a settlement is voluntary, the intent to defeat or defraud creditors may be inferred, if the circumstances are such that it would necessarily have that effect, every one will agree. It has been affirmed in our own Courts time and time again. And even though there be a consideration to support it, a settlement may come within the statute

13 Eliz. ch. 5, if actual fraud is proved, or if the settlement has been made in pursuance of a scheme for defeating creditors. The inferences of law which Courts draw in favour of creditors may, however, be, and in many cases have been held to be, rebutted by the proof of the existence of a laudable motive, not necessarily tending to defeat creditors, although sometimes having that effect. But unless one can find a case of exactly similar circumstances, coinciding on all sides with the one under review, decided cases are of little assistance, except as illustrative of the general principles upon which Courts act.

Whether a settlement is voluntary or made with the intent of hindering, delaying or defrauding creditors, or is made *bonâ fide*, and upon valuable and adequate consideration must, therefore, always be questions to be decided upon the facts of each particular case. Each case must stand upon its own footing. I shall, therefore, proceed to consider the facts in this case. In 1907, Robert Kearney being then a man fifty-seven years of age, lived with his wife and a family consisting of three sons and an unmarried daughter, on a farm in Wakefield, Carleton county; the sons were Frederick A., James, and Roy, aged respectively, twenty-two, twenty, and fourteen years; the farm consisted of 225 acres of land which with the buildings thereon, but exclusive of the personal property, was of the fair value of $4,000, upon which there was a mortgage encumbrance of something over $2,200—(in June, 1909, $2,238.22). From the time they were fourteen years of age, the two eldest sons had worked with their father on the farm in the summer time, and in the winter worked out in the lumber woods, and in pressing hay, turning in to their father their earnings with the exception of what was required for clothing and other personal necessaries. For two years before this time the father had not been in good health; in 1905 his health had begun to suffer, and while he was able to do chores and light work around the farm, and is still able to do so, he was not able to do what might be called heavy farm work. From the age of fourteen Frederick had been working for his father as stated, but at the age of eighteen, in consequence of his father's failing health and inability to perform heavy farm work, he assumed increased responsibilities and practically took charge of all the heavy work on the farm, the father, however, still remaining the head and director of the farming business. This was the position of the father and the three sons when, in the same year, the two oldest sons Frederick and James began to talk of leaving home, and going away to start in life upon their own account. In order to prevent the boys from leaving home and to assist them in starting business on their own account, it was arranged and concluded by the family—in a general talk of the family, the evidence is—that

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if the boys would stay at home, another farm in the neighbourhood, known as the Hamilton place, would be purchased for Frederick, and James would stay at home with his father and have the homestead, with this condition, that one-half of the homestead should eventually go to Roy, the youngest son, provided he remained home until 21 years of age, assisted James in the working of the farm, and turned in his earnings to him. As a result of this understanding and arrangement, Frederick and his father negotiated for and purchased the Hamilton place, the title being put in Frederick's name. For this place, including the personal property, which was valued at $300, they paid $3,100. There was a mortgage incumbrance of $1,550 upon it when purchased which was allowed to stand. Frederick mortgaged it to the grantor for an additional $1,050, and the difference of $500 of the purchase price was paid in cash. Of this $500, $210 of the boys' money was paid down, Frederick raised $120 more upon a policy of insurance, which he carried on his life, which was also paid, and the difference of $170, the two sons Frederick and James earned shortly after the conveyance of the property to Frederick, and also paid. The evidence is that the boys had earned practically the whole of the two sums of $210 and $170 which, with the amount borrowed upon Frederick's insurance policy made up the $500 cash payment required for the conveyance to him of the Hamilton place. For two years after the acquisition of the Hamilton place, or at any rate for two seasons thereafter, the father and sons worked both that place and the home farm in a sort of common partnership; but along in the winter of 1908-9, James, who was then over twenty-one years of age and contemplating marriage, began to urge and kept continually pressing his father for $1,000 and a pair of horses with which to purchase a farm and commence farming on his own account. In the spring he became very urgent. We are told that every time he got his father alone he pressed the matter upon his attention; he no longer felt satisfied with the one-half of the home farm promised him, but he and his prospective wife wanted to get off by themselves, away from the homestead, on their own hook. Frederick was aware and anxious to assist in meeting his brother's wishes in this respect. It was Frederick, who really first suggested that he and his brother should change positions in regard to the two farms. The father told James that he could not assist him to the extent of $1,000 and a pair of horses, giving as a principal reason for his refusal that between them, they already had land enough. The father did, however, tell James—to use his own words: "I will try and get Fred. to come home and you take the Hamilton place. So we talked it over, his mother and all of them, and Fred. said he would come home and take

a deed of the place, and when Roy was 21 years of age, if he worked there till he was 21, and Fred. would have his earnings, he would have half the place, and Fred. would have the other half, and we would live there." Roy was then about 15½ years of age. This was to make provision for Roy to a certain extent, and the conveyance to Frederick was to be made upon the understanding that he would convey one-half the property to Roy. It does not appear clear whether in the proposed arrangement of 1907, anything definite was agreed on in regard to the maintenance of the father and mother by the sons as part of the consideration of the proposed conveyance of the homestead, but it was talked of in a tentative way, and when the arrangement of 1909 came to be made both Robert and Frederick Kearney say that as a part of the consideration for the deeds the father was to have the crop of 1909 for the purpose of paying his debts, and also as a part of the consideration, the sons were to harvest the crops, and that Frederick would support his father and mother so long as they remained on the homestead. That this was the family arrangement appears to be clear from the evidence of Robert and Frederick Kearney. No other member of the family was called at the hearing, and no attempt was made to contradict what these two witnesses said. This arrangement was carried out by the execution on June 21st, 1909, of the necessary conveyances. Frederick, in whom was vested the title of the Hamilton place, conveyed it to James, and the father conveyed the home farm to Frederick the consideration expressed in the latter deed being $5; on the same day Frederick executed a conveyance of a one-half interest in the homestead farm to Roy, and deposited it with their mother to be delivered to Roy when he became of age, provided that in the meantime he fulfilled the conditions upon which it was executed, *i.e.*, by giving his labour and earnings to Frederick during his minority. The stock, or most of it, on the Hamilton place went to James with the land, and the personal property (except household furniture and a few other things), stock and farming implements went with the homestead to Frederick, although nothing is said in either conveyance about personal property. Immediately after the arrangement, James and Frederick, not waiting for the conveyances, took complete charge of the respective farms promised to be conveyed to them. James wanted his deed long before he got it, but the father says that means were scarce, and as there was no particular urgency in the matter, the preparation of the conveyances was delayed. The mother did not join in the conveyance to Frederick, and although executed on the 21st of June, it was not recorded in the register of the county until the following April. On the 30th of June, James married, and set up housekeeping on his own

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account on the Hamilton place, where he and his wife still reside, undisturbed by the present suit. In February, 1909, Robert Kearney bought from the plaintiff, one-half of a carload of fertilizer of the value of $592.50, all of which was used on the home farm in that year. This was not at all an unusual quantity of fertilizer for Mr. Kearney to buy in any one year, because in 1907, we find him buying $900 worth for the home place; in 1908, $560 worth for the Hamilton place, and in 1911 6½ tons for the boys. In the raising of potatoes upon a large scale, great quantities of this fertilizer is, apparently, used by the farmers of the country. The fertilizer bought of the plaintiff in 1909, was to be paid for on the 1st of January, 1910. In July, 1909, Mr. Kearney gave the plaintiff his note at six months for the amount of the price, and upon this note the plaintiff obtained judgment on the 18th of February, 1911, for $625.25, inclusive of interest after the maturity of the note and costs of suit. The execution issued by the plaintiff upon this judgment was returned by the sheriff of Carleton county *nulla bona*, and after examination of the judgment debtor upon oath before Judge Carleton, as to any and what property he had, which by law was liable to be taken in execution to satisfy the judgment, the plaintiff brought this action to have the deeds of the 21st of June, 1909, from Robert Kearney to Frederick and from Frederick to Roy declared void as against the plaintiff as being in contravention of the statute of Elizabeth. The deed from Frederick to James is not in any way impeached in the suit. When the deeds were given on the 21st of June, the defendant Robert Kearney owed debts, due and accruing due, including the $592.50 owed the plaintiff, amounting in all, as I make it, to $1,742. It is unnecessary that I should enumerate all the creditors, but I might mention one, the Bank of Montreal, who was a creditor to the amount of $305. Robert Kearney says that at the time none of these creditors—"not a soul," as he puts it—were pressing for payment. Frederick says that at the time of the conveyances, he knew his father owed some debts, but that he did not know he owed so much, as it afterwards turned out he did owe; he knew he owed the Bank of Montreal, that was all; he did not know his father owed for the fertilizer purchased from the plaintiff early in the year.

It was argued in the Court below, and has been urged before us, as one of the reasons why the deeds impeached should be declared void as against the plaintiff, that Robert Kearney in making the settlement which he did, denuded himself of practically all his property, and retained nothing with which to satisfy his creditors. We do not know what transpired before Judge Carleton, for the record is not here; but from the fact

that the plaintiff commenced this action for the purpose of following real estate which was once the property of the judgment debtor, and making it available for the satisfaction of the judgment, we can, I think, safely assume that there was either insufficient or no personal property of the defendant disclosed at the examination. Notwithstanding this inference, but having regard solely to the facts that are disclosed in the record that is before us, and by which only we are to be bound, I think the statement that the defendant denuded himself of all his property, scarcely warranted. It seems absolutely clear from the uncontradicted evidence, that Robert Kearney retained a share in a horse, the share being of the value of $339, subject to a debt of $45, which stood against it; and, that he also retained and owned household furniture that cost as much as $500 anyway, although its value at the date of the judgment is not stated. In order to assist us in determining the intent with which the settlement was made, we may, I think, properly look at the prospects which the settlor had, and the reasonable expectations that he entertained at the time it was made. On June 21st, 1909, Robert Kearney had 23 acres of land in potatoes; he says himself the prospects for an abundant harvest were extremely good; he had used one-half of a carload of fertilizer upon this acreage; a yield of 75 barrels to the acre is a very low estimate, 100 barrels to the acre is quite a common one, while some farmers get a return of 110, and even as high as 140 barrels to the acre. So that, at one dollar per barrel, which was an ordinary price locally, he might reasonably expect, with a fair growing season, anywhere between $1,725 and $3,220 from his potato crop alone. In addition to this, he would have, under ordinary conditions, $150 worth of pork, 300 bushels of oats, at fifty cents a bushel, and 21 tons of hay at $10 per ton. With prospects such as these—with the price of a crop, which under ordinary conditions would be worth at least $2,235 available in three or four months, and which would cost him nothing in the harvesting because it was one of the considerations of the settlement that the sons should harvest the crop of that year without expense to their father; with the personal property, which I have mentioned, still in his hands, and with his own personal earning capacity of fifty dollars per month during four months of the summer season, and with debts amounting to but $1,742, some of which were unaccrued—the plaintiff's would not be due until the first of the next January; and with no creditors pressing, would we be justified in drawing the inference—for there is no actual fraud suggested—that the defendant Robert Kearney acted in contravention of the spirit of the statute in making the settlement which he did, a settlement which was but the consummation of a verbal family ar-

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rangement made two years previously, the only change in it being a change in the position of the two sons, James taking Frederick's place, and Frederick, James'? For my own part I can scarcely think so. Unfortunately, this crop of so much promise turned out an almost complete failure, a circumstance which, while it entirely changed Robert Kearney's outlook, in nowise affects the *bona fides* of his intentions at the time the settlement was made.

It has been stated as a settled principle that in order to determine whether a disposition of property is void as to creditors under the statute, the state of circumstances at the time the conveyance is executed must be regarded, and not subsequent events, except such as must have been in the contemplation of the transferor at the time of transferring the property, and from which a fraudulent intention at that time may be gathered. In April, 1910, Robert Kearney left the homestead and travelled through the country as groom in charge of a breeding stallion, earning in this way fifty dollars per month for four months; in 1911, he did the same, earning another $200. Every dollar of the $400 went, he says, to pay his debts. And in addition, he must have during those years, from the crop of 1910, and from other sources, realized somewhere in the vicinity of $350 more, for we find that at the time of the hearing in this suit, in October last, he had reduced his general liabilities from $1,742 to $1,000. It would, I think, be drawing an inference directly contrary to their rational import and meaning to conclude from these subsequent events that at the time of the settlement this defendant had in contemplation the delaying, defrauding, or defeating of his creditors.

Then, it is contended that this was a voluntary settlement, made without valuable consideration or at most upon an entirely inadequate consideration; and it was argued by counsel for respondent that inadequacy of consideration is to be treated in the same way as an entire absence of consideration; but difficulties in maintaining this latter proposition will, I think, present themselves when it is undertaken to apply it to cases where the integrity of family arrangements is sought to be established. It has been already pointed out that in the purchase of the Hamilton place there was paid in cash as part of the consideration for the purchase the sum of $500. It is quite clear that no part of this sum was contributed by the father; it was Frederick's and James's own money, partly earned and partly raised by the hypothecation of Frederick's life insurance. Without entering upon any minute enquiry for the purpose of ascertaining just how much of this $500 was contributed by Frederick and how much by James—for in the present aspects of the case such an enquiry seems to me to be unnecessary—it must be ad-

mitted on all hands that here at all events was a valuable consideration. But in addition to that it may be pointed out, that during the years 1907-8, while Frederick owned the place, he had fertilized it heavily; the effects of the fertilization would, we are told, be quite noticeable in the increased productiveness of the soil during a few succeeding years after the season in which it was first used; the effects are not limited but lasting. The evidence is that this increased productiveness of the soil would result in the raising of between two and three hundred additional barrels of potatoes, and between ten and fifteen additional tons of hay. Reducing this increased yield to a money basis by taking the lowest estimate, we can, I think, fairly conclude, that during his two years' occupancy of it, Frederick had enhanced the value of the farm by at least $300. But with his usual ability, counsel for the respondent argued that admitting the value of Frederick's equity of redemption in the Hamilton place, as a matter of law his conveyance of the place to James formed no consideration for the father's conveyance of the homestead to Frederick, because the consideration for the latter conveyance should have moved from the grantee to the grantor and not to James; that if, instead of conveying the Hamilton place to James, Frederick had conveyed it to the father the case would have been entirely different, for then each conveyance would have formed a valuable consideration for the other, and by such a transfer the security of creditors could not be said to have been diminished, because if the debtor had withdrawn from his available assets one farm, he could say, and it would be true, he had replaced it by another. A. should not be permitted to say to B.: You convey your farm to C., and in consideration thereof I will convey my farm to you: thus, without any money or other valuable consideration to which creditors might have recourse, divesting himself of his farm to their detriment. That is the argument—an argument which I am free to confess was not without its effect upon my mind at the time. But notwithstanding some doubts I have entertained in regard to the matter, I have come to the conclusion that the settlement here can be supported upon the ground of its being a family arrangement entered into *bonâ fide* and for valuable consideration in 1907, when the settlor was neither indebted nor contemplating future indebtedness, but on the contrary, free to do as he liked with his own, although the arrangement was not carried into effect until two years later. I have never had any doubt in regard to the genuineness, good faith and absence of fraudulent intent that upon the face of it, seems to have characterised the settlement proposed and carried out between the father and the sons. And after all I cannot see that it made any real difference to the creditors of Robert Kearney whether

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he conveyed the homestead farm to James as was contemplated by the first arrangement, or whether he conveyed it to Frederick, as he afterwards did under the changed arrangement. For, notwithstanding the change that was made in the arrangements, I think they must be regarded as substantially the same transaction. The only persons affected by the change were those directly interested, *i.e.*, the sons, and not the creditors, to whom the result would have been the same in either case. In the case of an agreement for the sale and purchase of land, the covenant of the vendor is fulfilled by a conveyance to a nominee of the vendee. I think the father would be discharging his obligation to convey, if at the instance and request of James, he subsequently conveyed the property to Frederick. And that is what he did. That Frederick in consideration of this conveyance, made a conveyance of his own farm to James, can make no possible difference to the creditors, although, as is quite obvious, it made a considerable difference to Frederick. It is important to consider the position in which the decree leaves Frederick. As has already been pointed out, he had an equity of redemption in the Hamilton place of the value, as I make it, of $800, or if that is an over-estimate, it can at any rate be said with accuracy that in the place he had an equity of redemption of considerable value, and in addition to that he was in undisputed possession. Agreeably to his father's and brother's request and his own wishes he gives up this possession and interest to his brother James and accepts in exchange a conveyance of the homestead, which the decree now takes from him, or perhaps I would be more correct in saying, which the decree leaves him weighted down with an additional burthen of $625, besides costs of suit. This does not seem to me to be either just or equitable to this defendant. If it was intended to attack the family arrangement in an endeavour to have the deed from the father to Frederick declared void as being in fraud of creditors, in fairness to Frederick and in order to protect his interests which are undoubted, James Kearney should, I think, have been made a party to the suit, so that in the event of the conveyance from the father to Frederick being declared void, or the property conveyed by it charged with the judgment debt of the plaintiff, Frederick could be reinstated to his former position as owner of the Hamilton place which he let pass from his hands as part of the same arrangement which made him the owner of the homestead. And with such an addition to the party defendant, if upon a consideration of the transaction as a whole, bringing in all the conveyances, it were found that James, too, had some measurable pecuniary interest in the Hamilton place his rights could be determined and secured to him. But in the result, which imposes the whole burthen upon one brother and leaves the other

free, I cannot agree; and if in the general aspect of the case, I am wrong in the conclusion at which I have arrived, I should still be disposed to allow this appeal upon the ground which I have just mentioned.

It was contended for the respondent that even if he was wrong in regard to Frederick's one-half interest in the homestead, the conveyance to the defendant Roy of the other half could not be upheld, since that, clearly, was voluntary; but I do not accede to this contention. The two conveyances are so inseparably connected and involved in the same transaction that it is difficult to see how one can be considered apart from the other; they must, I think, stand or fall together: *Harman* v. *Richards*, 10 Hare 81. Neither can I see how a conveyance in consideration of which the grantee has given to the grantor at least two years of his labour, can be said to be voluntary. The question of the adequacy of the consideration I shall consider presently. Several cases arising in the Equity Court of the province—only the last-mentioned of which was, I think, referred to at the argument—in which questions similar in principle to those arising in the present one were discussed and determined, may be referred to: *Atkinson* v. *Bourgeois*, 1 N.B. Eq. 641; *Gorman* v. *Urquhart*, 2 N.B. Eq. 42; *Smith* v. *Wright*, 2 N.B. Eq. 528; *Baird* v. *Slipp*, 3 N.B. Eq. 258. Upon the authority of these cases alone, I should be disposed to think the settlement between Robert Kearney and his sons, without the statute; but while I hold this view, it may not be considered wholly unprofitable if I take the time to briefly refer to a few of the many cases upon like questions decided in the Imperial Courts.

Where there is a doubt as to the honesty of the arrangement, and some valuable consideration, a settlement will, sometimes, be upheld even as against creditors or purchasers: *Townend* v. *Toker*, L.R. 1 Ch. 446. And where there is a full and fair communication of all material circumstances affecting the subject-matter of the agreement, which are within the knowledge of the several parties, whether such information be asked for by the other parties or not, a transaction, not otherwise valid, may be supported upon the ground of its being a family arrangement: *Greenwood* v. *Greenwood*, 2 DeG. J. & S. 28. And although where the settlement is disputed by the creditors or purchasers, the same rules are not applied as between the parties themselves, it will be found that, even as against creditors or purchasers family arrangements are exempt from the ordinary rules which affect other deeds; the consideration being composed partly of natural love and affection and partly of value. In *Persse* v. *Persse*, 7 Cl. & F. 279, at 318, Cottenham, L.C., speaking of family arrangements, says:—

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By what scale of money consideration are these objects to be estimated? The impossibility of estimating them has led to the exemption of family arrangements from the rules which affect others. The consideration in this and in other such cases is compounded partly of value and partly of love and affection.

And Turner, L.J., in *Baker* v. *Bradley*, 7 DeG. M. & G. 597, at 620, says:—

Transactions between parent and child may proceed upon arrangements between them for the settlement of property or of their rights in property in which they are interested. In such cases this Court regards the transaction with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction.

And in *Rosher* v. *Williams*, L.R. 20 Eq. 210, Malins, V.-C., in speaking of modern decisions upon voluntary settlements, at 218, says:—

I think the fair result of them all may be thus stated; that if upon the occasion of executing that which is called a voluntary settlement, that is, a deed which is not induced by marriage or any marriage considerations, or the actual sale of property; if between a father and son, husband and wife, or parent and child, in any way whatever an instrument is executed, which ordinarily is called a voluntary settlement, and it turns out that instead of being purely voluntary, any consideration whatever was paid or given, or any benefit rendered to the grantor, even such an agreement to relieve the grantor from the immediate payment of a debt, as in *Bayspoole* v. *Collins*, L.R. 6 Ch. 228, the Court will anxiously lay hold of any circumstances constituting a consideration moving from the grantee to the grantor to take a case out of the category of voluntary settlements.

Palles, C.B., speaking of this passage which I have quoted from the judgment of Malins, V.-C., says, in *Mullins* v. *Guilfoyle*, L.R. 2 Ir. 95, at 109:—

In this passage the Vice-Chancellor, in my opinion, refers to a question very different from that before us, viz., to the inadequacy of the consideration, as distinguished from its existence. A deed, although for valuable consideration may be executed to defeat purchasers; and gross inadequacy of consideration is often one of many circumstances which induce the Court to infer that intent. I can understand cases in which the relation of the parties, as husband and wife, or parent and child, or the nature of the transaction such, for instance, as a family arrangement, will be sufficient to uphold a transaction based upon a consideration which although valuable, is so inadequate that it might, under other circumstances have raised an inference of fraud. But it appears to me to be clear that the existence of that relation is material solely to the quantum not to the existence, of consideration. An inadequate, though valuable, consideration in a contract between parent and child can have no greater

effect than would be attributed to that same valuable, but inadequate, consideration, coupled with the good, though not valuable, consideration, which arises from the relation. The two taken together constitute, it is admitted, a valuable consideration sufficient to prevent the application of the statute. But it is settled that a good consideration *per se* would not be sufficient. Of the two elements, then, the joint effect of which has excluded the statute, the inadequate consideration has been the effective one.

Where a person against whom an action for breach of promise had been commenced, and who subsequently ascertained that he was entitled to a legacy, made a settlement of the legacy upon his wife and children of his marriage—the Judge being of opinion on the evidence that he acted *bonâ fide* and had not the intention of defeating or delaying his creditors—the settlement was upheld: *Ex parte Mercer, In re Wise*, 17 Q.B.D. 290. And where a widow engaged in a farming business upon a farm of her own, granted the farm and premises (which constituted her whole property) to her two daughters in consideration of their covenant to pay the debts incurred by her in connection with the working of the farm and to maintain the grantor, this was upheld by Fry, J. (whose judgment was affirmed by the Court of Appeal) as an honest family arrangement upon valuable consideration, and that it was not a sufficient badge of fraud to shew that the value of the consideration was inadequate, or that there were outstanding debts not within the scope of the covenant—there being nothing to shew that any such debts were present in the settlor's mind in making the arrangement: *In re Johnson, Golden* v. *Gillam*, 20 Ch.D. 389. At p. 397 of the report, Fry, J., says:—

> But it also appears to me to be plain that when a *bonâ fide* and honest instrument is executed, for which valuable consideration is given, and the instrument is one between relatives, the Court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud, and if it is not a badge of fraud or evidence of an intention to defeat creditors, it has no relation to the case.

Where a father by deed assigned to his son, "in consideration of natural love and affection" his dwelling house and all his personal estate, it was held in an action by the son against the sheriff for levying on goods part of such estate under a *fi. fa.* against the father, that it was competent to the plaintiff to prove that by a bond bearing even date with the assignment, he bound himself to maintain his father's wife and children; and the jury having found that it was part of the same transaction, and that the assignment was *bonâ fide*, it was not void as

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against creditors under the statute 13 Eliz. ch. 5. Rolfe, B., in this case says:—

> It is a mistake to suppose that the statute makes void as against creditors all voluntary deeds. All that it says is, that a practice of making covinous and fraudulent deeds had prevailed, and therefore, that all feoffments, gifts, etc., of any lands or goods and chattels as against the persons whose actions, debts, etc., by such covinous and fraudulent devices and practices shall be disturbed, hindered, delayed or defrauded, shall be void. The Courts in construing the statute, have held it to include deeds made without consideration as being *primâ facie* fraudulent because necessarily tending to delay creditors. But the question in each case is whether the deed is fraudulent or not; and to rebut the presumption of fraud, the party is surely at liberty to give in evidence all the circumstances of the transaction—not to contradict the consideration stated in the deed, but to take it out of the operation of the statute: *Gale* v. *Williamson*, 8 M. & W. 405, at 410.

The question whether several deeds are part of the same transaction, or are separate and distinct transactions, depends on and is to be decided by the surrounding circumstances, and not simply upon the fact whether the deeds are or are not by express reference grafted into or connected with each other. *Harman* v. *Richards*, 10 Hare 81, is a case in which Turner, V.-C., held upon evidence of surrounding circumstances, a settlement that, standing alone, would have been fraudulent against creditors, to be connected with and part of the same transaction with several purchase deeds of even date, to which some only of the same persons were parties, and therefore good. See also *Holmes* v. *Penney*, 3 K. & J. 90; *Freeman* v. *Pope*, L.R. 5 Ch. 538; *Boldero* v. *London and Westminster Loan and Discount Co.*, 5 Ex. D. 47; *In re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360; *In re Reis, ex parte Clough*, [1904] 2 K.B. 769.

The question of inadequacy of consideration was considered in several of the cases already mentioned. In May's Fraudulent Conveyances, 3rd Eng. ed., 194, where the authorities are gathered, it is said:—

> Where it is found that the transaction at issue is, on the whole, fair and honourable and not induced by the fraudulent intention of defeating creditors or purchasers, the Court is not very particular as to the amount of the consideration; if it is valuable and not so entirely inadequate as, from its insufficiency, to induce the presumption of fraud, it is enough. The smallness of the consideration is not a matter the Court will go into, except so far as it is evidence that the transaction was a sham: *Bayspoole* v. *Collins*, L.R. 6 Ch. 228; and it will not "weigh considerations in diamond scales": *Roe* v. *Mitton*, 2 Wils. 358*n*.

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A simple purchase by a stranger, for money paid, cannot be set aside at the suit of creditors or purchasers, unless there is such inadequacy as to induce the presumption of collusion, or such, in fact, as might have invalidated the sale as between the vendor and purchaser, without the interposition of creditors or purchasers. It was said by the Court in *Bolton* v. *Madden*, L.R. 9 Q.B. 55, at 57:—

> The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced.

So, Lord Westbury, L.C., in *Tennent* v. *Tennents*, L.R. 2 H.L. Sc. 6, laid down the rule (p. 9):—

> It is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.

So, also, has the rule been held to be in Ontario. Thus, in *Carridice* v. *Currie*, 19 Gr. 108, it is said by Mowat, V.-C.:—

> Adequacy of consideration is not necessary to maintain a transaction under the 13 Elizabeth; though in some cases the inadequacy may afford some evidence of guilty knowledge. But a conveyance by a father to his son in consideration of an annuity of less value than the property conveyed does not suggest guilty knowledge of a fraud by the grantor, in the same way that a conveyance for an inadequate price to a stranger sometimes does.

I have come, therefore, to the conclusion, upon the whole of the case that the instruments impeached were executed in good faith, and for a valuable and adequate consideration; that the arrangement was an honest family one and was entered into without any intention to defraud or delay creditors. That being so, I would allow the appeal, with costs.

LANDRY, and MCKEOWN, JJ., concurred.

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Defendants' appeal allowed.

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ST. JOHN RIVER STEAMSHIP CO., Ltd. v. AUSTIN.

New Brunswick Supreme Court, Barker, C.J., McLeod, White, Barry, and McKeown, JJ. June 21, 1912.

1. APPEAL (§ VII L 3—509)—FINDINGS OF COURT—TRIAL WITHOUT JURY—DEMEANOUR—REVIEW.

A court of appeal will not interfere in the finding of fact of a trial judge without a jury where the judge after hearing contradictory evidence has come to his decision upon the credibility of the witnesses as evidenced by their demeanour on the witness stand; but the rule is otherwise where the finding of fact depends upon the drawing of inferences from the facts in evidence.

[*Phœnix Ins. Co.* v. *McGhee*, 18 Can. S.C.R. 61; *North British Mer. Ins. Co.* v. *Tourville*, 25 Can. S.C.R. 177; *Jack* v. *Kearney* (No. 2), 10 D.L.R. 48, distinguished; *Shaw* v. *Robinson*, 8 E.L.R. 557, 10 E.L.R. 103, followed.]

Statement

THIS is an appeal from the decision of Landry, J., sitting in the Chancery Division, adverse to the plaintiffs' claim except as to a small amount of $11.50 and in favour of the defendants on the trial of the consolidated action not only as to the plaintiffs' claim but also as to their counterclaim for $1,000 for the use and occupation of the Star Line wharf so called.

G. W. Fowler, K.C., and *L. A. Currey*, K.C., for plaintiff company.

M. G. Teed, K.C., and *W. A. Ewing*, K.C., for defendant company.

J. B. M. Baxter, K.C., for defendant M. D. Austin.

Barker, C.J.

BARKER, C.J.:—The whole question involved is one of fact. In all the substantial points the evidence was contradictory and the sole question for the Judge was as to which witnesses he should give credit. The plaintiffs' case rested on a verbal arrangement said to have been made with the manager of the defendant company. In order to establish this agreement he relied on his own testimony and that of Mr. Jones, vice-president of the plaintiff company, and that of a Mr. Baird who happened to be present when the arrangement was made. The onus was upon the plaintiff to establish the agreement, and the Judge, in view of the contradictory evidence and of some surrounding circumstances which seemed to support the defendants' contention, thought he had failed in establishing it. Besides this the learned Judge was materially impressed by the manner and demeanour of the plaintiffs' witnesses under examination which detracted from the weight and credit to which their evidence would otherwise be entitled. This is not a case where an inference is to be drawn from undisputed facts and the Judge had nothing to aid him in coming to a conclusion which the

Court has not, but it is a case of contradictory evidence given in the presence of the Judge himself when the manner and demeanour of the witnesses are important factors in determining as to their credit. In *Owners of SS. Draupner* v. *Owners of Cargo of SS. Draupner*, [1910] A.C. 450, Lord Loreburn says:—

> I think that the appellants are right. In expressing that opinion I wish merely to safeguard myself against this being regarded as a case in which the House has differed on questions of fact from the Courts before which the case has previously been presented. I think your Lordships are always very chary in differing, with regard to questions of fact, from a finding in the Courts below, mainly because those Courts have a better opportunity than we can have of observing the weight and importance to be attached to the evidence of the different witnesses. But this is a case in which no oral evidence is in question at all. It is simply a case in which we are asked from admitted facts to draw the proper inferences.

I am unable to say the Judge in the Court below was wrong in his conclusions. On the contrary with the opportunity he had of forming an opinion as to the credibility of the witnesses from their demeanour his conclusions on that point are likely to be much more reliable than any opinion I might have formed without any such advantage. See also *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704.

The appeal must be dismissed with costs.

BARRY, J.:—These two actions, one in the King's Bench Division, and the other in the Chancery Division, were consolidated and tried before Landry, J., without a jury in the Chancery Division, and judgment therein pronounced on the 8th of March last. During the open navigation season prior to the year 1911, there had been three steamboat companies engaged in the transportation of freight and passengers upon the river between St. John and Fredericton and immediate points. These three companies were The Star Line Steamship Company, who owned and operated two steamers, the "Victoria" and "Majestic," the former plying between St. John and Fredericton, and the latter running part of the time on what was called the suburban route, and part of the time between St. John and Oromocto; The St. John River Steamship Company, Limited, also owning and operating two steamers, the "Elaine" and "Hampstead," the former plying between St. John and Fredericton, and the latter between Gagetown and Fredericton; and the Crystal Stream Steamship Company, Limited, owning and operating one steamer, the "Sincennes" plying between the city of St. John and the mouth of the Washademoak Lake, and thence to Cole's Island. These were the companies and these the steamers engaged in the transportation business upon the

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river in the season of 1910. In January, 1911, the Star Line Steamship Company was placed in liquidation, and its two steamers and other assets afterwards sold. On the 11th of March, the plaintiff company purchased at public auction the wharves, warehouse and residence at Fredericton of the Star Line Company, and on the same day the defendant company, through its president, purchased the steamer "Majestic," one of the Star Line Company's boats, and on the 27th of March the plaintiff company purchased the steamer "Victoria," the other of the Star Line Company's boats, for the purpose of placing her, as is alleged, upon the St. John-Fredericton route, and also acquired the unexpired term of the latter company's lease of what is known as the Star Line wharf at St. John, the property in fee simple in this wharf being in the defendant Austin. This lease expired on the first day of the following May, so that the unexpired term which the plaintiff company acquired was of but thirty-three or thirty-four days' duration. The steamer "Majestic" was almost immediately after the acquisition of the "Victoria" by the plaintiff company, put upon the St. John-Fredericton route by the defendant company, the same route for which the plaintiff company had acquired the steamer "Victoria." The defendant company also acquired from the defendant Austin, a new lease of the Star Line wharf, and these two circumstances, the placing of the "Majestic" upon the St. John-Fredericton route, and the leasing of the Star Line wharf by Austin to the defendant company, are the cause of the present litigation.

In the statement of claim filed in the action in the King's Bench Division, it is alleged by the plaintiffs that on the 11th of April, 1911, and after the defendants had purchased the steamer "Majestic," the plaintiffs and the defendants at the latter's request, and for their mutual benefit, and so as to enable them to give a better service, and for the public interest, did promise and agree, each with the other, that during the steamboating season on the St. John River and Washademoak Lake of the year 1911, beginning in April and ending in November, they would not run steamers in opposition to one another on said route; that is that the plaintiffs would not run any steamer upon the St. John-Washademoak route, and that the defendants would not run any steamer upon the St. John-Fredericton route, and that neither would interfere in any way with the other's wharf terminals in the city of St. John, either by way of the one leasing the other's wharves, or interfering in any way with their respective possessions or enjoyment. The plaintiffs also claim for the use and occupation of the Star Line wharf by the defendant company for a period of twenty-three days.

Under the purchase of the 27th of March, by which the plaintiffs acquired the unexpired term of years in the Star Line wharf

at St. John, the plaintiffs went into occupation on the wharf, the lease of which expired on the 1st of May, and after the expiration of the lease continued to hold possession of the same, claiming under an alleged agreement or option for a lease, or an offer to let by the owner which had been accepted by plaintiffs—although no formal lease had been executed between the owner and themselves—until the 9th of May, when they were forcibly dispossessed by the owner of the wharf, the defendant Austin, and the defendant company put in possession, the owner of the wharf having, it appears, on the 3rd day of the previous April granted a lease of the wharf to that company, for a term of four years from the 1st of May, 1911, at the annual rental of $625.

In the suit originally instituted in the Chancery Division the plaintiffs allege and claim damages for a wrongful and forcible dispossession of them by the defendants, of the Star Line wharf, and the possession of it from the 9th to the 17th of May, at which latter date the plaintiffs were restored to possession by injunction order of the Chancery Division. And it is also alleged that the defendants agreed with the plaintiffs not to take or accept any lease of the Star Line wharf and warehouse, or interfere in any way with the plaintiffs' possession of the same. In the consolidated suit, therefore, compensation is sought for the damage suffered by the plaintiffs for the breach of the alleged agreement in regard to non-interference upon the St. John-Fredericton route, and as compensation for the use and occupation of the Star Line wharf for twenty-three days, and as damages for the forcible dispossession of the plaintiffs of the Star Line wharf, and for a breach of the alleged agreement on the part of the defendants that they would not interfere with the plaintiff's wharf terminals at St. John. Besides the determination of the question of damages, the Court is asked to order that the lease given by Austin to the defendant company be delivered up to be cancelled, and that the injunction restraining the defendants from in any way interfering with the plaintiffs' possession and use of the Star Line wharf and warehouse be made perpetual, or continued until the expiration of a lease of the same property, alleged to have been made by the defendant Austin to the plaintiffs.

The defendants deny the making of all the agreements; they also deny that there was any lease, option, or agreement for a lease between the defendant Austin and the plaintiffs; and the defendants, the Crystal Stream Steamship Company, counterclaim for compensation for the use and occupation by the plaintiff company of the Star Line wharf and warehouse since the 1st of May, 1911. The plaintiffs sought to establish by the evidence of three witnesses, Dr. Currey, the president and manager of the plaintiff company; Mr. R. Keltie Jones, its vice-president, and Mr. Alexander W. Baird, the alleged agreement between the plaintiffs and defendants in regard to non-interference in transportation upon the river, and non-interference with the plain-

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tiffs' terminal facilities at St. John, which would include the leasing of the Star Line wharf from the owner of that property. It is not my intention to go into the details of the evidence adduced by the plaintiffs in support of their claim, or of that given contra by the defendants, suffice to say that in every important particular the evidence produced on behalf of the plaintiffs seems to have been positively contradicted by the evidence of Mr. J. D. Purdy, with whom, as president of the defendant company, the agreement in regard to non-interference with transportation and wharf terminals is alleged to have been made. The learned trial Judge has accepted the statement of Mr. Purdy in preference to the evidence of the plaintiffs' witnesses in regard to what occurred on the 11th of March in Dr. Currey's office, which was the time and place when and where the agreement is alleged to have been made.

It is not at all necessary that I should express any opinion of my own in regard to the conclusion at which I might, possibly, have arrived upon the same evidence. Reading the printed record as it is before us, and regarding the evidence as of all the same value, the preponderance appears clearly to be in favour of the plaintiffs' contention. All of the witnesses examined on this phase of the case are men of undoubted standing, and comparatively well known in the business life of St. John. This circumstance emphasizes the difficulties of a trial Judge, when called upon to perform the always unpleasant duty, imposed upon him by law, of deciding between witnesses apparently equally respectable and of equal credibility; and especially do these difficulties present themselves where, in a case like the present, the evidence on the one side is diametrically opposed to that on the other. The Judge is compelled to meet the situation in some way; in this case he meets it by accepting the evidence of one witness against the evidence of three. And as explanatory of the reasons that induced him to adopt this view the Judge says that

> while the evidence of Messrs. Baird and Jones, read as mechanically reported and taken as a whole, seems to support pretty unqualifiedly the version given by Mr. Currey, of the Purdy interview, I cannot say that it so impressed me, as they gave it, and I paid special attention to it as it was being given. Their mild protests, as to the little attention they gave the conversation, not knowing then it was going to be important, and because of these facts, an apparent hesitation on their part to confidently affirm, convinced me that they were not positively contradicting Mr. Purdy. A hesitancy in the manner and apparent effort to jog a non-responsive memory on these points, which cannot appear in the reported evidence, tended to make me regard their evidence on this vital point as not coming from the absolute conviction of being right. I felt at the time, and that impression has not left me by a closer examination, that Mr. Currey's positiveness of recollection on this point had more weight in directing their testimony than their own fixed recollection.

For these and other reasons which are stated in his judgment the learned trial Judge finds all the issues in favour of the defendants, excepting the one which relates to the use and occupation by the defendants of the Star Line wharf for a period of twenty-three days, which he finds in favour of the plaintiffs. He finds in favour of the defendants upon their counterclaim, and assesses the damages at $1,000 for the use and occupation by the plaintiffs of the Star Line wharf from the 17th of May, to the date of judgment. It is not clear to me upon what basis the learned Judge arrives at these figures, as the amount of damages to which the defendant company is entitled; but since the amount found does not appear to have been at all questioned by the plaintiffs at the argument, I presume that we are justified in assuming that the right to any damages being once established in favour of the defendants, the plaintiffs have nothing to urge in diminution of the sum assessed. As this appeal comes to us solely upon questions of fact, it becomes necessary to consider under what circumstances we are justified in entering upon an examination of the contradictory evidence upon which the judgment of the Judge in the Chancery Division proceeds, and to what extent we are at liberty to pass upon the facts for ourselves. It was argued by counsel for the plaintiffs that if a sufficiently clear case is made out, an appellate Court will allow an appeal upon mere questions of fact against the findings of the trial Court, and a dictum of Strong, J., in *Phoenix Insurance Co.* v. *McGhee*, 18 Can. S.C.R. 61, was quoted as supporting that view. Strong, J.'s, remarks in the judgment alluded to, seem to have been based upon a passage from the judgment of Lord Bramwell in *Jones* v. *Hough*, 5 Ex. D. 115, in which he said, at 122:—

> A great difference exists between a finding by the Judge and a finding by the jury. Where a jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the Judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like.

It is to be observed that at p. 70 of the report of *Phoenix Ins. Co.* v. *McGhee*, 18 Can. S.C.R. 61, the same learned Judge, Strong, J., says:—

> The case must depend then altogether on the evidence of Nickerson, the captain of the schooner. This witness was unfortunately not examined before the Court and jury, but his deposition taken by consent before an examiner, was read at the trial;

thus leaving the Appeal Court in as good position and as free to judge of the effect of the captain's evidence, and the credit to be placed in it as the jury themselves were.

North British & Mer. Ins. Co. v. *Tourville*, 25 Can. S.C.R. 177, is another case relied upon by the plaintiffs in support of their application to have the findings of the Court below re-

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versed. While in that case the Court did allow the appeal against the concurrent findings of two Courts, it is important to bear in mind that the Judge who determined it in the first instance did not hear the witnesses, but gave his judgment upon written depositions, and the credibility of any of the witnesses was not directly questioned; and Tashereau, J., who delivered the judgment of the Court, is careful in distinguishing the case there under consideration from a series of decisions from which he said they did not intend to deviate, in which it had been held by the Supreme Court of Canada, that where a judgment appealed, is founded wholly on questions of fact, that Court would not reverse it unless convinced beyond all reasonable doubt, that such judgment is clearly erroneous.

That parties are entitled to have the decision of a Court of Appeal on questions of fact as on questions of law, was determined in "The Glannibanta," 1 P.D. 283, and it was there said that the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has not heard nor seen the witnesses, for which due allowance should be made. As a rule a Court of Appeal will be disinclined to interfere when the Judge hearing the witnesses has come to his decision upon the credibility of witnesses as evidenced by their demeanour; but otherwise in cases where it depends upon the drawing of inferences from the facts in evidence.

In *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, which was an appeal from the judgment of Gorrell Barnes, J., in a case tried by him without a jury, Lindley, M.R., who delivered the considered judgment of the Court of Appeal, made the following observations as to the rules which should be applied by the Court on the hearing of such appeals:—

> The case was not tried with a jury, and the appeal from the Judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns upon a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the

witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact, turning on the credibility of witnesses whom the Court has not seen.

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The same question was fully discussed and considered in the recent case of *Shaw* v. *Robinson*, 10 E.L.R. 103 (N.B.), affirming *Shaw* v. *Robinson*, 8 E.L.R. 557, and the judgment of a majority of the Court in that case proceeds upon the same rules and principles as are laid down in "*The Glannibanta*," 1 P.D. 283, and *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, rules which I think are peculiarly applicable to the present appeal. Although the Judge, in arriving at the conclusion which he has, brings to his assistance certain inferences, which he draws from the general aspects of the case, wherever a conflict occurs between the evidence of the defendants, and that of the plaintiffs, he accepts the former.

The finding of the Judge thus turning almost entirely upon the question of what set of witnesses was to be believed, that question depending upon the manner and demeanour of the witnesses while giving their evidence, I am disposed to think that a Court of Appeal ought not, under the authorities, interfere with his finding. In regard to the alleged agreement between the plaintiffs and the defendant Austin, in reference to the leasing of the Star Line wharf, I find no difficulty whatever in arriving at the same conclusion as the trial Judge. It seems to me that, viewing the whole evidence, the negotiations between the parties never passed the treaty stage. After he acquired the "Victoria" Dr. Currey was, doubtless, most anxious to acquire a lease of the wharf, because it appears that that was the only wharf at the landing-place of all the steamers at which the "Victoria" could be conveniently docked and discharged; but it does not seem to me that he ever wholly met the demands of the owner upon the important term of the rent required by the latter; their minds never came together upon that question, and there was no complete and concluded agreement between them.

The case of *Jack* v. *Kearney* (No. 2), 10 D.L.R. 48, reversing *Jack* v. *Kearney*, 4 D.L.R. 836, is easily distinguishable from the present one. In that case the facts were not disputed; there was no conflict of testimony; indeed, the plaintiff sought to prove his case by the evidence of the principal defendant himself, and the Appeal Court was in quite as good a position to draw the inferences of law arising upon the undisputed facts, as was the Judge who heard the witnesses. In my opinion, this appeal should be dismissed.

McKEOWN, J.:—I agree that this appeal be dismissed, because I consider myself, in the circumstances of this case, in

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no position to overrule the findings of fact made by the learned trial Judge. In appeals upon simple questions of fact there is involved, not only a consideration of the evidence but the accurate exercise of judgment on the part of the trial justice, and it is a consideration of the latter element which moves me to acquiesce in the dismissal of this appeal.

Khoo Sit Hop v. *Lim Thean Tong*, [1912] A.C. 323, was an appeal by the defendant from a decree of the Supreme Court of the Straits Settlements (Settlement of Penang), by which decree a judgment delivered by Thornton, J., was reversed. The appeal was upon a question of fact only, and the decision of this question turned upon the credibility of oral evidence involving, as well, consideration of the weight which should be properly allowed in a Court of Appeal to the opinion of a trial Judge. In delivering the judgment of the Judicial Committee of the Privy Council, Lord Robson said, at 325 of the report:—

> The case was tried before the Judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are, therefore, called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue, their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. . . . Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony.

The Committee advised that the judgment appealed from be reversed, and the judgment of the trial Justice restored.

I have given careful consideration to the evidence in this case as well as to the judgment of the learned trial Judge, and in view of the findings of fact which he has made, and the reasons given therefor, I am of opinion that the appeal should be dismissed.

McLeod, J.
White, J.

McLEOD, and WHITE, JJ., concurred.

Appeal dismissed.

ROSS v. WEBB et al.

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Feb. 5

Manitoba King's Bench. Trial before Macdonald, J. February 5, 1913.

1. PRINCIPAL AND AGENT (§ III—41)—LIABILITY OF SUB-AGENTS—NOTICE OF PRINCIPAL'S CLAIM.

An arbitrator, appointed pursuant to a partnership agreement, for the purpose of a voluntary winding-up of the partnership, is not liable to a claimant for moneys collected by him for the firm, but which moneys really belonged to the claimant, where the arbitrator accounted to the firm for that money, although he knew that it belonged to the claimant, since there is no privity between the claimant and the arbitrator, the latter being accountable only to the firm.

[Leake on Contracts, 6th ed., 73, specially referred to.]

Statement

ACTION claiming certain moneys collected by the defendant, the arbitrator appointed under the provisions of a partnership agreement for the purpose of winding up its affairs.

The action was dismissed.

M. G. Macneil and *B. L. Deacon*, for plaintiffs.

C. H. Locke, for defendant.

Macdonald, J.

MACDONALD, J.:—Under an agreement between Ida V. Chalmers and Howard A. D. Chalmers, doing business under the name of Walter Suckling & Co., the firm dissolved partnership and, for the purpose of winding up its affairs, appointed the defendant Webb arbitrator under the provisions of their partnership agreement, empowering this defendant to realize upon and get in the moneys and accounts, bills payable and all other assets of the firm and pay out the moneys so realized.

1st. In payment of the costs and expenses of the winding up.

2nd. In payment of the debts of the partnership to third parties.

3rd. In payment to the members of the said partnership of all moneys owing to them or either of them respectively by the said partnership.

4th. The balance to be paid over to the said partners according to their respective shares or interest in said partnership as set out in said partnership agreement.

Under this agreement all the assets of the firm, consisting of real estate, agreements of sale of real estate or mortgages upon real estate, whether standing in the joint names of the parties or in the individual name of either of them, being partnership property, were to be assigned to the Western Trust Company to be realized upon as soon as could be done without sacrifice of the same, and at a price to be mutually agreed upon between the parties or in case the parties could not agree, then at a price to be fixed by the defendant Webb.

For the convenience of all concerned, the defendant Webb

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conducted the liquidation of the firm at the offices occupied by that firm and had the assistance of the staff of the firm, as well as the assistance of his co-defendants (who are his partners in the business of accountants) and the office staff of his firm.

Among the securities taken over by the defendant Webb were certain agreements for the sale of land made between one Axtell and Sarah Jane George and Axtell and W. D. Law; one of these was assigned by Axtell in August, 1907, to the plaintiff, and the individual members of Walter Suckling & Co. The latter on the ninth October, 1908, assigned their interest in this agreement to Sarah Jane George.

The moneys payable under this agreement were collected by the defendant Webb and handled by him, as were the collections on behalf of Walter Suckling & Co., and no distinction made between those moneys and the moneys of that firm. This agreement was in the hands of Walter Suckling & Co., to whom was assigned the duty of looking after and collecting the moneys falling due thereunder. As a matter of fact, the firm claimed some interest in the agreement, having advanced moneys to the plaintiff in connection with it, and they now claim an interest in the moneys collected from it; how much does not seem clear. The witness Chalmers says their interest in it was but small, something in the neighbourhood of $28.

Prior to the defendant Webb taking charge, collections made by the firm were credited to an account called "Speculation and Investment Account." This account the defendant dissected by opening an account for the individual party to whom the collection belonged, and he started off his work by keeping two separate trust accounts, one for the firm's trust collections, and the other for the firm's moneys. This he found that he could not continue, as trust funds were being used generally in liquidation of the firm's debts. At the time the defendant Webb took charge there were not sufficient moneys paid over to him to pay out trust moneys previously collected by the firm, and, as moneys came in, irrespective of the source from which they came or to whom credited, they were paid out for payment of the firm's liabilities. The moneys in question here were paid out in this way long before the defendant Webb ceased to represent the firm of Walter Suckling & Co., under the agreement referred to.

When the defendant Webb was retiring from his employment with the Suckling Co., he paid himself for his services the sum of $1,160, being within $32 of the moneys in his hands.

The plaintiff brings this action claiming that the moneys due him and collected under the Axtell agreement were his and collected for him, and that the defendant Webb, as the trustee of such moneys for him, is responsible to him for payment.

There never was any agreement or arrangement made between the plaintiff and Webb, whereby the latter was to assume this responsibility.

The witness Chalmers, who is directly interested in this action, says that he arranged with the defendant Webb that the latter was to collect under this agreement and keep the moneys separate and apart from other collections, and credit and remit to the plaintiff. The defendant Webb denies this, and it seems strange that if such an understanding was arrived at, that this defendant should demand and receive express authority to pay out moneys received under this same agreement, the property of Miss Womald, and collected by this defendant, and if such instructions were given, there does not appear to be any reason why they should not have been obeyed, as there were ample moneys on hand at the time this collection was made with which to pay.

The defendant Webb denies that there ever was such an understanding or arrangement and such being the case, I cannot, on the unsupported evidence of Mr. Chalmers, give effect to his contention in the face of this denial.

The position then is simply this,—Is the defendant Webb, by reason of his having collected this money as liquidator for Suckling & Co., knowing it to belong to the plaintiff, liable to the plaintiff? It is contended by Suckling & Co. that this defendant has not accounted to them for it; but I find that he has. If he has overcharged in his account for expenses of liquidation, that is a matter between him and Suckling & Co. and the real purpose of this action is plainly an effort on the part of the latter company to recover from this defendant a part of the moneys retained by him for such expenses.

There is clearly no privity between the plaintiff and the defendant Webb; he was not acting for the plaintiff, but simply as the servant of Suckling & Co., and accountable to that firm only. It is not the winding up of an insolvent firm, where the liquidator might be held responsible for trust funds collected, but the voluntary winding up of a thoroughly responsible company, viewing it from a financial standpoint.

> A claim for money received cannot in general be made upon a subagent who receives it only on account of the agent without any privity or relation to the principal to whose use it is paid: Leake on Contracts, 6th ed., 73.

And this principle seems to me to apply directly to this case. I grant a nonsuit with costs.

Action dismissed.

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Jan. 27.

STEVENS v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Magee, and Hodgins, JJ.A. January 27, 1913.

1. APPEAL (§ VII L 2—476)—REVIEW OF FACTS—VERDICT—NEGLIGENCE, FINDING AS TO.

A verdict of a jury for the plaintiff in an action to recover damages for injury resulting from the alleged negligence of a railroad company in leaving an unnecessarily wide space between the planking and the inside of one of the rails of their track at a highway crossing, whereby the plaintiff while walking along the highway at night got his foot caught in the space, and being unable to extricate it in time, it was cut off by a locomotive, should not be disturbed on appeal, where the jury find that the railroad company was negligent in not having the crossing in proper order, and that the plaintiff could not by the exercise of reasonable care have avoided the accident.

2. APPEAL (§ VII I 2—476)—REVIEW OF FACTS—VERDICT, NOT DISTURBED, WHEN.

On appeal to the appellate division of the Ontario Supreme Court from the judgment of a trial court, based upon the findings of a jury in favour of the plaintiff, who was the sole witness for himself, though the appellate court may doubt the plaintiff's story or disbelieve him, they have no right to substitute their own opinion of the facts for that of the jury, but if there is some evidence to support the finding of the jury, it cannot be disturbed. (*Per* Garrow, J.A.)

Statement

APPEAL by the defendants from the judgment of Clute, J., at the second trial of the action, upon the findings of a jury, in favour of the plaintiff.

The action was brought to recover damages for injury sustained by the plaintiff, viz., having his foot cut off by the locomotive of a train of the defendants, at a highway crossing, by reason, as the plaintiff alleged, of the negligence of the defendants or their servants, in leaving an unnecessarily wide space between the planking and the inside of the north rail of their track, whereby the plaintiff had his foot caught in the space, and was unable to extricate it. See the judgment of the Court of Appeal, after the first trial, directing a new trial: 3 O.W.N. 221.

The appeal was dismissed.

I. F. Hellmuth, K.C., and *W. L. Scott*, for the defendants.

J. A. Macintosh, for the plaintiff.

Garrow, J.A.

GARROW, J.A.:—This case has been twice tried, and I am unable to agree that there are circumstances which would justify another trial. The issues are essentially upon questions of fact, vitally involving the question of the credit to be given to the depositions at the trial of the plaintiff himself. For, as carefully pointed out to the jury by Clute, J., in his charge, unless the plaintiff is believed, the case utterly fails. We may doubt the plaintiff's story, or even go farther and say we do not believe him, but we have no right to substitute ourselves for the jury or our opinion for theirs upon such a question.

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There is some confusion in the findings of the jury; but, upon the whole, I take it to be reasonably clear that it is found as a fact that the opening between the rail and the plank exceeded two inches, and was, therefore, wider than necessary. On this there was, I think, some evidence to support the finding.

I would dismiss the appeal with costs.

MAGEE, J.A.

MAGEE, J.A.:—Two trials have now been had in this action, in which the plaintiff charged that the defendants negligently left an unnecessarily wide space between the planking and the inside of the north rail of their track, at a highway crossing, whereby, while he was walking along the highway at night, he got his foot caught in the space, and, he being unable to extricate it in time, it was cut off by the locomotive of a train. The jury at each trial have accepted the plaintiff's version of his misfortune, and have rejected the theory of the defendants that he was injured while intoxicated, not at the plank crossing, but some distance east of it.

Apart from the probable uselessness of a third trial, I see no ground for disturbing the result of the second one. When the case was before this Court after the first trial the facts were more fully referred to. Some details then in evidence have been left out at the second trial and some additional ones proved. It was strongly urged before this Court that the plaintiff's story was incredible, and that his foot could not have been cut off as he stated without some injury being caused to the boot; but the jury had before them what the defendants put forward as a fair reproduction of the track and planks and engine, and would be able to judge of the credibility or the reverse of the plaintiff's evidence; and the cross-examination of the plaintiff does not read as if the defendants had much hope of convincing the jury that it would be impossible for the boot to get down so far that the top would not be pressed between the wheel and the rail.

The plaintiff swears that, in his struggles before the train reached him, he threw himself so hard that his ankle went out of joint, and that, when he did so, he screamed with the pain. This was brought out on cross-examination, and is a circumstance not mentioned at the former trial, and would more readily account for the occurrence happening as the plaintiff says it did; and the jury may well have considered that the plaintiff's account given to the doctor immediately after the accident was not likely to have been manufactured.

The two physicians who attended to the plaintiff that same evening were called by the defendants, but not a question was asked them or any other witness as to even the improbability of the injuries being received as he states or the insufficiency of the space to receive the boot if crushed down. His statement is

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undisputed that the wheel cut off the foot an inch or two above the ankle joint.

The evidence for the defendants shews that 1¾ or 2 inches is all the width of space necessary to be left between the plank and the rail for the wheel flange. As to the actual width of the space the jury may very well have discounted the evidence of the section foreman, practically the only witness, as to its measurement, and they may well have preferred the plaintiff's statement that his heel, 2½ inches wide, had gone into it, as the best proof of the width, since the planks had been taken up and a new rail put down in the interval. The defendants' own witnesses, including the two physicians, say that the plaintiff was sober.

The answers of the jury, as ultimately brought in by them, find the defendant company negligent in not having the crossing in proper order, or the accident would not have happened, because there was space enough for the plaintiff's foot to get caught between the rail and the plank, and that the plaintiff could not, by the exercise of reasonable care, have avoided the accident.

These answers are not inconsistent with answers previously made or the jurors' statements in Court. They were fully instructed; and I do not think the judgment for the plaintiff upon their answers should be disturbed.

Maclaren, J.A.
Hodgins, J.A.

MACLAREN and HODGINS, JJ.A., concurred.

Appeal dismissed.

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HOLDEN v. RYAN.

Ontario Supreme Court (High Court Division), Britton, J. January 23, 1913.

1. BUILDINGS (§ II—18)—SEMI-DETACHED HOUSES—SIZE OF LOT—ALTERATION TO SINGLE HOUSE.

Although a building structurally divided into two equal divisions by a wall extending its whole height with no internal communication, common staircase, or common front door, constitutes a pair of semi-detached buildings, and to erect such a building upon a lot which has a frontage of only forty feet on a specified street would be a violation of a building restriction that every pair of semi-detached buildings shall be upon land having a frontage on such street of at least fifty feet; yet when the building is subsequently altered by constructing and maintaining a door as a permanent passage-way through the dividing wall, the structure becomes only one building within the meaning of the restriction in the deed.

[*Ilford Park Estates Limited* v. *Jacobs*, [1903] 2 Ch. 522, 526, considered; *Holden* v. *Ryan*, 4 D.L.R. 151, referred to.]

2. BUILDINGS (§ I A—9*a*)—ERECTION OF APARTMENT HOUSE—CORNER LOT—MUNICIPAL BUILDING RESTRICTIONS.

Although it is a violation of a building restriction that a building erected upon any of certain lots having a frontage upon some

other street as well as upon a specified street shall have its front upon such specified street, to erect an apartment building on the corner of such street and another street with an entrance to only one of the apartments on the specified street and the main entrance for all the other apartments on the other street, there being no connection between them and the one apartment entered from the specified street; yet when the building is subsequently altered so that the end fronting the specified street will be the predominating front of the building constituting the main entrance from the outside to all the apartments, this is a sufficient compliance with the requirement of the restriction, and the fact that the side entrance is more imposing is not material.

[*Holden* v. *Ryan*, 4 D.L.R. 151, referred to.]

3. CONTEMPT (§ II 15)—PROCEDURE—"BENEFIT OF DOUBT," TO DEFENDANT, WHEN.

On an application to commit a defendant for contempt of court for disobeying a judgment restraining him from proceeding with the erection of a building on the ground that it is in contravention of certain building restrictions, any doubt as to the time, construction and meaning of the restrictions should be resolved in favour of the defendant.

Statement

MOTION by the plaintiff to commit the defendant for contempt of Court by disobedience to the judgment of Teetzel, J., 4 D.L.R. 151, 3 O.W.N. 1585, restraining the defendant from proceeding with the erection of a building or buildings on the corner of Palmerston avenue and Harbord street, in the city of Toronto, in contravention of certain building restrictions to which the land owned by the defendant was liable.

A. C. McMaster, for the plaintiff.

J. R. Roaf, for the defendant.

Britton, J.

BRITTON, J.:—The judgment of Teetzel, J., is, that the building then in course of erection contravened the building restrictions: (a) in that the buildings of the defendant being erected were two, and that one of these buildings, viz., the western one, has not appurtenant to it land having a frontage on Palmerston avenue of at least 33 feet; and (b) that this building, not being a stable or outbuilding, being upon the lot which has a frontage upon Harbord street, as well as upon Palmerston avenue, has not its front upon Palmerston avenue. And by that judgment the defendant was restrained from proceeding with the erection of the said buildings unless and until the said buildings are altered so as to conform with the said building restrictions.

The defendant apparently accepted the decision, and proceeded at once to alter the so-called buildings to make them conform with the restrictions.

The objections, in short, are that there are two buildings; and, if so, the western one does not conform to the restrictions; and that, even if only one building, it does not front upon Palmerston avenue, within the true meaning of and as required by the restrictions.

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The fact of there being two buildings, as found by the trial Judge, was so found as then there was the "vertical division wall, running north and south, extending the whole height of the building, dividing it into two equal divisions. There is no door or other opening in this division wall, so that there is no means of access to and from the easterly and westerly halves of the building; each half has its independent entrance facing upon Harbord street." That is now changed. There is a door-way through the vertical wall. It was made in good faith as a permanent door-way or passage-way, to be finished and to remain as part of the structure. With such an opening, through a middle wall—called a "fire-wall"—a fire-wall required by the city corporation—and in a building with the four enclosing walls all under one roof, I am not able to say that this building is two buildings within the meaning of the restriction; and, if not, there is no violation of the injunction in that respect.

The case of *Ilford Park Estates Ltd.* v. *Jacobs*, [1903] 2 Ch. 522, relied upon by the learned trial Judge, was decided upon the facts summarized on p. 526 of the report, as follows:—

> Now in this case there is no question of one house being built and then used as two houses. In substance, each building constitutes two houses, which are structurally separate in every respect, with separate approaches to the street, and no internal communication. It is quite different from a case where one building is erected containing separate flats. In that case there is internal communication between the flats by means of a common staircase. In the present case there is no internal communication whatever.

Then, upon the best consideration I can give to the plans and to the affidavit evidence before me, I am of opinion that this building will have its front upon Palmerston avenue. It will not be as convenient or as imposing a front as perhaps should belong to so large and costly a building; but that is a matter between the defendant as owner and her tenants.

A comparatively narrow hall, a dark hall, leading from the street entrance to the stairway and thence to the apartments does not determine the question of front or main entrance.

This is a question between the Harbord street entrance and the Palmerston avenue entrance to the building as it stands, as to which shall be called the front entrance, and a consideration of the plans and of the evidence that the front of the building will be on Palmerston avenue, and that the work now in progress is with that in view.

The part fronting on Palmerston avenue will be the main entrance. The building is now—whatever the original intentions were—being so erected that the end fronting on Palmerston avenue will be the predominating front of the building, the main entrance from the outside to all the apartments.

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That there may be a shorter and more convenient way for persons approaching the building from the west, and desiring to enter the western apartments, or the westerly end of the easterly apartments, does not affect the question under consideration, nor is it material that the side facing Harbord street has two or more or less doors, or that the southerly side is more architecturally beautiful than the end fronting on Palmerston avenue. That side of the building is the "frontage" on Harbord street, as the word "frontage" is used in restriction 3.

If I had any doubt as to the time, construction and meaning of the restrictions, that doubt should, upon a motion to commit, be resolved in favour of the defendant.

The motion should be dismissed, and with costs.

Motion dismissed.

Re ERSKINE.

ONT.

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1913

Jan. 27.

Ontario Supreme Court, Britton, J. January 27, 1913.

1. WILLS (§ III A—75)—DEVISE AND LEGACY — CONSTRUCTION—INTENT—"MY ESTATE," MEANING OF.

Under a will whereby the testator gives his widow the family residence during her natural life and a certain sum of money yearly to be paid to her in monthly instalments "so long as my estate will pay the same," and which will makes other bequests and a devise of land to the testator's son, with a direction that at the decease of the widow the proceeds of the residue and remainder of the estate both real and personal, including the family residence, be divided among certain persons; the words "my estate," in the clause providing for the widow, mean the estate of the testator not otherwise devised or dealt with by the will, and the annuity of the widow is payable only out of that part of the estate which the executors have in hand, exclusive of the family residence and the particular bequests and the land devised to the son, notwithstanding that the will contains a power on the part of the executors to sell the real estate.

2. EXECUTORS AND ADMINISTRATORS (§ II A 2—44a)—MORTGAGE TO PAY ANNUITY.

Where a will provides for an annuity to be paid by the executors to the testator's widow "so long as my estate will pay the same," after giving a life interest in the family residence to the widow and a devise of land to the testator's son, and providing for other bequests with a direction that at the decease of the widow the proceeds of the residue and remainder of the estate both real and personal, including the family residence, be divided among certain persons, the executors have no right to raise the annuity by way of a mortgage on the family residence or on the land devised to the son, the widow being entitled to the annuity only if there is cash enough on hand to pay for the same.

Statement

MOTION by the Union Trust Company Limited, the executors and trustees under the will of John Erskine, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the construction of the will.

The will was dated the 22nd December, 1905; and the testator died on the 18th June, 1906.

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The testator directed that all his just debts and funeral and testamentary expenses should be paid by his executors as soon as convenient after his decease; he appointed the trust company executors and trustees, and then proceeded:—

"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say.

"To my wife Isabella Erskine I give, devise, and bequeath during the term of her natural life the premises known as house number 14 Saint Vincent street in the city of Toronto aforesaid free from taxes together with the contents of same also the sum of four hundred dollars ($400) yearly to be paid to her in monthly instalments so long as my estate will pay the same.

"To my son John Alexander Erskine I give devise and bequeath the sum of one hundred dollars ($100) and the south half of lot number five (5) concession five (5) in the township of Bryce in the district of Algoma and Province aforesaid.

"To my sisters Anne Hill and Agnes Erskine I give devise and bequeath the sum of one hundred and fifty dollars ($150) each.

"I direct my executors to pay off the existing mortgage on my above-mentioned Saint Vincent street property out of the proceeds of my life insurance.

"At the decease of my said wife I direct that the proceeds of the residue and remainder of my estate both real and personal including my said house and contents be divided equally between my said sisters Annie Hill and Agnes Erskine and my said son John Alexander Erskine share and share alike or the survivors or survivor thereof.

"I hereby empower my executors in their discretion to sell and dispose of any or all of my real estate and to execute conveyances thereof."

The legacies to John Alexander Erskine, Annie Hill, and Agnes Erskine had been paid.

All the debts, including the mortgage on the residence number 14 Saint Vincent street, had been paid.

The widow had remained in possession, and was now, by herself or her tenant, in possession, of the residence. The estate had been administered, leaving the widow in possesion of the residence and furniture, and John Alexander in possession of what was called the farm, which was the land allotted upon a veteran land grant, 100 acres, with no buildings upon it, and not under cultivation. The widow had been paid the annuity down to August, 1909; and the estate was actually indebted to the executors in the sum of $45.66, or thereabouts.

The executors, being in doubt, asked the assistance of the Court, submitting the following questions:—

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"(1) Whether, upon the true intent and meaning of the will, the annuity of $400 to the widow was payable out of the corpus of the whole of the estate or only out of that part of the estate which came into the hands of the executors as cash.

"(2) Whether the executors could raise the annuity by way of mortgage of the premises number 14 Saint Vincent street, Toronto, and of the lands devised to John Alexander Erskine, in the township of Bryce, in the will mentioned.

"(3) Whether these properties should, as between them, bear the annuity in proportion to their respective values."

D. C. Ross, for the applicants.

George Wilkie, for the widow.

B. N. Davis, for the other beneficiaries.

Britton, J.

BRITTON, J. (after setting out the facts as above):—The will must be construed as a whole. From the words used, what is the real meaning?

The testator intended to dispose of his whole estate. His words are: "I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following . . . ." To his wife during her natural life he gave the residence, together with the contents of the same; also the yearly sum of $400, payable monthly, as long as his estate could pay the same—not for life—for the estate might not be able to continue the payment during her entire life. The house and contents the widow would have for life. She might not have it for life if sold or mortgaged to raise money out of which to pay the $400 for life; and, even if mortgaged or sold, there might not be sufficient to pay the $400 for life. The widow is now only 68 years old. She may live quite long enough to exhaust, at the rate of $400 a year, all that the residence would realise, so that before death she would have neither residence nor yearly allowance. That was not within the contemplation of the testator. I am of the opinion that the words "my estate," in the clause providing for his wife, mean the estate of the testator not otherwise devised or dealt with by his will.

The general words "remainder of my estate both real and personal" cannot be held to include the farm devised to John Alexander, nor can it include the money legacies paid to Annie Hill and Agnes Erskine. The words are general words, and would include, of course, other property of the testator, if any, obtained by him subsequent to the making of the will, or owned by him at time of his death.

The last clause of the will, simply empowering the executors to sell, is the general one, and in this case neither adds to nor detracts from the will—nor does it assist in the interpretation of the will.

My answer to the first question is, that the annuity is pay-

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able only out of that part of the estate which the executors had in hand, exclusive of the residence and farm.

My answer to the second question is, "No."

The third question is covered by my answers to the first and second.

As the executors will continue to act and deal with the estate after the death of the widow, it will be no hardship to them to make their costs payable out of the estate. No costs to the other parties.

Judgment accordingly.

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Jan. 7.

REX v. CRAWFORD.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. January 7, 1913.

1. EVIDENCE (§ V—511b)—DEMONSTRATIVE EVIDENCE—VIEW BY COURT—CRIMINAL TRIAL BY MAGISTRATE.

A police magistrate sitting as such under Part 16 of the Criminal Code (1906), and summarily trying an indictable offence, has no right during the trial to take a view of the land in respect of a transaction in which the charge of fraud was made which he was trying as such magistrate, at least where there is no consent of both the Crown and the accused to his so doing.

[*R. v. Petrie*, 20 O.R. 317, applied. See Annotation to this case.]

2. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL BY CONSENT—"VIEW" BY MAGISTRATE.

Although sec. 958 of the Criminal Code (1906) empowers the court to order that the jury on a criminal trial shall have a view of any place, person or thing, it is not to be inferred that a magistrate exercising a limited statutory power of summary trial without a jury in respect of certain indictable offences, may in like manner take a view of lands which are the subject matter of the offence charged.

Statement

QUESTION reserved by the police magistrate of Vancouver for the opinion of the Court.

D. W. F. McDonald, for defendant.

J. K. Kennedy, for the magistrate.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The police magistrate of the city of Vancouver submitted for the opinion of this Court a question which may be shortly stated as follows: Had he, while trying an indictable offence summarily, under Part 16 of the Criminal Code, the right to take a view of the lots in respect of one of which the alleged fraud was committed? The right to do so was contested by the learned counsel for the Crown, so that no question of consent arises here. I am of the opinion that the magistrate had no such right, and would therefore answer the question in the negative.

Irving, J.A.

IRVING, J.A.:—The police magistrate, sitting under Part 16 of the Code, has reserved under sec. 1014 the question as to his right when trying an indictable offence under Part 16 to take a view. The Queen's Bench Division, Armour, C.J., Fal-

conbridge, and Street, JJ., in the case of *Reg.* v. *Petrie* (1890), 20 O.R. 317, decided that there was no authority for a Judge exercising jurisdiction under the Speedy Trials Act to take a view.

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At common law there was no power enabling the Court of Assize to order a view, except by consent, even in a civil case; 4 & 5 Anne ch. 16, provided for a view in civil cases. The right to order a view in criminal cases was conferred by 6 Geo. IV. ch. 50, sec. 23, the Juries Act, 1825, on "any of the Courts of record at Westminster, or in the Counties Palatine, or great sessions in Wales."

In 1847, Greaves, who wrote the 4th edition (1865) of Russell on Crimes, "the most authoritative text-book on crimes," (*per O'Hagan*, J., 17 Ir. Cr. L. 305), on an application by the prisoner's counsel for a view, said:—

> It is doubtful according to the authorities whether in a criminal case at the assizes there can be a view except by the consent of the prosecutor: See *R.* v. *Whalley*, 2 C. & K. 376,

but the Court seems to have considered there was jurisdiction at common law to allow the view: See Odgers on Evidence (1911), p. 384. I must say this decision seems to be opposed to the authorities, which are set out in the note to *R.* v. *Whalley*, 2 C. & K. 376.

I am unable to find any authority, statutory or otherwise, enabling the Judge to take a view, and as the jury could not in criminal cases take a view except by consent, I do not see how a Judge sitting as Judge and jury can take a view without statutory authority.

In my opinion the case should be answered in the negative.

Martin, J.A.

MARTIN, J.A.:—In my opinion, the question reserved should be answered in the negative. The statute in terms (sec. 958) only empowers the Court to "direct that the jury shall have a view of any place, thing, or person": there is nothing authorizing a Judge or magistrate to do the same. No case has been cited to us on the exact point raised, nor have I been able to discover one after a diligent search. I therefore think it would not be prudent or safe to sanction a proceeding which is not in accord with the established course of criminal justice.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the judgment of Irving, J.A.

Question negatived.

Annotation

View in criminal trial

Annotation—Evidence (§ V—511)—Demonstrative evidence—View of locus in quo in criminal trial.

"Real evidence" is often produced at trials, when it is not exacted by any rule either of law or practice. Valuable evidence of this kind is sometimes given by means of accurate and verified models, or by what is

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Annotation (*continued*)—Evidence (§ V—511)—Demonstrative evidence—View of locus in quo in criminal trial.

technically termed a "view" i.e., a personal inspection by some of the jury of the *locus in quo*,—a proceeding allowed in certain cases by the common law, in criminal as well as in civil cases, and much extended by the statutes, 4 Anne, ch. 16, sec. 8; Juries Act (Imp.) 1825), 6 Geo. 4, ch. 50, sec. 23; Common Law Procedure Act, 1852 (Imp.), 15 and 16 Vict. ch. 76, sec. 114, and Common Law Procedure Act, 1854 (Imp.), 17 and 18 Vict. ch. 125, sec. 58. Best on Evid. 11th ed., 195; *R.* v. *Martin*, L.R. 1 C.C.R. 378, 12 Cox C.C. 204, 41 L.J.M.C. 113. The application for the view may be made at any time before verdict. *Ibid.;* Bowen-Rowlands on Crim. Proceedings, 2nd ed., 252.

Section 958 of the Criminal Code of Canada, 1906, is as follows:—

"On the trial of any person for an offence against this Act, the Court may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person, shall be shewn to such jurors, and may for that purpose adjourn the trial, and the costs occasioned thereby shall be in the discretion of the Court.

"(2) When such view is ordered, the Court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors: Provided that no breach of any such directions shall affect the validity of the proceedings."

Taking a view of the locality of the offence is receiving evidence, in a sense, and the prisoner's counsel should have the opportunity of attending: *R.* v. *Petrie* (1890), 20 O.R. 317, 324. In that case the prisoner was indicted for feloniously displacing a railway switch and was tried by a Judge without a jury under the Speedy Trials Act. After hearing the evidence and the speeches of counsel the Judge reserved his decision, and before giving it he examined the switch in question, neither the prisoner nor any one on his behalf being present. The conviction was quashed, the Queen's Bench Division (Armour, C.J., Falconbridge and Street, JJ.) holding that even if the trial Judge had been warranted in law in taking the view, the manner of his taking it without the presence of the prisoner, or of any one on his behalf, was unwarranted.

That seems to have been all that was required for the decision of the case, but Armour, C.J., in delivering the opinion of the Court goes further and deals with the question of jurisdiction, and concludes that there was no authority in Ontario either at common law or by statute, to warrant a Judge trying a case without a jury in taking a view. He says:—

"It is clear that there is no statute authorizing the Judge to have a view in such a case, and we have to ascertain whether there is otherwise any authority in support of the right of a Judge to take such a view. If the Court had power at common law, an inherent power, to order a view by a jury in a trial for a criminal offence, it might well be argued that when the functions of the jury devolved upon the Court by statute, the Court became possessed of the power itself to take a view. The statute 4 Anne ch. 16, sec. 8, did not extend to criminal cases, and neither before it nor after it, until 6 Geo. IV. ch. 50, sec. 23, could a view be had in a

Annotation (*continued*)—Evidence (§ V—511)—Demonstrative evidence—View of locus in quo in criminal trial.

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criminal case without consent. (See 1 Burr. 253 in margin); In *Rex* v. *Redman*, 1 Kenyon 384, there was a motion for a view on behalf of the defendant, who stood indicted for a forcible entry. *Per* Curiam.—There can be no view in a criminal prosecution without consent, and the practice was so before the Act (4 Anne ch. 16). See *Anonymous*, 1 Barnard 144; 2 Barnard 214; 2 Chitty 422; *Commonwealth* v. *Knapp*, 9 Pickering, at p. 515, where it is doubted whether even with consent a view could be granted in a felony. There was no authority, in my opinion, for the learned Judge taking the view which he took in this case."

There is no authority for a magistrate trying a summary conviction matter, such as a charge of selling intoxicants to an Indian, to take a view of the *locus in quo* during an adjournment of the trial, as he himself stated in delivering his judgment finding the accused guilty; and where he did this *suo moto* and without notice to the parties or their counsel, it constitutes such an inherent defect in the course of legal procedure that the conviction is voided, even though the course taken by the magistrate was with the best intention: *Re Sing Kee* (1901), 5 Can. Cr. Cas. 86, 8 B.C.R. 20. The objection goes to the jurisdiction and may be given effect to notwithstanding a general statutory provision against the removal of convictions for such offences by certiorari, which would, however, not constitute a bar to certiorari for want of jurisdiction: *Ibid.*

The theory that a view was not permissible at common law is strongly controverted by modern text-writers. Wigmore on Evidence, sec. 1164, says:—

"The inconvenience of adjourning Court until a view can be had, or of postponing the trial for the purpose, may suffice to overcome the advantages of a view, particularly when the nature of the issue or of the object to be viewed renders the view of small consequence. Accordingly, it is proper that the trial Court should have the right to grant or to refuse a view according to the requirements of the case in hand. In the earlier practice, the granting of a view seems to have become almost demandable as of course; but a sounder doctrine was introduced by the statute of Anne (which apparently only re-stated the correct common-law principle); so that the trial Court's discretion was given its proper control."

"That the Court is empowered to order such a view, in consequence of its ordinary common-law function, and irrespective of statutes conferring express power, is not only naturally to be inferred, but is clearly recognized in the precedents. Nor can any distinction here properly be taken as to criminal cases. It is true that here, by some singular scruple, a doubt has more than once been judicially expressed. But it is impossible to see why the Court's power to aid the investigation of truth in this manner should be restricted in criminal cases and the better precedents accept this doctrine." Wigmore on Evid., sec. 1163.

"Moreover, the process of view need not be applicable merely where land is to be observed; it is applicable to any kind of object, real or personal in nature, which must be visited in order to be properly understood. Thus at common law there need be no limitations of the above sorts upon the judicial power to order a view. The regulation of the subject by statute, which began in England some two centuries ago, was concerned

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Annotation (*continued*)—Evidence (§ V—511)—Demonstrative evidence—View of locus in quo in criminal trial.

rather with the details of the process than with the limits of the power. Statutes now regulate the process in almost every jurisdiction, but it may be assumed that the judicial power to order a view exists independently of any statutory phrases of limitation." Wigmore on Evid., sec. 1163.

In *Springer* v. *Chicago* (1891), 135 Ill. 553, 561, 26 N.E. 514, Craig, J., said:—"If the parties had the right upon the trial to prove by oral testimony the condition of the property at the time of the trial, . . . upon what principle can it be said the Court could not allow the jury in person to view the premises and thus ascertain the condition thereof for themselves? . . . If a plat or photograph of the premises would be proper evidence, why not allow the jury to look at the property itself, instead of a picture of the same? There may be cases where a trial Court should not grant a view of premises where it would be expensive or cause delay, or where a view would serve no useful purpose; but this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. . . . If at common law, independent of any English statute, the Court had the power to order a view by jury (as we think it plain the Court had such power) as we have adopted the common law in this state, our Courts have the same power."

Under sec. 11 of the Criminal Code, 1906 (Can.), the criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any Ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia, passed since such union, or by the Criminal Code or any other Act of the Parliament of Canada, and as altered, varied, modified, or affected by any such Ordinance or Act, shall be the criminal law of the province of British Columbia.

This makes it of importance to consider, as to the province of British Columbia, parts of the statutory law of England which having been enacted subsequently to the year 1792 in which the adoption of the English criminal law took effect in Ontario, were not material to the consideration of *R.* v. *Petrie* (1890), 20 O.R. 317.

The statute 4 Anne, ch. 16, in terms applied "in any action" at Westminster (which phrase would ordinarily not relate to a proceeding by indictment) and authorized the Court to order special writs commanding the selection of six out of the jurors therein named to whom the matters controverted should be shewn by two persons appointed by the Court.

Mansfield, L.J., stated the Rules for Views (1 Burr. 252) as follows: "Before the 4 & 5 Anne, ch. 16, sec. 8, there could be no view till after the cause had been brought on to trial. If the Court saw the question involved in obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or Judge at the trial, 'that the nature of the question made a view not only proper, but necessary,' for the Judges at the assizes were not to give way to the delay and expense of a view unless they saw that a case could not be understood without one. However, it often happened in fact that upon the desire of either party causes were put off for want of a view upon

Annotation (*continued*)—Evidence (§ V—511)—Demonstrative evidence—View of locus in quo in criminal trial.

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specious allegations from the nature of the question that a view was proper, without going into the proof so as to be able to judge whether the evidence might not be understood without it. This circuity occasioned delay and expense; to prevent which the 4 & 5 Anne, ch. 16, sec. 8, empowered the Courts at Westminster to grant a view in the first instance previous to the trial. Nothing can be plainer than the 4 & 5 Anne, ch. 16, sec. 8. The Courts are not bound to grant a view of course; the Act only says 'they may order it where it shall appear to them that it will be proper and necessary.' We are all clearly of opinion that the Act of Parliament meant a view should not be granted unless the Court was satisfied that it was proper and necessary. The abuse to which they are now perverted, makes this caution our indispensable duty; and, therefore, upon every motion for a view, we will hear both parties, and examine, upon all the circumstances which shall be laid before us on both sides, into the propriety and necessity of the motion; unless the party who applies will consent to and move it upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice."

An English statute, of 1825, 6 Geo. IV., ch. 50, secs. 23 and 24, provided that in any case civil or criminal wherever "it shall appear . . . that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial," an order may appoint six or more, to be named by consent or, upon disagreement, by the sheriff, and the place in question shewn them by two persons appointed by the Court; and "those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn," and only so many added as are needed to make up twelve.

Chitty says: "In cases of indictments for nuisances, it may be necessary, either on behalf of the prosecutor, or of the defendant, for the jury to have a view of the premises indicted. This, it seems, cannot be granted by the Judges at the assizes, but if necessary may be the ground of removal by certiorari into the King's Bench. The power of granting a view, in criminal and civil cases, is now given, by the 6 Geo. 4 ch. 50, sec. 23, to the Court in which the issue is depending, or to a Judge in vacation. The Court will grant it on an indictment for not repairing a highway, or for a nuisance, but not on a prosecution for perjury, unless under particular circumstances. And a view will not be granted, if there is any risk of its misleading the jury. When it is allowed, the same rules will, in general, prevail, as are observable in civil proceedings." 1 Chitty's Criminal Law 483.

A later English statute, 15 & 16 Vict. ch. 76, sec. 114, made an order of a Judge for the view sufficient without the issue of a formal writ of view. A change of venue is authorized by the English Crown rule 45, if a view in another county is necessary: *Clerk* v. *R.*, 9 H.L.C. 184.

It has been held in England the Judge may adjourn the Court to enable the jury to have the view, even after the summing up; but the jury must not communicate with the witnesses during such view: *R.* v. *Martin* (1881), 12 Cox C.C. 204.

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Annotation (*continued*)—**Evidence (§ V—511)—Demonstrative evidence—View of locus in quo in criminal trial.**

In *R.* v. *Whalley*, 2 C. & K. 376, it was held that a view could not be obtained at quarter sessions and an opinion was expressed that 'it was doubtful whether at assizes there could be a view except by consent. But the necessity for a view seems to be a sufficient ground for removal of the indictment into the King's Bench Division: *R.* v. *Justices of Tradgeley*, Sess. Cas. 180.

The County Court Judge's Criminal Court is a Court of record for all the purpose of the trial and proceedings connected therewith, or relating thereto: Cr. Code (1906), sec. 824. Its general jurisdiction is for the trial of offences which might be tried with a jury at the Courts of general sessions, or quarter sessions, in Ontario; Cr. Code (1906), ch. 825.

The Judge presiding at a County Court Judge's Criminal Court has in any case tried before him, the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a jury would have in case the prisoner were tried by a Court having jurisdiction to try the offence in the ordinary way and may render any verdict which might be rendered by a jury upon a trial at a sitting of any such Court. Cr. Code (1906), sec. 835.

But all of these statutory provisions fall short of making applicable to such Court even *mutatis mutandis*, the statutory provision regarding a view by the jury contained in Cr. Code sec. 958, quoted supra. Furthermore, if there be any inherent common law jurisdiction pertaining to its quality or status as a Court of record which might authorize a view, it could hardly be held to be more extensive than the powers held by Courts of Assize and Courts of General and Quarter Sessions, and under the established English precedents the view could be taken only "upon consent:" *R.* v. *Redman*, 1 Kenyon, 384; *R.* v. *Whalley*, 2 C. & K. 376; *R.* v. *Justices of Tradgeley*, Sess. Cas. 180.

The trial of criminal cases without a jury is a modern device and no common law practice in regard thereto is available except in so far as the common law as to jury trials may be applicable.

Some of the American decisions as to the practice of granting views by the jury may be here noted:—When there is an inspection of the scene of guilt, it must be shewn what changes, if any, have taken place since the guilty act: *State* v. *Knapp*, 45 N.H. 148. In most jurisdictions the jury may be taken to view the premises: *Com.* v. *Webster*, 5 Cush. 298; *Chute* v. *State*, 19 Minn. 271; *Fleming* v. *State*, 11 Ind. 234; *Doud* v. *Guthrie*, 13 Ill. App. 659, but the visit must be in the presence of the accused: *State* v. *Bertin*, 24 La. Ann. 46. See *State* v. *Ah Lee*, 8 Or. 214. The view may be granted after the Judge has summed up the case: *Reg.* v. *Martin*, L.R. 1 C.C. 378, 41 L.J.M.C. N.S., 113, 26 L.T.N.S. 778, 12 Cox C.C. 204. If a part of the jury are allowed to go by themselves to the view this is error: *Ruloff* v. *People*, 18 N.Y. 179; Wharton's Crim. Evid. 10th ed., sec. 797, p. 1555.

If a view of the property has been given to the jury, the results of it may properly be regarded as part of the evidence in the case. Chamberlayne on Evidence, sec. 2172; *Shoemaker* v. *U.S.* (1893), 147 U.S. 282, 13 S. Ct. 361, 37 L. ed. 170; *Re Guilford* (1903), 85 N.Y. App. Div. 207; *Wead* v. *St. Johnsbury R. Co.* (1894), 66 Vt. 420, 29 Atl. 631; *State* v. *Fillpot*, 98 Pac. Rep. 659, 51 Wash. 223.

Annotation (*continued*)—**Evidence** (§ V—511)—**Demonstrative evidence**—**View of locus in quo in criminal trial.** B. C. Annotation View in criminal trial

Allowing the jury to view the place where the alleged crime was committed, or where some fact or transaction material thereto occurred, being discretionary with the Court, where the premises have been thoroughly described in the evidence, it is not error to refuse defendant to have the jury take the view. This rule applies to capital cases, but in any case if the view is likely to mislead the jury it should be denied. 12 Cyc. 537.

The cases are divided upon the question whether the purpose of the view is to furnish new evidence or to enable the jurors to comprehend more clearly, by the aid of visible objects, the evidence already received. The latter proposition is well sustained and seems more consistent with the conservative theories on which the rules of procedure and jury trials are based, but the contrary theory, holding that the purpose of a view is to supply evidence, is supported by good authorities. 12 Cyc. 537.

The enlargement of the rights of Judges and magistrates sitting without a jury as regards the taking a view of the *locus* seems to be one which calls for legislative action.

HAINES v. MacKAY.

ONT. S. C. 1913 Jan. 24.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex.D., Riddell, Sutherland, and Kelly, JJ. January 24, 1913.

1. DISMISSAL AND DISCONTINUANCE (§ I—2)—INVOLUNTARY — FOR WANT OF PROSECUTION—ABSENCE OF INCURABLY INSANE WITNESS—WANT OF GOOD FAITH.

An action for criminal conversation is properly dismissed for want of prosecution, where plaintiff's counsel, after an undue delay, moved to postpone the hearing after the case had been reached for trial, on the ground that he was not prepared to proceed, and where he did not have witnesses ready who could prove a case, but desired to procure the evidence of plaintiff's wife, who was then in an insane asylum, but who, as it appeared by evidence of medical men from the asylum, was incurably insane and could never give credible evidence on the subject, and where the whole course of the plaintiff was indicative of want of good faith.

Statement

APPEAL by the plaintiff from the judgment of Leitch, J., dismissing an action for criminal conversation.

The appeal was dismissed.

D. O. Cameron, for the plaintiff.

No one appeared for the defendant.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—The statement of claim, delivered on the 18th December, 1911, alleges that "in or about the year 1905 the defendant did seduce, debauch, and have illicit connection with the plaintiff's wife . . . ;" and $50,000 damages are claimed. The defence is a simple denial.

The writ of summons was issued on the 18th September, 1911; and, after the action was at issue for some time, nothing

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was done to bring it to trial. On the 9th October, 1912, a motion was made by the defendant for an order dismissing the action for want of prosecution. The Master in Chambers made an order that particulars should be served within a time limited, certain costs paid, and the case set down for trial, or the action should stand dismissed. Particulars were served in time, which alleged the wrongful acts to have taken place in 1908 and 1909.

An examination for discovery of the plaintiff is said to have shewn that the date he must have intended to allege was 1907; and a new set of particulars was served on the 20th November, 1912, after the date fixed for serving particulars. No order was procured allowing these particulars nunc pro tunc, but the case was set down, and the costs already referred to paid.

At the trial before Leitch, J., at Milton, on the 2nd December, 1912, Mr. Cameron, counsel for the plaintiff, moved to adjourn the hearing. Counsel for the defendant argued that, by reason of the non-compliance with the Master's order, the case was not properly before the Court—that the action was dead. But he said that he was prepared to go on and fight out the action. The plaintiff's counsel then said (answering the objection of his opponent that the plaintiff could not amend his particulars):—

"Of course, he would have a right to amend; there is no doubt about that. I wanted to move to postpone the case, on the ground that we cannot get our witnesses here. Our main witness is undoubtedly the plaintiff's wife, and she is now in the Asylum at Toronto, and we think is of a good mind, and we had her served with a subpœna; and this morning my client obtains this letter from the Asylum authority (reads). We contend she is in good mind; and there are now in the court-room three doctors from the institution. I do not know how they came here. I suppose they are here to shew cause why this woman should not obey the subpœna that was served on her—two doctors from the asylum and Dr. Bruce Smith. Under the circumstances, I do not think we should be forced to go on."

Mr. Justice Leitch: "Do you think this charge ought to be held over this defendant for any length of time?"

Mr. Cameron: "It is a nasty thing, I admit, holding it over Mr. MacKay; but at the same time this plaintiff has a right to have a trial. It is not his fault that his wife is not here."

Mr. Justice Leitch: "She may be permanently insane."

Mr. Cameron: "No, she is not permanently insane. I do not think she is insane to-day. She is just in there on account of drink and of dope—nothing else. There are three doctors here to-day."

Mr. Justice Leitch: "You want to find out from them if she is insane?"

Mr. Cameron: "Yes; I want to put them in the box and ask if she is insane."

Mr. Justice Leitch: "Have you any objection to that?"

Mr. McEvoy (counsel for the defendant): "None whatever."

Evidence was then given by three medical men that the plaintiff's wife was incurably insane; that she would never be any better, having been in the Asylum since May, 1911. This evidence was given, of course, on the motion of the plaintiff to postpone.

Thereupon the following took place according to the reporter's notes:—

Mr. Justice Leitch: "Well, do you think any good purpose would be served by adjourning this case?"

Mr. Cameron: "Well, of course, this last witness says her memory would be good; and the other two doctors only say she had hallucinations. These last two witnesses both say the only hallucination she had was that about voices."

Mr. Justice Leitch: "Well, you cannot go on, can you?"

Mr. Cameron: "I do not see how we can. I would suggest adjourning to the winter assizes at Toronto. She may be all right by that time."

Mr. Justice Leitch: "With reference to your statement that she is a dope fiend and an alcohol fiend, what was she like when she made those charges?"

Mr. Cameron: "She was all right when she made those charges."

Mr. Justice Leitch: "In the face of that order that Mr. McEvoy has read, and in the face of the witnesses that you have called—Dr. Bruce Smith and Dr. Foster and Dr. Clair—in the face of all the evidence, I would not keep that charge hanging over any man."

Mr. Cameron: "I submit we are entitled to an adjournment."

Mr. Justice Leitch: "I will not adjourn it. If you want to try it, you must go on and try it."

Mr. Cameron: "Then, are these particulars of the 20th November properly delivered, or is the case dead except as to the particulars of 1907?"

Mr. Justice Leitch: "The particulars in compliance with the order were the particulars of 1907."

Mr. Cameron: "Well, the plaintiff abandons these particulars, and says that he and his wife were not in Toronto in 1907. I understand that the defence will be confined to the particulars that were delivered properly and in time."

Mr. Justice Leitch: "The evidence will be confined to the particulars dated the 7th November, 1912. Those were the particulars that were delivered in pursuance of the order; and those are the only particulars that are before the Court."

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Mr. McEvoy: "Then, on the examination for discovery it is admitted that there was no wrong-doing at that time; that the plaintiff's wife was in Owen Sound living; 98½ Denison avenue, the place where they resided, was in Toronto."

Mr. Cameron: "I admit the particulars we served were one year out; and we served them with amended particulars."

Mr. Justice Leitch: "No, I think there has not been a compliance with the order for particulars; and I will dismiss the action."

Mr. Cameron: "Had not your Lordship better wait till we give the evidence?"

Mr. Justice Leitch: "Well, you are not able to give evidence. I will dismiss the action with costs."

Mr. Cameron: "I suppose your Lordship will give us a grant of thirty days' stay?"

It will be seen that Mr. Cameron said that he did not see how he could go on; and that, when a suggestion was made to hear evidence, and the learned Judge said that the plaintiff was not able to give evidence, Mr. Cameron did not contradict the statement or offer any evidence or press that evidence should be taken.

Upon the appeal it was urged that my learned brother dismissed the action because there was no compliance with the Master's order; but this is clearly not so. The action was dismissed because the plaintiff's counsel did not produce evidence. What the learned trial Judge said was a challenge to counsel to produce evidence if he had it.

Counsel now says that he had at the trial eight witnesses who could have given evidence which he hoped would prove a case without the evidence of the plaintiff's wife. No such statement was made at the trial.

In view of what seemed to us the imperfect state of the evidence as reported, we asked the learned trial Judge what took place before him; and he informed us that he asked Mr. Cameron if he had any witnesses who could prove a case, and Mr. Cameron replied in the negative.

It is perfectly plain, even without this statement, that the case was not tried, but was dismissed, simply because the plaintiff did not tender or pretend to have witnesses who could prove a case.

We are not concerned to determine whether the learned trial Judge was right in his impression that only the charges in the first set of particulars could be gone into. This was not a ruling in the course of a trial. The proper course was for the plaintiff, if he desired a trial on the later charges, to tender his evidence formally and take a ruling thereupon, move to amend the particulars and have an express decision; bring the matter up clearly in some way and have it clearly decided.

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The course at the trial was: motion for postponement made by the plaintiff and rightly refused; and the plaintiff then, in effect, admitting that he had no evidence to prove a case.

The Court is always very loath to decide that a plaintiff is not to be allowed to develop any case he may conceive himself to have, or to punish a litigant for any mistake in practice, date, etc. But here the charge is an odious one. The woman alleged to have been seduced is a maniac on the subject of men having sexual intercourse with her, and can never give credible evidence on the subject. The whole course of the plaintiff is indicative of want of good faith; and I cannot but think that the lines must be drawn with some strictness.

I am of opinion that the appeal must be dismissed, but without costs, no counsel appearing to oppose the appeal.

A further fact should be added. Counsel for the plaintiff applied, before trial, to Mr. Justice Middleton for a habeas corpus ad testificandum for the plaintiff's wife. My learned brother did not dismiss the application; but told counsel that he should be furnished with some kind of evidence to shew that the woman could or might give evidence upon which the slightest reliance could be placed; and the application was not further proceeded with.

It seems quite clear that the whole proceeding at the trial was a sham on the part of the plaintiff.

Appeal dismissed.

GRAHAM CO., Limited v. CANADA BROKERAGE CO., Limited.

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Mar. 19.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 19, 1913.

1. SALE (§ III A—58)—TENDER OF SECOND SAMPLE—REFUSAL TO INSPECT.

The buyer is not entitled to withdraw from his contract on the ground that one box of merchandise (*ex gr.*, evaporated apples), forwarded as a sample was not satisfactory, where the contract of sale contained a stipulation that it was "subject to the approval of five boxes, when ready for shipment"; the buyer must still inspect and pass upon a shipment of five boxes forwarded for the approval of the buyer in accordance with the terms of the contract and if the buyer refuses even to inspect these shipments, on the ground that the rejection of the one box operated as a termination of the contract, the seller may re-sell the goods and recover damages.

[*Borrowman* v. *Free*, 4 Q.B.D. 500, applied.]

Statement

APPEAL by the defendants from the judgment of the Senior Judge of the County Court of the County of Hastings, in an action in that Court, in favour of the plaintiff for the recovery of $300 damages in an action for breach of contract.

The appeal was dismissed.

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Clute, J.

Shirley Denison, K.C., for the defendants.

M. Wright, and *W. D. M. Shorey*, for the plaintiffs.

The judgment of the Court was delivered by CLUTE, J.:—The plaintiffs, through their commission agents, Messrs. Anderson, Powis & Co., on the 31st August, 1911, sold to the defendants "600 50 lb. boxes of good primes, at 10c. per lb., f.o.b. Ontario shipping point; subject to approval of 5 boxes when ready for shipment; Belleville freight to apply; shipment first half of October; terms sight draft, documents attached."

On the 5th October, 1911, the plaintiffs wrote the defendants as follows: "Referring to the order which we have on our books for 600 cases evaporated apples for you, sold through Wallace Anderson, Toronto, we are sending you by express to-day sample case of evaporated apples, which we think will be a fair representation of the 600 cases we can ship you. Please advise immediately by return mail if these goods are satisfactory."

The defendants replied on the 7th October, 1911, in part, as follows: "We are in receipt of your favour of the 15th inst., also invoice for sample box of evaporated apples, representing 600 boxes, which we were to take subject to our approval of sample. We have opened this box, and must say that out of seven samples that we have here it is the worst of the lot. I immediately called up Mr. Williams of Wallace Anderson, and he is writing you to-day and will confirm what I say. We cannot accept the car."

In reply to this letter, on the 9th October, the plaintiffs wrote: "We have telephoned our Frankford branch to send you five cases by express to-day. Please wire us report on them to-morrow without fail; as, if not satisfactory, we will try and submit some goods from some other branch. We want to deliver exactly what we have sold."

To this the defendants replied on the 10th October as follows: "We are in receipt of your favour of the 9th inst., and are rather surprised that you are sending forward another lot of samples of evaporated apples, as samples had already been submitted and refused, which closes the transaction as far as we are concerned. We, therefore, have no interest in any further samples."

On the 13th October, the plaintiffs again wrote: "We are sending you by express to-day another five cases evaporated apples from Belleville, representing 600 cases, which we can load here to-morrow, subject to immediate reply by wire at our expense. We consider these choice goods, away above the grade which we sold you, and so sure are we that the quality is right that we are quite willing to ship them on any 'good prime' contract you may have anywhere in Canada and stand behind the

goods at their destination. Please reply by wire your decision early to-morrow morning regarding this order, and oblige."

The defendants replied on the 18th October: "We acknowledge receipt of your favour of the 13th inst., but we did not wire reply, as we have already advised you that we are not interested in further samples. Should we, however, be in the market later for evaporated apples, we would be glad to give you every opportunity, in fact would give you the preference. We return herein debit note for 10 boxes shipped, which are lying here to your order."

The defendants refused to examine either of the lots of five boxes each, sent by the plaintiffs, standing by the rejection of the first box, and insisting, as the correspondence shews, that the contract was off. The plaintiffs thereupon sold the lot, realising $300 less than contract-price.

It was not argued before us that the damages in the claim were unreasonable if the defendants were wrong in refusing to inspect either of the samples of the five boxes.

The first question is, whether the contract was varied between the parties, submitting one case for five. During the argument, I was rather impressed with the view that this was the effect of the correspondence between the parties; but, upon a closer examination of the letters of the 5th and 7th October, between the parties, I do not think they have this effect. The plaintiffs merely said: "We are sending by express to-day sample case of evaporated apples which we think will be a fair representation of the 600 cases we can ship you."

No doubt, if inspection had proved satisfactory, this sample might have taken the place of the five boxes, but the plaintiffs do not expressly ask that this should be done; nor do the defendants, in their reply, accept it as such; for all that is contained in this letter, they clearly had the right to ask for the five boxes.

The letters, in short, are not sufficiently definite to introduce a new term in place of the old, and substitute one box in lieu of the five. The fact that the defendants inspected the sample box sent does not necessarily imply that they thereby intended to treat that in lieu of the five boxes. They did, in fact, subsequently do so; but I mean that their mere act of inspection would not necessarily imply that that was their intention. They might very well say that the meaning of the plaintiffs' letter is, that, if they feel satisfied with this single box sample, they will fill the contract with goods of that class. But in the letters neither of the parties distinctly takes this ground, and the fair construction of the letters and what was done by way of inspection is, that the plaintiffs intended to reserve to themselves the right of formally sending the five boxes, in case the one box did not prove satisfactory.

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If this be so, as I think it is, then the defendants have wrongfully refused inspection under the contract; and, upon the plaintiffs proving, as they did to the satisfaction of the trial Judge, the loss incurred by them for such wrongful refusal, they are entitled to recover in damages. This view is sufficient for the disposition of this case.

But I also think that the view of the trial Judge on the authorities is correct, even assuming that the five first boxes sent must be treated as a second sample sent for inspection under the contract. Benjamin on Sale, 5th ed., p. 358, says: "But an appropriation and tender of goods, not in accordance with the contract, and in consequence rejected by the purchaser, is revocable, and the seller may afterwards, within the contract-time, appropriate and tender other goods which are in accordance with the contract."

Borrowman v. *Free*, 4 Q.B.D. 500: In this case, after the refusal of a tender of a cargo of maize, which the defendants refused to accept because the shipping documents were not tendered with it, and an arbitrator to which the matter was referred having decided that the tender was invalid, the plaintiffs, within the time limited, tendered a cargo of another shipment, which the defendants refused to accept upon the ground that they were not bound to accept any cargo in substitution for that of the first cargo. It was held that the defendants were bound to accept the tender of the second cargo and might be sued by the plaintiffs for any loss which the latter might have sustained through the refusal to accept it.

Without expressing any opinion as to the decision of the arbitrator, Bramwell, L.J., said:—

> The case may be shortly stated as follows: If the "Charles Platt" was a proper ship, the plaintiffs were entitled to tender her cargo; if she was not they were entitled to withdraw the tender, and instead of the cargo of the "Charles Platt" to offer that of the "Maria D."

Cotton, L.J., pointed out that,

> if there had been an election within the terms of the contract, it would have been binding upon the defendants. . . . The offer of the cargo of the "Charles Platt" was withdrawn, and the plaintiffs, as they were at liberty to do, offered another. It was said that if, after the cargo had been objected to, another had been immediately offered, the rule to be applied might have been different. I do not think so. A contract had been arrived at, which was acceptable to both parties, and it could not be altered without the assent of both parties.

In the present case there was no selection, within the time of the contract, of any particular lot. The contract was satisfied if, within the time, the plaintiffs tendered required sample which the defendants approved. I do not think the question of

election arises in this case. The plaintiffs were ready to comply with the terms of their contract, and the defendants refused inspection.

The plaintiffs were, therefore, entitled to recover damages for such refusal; and the appeal should be dismissed with costs.

Appeal dismissed.

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GRAHAM CO. v. CANADA BROKERAGE CO.

REX ex rel. WELLS v. GREEN.

MAN.

Manitoba King's Bench, Macdonald, J. February 6, 1913.

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Feb. 6.

1. SCHOOLS (§ III A—56)—OFFICERS—OBLIGATION TO CONVEY PUPILS TO SCHOOL—DISTANCE OF "FURTHER THAN ONE MILE."

Under a by-law, passed pursuant to sec. 91 (*a*) of the Public Schools Act, R.S.M. 1902, ch. 143, to the effect that trustees shall provide suitable arrangements for conveying to and from school "all pupils who would have further than one mile to walk in order to reach the school," the distance between the house where the school children live and the road over which the van provided by the trustees passed should be taken into account, and also the distance from the school gate into the school building.

Statement

APPLICATION by John Wells for a mandamus directed to F. C. Green, Archibald Wood, William C. McKinnoll, Dan Dicks and Thomas Campbell, trustees of the school district of Teulon to compel them to allow Wells' children to ride in the conveyance used by the trustees to take children to the school. The school trustees contended that Wells' house was two feet short of one mile from the school, and because of this shortage of two feet they refused to concede to his children the privileges extended by the Act. The fact seemed to be that the children were taken to the school by the conveyance provided by the school trustees up to the 22nd day of April, 1912, and after that the driver of the conveyance, Archibald Campbell, would not allow any of Wells' children into the conveyance, so they were compelled to walk to and from the school.

The evidence shewed that William C. McKinnoll, one of the trustees, was the unsuccessful candidate for the office of reeve of Rockwood at the election held in April, 1912. Wells supported John Polson, the successful candidate, and after the election was over the children were refused conveyance by the driver, although he sometimes carried persons not in attendance at the school, and parcels to and from the school for persons resident in the school district. The route of the conveyance was changed, the result being that two vans travelled over the same road for a distance of a mile.

Evidence was given by the applicant and other witnesses, that they had measured and chained with a proper surveyor's chain the distance which Wells' children would have to walk to

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reach the school and ascertained it to be a mile and three hundred and seventy feet.

The order for a mandamus was granted.

F. M. Burbidge, for applicant.

E. L. Howell, for school trustees.

MACDONALD, J.:—It is admitted that the school district has been legally created under the provisions of the Public Schools Act, R.S.M. 1902, ch. 143, and amendments thereto and that a by-law of the council was passed pursuant to section 91 (*a*) of the Act providing that the trustees shall provide suitable arrangements for conveying to and from school all pupils who would have further than one mile to walk in order to reach the school.

It is plain from the evidence before me that the children of John Wells, the plaintiff here, have been refused the enjoyment of the arrangements made and in a manner that clearly indicates ill-will towards Wells and anything but a desire to carry out the true spirit of the Act.

These defendants contend that Wells is two feet short of one mile from the school and because of this shortage of two feet they refuse to concede to his children the privileges extended by the Act. I cannot conceive men of reason actuated by any motive other than resentment and bad humour stooping to such smallness. But as a matter of fact the children of Wells would have to walk more than a mile from their home to get to the school; the contention of the defendants is that in a measurement of the distance from the school to the van route opposite the Wells home, the distance between the house and the road should not be counted, nor yet the distance from the school gate into the school building. Those distances omitted make the two feet short of the mile, but I cannot understand why those distances should be omitted. The wording of the Act is plain, "all pupils who would have further than one mile to walk in order to reach the school." How are the children going to get from their homes to the van route? Surely that distance must be taken into account.

I grant the order for a mandamus with costs against the defendants personally and not against the school district.

Order granted.

INDEPENDENT CASH MUTUAL FIRE INSURANCE CO. v. WINTERBORN.

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Jan. 24.

Ontario Supreme Court. Trial before Kelly, J. January 24, 1913.

1. PRINCIPAL AND AGENT (§ III—33)—INSURANCE AGENT—LIABILITY FOR NEGLIGENCE—FAILURE TO ADVISE INSURED OF RISK IN PROHIBITED CLASS.

An insurance agent is liable for the legally enforceable damages sustained by his company where he insured against a risk contrary to instructions given him by the company, by issuing an interim receipt to the insured, but where knowledge of this fact never reached the company until the loss was sustained; it appearing that the agent acted negligently and carelessly and without due regard to the interests of his principal.

[22 Cyc. 1437, 1438, specially referred to; *Connecticut Fire Insurance Co.* v. *Kavanagh*, [1892] A.C. 473, and *Stoness* v. *Anglo-American Insurance Co.*, 3 D.L.R. 63, 3 O.W.N. 494, referred to.]

2. PRINCIPAL AND AGENT (§ III—33)—INSURANCE AGENT—LIABILITY FOR NEGLIGENCE—BREACH OF DUTY—MEASURE OF DAMAGES.

The measure of damages in an action against an insurance agent by the company for loss on a risk which the agent insured contrary to instructions, and in reference to which he acted negligently and carelessly and without due regard to the interests of his principal, is the sum which the company was liable for under the policy and the premium paid to but not accounted for by the agent, but the company is not entitled to the sum paid out for costs of court or counsel fees in unsuccessfully defending an action brought by the insured under the policy in question.

Statement

ACTION against a former agent of the plaintiffs to recover the sum of $660.64 and interest, in the circumstances stated below.

Judgment was given for the plaintiff.

E. G. Porter, K.C., and *W. Carnew*, for the plaintiffs.

T. A. O'Rourke, for the defendant.

Kelly, J.

KELLY, J.:—The head-office of the plaintiff company is in Toronto. The defendant is an insurance agent residing in Trenton. At the time of the trial, he had twelve years' experience as such agent. In May, 1909, he was appointed by the plaintiffs their agent at Trenton; and if the statement in their letter of May 12th be correct, they then forwarded to him supplies such as forms, stationery, etc., and also an agency agreement in duplicate, one copy of which was to be signed by the defendant and returned to the plaintiffs, and the other to be retained by him. This agreement was not signed by the defendant; he denies that it ever reached him. From that time, however, he acted as the plaintiffs' agent; and he received from them blank forms of interim receipts issued in book form, which were to be used by him on his receiving applications for insurance.

In January and February, 1910, some correspondence passed between the parties with regard to the issue of insurance on grain separators; and the plaintiffs made it clear to the defendant not only by this correspondence, but through their sup-

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erintendent, that they would not entertain proposals for that class of risk.

On the 9th August, 1910, Jeffery & Dainard applied to the defendant for an insurance of $600 on their grain separator and attachments; and the defendant then issued to them an interim receipt on the printed form supplied to him by the plaintiffs. The premium for this insurance for one year from the 9th August, 1910, was therein stated to be $18. Of this amount, $8 was at that time paid by Jeffery & Dainard to the defendant. He says that on that date he took from them a written application for the insurance, and that without delay he forwarded it by post to the plaintiffs' head office. This communication, if sent, never reached the plaintiffs. On the 8th November, 1910, Jeffery & Dainard paid to the defendant $10, the balance of the yearly premium, and he endorsed a receipt therefor on the official printed interim receipt.

From the time when, as the defendant says, he forwarded the application to the plaintiffs, until May, 1911, no further communications passed between the plaintiffs and the defendant with reference to the insurance.

On the 19th May, 1911, the articles insured were destroyed by fire, and the insured applied to the plaintiffs, through the defendant, for a settlement of their loss. On being communicated with, the plaintiffs for the first time learned that the defendant had issued an interim receipt and accepted the premium from the insured. This in fact was the first knowledge they had of this insurance having been effected.

On or about October 11th, 1911, an inspector of the plaintiffs interviewed defendant at Trenton. Defendant says he then had in his possession a copy of the application and that he shewed it to the inspector, but cannot say whether the latter returned it. The inspector, on the other hand, says that he is not aware that he saw this copy in defendant's possession, and that he did not take it with him when parting with defendant. The latter cannot further account for it.

I mention this circumstance to draw attention to the defendant's evidence as to the unaccounted-for disappearance of important papers in this transaction—the agency agreement sent him from plaintiff's office, the application which he says he posted to the plaintiffs and which did not reach them, and the copy of the application which is not accounted for after the time he says he shewed it to the inspector.

About the end of 1911 the insured brought an action against the plaintiffs to recover the amount of their insurance—$600—and the plaintiffs paid them in settlement that sum and $17.64 costs of action.

The plaintiffs have brought the present action to recover

from the defendant $660.64 and interest, that is, the $617.64 paid to Jeffery & Dainard, $25 the plaintiffs' costs of defending Jeffery & Dainard's action, and the $18 premium received by the defendant and not accounted for.

With the knowledge that the plaintiffs would not issue insurance on the class of property offered by the insured, and being familiar with his duties as agent, the defendant accepted the application and the premium, and issued an interim receipt on the form intrusted to him by the plaintiffs. In view of the evident carelessness of the defendant and the plaintiffs' denial of the receipt of the application, I find difficulty in accepting the statement that the application was sent to the plaintiffs.

The evidence of defendant's carelessness in dealing with these important matters (and part of this evidence is given by himself) may well suggest that he overlooked forwarding it. Moreover, he sent no further communication to the plaintiffs about this application, and admits that in the usual course of dealing the policy should have reached him within a reasonable time; not receiving it, he made no further enquiry and took no further interest in the matter except to receive from the insured in November (three months after the application was made) the balance of the premium for the whole year.

A suggestion was made that the interim receipt was valid for thirty days only from the time of its issue. The blank in the printed form at the foot of the receipt, which is intended to limit the time for which it would afford protection to the insured, was not filled in; and Jeffery & Dainard may well have thought that there was no question of limiting the time, especially as the defendant treated the insurance as being in force, and accepted the balance of the premium months after the application was made.

On the 1st June, 1911, the defendant wrote to the plaintiffs, expressing regret that "carelessness and absence of method on my part, principally owing to the pressure of other and outside business, have caused you so much trouble and me so much anxiety." And, later on, he says: "As to the premium, that was paid, at least to me; and if it was not paid to you, which, I think, under the circumstances, was quite likely, that was my fault, and not that of Jeffery & Dainard, and it is still owing to you by me." He then proceeds to explain that owing to the work and responsibility resting upon him in connection with his other business, "it will not be at all difficult for you to understand how easy it would be for such a matter as an interim receipt, or a premium, or a policy to slip altogether from the memory." He adds, "please remember that Jeffery & Dainard were certain they were insured, they paid their premium and got their receipt"; and he goes on to say that he is willing to

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acknowledge that he has acted thoughtlessly and carelessly, and expresses himself as being "quite sure you will deal mercifully and leniently with me and generously to my clients."

Without going more fully into the details, it is clear to me that the defendant acted negligently and carelessly and without due regard to the interests of his principals, the plaintiffs, to such an extent as to render him liable.

As to the effect of the issue of the interim receipt, reference may be made to *Stoness* v. *Anglo-American Insurance Co.*, 3 D.L.R. 63, 3 O.W.N. 494, 886.

The question of the liability of an insurance agent is considered in 22 Cyc. 1437, where it is stated that the agent must respond in damages for any breach of duty arising out of his relations as agent which has resulted in injury to the company; and in support of that proposition is cited *Connecticut Fire Insurance Co* v. *Kavanagh*, [1892] A.C. 473.

If the agent violates instructions as to the class of risks which he is to insure, and thereby renders the company liable for a loss on a risk which would not have been accepted had the instructions been observed, the agent will be liable to the company for the amount of loss which it has been compelled to pay on account of such risk: 22 Cyc. 1437, 1438.

But the plaintiffs could have avoided incurring the costs of the action brought by the insured against them.

Judgment will be in favour of the plaintiffs for $600 and interest thereon from the 10th January, 1912, and also for the $18 premium received by the defendant and not accounted for, and interest thereon from the 8th November, 1910, and the costs of this action.

Judgment for plaintiff.

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NIAGARA AND ONTARIO CONSTRUCTION CO. v. WYSE and UNITED STATES FIDELITY AND GUARANTY CO.

Ontario Supreme Court. Trial before Middleton, J. March 20, 1913.

1. BONDS (§ II A—9)—FOR INDEMNITY AND SECURITY — CONTRACTOR'S BOND.

Where a guaranty company entered into a bond which was conditioned that a sub-contractor would "well and faithfully in all respects perform, execute and carry out the said contract," and recited that annexed to the bond was a copy of the contract in question, which, however, did not contain some slight alterations made on the final revision of the contract as re-executed by the parties after the date of the bond, the guaranty company are not relieved from liability if the words inserted do not alter the meaning of the contract in any way, since the guaranty company was not prejudiced by an immaterial alteration.

[*Tolhurst* v. *Portland Cement Manufacturers*, [1903] A.C. 422; *Harrison* v. *Seymour*, L.R. 1 C.P. 518; *Croydon, etc., Co.* v. *Dickinson*, 2 C.P.D. 46, referred to.]

2. PRINCIPAL AND SURETY (§ I B—11)—WAIVER OF CLAIMS—RELEASE OF SURETY.

A waiver of a claim for damages which may arise out of delays or interruptions in the performance of a contract does not constitute any material change in the contractual obligations of the parties, or enlarge the liabilities of the surety, so as to operate as a discharge of the contractor's surety.

3. PRINCIPAL AND SURETY (§ II—15)—RIGHTS AND REMEDIES OF A SURETY —CREDIT FOR ALLOWANCES WAIVED.

Where a person under bond for the performance of work waives any claim for an allowance arising out of the contract, his surety will be entitled, on the taking of the accounts, to credit for the amount voluntarily released.

4. PRINCIPAL AND SURETY (§ II—15)—CONTRACTOR'S BOND—ADVANCES TO ASSIST COMPLETION OF CONTRACT.

Where a sub-contractor has completed his work and performed his contract with the assistance of advances made him by his head contractor, the latter cannot recover these advances from the surety of the sub-contractor who entered into a bond conditioned for the due performance of the work, such being beyond the conditions expressed in the bond; if, however, the head contractor had completed the work on his own account upon the sub-contractor's default and charged the cost thereof against the sub-contractor deducting from this amount the sums due under the contract, the surety would still be liable, provided notice as required by the contract had been duly given to the surety.

[*Cadwell* v. *Campeau*, 3 D.L.R. 555, referred to.]

Statement

ACTION by a contracting company against a sub-contractor and his sureties, for breach of contract.

W. N. Tilley, and *A. W. Ballantyne*, for the plaintiffs.

R. McKay, K.C., and *W. B. Milliken*, for the defendant guaranty company.

The defendant Wyse appeared in person.

Middleton, J.

MIDDLETON, J.:—This action arises out of the construction of the Hydro-Electric transmission line. Wyse, it is said, failed to perform his sub-contract, and this action is brought upon the bond given to the plaintiffs.

A number of defences are raised.

First, it is said that the contract between the plaintiffs and Wyse was, after the execution of the bond sued upon, altered without the consent of the sureties, and that this alteration operates to discharge the sureties.

After the bond had been arranged and settled, engrossments were made for the purpose of execution by Wyse. Wyse arranged with the defendant guaranty company to become his sureties, and furnished them with a copy of the unsigned agreement. The bond in question was then drawn and executed—the condition reciting that Wyse has entered into the written contract hereto annexed, and the condition is, that he shall "well and faithfully in all respects perform, execute, and carry out the said contract."

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Wyse, after executing the contract, sent it and the bond to the plaintiffs. Mr. C. L. de Muralt, the chairman of the directors of the plaintiff company, who acted for them throughout in the transaction, compared the executed copies and the draft, with the result that he discovered some minor errors in the preparation of the copies signed—probably arising from the omission to insert words added upon its revision. He thereupon wrote Wyse, sending him four new copies prepared from the draft, including the added words, asking him to execute these instead of the four copies which had been forwarded—undertaking that the plaintiff company would execute them as soon as they received the copies executed by Wyse. He added: "You may consider the contract as existing between us as soon as you have executed the four copies and mailed them to us." Wyse in due course executed and mailed the four copies; and the plaintiff also executed them.

The bond executed by the sureties is dated the 19th February, 1909. The copy of the contract annexed is dated the 15th February, 1909. The contract actually executed bears date the 15th February, 1909, but was not in fact executed until after Mr. de Muralt's letter above referred to, which bears date the 24th February. The argument presented for the defendants is not based upon the fact that the contract had not been executed at the date of the bond, but upon the fact that the surety bond embodies in it, by reference upon its face, the contract as originally executed by Wyse; and that the plaintiff's endeavour is, to use the words of Lord Robertson, *Tolhurst* v. *Portland Cement Manufacturers*, [1903] A.C. 422,

> the old and oft-rejected argument that a man can be forced to do something which he never agreed to, merely because it is very like and no more onerous than something which he did agree to.

It is said, and rightly said, that the surety became surety on the faith of the contract attached, and that by the contract of suretyship the terms of the original contract had become embodied in it; that any variation will discharge the surety; and that to hold the contrary would be to impose upon the surety a contract he did not in truth make.

The answer to this contention is, I think, obvious when the nature of the alterations is considered. They both occur in one short clause of the contract, and consist in the insertion of the words italicised. "The parties of the second part shall, *before doing any work*, submit for the approval of the Commission's engineer samples of all materials to be used; and the party of the second part shall place his order for all materials in time to avoid delays *in the progress of the work* on this account."

This clause is, I think, a separate and independent obligation

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undertaken by the contracting party. He contracted to do the work; and for this the sureties are responsible. He has contracted, before doing the work, to submit samples; and for this also the sureties are to be responsible. If the words constitute an alteration in the contractual relationship between the parties, they would operate to discharge only in so far as the plaintiffs claim on account of a breach of the second of these two obligations. See *Harrison* v. *Seymour*, L.R. 1 C.P. 518; *Croydon, etc., Co.* v. *Dickinson*, 2 C.P.D. 46.

Beyond this, I think the words inserted do not in any way alter the contract. I think it would be implied that the samples were to be submitted before the work was done; and the second set of words added—"in the progress of the work"—do not, I think, change the meaning of the sentence in any degree.

If it be of any importance, and if it be a question of fact, as I think it is, then I find that the alterations made in the contract are in no way material and could in no way prejudice the sureties.

For these reasons, I think, this objection fails.

The second objection is also based upon an alteration of the contract.

On the 14th April Wyse wrote a letter to the plaintiffs:—"I understand and accept your letter of April 1st as an order to proceed with the work, and hereby agree that you are not to be held responsible by me for any delays or interruptions arising over the matter of right of way or by reason of any action on the part of the Hydro-Electric Power Commission or the McGuigan Construction Company (the principal contractors) resulting in stoppage or delay of the work."

This, it is said, constitutes an agreement by which the contract is materially varied. It is said that by this arrangement Wyse undertook to do the work not in accordance with the provisions of his contract—which entitled him to proceed to completion upon a waiting right of way—but upon an uncompleted right of way, which might occasion the shifting of the construction camps and their return at great expense; and that, the sureties not having been consulted, they are discharged.

Having regard to the terms of the contract between Wyse and the plaintiffs, I do not think that this constitutes any change in his contractual obligation, or in any way enlarges the obligation of the sureties. The plaintiffs were entitled to give notice at any time. Wyse simply waives any claim against them for damages, if they gave him notice at a time which was convenient to him.

I do not find anything in the contract imposing any such liability upon the plaintiffs. The default in the preparation of the right of way was not their own, but was the Commission's

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or the McGuigan Construction Company's; and the letter was, in my view, demanded entirely through overcaution on the part of the plaintiffs' manager.

Moreover, I should not regard the releasing of any possible claim by Wyse with respect to this one matter as such an alteration of the contract as would discharge the surety. If Wyse, on the contract, could have any claim for an allowance waived by him, then the sureties' right would be to have the amount which he voluntarily released credited upon the taking of accounts.

I was told by counsel that whatever delay was occasioned by the failure of the Commission to have its right of way ready in time was compensated for by an allowance credited to Wyse; so that, in fact, the sureties had sustained no damage.

The third matter to be dealt with is one of far greater importance and difficulty. It is said that there is no default under the bond. The contract was for the construction of the work by Wyse. The bond was for the due performance of this contract. It is said that the work was constructed by Wyse; that he has performed his contract; and that, therefore, there can be no liability. It is said that the plaintiffs have not been damnified by any default of Wyse in that which he undertook to do. The McGuigan Construction Company have advanced moneys to Wyse to enable him to complete his work, and they seek to recoup themselves out of the moneys payable to the plaintiffs in respect to this work. They may be so entitled, by virtue of the terms existing between them and the plaintiffs; if so, this is something against which the sureties did not undertake to indemnify.

I have come to the conclusion that this argument is well-founded, in so far as it is applicable. I do not see how the payments withheld by the McGuigan Construction Company from the plaintiffs, to recoup themselves for advances to Wyse, which were made to enable him to complete his contract, can be placed in any higher position than advances made by the plaintiffs themselves for the like purposes. In either case, they do not fall within the letter of the bond.

The plaintiffs rely upon the clause at the end of the general conditions, providing that, before payment is made upon the final certificate, the contractor shall furnish satisfactory evidence that he has paid for his labour and material. Even if this clause can be carried into the contract, as referring to the obligations between the plaintiffs and defendant, it has at most no greater effect than to make the proof of payment for labour and material a condition precedent to the right to obtain payment under the contract. The mere default in paying for labour and material is not the thing stipulated in the bond, which is performance and carrying out of the contract and its condition. . . .

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This question is not entirely unlike that which arose in *Cadwell* v. *Campeau*, 3 D.L.R. 555, 21 O.W.R. 263. There, one surety, for the purpose of avoiding default on the part of the contractor, made advances to him. This inured to the benefit of the co-surety, as it enabled the contractor to complete the work and prevented the making of any claim by the owner. It was held that this did not give a right to contribution, as the bond was for the due construction of the work.

The facts relating to the completion of the work here are not fully developed. It appeared that $2,000 was withheld to answer the completion of the work. It also appeared that this sum was entirely inadequate. If my memory serves me rightly, it did not appear whether the work which had to be done to complete was in fact done by Wyse or by the McGuigan Construction Company and charged up to Wyse. If the work was done by that company and charged up to Wyse and the amount deducted from the money coming to the plaintiffs, this will be within the terms of the bond; and, provided notice was duly given, the plaintiffs will be entitled to recover.

Owing to the lack of definite information, I am not able to deal with the question of notice. If the plaintiffs desire to have a reference to ascertain what sum, if any, can be recovered under the above finding, this question will be open upon a reference.

At the hearing it was arranged that, if I thought there was liability upon the bond, judgment should be entered for the penalty, and the case be referred to ascertain the sum for which execution should issue. I am not sure, in view of the doubt upon the evidence whether there is anything which the plaintiffs are entitled to recover, that this can be done; but the result can probably be accomplished by inserting appropriate declarations embodying the views expressed.

Costs should be reserved until the final result is known.

Judgment accordingly.

CITY OF PRINCE ALBERT v. CANADIAN NORTHERN R. CO.

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Saskatchewan Supreme Court. Trial before Brown, J. February 6, 1913.

1. TAXES (§ III D—136)—ASSESSMENT—CORRECTION OF ROLL.

An assessment of taxes by a city corporation is not invalid though the provisions of sec. 281 of the City Act R.S.S. 1909, ch. 84, providing that before the notices are sent out the assessment roll must be checked over by a committee consisting of the assessor and two members of the council, were not complied with, if the roll was finally passed by the council as provided in sec. 298 of that Act, to the effect that the roll as finally passed by the council shall be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll.

[See the amended sec. 281 of the City Act, Sask. Stat. 1912, ch. 26, sec. 17.]

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2. JUDGMENT (§ II D 4—127) — EFFECT AND CONCLUSIVENESS — REVIEW OF TAXATION—SUBSEQUENT ACTION FOR TAXES.

In an action by a city corporation against a railway company for the recovery of taxes assessed against certain property belonging to the company within the city limits, the company may set up as a defence the exemption privilege provided in sec. 14, ch. 40, R.S.S., notwithstanding an unsuccessful appeal by them from the assessment to the Court of Revision and the dismissal of a subsequent appeal to a judge of the district court on this very ground.

[See *Nickle* v. *Douglas*, 37 U.C.Q.B. 51.]

3. TAXES (§ I F 2—84)—EXEMPTIONS—RAILWAY PROPERTY.

The exemption privilege given to railways under sec. 14, ch. 40, R.S.S. 1909, providing that the railway and the land comprised in the right-of-way, station grounds, yards and terminals, and all buildings, structures and personal property used for the purposes of the operation of a railway shall be free and exempt from taxation, does not apply to arrears of taxes which were a charge on the land in question before it was purchased by the railway company, nor to assessments for local improvements made on the land.

4. TAXES (§ I F 2—84)—EXEMPTIONS—RAILWAY PROPERTY NOT IN USE AS SUCH.

The exemption privilege given by sec. 14, ch. 40, R.S.S. 1909, to railway companies may be claimed by a railway company on land having a maximum area of one mile in length by 500 feet in width, which amount of land they are allowed to expropriate under sec. 177 of the Railway Act of Canada for stations, depots, yards and other structures for the accommodation of traffic, even though the land in question is not actually used or immediately needed for railway purposes, and whether the land had been obtained by expropriation proceedings or by voluntary sale or otherwise; and to exempt a further area the railway must shew that the additional land is necessary for the purposes set out in sec. 177 of the Railway Act.

5. TAXES (§ I F 2—84)—EXEMPTIONS—LIMITATION AS TO RAILWAY PROPERTY.

A railway company is not entitled under the statute R.S.S. 1909, ch. 40, to an exemption from taxation on land in excess of the area they are allowed to expropriate under sub-sec. (*a*) of sec. 177 of the Railway Act of Canada, giving them the right to take for right-of-way land 100 feet in width and under sub-sec. (*b*) giving them the right to take for stations, yards and other structures for accommodation of traffic an area one mile in length by 500 feet in breadth, including the width of the right-of-way, unless they shew that the additional area is necessary for the purposes set out in sub-sec. (*b*); such necessity will be presumed if the additional area was obtained by permission of the Railway Board as provided in sec. 178 of the Act, but not otherwise.

6. EMINENT DOMAIN (§ I D 2—37)—RAILROADS—EXPROPRIATION FOR RAILWAY YARDS.

Under the provisions of sec. 178 of the Railway Act of Canada, R. S.C. 1906, ch. 37, giving the Railway Board the right to give a railway company permission to take more land for railway purposes than they are entitled to take under sub-sec. (*b*) of sec. 177 of the Act, providing that there may be taken for stations, depots, etc., an area one mile in length by 500 feet in breadth including the width of the right-of-way, if such additional land is shewn to be "necessary," the word "necessary" should be given a liberal construction. (Dictum *per* Brown, J.)

7. EVIDENCE (§ II D—127)—BURDEN OF PROOF—EXEMPTIONS.

In an action against a railway company for recovery of taxes assessed against their property by a city corporation, where the company claims an exemption from taxation under sec. 14, ch. 40, R. S.S., the burden of proving such exemption is upon the railway company.

THIS is an action brought for the recovery of taxes assessed in the year 1911 against certain property belonging to the defendants and situated within the limits of the plaintiff corporation.

Judgment was given ordering a reference.

A. E. Doak, for plaintiffs.

C. E. Gregory, K.C., and *J. H. Lindsay*, for defendants.

BROWN, J.:—The evidence shews that the assessor who made the assessment in 1911 completed the roll, checked it over, and sent out the notices himself, without the intervention of any members of the council. It is objected that under sec. 281 of the City Act it is provided that before the notices are sent out the roll must be checked over by a committee consisting of the assessor and two members of the council, and, this not having been done, the assessment is invalid and the defendants are relieved from payment. The roll was finally passed by the council as provided for in sec. 298 of the City Act. That section provides that the roll as finally passed by the council shall be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll. I am of opinion that in view of this provision the objection taken cannot be upheld, and that in any event the objection cannot be taken by way of defence to an action brought for the recovery of taxes.

The main ground on which the defendants rely in denying liability is that the property is exempt under the provisions of sec. 14, ch. 40, R.S.S. The defendants appealed against the assessment to the Court of Revision and, again, to a Judge of the District Court, on this very ground, but their appeal was dismissed. It is admitted by counsel for the plaintiffs that notwithstanding such appeal and such dismissal the defendants have the right to set up the same ground by way of defence to this action, and I think such admission on the part of counsel was quite proper. See *Nickle* v. *Douglas*, 37 U.C.Q.B. 51. There was some objection, too, that the plaintiffs by their statement of claim seek to recover only for the taxes of 1911, and that, as the evidence shews that a large share of the taxes which go to make up the totality of the plaintiffs' claim are arrears, such arrears should not be allowed. The heading over the column which gives the particulars of taxes in the statement of claim reads, "Total Taxes and Arrears," and in view of this I think the defendants could not have been misled, and that the claim as it stands is sufficient for the purpose. It appears that a portion of these arrears are taxes that stood against the lots when the same were purchased by the defendants. It also appears that a portion of the taxes is for local improvements.

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The exemption privilege claimed under sec. 14 aforesaid is of course no defence as against such arrears and such local improvement taxes and they at all events must be paid. Section 14 aforesaid provides that the railway and the land comprised in the right of way, station grounds, yards and terminals, and all buildings, structures and personal property used for the purposes of the operation of a railway shall be free and exempt from taxation. The defendants contend that the property in question is exempt as being comprised in the right of way, station grounds, yards, and terminals of the railway. On the other hand, the plaintiffs say that none of this property is actually used by the railway for such purposes, and until it is so used it is not exempt. Sec. 177 of the Railway Act of Canada, and a similar section contained in our Provincial Railway Act, provide what land a railway company may expropriate for right-of-way and for stations, yards, etc. Under sub-sec. (*a*) of sec. 177 there may be taken for right-of-way land 100 feet in breadth, and under sub-sec. (*b*) of sec. 177 there may be taken for stations, depots, and yards, with the freight sheds, warehouses, wharves, elevators, and other structures for the accommodation of traffic incidental thereto, an area one mile in length by 500 feet in breadth, including the width of the right of way. Under sec. 178 of the same Act it is provided that should the company require more ample space than that provided for under sec. 177 it may apply to the Railway Board for permission to take such additional property without the consent of the owner. Thus the company may take for stations, depots, yards, etc., an area of land one mile in length by 500 feet in breadth, and if they need it they may take more by permission of the Railway Board. It is evidently contemplated that an area one mile in length by 500 feet in breadth is not too much for a company to take and hold for such purposes wherever they have a station and yards, but if they want to take more than that they must satisfy the Railway Board that they require it. I am of opinion, therefore, that under sec. 14, ch. 40 aforesaid, the company could hold as exempt from taxation an area up to one mile in length by 500 feet in width, and that the same would be exempt even though it was not actually used or immediately needed for railway purposes, and that it would be exempt whether obtained by expropriation proceedings under the Act, or by voluntary sale, or otherwise. I am further of opinion that to exempt any larger area than that it must be shewn that the additional area is necessary for the purposes as set out in sub-sec. (*b*) of sec. 177 aforesaid. If such additional area were obtained, under sec. 178, by permission of the Railway Board, it would be presumed that it was necessary. On the other hand, if obtained otherwise, it must be shewn to be necessary. In this case there is

nothing to shew how it was obtained. A plan was put in by the defendants shewing the location of the railway tracks and the property in question. This plan is supposed to scale 200 feet to the inch, and yet there are lots marked as being only 122 feet in length which scale over an inch, and I am therefore of opinion that the plan is not accurate and not a very safe guide. However, allowing for inaccuracies in the plan, it is clear that the area claimed as exempt for station yards, etc., and which, of course, includes much property in addition to that referred to herein, far exceeds one mile in length and far exceeds 500 feet in width. In this case, therefore, the defendants must shew that the property which they claim as exempt is in the right of way or is necessary for the purposes as set out in sub-sec. (*b*) of sec. 177. In deciding what is necessary for the purposes of sub-sec. (*b*) it seems to me that a liberal construction should be given to the word "necessary." The Railway Act contemplates that the company, in providing these facilities for traffic, should see that they are good and sufficient, that is, good and sufficient for the purposes for which they exist, and which must include the convenience of the public. The mere fact that a track is not laid across a lot does not say that such lot is not necessary for the purposes set out in sub-sec. (*b*). If the lot or lots are necessary to the approach to the station or a warehouse, etc., or are necessary for the purpose of loading or unloading a car, for example, they would be exempt. Again, the mere fact that part of a lot is necessary for the company's purposes would not exempt that part which is not necessary. Likewise, a lot which is partly in the right of way would not be exempt as to that part which is not in the right of way. I might also point out that the mere fact that some of the lots are occupied by third parties does not of necessity make such lots subject to taxation. If such occupation by way of warehouse or otherwise is reasonably necessary for traffic facilities, it is within the contemplation of sub-sec. (*b*).

I have thus tried to lay down the general principles upon which the taxation in this case should have proceeded; and these principles, of course, will be applied to the facts as they existed at the completion of the assessment roll for 1911. Under the evidence submitted at the trial it is quite impossible for me to properly apply those principles to all the property in this case, and it will, therefore, be necessary to refer the matter to the local registrar at Prince Albert. It may be that in view of what I have herein laid down the parties can agree as to the taxes to be paid, but if within thirty days such an agreement is not arrived at, the action is referred to the local registrar to take evidence on the question as to what property is exempt, and the burden of proof in deciding this question shall be on the defendants. The

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local registrar will make his report thereon, and will report also as to the amount due the plaintiffs under their claim. Either party will have leave to myself or a Judge in Chambers to review such report and for further directions. The question of costs will be reserved, to be disposed of by the Judge to whom such further application is made.

Reference ordered.

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Feb. 3.

THE MINOT GROCERY COMPANY v. DURICK et al.

Saskatchewan Supreme Court. Trial before Brown, J. February 3, 1913.

1. CORPORATIONS AND COMPANIES (§ VII C—376)—FOREIGN COMPANIES — RIGHT TO SUE — FRAUDULENT CONVEYANCE OF LAND IN DOMESTIC LAW DISTRICT.

Where the action is not in respect of any contract made in whole or in part in Saskatchewan, a foreign company may maintain an action on behalf of itself and all other creditors to set aside as fraudulent certain conveyances made by the debtor of real estate situate in Saskatchewan, though the plaintiff company is not registered under the Foreign Companies Act, R.S.S. 1909, ch. 73, so as to confer upon it the right to do business in that province.

2. CONFLICT OF LAWS (§ I G—125)—RIGHTS IN PROPERTY GENERALLY—LEX SITUS—LANDS—FRAUDULENT CONVEYANCE.

An action by creditors to set aside as fraudulent certain conveyances by debtors of land situate within a province is governed by the laws of the province where the land is situated and all creditors, no matter where they reside, are entitled to the benefit of that law; except where otherwise expressly prescribed by statute.

3. DEPOSITIONS (§ III—12)—OBJECTION AS TO REGULARITY—TIME TO TAKE—INSCRIPTION IN SHORTHAND.

Where evidence taken under commission outside of the jurisdiction has been inscribed in shorthand without authority therefor in the commission order or otherwise, an objection on that ground alone will be overruled, where no such objection was raised upon the examination but is taken for the first time at the trial. (Dictum *per* Brown, J.)

4. EVIDENCE (§ I C—22)—JUDICIAL RECORDS AND DECISIONS—BANKRUPTCY ORDERS PROVABLE BY REFEREE INSTEAD OF BY SEAL OF COURT, WHEN.

An order of adjudication and an order of reference made in foreign bankruptcy proceedings are properly authenticated for use in evidence in Saskatchewan, although instead of being certified under the seal of the foreign court they are certified under the hand of the referee in bankruptcy, where it appears that the orders in question are, during the bankruptcy proceedings, kept continuously in the custody of the referee to whom they must be forwarded by the clerk of the bankruptcy court under the foreign law. (Dictum, *per* Brown, J.)

Statement

ACTION by the plaintiffs on behalf of themselves and all other creditors of defendant William Durick to set aside as fraudulent certain conveyances.

Judgment was given setting aside the transfers.

J. A. Allan, for plaintiffs.

W. B. Willoughby, for defendant Frank Durick.

BROWN, J.:—The plaintiffs are a foreign company, doing business at Minot, in the State of North Dakota. The defendants William Durick and F. A. Nye are merchants, and formerly carried on business at Columbus, in the same State, under the name of "Durick and Nye." The defendant Frank Durick is a farmer, and resides near Estevan, in this province.

The firm of Durick and Nye began doing business with the plaintiffs in the year 1906, and continued business relationships until July, 1911, at which time the plaintiffs' account stood at the sum of $1,726.59. At that time, and for some time previous thereto, William Durick was the registered owner of two quarter sections of land situate in this province, namely, the south-west quarter of section 20, township 1, range 7, west of the 2nd meridian, and the south-west quarter of section 5, township 1, range 7, west of the 2nd meridian. A large portion of this land was under cultivation, and it had been agreed that the proceeds of the crop on this land in 1911 should be turned into the business and applied in reduction of the plaintiffs' account, as the firm of Durick and Nye were at that time in straitened circumstances. On July 27, 1911, O. M. Pierce, the treasurer of the plaintiff company, visited the place of business of Durick and Nye at Columbus, and there saw Nye and discussed with him the necessity of reducing the account, and also discussed the prospects of the crop on the land in question. William Durick was at the time on the land looking after the farming operations there. Pierce was desirous of seeing the crop, and he and Nye on that day autoed to the land, it being situate a comparatively short distance from Columbus. Frank Durick's farm was situated close to the land in question, and he and William Durick being brothers assisted each other in their farming operations. On the day of Pierce's visit, both William and Frank Durick were there, and Pierce, after seeing the crop, expressed the belief that if the same was put in the business there would be sufficient to take care of the plaintiffs' account. After Pierce and Nye left, and on the same day, it was arranged between William and Frank Durick that William should transfer the land, including the crop, to Frank, and on the following day they went to Esteven and had the transfer drawn up and executed, and in due course certificates of title issued for the land in the name of Frank Durick, and still remain in his name.

The plaintiffs bring this action on behalf of themselves and other creditors to have these transfers set aside as fraudulent. The firm of Durick and Nye and the defendants William Durick and F. A. Nye individually were adjudged bankrupts by the law of North Dakota on December 20, 1911, and the evidence is clear that unless the land in question is available for the creditors their claims cannot be realized.

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Brown, J.

I have no hesitation in finding that the transfers were made, both on the part of William and Frank Durick, in fraud of the plaintiffs and the other creditors of Durick and Nye.

The transaction is simply reeking with fraud, so much so that it is not necessary that I should give reasons in particular for making such a finding. The defendants William Durick and F. A. Nye did not defend the action; but counsel on behalf of Frank Durick, who did defend the action raised a number of objections which are, in my judgment, of such an insubstantial character that they scarcely require serious consideration. I will, however, deal with them.

It is objected that service of the concurrent writ on the defendants William Durick and F. A. Nye outside the jurisdiction is irregular, in that such service was made before the service of the writ on Frank Durick, in contravention of sub-sec. 7, rule 23 of the Rules of Court. In this case the writ was clearly issued under sub-sec. 2 of rule 23, and in any event Frank Durick cannot take advantage of any irregularity in the issue or service of the writ on the defendants William Durick and F. A. Nye.

It was objected that the evidence of the witnesses Havel, Lewis, and Bryans, which was taken under commission at Minot, is not admissible because it was taken down in shorthand, whereas there is no authority in the order to have it so taken. The practice of having the evidence taken down by a shorthand reporter is almost invariably followed, and is one which, both for the sake of convenience and accuracy in report, should be encouraged. It was not objected to by counsel at the time of the examination, and therefore cannot be objected to now.

The admissibility in evidence of the order of adjudication and the order of reference made in the bankruptcy proceedings is objected to on the ground that the certified copies tendered in evidence should be under the seal of the Court, whereas they are under the hand of the referee in bankruptcy only. According to the evidence of Mr. Twiford, an attorney-at-law practising at Minot, and who gave evidence at the trial, it is the Referee in bankruptcy who has the custody of these orders; they are forwarded to him by the clerk of the Court, and remain in his possession during the bankruptcy proceedings. His certificate would, under the circumstances, be sufficient. I am inclined to the view that the list of creditors, and the evidence of William Durick and F. A. Nye, given in the bankruptcy proceedings, are not admissible in evidence at this trial, but it is not necessary that I should more than express my opinion to that effect, because this evidence is quite immaterial. There was ample evidence given at the trial, apart altogether from the evidence taken under commission, and the exhibits connected

therewith, to justify a finding in the plaintiffs' favour on all questions material to this case.

It is objected that the plaintiffs are a foreign company and are not registered in this province, and in consequence have no right to bring this action. In view of the fact that they are not registered in this province they, of course, cannot do business in this province, but they are not seeking to do business when they bring this action. In seeking the relief which they now claim they are in no way violating any of the provisions of the Foreign Companies Act, and are therefore quite within their rights.

It is further objected that, as the plaintiffs are a foreign company, and the defendants William Durick and F. A. Nye are resident in the United States, and as all the debts of Durick and Nye were incurred in the United States, and all their creditors are resident in the United States, that the defendant William Durick had a right to do as he saw fit with this land, which is situated in Saskatchewan, and that this Court had no right to interfere. No authority was cited in support of this contention, and I fail to see the force of it. I can quite understand how the Courts in North Dakota would find themselves helpless under the circumstances, as they have no jurisdiction over land situate in this Province, but the Saskatchewan Court is the one that has jurisdiction, and the mere fact that the debtors and creditors are resident, and that the debts were incurred, without the jurisdiction, is to my mind immaterial. A person's capacity to alienate or acquire land, or to make a contract with regard thereto, is governed by the *lex situs*. According to our law, a transfer made in fraud of creditors, such as was done in this case, is void as against creditors, and all creditors, no matter where resident, are entitled to the benefit of that law.

It was also contended that one of the quarter sections was exempt as being the residence of the defendant William Durick. The evidence, however, satisfies me that William Durick's permanent and real residence was, at the time of the execution of these transfers and for some time prior thereto, at Columbus, and consequently the land would not be exempt as being his homestead.

There will, therefore, be judgment against the defendants William Durick and F. A. Nye, in the sum of $1,333.17, the amount now due the plaintiffs, and for costs as of an undefended action. The certificates of title to the land in question will be cancelled and new certificates issued in the name of the defendant William Durick; and the plaintiffs will have judgment against the defendant Frank Durick for their costs of action.

Judgment for the plaintiffs.

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FAIRWEATHER v. CANADIAN GENERAL ELECTRIC CO.

Ontario Supreme Court, Hodgins, J.A. March 1, 1913.

1. MASTER AND SERVANT (§ II B 5—165)—LIABILITY OF MASTER—WHETHER EMPLOYEE WAS WITHIN SPHERE OF DUTIES.

A foreman in charge of an electric power-house is acting within the sphere of his employment when he himself does or assists in doing necessary work which ordinarily would be done by others under his charge upon whom he had the right to call, unless it is shewn that his authority was limited by his employer to the requisitioning of help in such cases.

[*Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44, and *Whitehead* v. *Reader*, [1901] 2 K.B. 48, referred to.]

2. MASTER AND SERVANT (§ II A 4—62)—LIABILITY OF MASTER—SAFETY AS TO PLACE AND APPLIANCES.

It is the duty of the employer to provide proper appliances for the employees and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk.

[*Smith* v. *Baker*, [1891] A.C. 325, applied; *Schwab* v. *Michigan Central R. Co.*, 9 O.L.R. 86, and *Can. Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, referred to.]

3. EVIDENCE (§ XII D—936)—WEIGHT AND EFFICIENCY—NEGLIGENCE IMPERILING EMPLOYEE.

When a workman in the course of his employment is placed in a position of peril by the negligence of his master in the construction of the works and ways of the master, and an accident happens to the workman in the way that might be expected from the negligence found, a jury can infer that the negligence caused the accident.

[*McKeand* v. *C.P.R.*, 1 O.W.N. 1059, 2 O.W.N. 812, referred to.]

4. MASTER AND SERVANT (§ II B 4—160)—LIABILITY OF MASTER—SERVANT'S ASSUMPTION OF RISKS—KNOWLEDGE OF DEFECT.

Neither the employee's knowledge of a defect in the condition of the works due to the employer's negligence, nor the continuance in the employment, is conclusive evidence of willingness on the part of the employee to incur the risk.

[*Church* v. *Appelby*, 60 L.T. N.S. 542; *Yarmouth* v. *France*, 19 Q.B. D. 647; *Smith* v. *Baker*, [1891] A.C. 325; *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q.B. 338; *Grand Trunk Pacific R. Co.* v. *Brulott*, 46 Can. S.C.R. 629, 13 Can. Ry. Cas. 95, referred to.]

Statement

ACTION by Edna Isabella Fairweather, widow of Henry Ivon Fairweather, to recover $10,000 damages for the death by drowning of her husband, foreman in charge of the defendants' Nassau power-house, on the Otonabee river, while cutting away the ice and débris on and over the apron of the sluiceway, by reason, as the plaintiff alleged, of the negligence and carelessness of the defendants.

E. G. Porter, K.C., for the plaintiff.

G. H. Watson, K.C., and *L. M. Hayes*, K.C., for the defendants.

Hodgins, J.A.

HODGINS, J.A.:—The facts in this case on which liability must be determined are somewhat complex. The plaintiff's husband had gone out on the ice which had formed on

and over the apron of a sluiceway, for carrying off water, ice, and débris, leading through the wing-dam from the forebay, and discharging into the Otonabee river. When about four or six feet from the outer end, and while cutting away the ice with a short axe so as to clear the apron, he fell into the river, and, notwithstanding the efforts of his companion, Bert Lockington, to reach him with his ice axe, he was carried around by a swift eddy and under the ice near the dam, and drowned.

The river water is admitted through the two westerly openings of the dam into the forebay; and, in order to keep the rack clear of débris, anchor ice, and other obstructions, this sluiceway is used, and is left open when anchor ice is present. The importance of keeping the rack clear and allowing the free transit of water through the flume to the wheels is admitted. In fact it is absolutely necessary.

There was a letter put in evidence (exhibit 12), from the superintendent of the Peterborough works to the deceased, dated six days before his death, delivered to him by Cotton on the same day, which shews the importance attached to uninterrupted operation of the power plant:—

"Peterborough, Jan. 8th, 1912.

"Mr. Fairweather: This will be handed to you by Mr. Cotton. I have sent him out to see you, to give you the results of his experience in running the power-house, which he did for a good many years, very satisfactorily indeed. I am frank to say that your operation of the power-house has been fairly satisfactory until the cold weather came, and since then it has been at times quite unsatisfactory. I hope Mr. Cotton will be able to give you such information that will eliminate further cause for complaint. Saturday morning and this morning the unsatisfactory operation cost us anywhere from $100 to $500. You can quite understand that such a condition of affairs is intolerable, and must be stopped at once."

The contentions of the defence were: (1) that what the deceased was doing was not his work, as he had a helper specially employed to clear away ice, and had the right to call upon others near-by for that purpose; (2) that he knew of and voluntarily incurred the risk, and that the defendants had provided ropes, the use of which would have prevented the fatal result of a fall into the river; (3) that he was in a specially dangerous place at the moment of the accident, which he need not have occupied; (4) that the clearing away of the ice could have been done by getting down into the sluiceway and working from there, instead of on the top of the ice.

I do not think that a foreman in charge of such a station, responsible for its efficient operation, is travelling outside his duty if he does or assists in doing work which those under him

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may be employed to do, if it is work necessary and proper to be done.

There was such an amount of ice there that it was necessary to clear it away. It was work that was urgent and that required speedy action. And, apart from the question whether the deceased was justified in doing it just as he did, I think it was natural and proper for him to have taken steps at that time to clear the apron. I do not think that the right to call for others, if proven to be known to the deceased, could in itself absolutely debar him as operator in charge from doing or assisting in doing necessary work at the moment, if, in his judgment, he could do it without calling them in.

Otherwise it would follow that he would be justified in doing nothing but requisitioning help; but I do not find in the evidence anything to warrant me in holding that his power and duty were so limited.

What the deceased did was done entirely for the benefit of the defendants, under the pressure of their written complaint, and was undoubtedly necessary, when undertaken, for the proper operation of the works under his charge, on the successful working of which the defendants' principal works depended.

It cannot be said that in this case, upon the evidence, the deceased's employment did not "directly or indirectly oblige him to encounter" the peril (as put by Lord Atkinson in *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44, at 50); nor that the thing he did was different in kind from anything he was required or expected to do (per Lord Loreburn, L.C., in the same case, at p. 47).

Lord Justice Collins in *Whitehead* v. *Reader*, [1901] 2 K.B. 48 at 51, points out that "we have to get back to the orders emanating from the master to see what is the sphere of employment of the workman": see also *Rees* v. *Thomas*, [1899] 1 Q.B. 1015.

I think the act that resulted in the death of Fairweather was not only in the line of his duty, but was really the result of what might almost be called an emergency.

The case of *Higgins* v. *Hamilton Electric R. Co.*, 7 O.W.R. 505, expresses in a few words a view in regard to the workmen there similar to that to which I have come on this branch of the case, as applicable to the deceased, namely:—

> That upon the general order which the workmen had received from the superintendent they were not forbidden to go behind these slats, and that for the purpose (specified) they were authorized and required, and it is reasonable, necessary and proper that they should go there.

The next question is, whether the defendants were negligent in their system or plant, and whether the plaintiff's injury and death were caused by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings,

and premises connected with, intended for, and used in the business of the defendants.

I think there were defects, and that the defendants were negligent in that respect, both at common law and under the Workmen's Compensation for Injuries Act. The element which was being dealt with was a dangerous one—water power. The wing-dam, which is very long, is wholly unprotected, both on its outer and inner sides, as are the walls of the forebay and flume except between them and along one side of the latter. There is a depth of twenty feet of water in the forebay. The surface of the wing-dam was and continued to be covered with ice or ice and snow.

Work under Cotton and his predecessors was treated as dangerous, and the visits of Paterson and Dobie supplied them with ample knowledge in this respect; and the use of ropes, which were kept in the store room of the power house for use in the machinery and for the men clearing ice, was resorted to.

Their use was neither compulsory nor invariable, nor was the method employed the same on all occasions, the end sometimes being attached to a post and sometimes held by another man. Even Cotton does not say that his instructions as to ropes extended to work done on the sluiceway or on the apron, but in all his answers mentions work inside the sluiceway and on the rack; and he thus defines their helpfulness: "If ropes properly put on, properly tied, and in the hands of competent men, no element of danger remains." They were at most temporary, occasional, makeshift safeguards, not especially designated for the work about and on the ice, and needing in their use a competent man to hold and a snubbing post to tie the end to. There were no life belts nor life lines (since supplied). The apron extended out 10 feet 3 inches (since shortened to 5 feet); and this length necessitated work on the ice which could not be reached from the pier. There was no guard rail, nor railed platform extending even a few feet out from the wing-dam over the sluiceway apron to enable the ice at the end of the apron to be broken with safety, although there is a rail above the rack.

In *Cairns* v. *Hunter*, 2 O.W.N. 472, 17 O.W.R. 947, the absence of a guard rope, in *Quimlo* v. *Bishop*, 2 O.W.N. 1152, 20 O.W.R. 313, of a guard and proper boots, and in *Montreal Park, etc.* v. *McDougall*, 36 Can. S.C.R. 1, of rubber gloves, were held to be negligence in the employer.

The plaintiff suggested a railed platform extending out above the apron (ex. 6). The objection to it, namely, that it would attract the spray and cause the ice to form under it so as to reach down to that on the apron, may be a valid one if it was as long as shewn, but if the apron had been as short as it

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now is—about 5 feet—a very modest railed platform would have enabled the outer end of the ice on the apron to be safely reached. The evidence of Fish and Hicks and others satisfies me that such a safeguard would have entirely obviated any danger.

The common law liability of an employer was stated in 1868, by Lord Cairns, in *Wilson* v. *Merry*, L.R. 1 Sch. App. 333, to depend on whether the employer had exercised due care in selecting proper and competent persons for the work, and furnished them with "suitable means and resources" to accomplish the work. Lord Colonsay uses the expression "to provide, or supply the means of providing, proper machinery or materials." In *Smith* v. *Baker*, [1891] A.C. 325, at p. 362, Lord Herschell says the duty is "to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

See also *Schwab* v. *Michigan Central R. Co.*, 9 O.L.R. 86; *Can. Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, and *Nylaki* v. *Dawson*, 6 O.W.R. 509, 7 O.W.R. 300, where the use of an ordinary open hook instead of a safety hook—where the danger was obvious and constant, and the means of averting it simple and apparent—was held negligence in the employer.

In *McKeand* v. *C. P. R.*, 1 O.W.N. 1059, 16 O.W.R. 664, [and see 2 O.W.N. 812, 18 O.W.R. 309] it is said: "When we find a workman in the course of his employment placed in a position of peril by the negligence of his master in the construction of the works and ways of the master, and an accident happening precisely in the way one would expect as the result of the negligence found, a jury can infer that the negligence caused the accident."

It was not argued that the letter was an order under sec. 3, sub-sec. 3, and I have, therefore, not considered the question which might be raised under that sub-section.

But notwithstanding these two findings, the defendants contend that the plaintiffs accepted the risk. In determining this question it is necessary to consider the cases on the subject.

Originally it was held that notwithstanding the common law liability imposed on the master to carry on his business on such a system and with such appliances as not to expose his workmen to unreasonable risk, a workman could by voluntarily agreeing to take the risks arising from their non-fulfilment absolve the master from the consequences of his breach of duty, whether or not the danger was one which might be called incidental to the work or was occasioned by the imperfect conditions under which the employer carried it on. That agreement need not be made in express terms, but could be implied from the conduct of the workman.

It was laid down in *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, by Bowen, L.J., at p. 697, speaking of the maxim *volenti non fit injuria*, that knowledge may not be a conclusive defence, but when it is knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered—that is, with knowledge and appreciation of both risk and danger—the defence is complete. The learned Judge was then referring to the maxim and not to contributory negligence, which, as he observes, arises when there has been a breach of duty on the part of the defendant, not where, *ex hypothesi*, there has been none. The case was decided upon the ground that the workman had voluntarily incurred the danger "incident to a perfectly lawful use of his (the owner's) own premises."

It would appear to me, from the judgments in the above case and those in *Smith* v. *Baker*, [1891] A.C. 325, that there may be three positions as to which the maxim may apply:—

(1) Where there is danger inherent in the work itself and where precautions are actually or commercially impossible, or where none are in fact taken, and where the workman consents, in the sense of agreeing voluntarily, to engage in the work with the knowledge and under those conditions (*per* Lord Watson in *Smith* v. *Baker*, [1891] A.C. 325 at 356, Lord Herschell, at 360-362, Lord Bramwell at 344; and in *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, *per* Bowen, L.J., at 695, and Fry, L.J., at 701-2; and *per* Romer, L.J., in *Williams* v. *Birmingham*, [1899] 2 Q.B. 338.

(2) Where the work is intrinsically dangerous notwithstanding that reasonable care has been taken to render it as little dangerous as possible, and the workman undertakes to do it, he thereby voluntarily subjects himself to the risks inevitably accompanying it (*per* Lord Herschell in *Smith* v. *Baker*, [1891] A.C. 325 at 360) or, as put by Bowen, L.J., in *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q.B. 338, where the danger is visible and the risk is appreciated and the injured person, knowing and appreciating both risk and danger, voluntarily encounters them.

(3) Where the inevitable consequences of the employee discharging his duty would obviously be to occasion him personal injury and where it is clearly brought home to his mind that the risk he ran was from a danger both foreseen and appreciated: *per* Esher, M.R., in *Yarmouth* v. *France*, 19 Q.B.D. at 651. Lord Watson in *Smith* v. *Baker*, p. 357, *per* Lord Herschell, pp. 361-3.

But, as pointed out in *Smith* v. *Baker*, the acceptance of the risk of negligence in the conditions of the works, ways, etc., or in the conduct of the master's operations is not covered by

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the maxim except in cases included in No. 3. The doctrine was considered in *Yarmouth* v. *France*, 19 Q.B.D. 647, and it was there laid down that the question of whether a workman could be said to be "*volens*" was a question of fact depending upon the evidence adduced in each case, and that the Court had no right to draw this inference merely from the fact of knowledge of the risk, together with continuance in the employment. The majority of the Court considered the workman's complaints and the reply of the foreman some evidence of non-acceptance of the risk, and held the defendants liable for the result of a defect in the plant, under the Workmen's Compensation Act.

In *Church* v. *Appelby*, 60 L.T.N.S. 542, it was held that in the case of a workman who was killed, the defence applied and that although no evidence could, therefore, be given as to the state of his mind with reference to the risk, knowledge of the defect, coupled with the continuance in the employment, was some, if not conclusive, evidence of willingness to incur it. Under our Act such continuance is expressly made non-conclusive.

In *Smith* v. *Baker*, [1891] A.C. 325, the Lord Chancellor put the question of law there involved as being whether upon the facts and on an occasion when the very form of his employment prevented the plaintiff from looking out for himself he consented to undergo this particular risk, and so disentitled himself to recover and concludes that the maxim is not applicable because the compulsion of that form of employment rendered him unable to take precautions. Lord Herschell, at p. 367, explains that knowledge and appreciation must be of the risk which arose on the occasion in question from the particular work which the plaintiff had then to perform, and thus brings up the limitation on contributory negligence mentioned by Lord Esher, L.R., in *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, in his dissenting judgment at 690:—

> If the servant, in spite of the danger, does any act tending to save life or to the protection of his master's property, I protest against its being said that the jury are bound to find that there is negligence in such case on the part of the man who runs the risk.

As stated in *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q.B. 338, the defendant must obtain a finding that the plaintiff had agreed to undertake the risk of the defect or negligence upon which the action was founded, and that a finding that he knew of the risk is not sufficient.

In that case, Sir A. L. Smith, L.J., said:—

> This is a case of no proper appliances having been supplied by the master at all, so that the man might carry on his operation in such a way as not to be exposed to unnecessary risk.

The jury found that the plaintiff had the same means of knowing of the danger as the defendants, and that he did know of

it. This is not the same as a finding that the plaintiff had taken upon himself the risk. That, as pointed out by Romer, L.J., is a question of fact in each case, to be decided according to the circumstances; and his continuance in the employment with knowledge of the risk and of the absence of precautions is important but not necessarily conclusive against him.

In *Canada Foundry* v. *Mitchell*, 35 Can. S.C.R. 452, the maxim was held not applicable to a case where the foreman of a gang used unsuitable appliances, and knew, and fully appreciated the risk, but was not found by the jury to have, by continuing their use, voluntarily incurred it. Nesbitt, J., in a very interesting judgment, dissented upon the ground that a workman who was perfectly aware of the danger of using these appliances, and took the course to save himself trouble must be held to have voluntarily accepted the risk. But he depends on the fact that proper appliances were provided, and not used by him, and that the workmen's option was exercised; a point which the finding of the jury negatived.

In *Montreal Park, etc., Co.* v. *McDougall*, 36 Can. S.C.R. 1, it was held that it was not a sufficient defence to shew that the defendant had knowledge of the risks of his employment but there must be such knowledge shewn as, under the circumstances, leaves no doubt that the risk was voluntarily incurred, and this must be found as a fact. That is the *ratio decidendi* in *Blanguist* v. *Hogan*, 1 O.W.R. 15, and *Gordanier* v. *Dick*, 2 O.W.R. 1051.

In *Brooks, etc.* v. *Fakkema*, 44 Can. S.C.R. 412, it was held that remaining in a place of danger was not a voluntary assumption of the risk of a dangerous operation.

In *Cameron* v. *Douglas*, 3 O.W.R. 817, the decision at the trial is not in my view reconcilable with the *Canada Foundry Co.* v. *Mitchell*, 35 Can. S.C.R. 452. The case, however, was sent back for a new trial (see *Cameron* v. *Douglas*, 5 O.W.R. 35, 6 O.W.R. 673).

Mr. Justice Anglin in *Grand Trunk Pacific R. Co.* v. *Brulott*, 46 Can. S.C.R. 629, 13 Can. Ry. Cases 95, thus expresses his idea as to what a finding that a workman is *volens* involves:—

> In order to find him *volens* the jury must have been satisfied that, with full knowledge and appreciation of the risk he incurred (in working without the protection of flags) he freely and without any compulsion, either of an immediate order or arising from fear of dismissal or serious reproof, assumed that risk as his own.

This is in line, though more adequately expressed, with the statement of Hawkins, J., in *Thrussell* v. *Handyside*, 20 Q.B.D. at p. 364:—

> It cannot be said that where a man is lawfully engaged in his work that he wilfully incurs any risk which he may encounter in the course of

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such work. . . . It is different where there is no duty to be performed and a man takes his chance of the danger, for there he voluntarily encounters the risk.

I am satisfied that, in the circumstances I have already discussed as to the situation created by the letter, the conditions during the week preceding and on the morning of the 14th January, the deceased did not, within the meaning of the maxim "*volenti non fit injuria*," as explained by these cases, voluntarily accept the risk. He falls within none of the three descriptions, and his case is well covered by Mr. Justice Anglin's view in *Grand Trunk Pacific R. Co.* v. *Brulott*, 46 Can. S.C.R. 629, 13 Can. R. Cas. 95.

The last question is, whether, notwithstanding the defect in the condition of the ways, etc., and although the defendants cannot succeed upon their plea that the deceased voluntarily accepted the risk—as I hold they cannot—they have still shewn such contributory negligence in the deceased as to prevent the plaintiff—his widow and personal representative—from succeeding.

In cases of neglect of duty by the master, contributory negligence is a good defence, and may be proved by shewing any act of negligence on the part of the workman but for which the accident would not have happened, which negligence may well include recklessness even in a needful exposure to danger.

I confess that this aspect of the case has given me considerable anxiety, and I am not wholly satisfied that I am right in the view that the defendants must fail here too.

As to the ropes, no doubt there were ropes in the store room, but knowledge of this fact by the deceased and of the one used on the 12th of January depends wholly upon Cotton's uncorroborated evidence. Bert Lockington says that he never saw deceased use a rope, and that while his brother was out on the chute with a rope round him on the 12th January, the deceased had not seen it as he was not out that day. George Lockington was not asked, nor was his father as to deceased's presence; and I prefer Bert Lockington's evidence on that point to Cotton's who says that deceased was there, and saw it. Johnston says that rope was not used after deceased came back till his death. Delisle says that ropes were used when deceased was there, but not in his presence.

I am not prepared to place implicit confidence in Cotton's evidence on this point, or as to his orders to Fairweather. Upon the question of contributory negligence, the onus is on the defendants, and they cannot succeed unless it is proved clearly; and I think Cotton's evidence on almost all material points is in conflict with the evidence of the other witnesses, and with the circumstances as I find them. Cotton's story that he took deceased to the storehouse 250 feet from the power house, and shewed him three ropes, and told him to use them for the men

for clearing ice from rack and sluiceway, looks, I think, a little too much like filling in the necessary gap in view of the evidence I have quoted, and is not probable having regard to some of the facts deposed to by others. Cotton was called at the very end of the defence, after the plaintiff's local witnesses, and those working there the last week, including the Lockingtons, had been examined.

Bert Lockington says:—

I told Fairweather I needed a rope on the day of the accident. Did not tell him what for; to put round one of us. I expect he heard me. He went into power-house, and then came back, and said wheels going faster than when he went in; said nothing about rope; one rope was in use. I don't remember if he said so.

It will be observed that Fairweather is not stated to have gone to the store house, but to the power house; and Bert Lockington himself says he did not know there were more ropes in the store house, and asserts that the rope used by him and his brother on the 12th, was in use on the governor on the power house, on the 14th January. William Lockington speaks of the ropes being there for general purposes, and used on winch and cutting ice.

When Cotton was giving his evidence he stated that he had told deceased not to cut ice, and I so noted it. But I thought at the time that his answer was not intended to be direct, but argumentative, and that what he had said was rather by way of remonstrance or advice. To avoid doing him any injustice, I obtained from the reporter a copy of that part of the evidence, which strengthens my view, because in both cases his answer has a reason added to it. I was not impressed by his testimony particularly on this point; and he gave evidence inconsistent with it, as follows:—

Q. And your instructions were to Mr. Fairweather that that would be his duty, to look after the ice? A. Yes.

Q. And you had confidence in his ability to do it? A. Yes.

However, I do not see that Cotton had any authority to give instructions to the deceased. He was sent there to give the results of his experience and information; but he is not put in charge nor is he given any mission except that of help. He was merely a fellow workman on that occasion. There was no warning against going upon the ice on the apron, and the alleged instructions do not specifically relate to that ice, more than to any other.

On the whole, therefore, and with some hesitation, I think that the defendants have failed to shew contributory negligence in the deceased.

There will be judgment for the plaintiff for $2,500, with costs of action. The apportionment of this sum may be spoken to before the formal judgment is settled.

Judgment for plaintiff.

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Ontario Supreme Court, Trial before Middleton, J. March 22, 1913.

1. RECORDS AND REGISTRY LAWS (§ III C—21)—FAILURE TO REGISTER SUBDIVISION PLAN—REGISTRY ACT (ONT.).

A purchaser buying under a registered plan without notice of a prior unregistered plan shewing streets and roads, and under which leases were granted of which he had no notice, is entitled to the protection of the Registry Act (Ont.), and is not bound by the prior plan.

2. HIGHWAYS (§ I A—8)—ESTABLISHMENT BY STATUTE—STREETS ON REGISTERED PLANS.

The statute, 1 Geo. V. (Ont.) ch. 42, sec. 44 (1), providing that allowances for roads, streets or commons surveyed in a city, town, village, or township, which have been surveyed and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances, roads, streets or commons have been or may be hereafter sold to purchasers, shall be public highways, streets and commons, does not apply to an unregistered plan, because this section is subject to the provisions of the Registry Act as to the amendment or alteration of plans, and no plan can be altered or amended by a judge until it is registered.

3. HIGHWAYS (§ II A—23) — OBSTRUCTION — ADVERSE CLAIM OF ABUTTING OWNER.

A purchaser taking under a plan upon which streets are shewn is not entitled to cut off access to these streets if dedication was intended, although they have not been accepted by the municipality.

4. ESTOPPEL (§ II A—24)—BY DEED—ESTOPPEL BY RESERVATION.

A purchaser taking under a registered plan is bound by the plan and is not entitled to set up that the plan is invalid as regards streets shewn thereon on the ground that the same encroach on another plan and that no order altering the other plan had been made under the statute in that behalf, where the deed of conveyance to such purchaser excepts such streets from the land conveyed and reserves the right of others to use the same.

Statement

THE first action was brought by Margaret Peake, the owner of lot 162 on plan 73A, for a declaration with respect to her rights upon Victoria Terrace and with respect to certain other streets shewn upon the plan, and for a mandatory order directing the removal of certain fences, and for an injunction.

The second action was brought by the defendant in the first action against L. C. Peake, husband of Margaret Peake, for damages for trespassing upon the lands claimed by the plaintiff and for an injunction.

In 1887, certain lots in the town of Niagara-on-the-Lake, and a large parcel, of irregular shape, immediately west thereof, were conveyed to the Niagara Assembly. This parcel had an extensive frontage on the south shore of Lake Ontario, and was intersected by an inlet, called Lansdowne Lake, and by a ravine. The whole tract of land was subdivided into small lots. An amphitheatre was located in the centre of the western portion, and was surrounded by a circular street called the Chautauqua Amphitheatre. From this circle radiated a number of avenues

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on which sites for cottages fronted; and along the entire lake front, both east and west of Lansdowne Lake, Victoria Terrace was laid out.

The plan was not registered; but a number of lots, fronting on different avenues, were leased for 999 years; none of the leases were registered.

All the lessees of these lots were subsequently foreclosed under a prior mortgage. The plaintiff and defendant and other persons then purchased the fee in certain lots on a new plan made and registered by the mortgagees. This registered plan covered part of the lands comprised in the unregistered plan, encroached on another registered plan, and covered land partly in the township and partly in the town.

Statement

J. A. Paterson, K.C., for the plaintiff in the first action and the defendant in the second.

E. D. Armour, K.C., and *C. P. Smith*, for the defendant in the first action and the plaintiff in the second.

MIDDLETON, J. (after setting out the facts and the dealings with the property by mortgagees and a purchasing syndicate): —The first and most important question is the right of Mrs. Peake, as one of the cottage-holders and by virtue of her ownership of lot 162, to have access to Victoria Terrace throughout its whole length.

Middleton, J.

This is important not only because the existence of the terrace as a drive and parade is greatly to the advantage of the occupants of the cottages, but also because it affords access to Queen street, an important thoroughfare leading to the business part of the town. Mrs. Peake contends that, as she leased according to the unregistered plan of 1891, the streets and lanes shewn upon that plan became and were highways, by virtue of the statute now found as 1 Geo. V. ch. 42, sec. 44.

Apart from any other answers to this claim or any discussion as to the meaning of the section in question, I do not think any such effect can be given to a plan which is not registered. Mitchell is, I think, entitled to the protection of the Registry Act. He purchased without knowledge of the lease or the plan, and these instruments are void as against him.

I think also that, when the arrangement was made for the purchase of the lands by the syndicate, the cottage-holders deliberately gave up whatever rights they had, consented to the substitution of the new plan and its registration, and conveyances in accordance with that plan; and I think their rights must be found in the conveyances which they then accepted.

The effect of the foreclosure and of the conveyances to the syndicate was to vest in them the entire fee simple, subject only to the rights given by the agreements to the cottage-holders,

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which were afterwards crystallised by the new plan and by its registration and by the subsequent conveyances.

The second question arises from what has already been indicated as to the location of the fence along Tennyson avenue. I think the proper inference to be drawn from the plan is, that the whole of the lands coloured brown were set apart as highways or streets, and that Tennyson avenue extended to the water's edge or what is shewn as the water's edge of Lansdowne Lake; and that Mitchell, therefore, had no right to enclose the small sandy beach near the outlet of the lake. I have no doubt that, had his attention been drawn to this, he would have removed the fence, and that this is no real factor in this litigation, although access to this portion of the beach appears to be of importance to the cottagers, as it is the only place where water can readily be obtained, to be drawn to the cottages.

The third question arises out of a matter that has not yet been discussed. Part of the land covered by the original plan was situated within the town of Niagara, and part immediately west of the town line. When the original plan was prepared, the grounds were laid out without any regard to the location of the town line or the subdivision into lots according to the registered town plan; and, when part of this original plan was adopted as the basis of plan 73A, most of the land covered by it was outside the town limit. A small portion, however, extended into the town, and covered lands included in the town plan. This included the easterly segment of the circle described as the Chautauqua Amphitheatre, about one-quarter of the entire circle. It also covers two short streets that have never been laid out, Froebel avenue and Knox avenue, with a small portion of the end of Tennyson avenue, also never opened.

The portion of the amphitheatre is cut off by the town line was laid out as a travelled road, and was used by the cottagers—who were all north of the amphitheatre—to reach Longfellow avenue, which was connected with the amphitheatre on its south side. Mitchell has erected his fence following the town line across the amphitheatre and across Froebel, Knox, and Tennyson avenues, until it reaches Lansdowne Lake. It thus cuts across the travelled road in two places, and is a source of substantial inconvenience to those entitled to use the street. He attempts to justify this by the statement that the plan is invalid where it encroaches upon land within the town.

I do not think that he is in a position to assert this invalidity; I think he is bound by the terms of his conveyance, which excepts from the lands conveyed to him the streets laid out upon the plan, and reserves the rights of all others entitled to use the streets thereto.

This, I think, covers all the questions argued, although I

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have not dealt with all the matters discussed by counsel. I think the plaintiff Margaret Peake has a *locus standi* to maintain this action—Mitchell having by his fences obstructed her ingress and egress from her property. See *Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, 25 A.R. (Ont.) 251. No case is made by which any lost grant can be inferred; nor was it possible for Mrs. Peake to obtain an easement along that portion of Victoria Terrace east of Landsdowne Lake. All the circumstances outlined conclusively shew that dedication cannot be presumed. I do not make any order as to the fence along the bank of Lansdowne Lake, as this does not amount to an obstruction of which the plaintiff can complain—see also *Sklitzsky* v. *Cranston*, 22 O.R. 590.

As success is divided, I think each party may be left to bear his or her own costs.

Judgment accordingly.

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Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. December 21, 1912.

1. ANIMALS (§ I C 3—34)—LIABILITY FOR INJURIES BY—ANIMALS FERAE NATURAE.

Where wild animals are kept for some purpose recognized as not censurable, all that can be demanded of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him.

[Cooley on Torts, 3rd ed., vol. 2, par. 411, approved; *Harper* v. *Marcks*, [1894] 2 Q.B. 319; *May* v. *Burdett*, 9 Q.B. 101; *Baker* v. *Snell*, [1908] 2 K.B. 352, and in appeal, [1908] 2 K.B. 825, referred to; see also annotation to *Hay* v. *Miller*, 11 L.R.A. N.S. 748.]

2. ANIMALS (§ I C 3—34)—LIABILITY—INJURIES CAUSED BY—OWNER AND KEEPER.

Not only the owner of animals *ferae naturae*, but also anyone who keeps or harbours them upon his premises is liable for injuries done throug their breaking loose.

[*Jackson* v. *Smithson*, 15 M. & W. 563; *Shaw* v. *Creary*, 19 O.R. 39, and *Wood* v. *Vaughan*, 28 N.B.R. 472, considered.]

3. THEATRES (§ I—5)—LIABILITY — INJURIES OCCURRING FROM ESCAPE OF TRAINED WILD ANIMAL KEPT FOR EXHIBITION BY PERFORMER.

The managers of a theatre are not liable for injuries resulting from the bite of a trained monkey owned by one of the performers, over whom the management had no control except while he was in the theatre, where the injuries were sustained while the animal was insecurely chained in a yard of adjoining premises of another person, although the yard was occasionally used by people engaged at the theatre without any direct sanction of the theatre managers or objection by the person who owned the yard, and even though the theatre managers had knowledge that the animal had been tied in the yard on the day preceding the accident.

Statement

APPEAL by the plaintiffs from the judgment of the Senior Judge of the County Court of the County of Wentworth, dismissing an action brought in that Court by Harry Hartley Connor,

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an infant, by his next friend, Samuel A. Connor, and the said Samuel A. Connor, as plaintiffs, against "The Princess Theatre," defendants for damages for personal injuries resulting from the bite of a performing monkey.

The appeal was dismissed.

The defence was a denial of the material allegations of the statement of claim.

The action was dismissed at the trial, and the plaintiffs appealed.

Argument

A. M. Lewis, for the plaintiffs, argued that the defendants were clearly liable for the damage done by the monkey. They knew that the animal had been tied in the yard, and that they had no right to allow it to be fastened there. He referred to Pollock on Torts, 9th ed., pp. 498, 499, 500, 501, 511, and 572; *May* v. *Burdett* (1846), 9 Q.B. 101; *Baker* v. *Snell*, [1908] 2 K.B. 352, 825.

H. McKenna, for the defendants, contended that the judgment of the learned trial Judge was right and should be affirmed. The defendants owned neither the animal nor the premises on which it was tied, and so no liability attached to them: *Bradd* v. *Whitney* (1907), 9 O.W.R. 656.

Lewis, in reply.

Boyd, C.

December 21. BOYD, C.:—The plaintiffs sue for damages resulting from the bite of a monkey, which, it is alleged, was brought upon the premises of the defendants and the premises used in connection with their theatre. The evidence shews that the defendants had engaged a woman who travelled with a performing monkey to give an exhibition for three days in their theatre in Hamilton. On the second day, it appears, the monkey had been tied in the yard of a restaurant which abutted on the rear part of the theatre, in which from time to time certain property not used or needed by the theatre was left loosely scattered about. No license so to use the yard was proved, and it is not suggested that the theatre had any control over or interest in this yard. As a matter of accommodation probably, the restaurant-man who owned the yard did not object to its occasional use. There was a cement walk giving access to the rear part of the theatre, and this yard, unfenced, lay alongside that back entrance. The boy, who with his father lived with the restaurant-keeper (a relative), was going through the yard, and the monkey, who was chained to the leg of a table in the yard, sprang at the lad and bit him severely in the arm.

A contract was put in, made by the Griffin Vaudeville Circuit of Toronto, at Toronto, on the 23rd May, 1912, with the possessor of this monkey for the performance of a "Novelty Act" at the Princess Theatre of Hamilton on three days, the 30th and 31st May and the 1st June.

The manager of the defendants first knew of or saw the

monkey on the forenoon of the first day, when there was a sort of rehearsal in his presence to see if the performance was satisfactory for his patrons in the afternoon.

The hours of performance and of attendance by the performers at the theatre were from 1.45 to 5 p.m. of each day. For the rest of the day the defendants had no control over the performer. On Friday the manager saw the monkey tied in the yard, and on Saturday morning the boy was bitten.

Proof is made that a lot of ladders and stuff such as boxes used at the show generally were pitched into the yard; that performing dogs were on occasion cleaned and exercised in the yard; and that some monkeys were in the yard once before. But, as to these occasions and the one in question, it does not appear whether it was the particular travelling troupe or the particular performer that so used the yard: the proper inference from the whole evidence is, that the theatre people did not interfere or sanction or direct such use. They did not object to it and they did not consent to it. Upon such evidence, can it be said that they kept or harboured the monkey or were in any sense responsible for its misconduct or mischief? They had no control over the yard and no control over the performer except during the intervals when he was within the precincts of the theatre—and this yard was not a part of these precincts.

To advert shortly to the law.

Animals have been classified as: ferocious, dangerous, mischievous, and harmless. The first three are of wild nature, *ferœ naturæ*, the last *mansuetæ naturæ*, of tame and gentle disposition, either naturally so or because they have been tamed and made subservient to the use of man.

There is a special class naturally wild and mischievous which have been trained to become performing animals, such as bears and monkeys, and these it may be lawful to keep and use for the purpose of gain or amusement; whereas in the case of ferocious beasts the keeping of these is by some judges accounted a wrongful act which makes the keeper responsible for any injury inflicted by them without proof of negligence. See *Baker* v. *Snell*, [1908] 2 K.B. 352, and in appeal 825. This was so held in the case of a monkey in *May* v. *Burdett*, 9 Q.B. 101, and it was put on the ground that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that, if it does mischief, negligence is to be presumed without express averment.

The law may not be so now in the case of trained animals which have been trained to serve some purpose for the use of man; a phase of the law referred to in *Harper* v. *Marcks*, [1894] 2 Q.B. 319, which is not cited in the case in 1908.

In the present case of a trained and performing monkey, I incline to think that the better rule is propounded by Mr. Cooley

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in his book on Torts: "When wild animals are kept for some purpose recognised as not censurable, all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him:" 3rd ed., vol. 2, paragraph 411.

The situation is well stated by Platt, B., in *Jackson* v. *Smithson* (1846), 15 M. & W. 563, 565: "No doubt a man has a right to keep an animal which is *ferœ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible." (*S.C.*, 15 L.J. Ex. 311). Not only is the owner liable, but so is any one who keeps or harbours the beast upon his premises. The law in this aspect was discussed in *Shaw* v. *Creary* (1890), 19 O.R. 39, and in an almost contemporaneous case in New Brunswick, *Wood* v. *Vaughan* (1889), 28 N.B.R. 472. See *Gardner* v. *Hart* (1896), 44 W.R. 527, where an innkeeper was made liable in whose premises the dangerous beast was kept, though the owners also lived there.

But in this case the defendants can in no way be accounted keepers or vicarious keepers of the monkey, unless when the monkey was actually in or upon their premises.

I may note the incisive criticism of the case of *Baker* v. *Snell* by Mr. Beven in 22 Harvard Law Review, p. 465, and the incisive counter-criticism of Mr. Beven by Sir F. Pollock in 25 Law Quarterly Review, p. 317.

Whatever may be the ultimate view, there is no doubt that in this case the monkey was improperly placed and insecurely fastened; and whoever put it there failed in that superior degree of care which the mischievous propensities of the animal called for.

The Judge rightly concluded in the case in appeal that no blame attached to the defendants, and the action was rightly dismissed.

It is not a case for costs.

Middleton, J.

MIDDLETON, J.:—I agree.

Latchford, J.

LATCHFORD, J.:—"If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass:" Lord Ellenborough, C.J., in *Leame* v. *Bray* (1803), 3 East 593, 595. It is not essential to liability that the defendant should own the animal. If a person harbours a dangerous animal or allows it to be at and resort to his premises, that is sufficient: *McKone* v. *Wood* (1831), 5 C. & P. 1. In *May* v. *Burdett*, 9 Q.B. 101, an action brought by the husband of a woman who had been bitten by a monkey, Lord Denman declares that the liability is put upon the true ground by Lord Hale in 1 Pleas of the Crown, 430 (b): "Though the owner have no particular notice of the quality of his beast . . . that he did any such thing before,

yet if it be a beast . . . *ferœ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey, that broke his chain and got loose."

May v. *Burdett* was approved recently in the remarkable case of *Baker* v. *Snell*, [1908] 2 K.B. 352, which was sustained on appeal: *ib.* 825.

Here, however, it is sought to attach liability, not to the owner or keeper of the mischievous animal, but to the managers of the theatre where the owner was engaged for a few days. The premises on which the monkey was when it bit the infant plaintiff were not the premises of the defendants nor under their control. The utmost length to which the evidence on the point goes is, that the defendants knew that certain performers used the yard occasionally to store their paraphernalia, and also knew that the owner of the monkey had tied the animal on the day prior to the accident to a table in the yard. No right so to use the yard was in the defendants or the performers. The animal was upon the premises of the restaurant-keeper. It was not kept or harboured by the defendants, and no liability attached to them.

The appeal fails and must be dismissed. It is not, I think, a case for costs.

Appeal dismissed without costs.

GROCOCK v. EDGAR ALLEN & CO., Limited.
(Decision No. 2.)

Ontario Supreme Court, Cartwright, M.C. January 20, 1913.

1. DISCOVERY AND INSPECTION (§ IV—31)—OFFICER OF CORPORATION—OFFICER OUT OF ONTARIO—PROOF OF OFFICIAL POSITION.

Con. Rule 1321 (Ont.), providing for the making of an order for the examination for discovery "of an officer residing out of Ontario of any corporation party to any action," does not apply where a motion is made by the plaintiff for an order for the examination for discovery of the Canadian manager of an English company, with head offices in England, though the plaintiff swears this manager is conversant with the matters in issue in the action, but where the exact nature and duties of this manager's position are not shewn, it not appearing clearly that he is an "officer" of the company.

2. DEPOSITIONS (§ IV—15)—USE ON TRIAL—OFFICER OF A CORPORATION.

The testimony adduced from an examination of an officer of a corporation residing out of the jurisdiction, under Con. Rule 1321 (Ont.), may be used by the adverse party as evidence at the trial of the action, saving all just exceptions.

MOTION by the plaintiff for an order for the examination for discovery of Thomas Hampton, manager for Canada of the defendant company, an English company, with head-office at Sheffield. See the report of a previous decision in the same action, *Grocock* v. *Edgar Allen* (No. 1), 3 D.L.R. 871, 3 O.W.N. 1315.

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The plaintiff swore that Hampton was conversant with the matters in issue in the action, and was, in his (the plaintiff's) opinion, the proper officer to make discovery. The exact nature and duties of Hampton's position were not shewn.

J. J. Maclennan, for the plaintiff.

H. E. Rose, K.C., for the defendants.

THE MASTER:—The motion is made under Con. Rule 1321, the terms of which and its proper scope and application now come up for decision for the first time, so far as I am aware. This Rule was passed on the 23rd September, 1911, to meet the difficulty pointed out in *Perrins Limited* v. *Algoma Tube Works Limited*, 8 O.L.R. 634. What has been done has, no doubt, been done designedly; and some important differences appear on a comparison of this Rule with Con. Rules 439 (2) and 454.

Rule 1321 is as follows: "The Court or Judge may order the examination for discovery, at such place and in such manner as may be deemed just and convenient, of an officer residing out of Ontario of any corporation party to any action. Service of the order and of all other papers necessary to obtain such examination may be made upon the solicitor for such party, and if the officer to be examined fails to attend and submit to examination pursuant to such order, the corporation shall be liable, if a plaintiff, to have its action dismissed, and if a defendant, to have its defence struck out and to be placed in the same position as if it had not defended."

The language used puts foreign corporations in the same position as those within the Province, under Con. Rule 439, in the consolidation of 1897, for some purposes.

In consequence of the questions raised as to what the term "officer" meant (see *Thomson* v. *Grand Trunk R.W. Co.*, 5 O.L.R. 38), on the 20th June, 1903, Rule 439(*a*) was passed, allowing the examination "of any officer or servant" of a corporation; but with the proviso that "such examination shall not be used as evidence at the trial."

Rule 1321 is limited to the examination "of an officer residing out of Ontario." It contains the penalty for default given in Con. Rule 454; but not the proviso against use of such examination as evidence at the trial; and the examination would, therefore, appear to be capable of being so used.

These differences in the language of the three Rules in question must have been deliberately made and must be given full effect to.

In the present case it would be a very serious matter for the defendant company, resident in Sheffield, to have judgment entered against it for default of Mr. Hampton in attending for an examination of which his company never had any

notice or knowledge—or to have his admissions, made behind their back and 3,000 miles away, used against them at the trial.

The new Rule, with its serious penalty for default, and the possible use of the depositions taken thereunder, must be applied with caution so as not to do injustice or give rise to unfavourable comment on the administration of justice in this Province, which has always upheld the principle "that a fair trial is above every other consideration."

As at present advised, I think the Rule did not contemplate a case like the present, and was not intended to apply thereto, unless the person to be examined is clearly an "officer."

No doubt, an order must go, when asked for, to examine an officer of the defendant company at Sheffield. Then the company will have full information to give, as well as the protection of seeing that their case is not prejudiced by any default of the officer or any unwarranted admissions.

The motion will be dismissed; costs in the cause, as the point is new.

Motion dismissed.

TOWNSEND v. NORTHERN CROWN BANK.

(Decision No. 2.)

Ontario Divisional Court, Sir William Mulock, C.J.Ex.D., Clute, and Riddell, JJ. December 24, 1912.

1. BANKS (§ VIII C—189)—LOAN BY BANK TO WHOLESALE DEALER.

The words "and the products thereof" in sub-section 1 of section 88 of the Bank Act, R.S.C. 1906, ch. 29, apply to all the articles previously mentioned in the sub-section, and not to live stock and dead stock only.

[*Townsend* v. *Northern Crown Bank*, 4 D.L.R. 91, affirmed; *Molsons Bank* v. *Beaudry*, Q.R. 11 K.B. 212, dissented from.]

2. BANKS (§ VIII C—189)—WHO IS A WHOLESALE DEALER IN LUMBER — BANK ACT (CAN.).

One who carries on business partly as a wholesale dealer in lumber, and partly as a builder, is a wholesale dealer in lumber within the meaning of sub-section 1 of section 88 of the Bank Act, R.S.C. ch. 29.

3. BANKS (VIII C 2—203)—SECURITY UNDER BANK ACT (CAN.)—CONTINUATION OF FORMER SECURITY—ONUS OF SUPPORTING SECURITY.

Security under section 90 of the Bank Act, R.S.C. ch. 29, which, though given less than 60 days before an assignment by the giver thereof for the benefit of his creditors, is but a continuation of a former security of the like character held by the bank for the indebtedness more than 60 days before the assignment, is not given within 60 days of the assignment, so as to throw upon the bank the onus of supporting it.

4. BANKS (§ VIII C—184)—ARTICLES PRODUCED FROM PLEDGED GOODS — SECURITY.

Articles manufactured from lumber covered by security under sections 88 and 90 of the Bank Act, R.S.C. 1906, ch. 29, are likewise covered by the security.

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5. BANKS (§ VIII C—187)—SECURITY—LUMBER USED IN BUILDING—ASSIGNMENT OF BUILDING CONTRACTS.

Where lumber covered by security given to a bank under sections 88 and 90 of the Bank Act, R.S.C. 1906, ch. 29, is used in the erection of buildings, and the building contracts are assigned to the bank, the bank is entitled to such of the money payable under the contracts as represents the lumber so used.

[*Townsend* v. *Northern Crown Bank*, 4 D.L.R. 91, affirmed.]

6. ASSIGNMENT FOR CREDITORS (§ III B—15)—POWERS AND STATUS OF ASSIGNEE.

An assignee for the benefit of creditors is in the position of a mere volunteer as against whom proceeds of materials pledged to a bank under the Bank Act, R.S.C. 1906, ch. 29, may be followed.

7. BANKS (§ VIII C—187)—STATUTORY SECURITY—RIGHT TO PROCEEDS OF GOODS WHEN SOLD.

An assignment to a bank of the book debts of a wholesale purchaser of lumber when given along with a transfer to the bank by way of statutory lien under sec. 90 of the Bank Act, R.S.C. 1906, ch. 29, will be supported to the extent to which such book debts represented materials which had been validly pledged to the bank under the statutory security of a like character for which such assignment and lien under sec. 90 was substituted, and the bank may follow the proceeds of such book debts in the hands of the debtor's assignee for creditors.

[*Townsend* v. *Northern Crown Bank*, 4 D.L.R. 91, varied.]

Statement

APPEAL by the plaintiff and cross-appeal by the defendants from the judgment of Sir William Meredith, C.J.C.P., 26 O.L.R. 291, 4 D.L.R. 91.

The judgment below was varied.

Argument

W. Laidlaw, K.C., for the plaintiff, argued that Brethour, the insolvent debtor, was not a wholesale dealer in lumber: *Treacher* v. *Treacher*, [1874] W.N. 4. The lumber, product of lumber, and proceeds thereof, in question in the action were not the product of the forest: *Molsons Bank* v. *Beaudry* (1902), Q.R. 11 K.B. 212 The renewals of all preferential liens on lumber and product and proceeds thereof were void as against the plaintiff: *Bank of Hamilton* v. *Halstead* (1897), 28 Can. S.C.R. 235; *Bank of Hamilton* v. *Shepherd* (1894), 21 A.R. 156. The law did not allow substitution of lumber and renewal of securities for lumber under the provisions of the Bank Act. The securities for lumber and the advances must be contemporaneous. The alleged preferential securities were given by Brethour within sixty days before the date of the assignment.

F. Arnoldi, K.C., for the defendants, contended that Brethour was a wholesale dealer within the meaning of the Act, and that the lumber in question was a product of the forest. It was quite competent for the bank to follow the proceeds of the sale of the goods: *Union Bank of Halifax* v. *Spinney* (1906), 38 Can. S.C.R. 187. Upon the cross-appeal, it was contended that the defendants were entitled to so much of the book-debts assigned to the bank as represented sales of lumber pledged to the bank, and to all moneys payable under the Johnson and Saunders contracts.

Laidlaw, in reply, argued that the defendants had abandoned at the trial the claims made on their cross-appeal.

December 24. MULOCK, C.J.:—The plaintiff's grounds of appeal in substance are as follows:—

1. That the debtor, Brethour, was not a "wholesale purchaser" within the meaning of sec. 88, sub-sec. 1, of the Bank Act, R.S.C. 1906, ch. 29.

2. That the lumber in question was not "products of the forest."

3. That the note in respect of which the bank claims to be entitled to the securities claimed, was not negotiated by the bank.

Sub-section 1 of sec. 88 is as follows: "The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products or of such live or dead stock and the products thereof."

Dealing with the first question, the evidence shews that Brethour bought lumber in car-load quantities, storing it in his yard, where he would have at times from two to three hundred thousand feet. The lumber thus purchased was partly used by Brethour in filling building and other contracts and carrying on his own business generally, and partly disposed of by sales in small quantities to the general public. This business was carried on in a small village in an agricultural district, and the transactions were comparatively small; but, still, Brethour's purchases were in their nature wholesale, and I am of opinion that as a matter of fact he was a "wholesale purchaser."

The second objection, that lumber is not the "product of the forest," within the meaning of the sub-section, was dealt with in *Molsons Bank* v. *Beaudry*, Q.R. 11 K.B. 212, where the Court (Hall, J., dissenting) affirmed the judgment of Curran, J., who held that lumber was not a "product of the forest." It was argued before us that, at most, the log only was a "product of the forest," and that, when the log was sawn into lumber, the lumber became the product of the mill and not of the forest. The section, I think, is not open to so narrow a construction.

In enumerating the classes of goods, etc., upon which the bank may lend, the section uses the words "agriculture," "forest," "quarry," "mine," "sea, lakes and rivers," etc., as indicating the original source of such goods, etc., not the means whereby they are produced; and the lumber produced from the sawing of the log has not thereby, in my opinion, ceased to be a product of the forest. It is not necessary here to lay down any general definition of the word "products," as used in the sub-section, it being sufficient for the purposes of this appeal to deal with what is the issue in question.

Beginning then with the standing timber, does it, when felled and sawn into lumber, remain a product of the forest within the meaning of the sub-section?

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It is common knowledge that manufacturers of lumber, as a rule, own the limits whence they derive their logs, and that their usual method of carrying on the lumber industry is to cause the standing timber to be felled, cut into logs, and sawn into lumber, sometimes in mills on the limits and sometimes elsewhere, the lumber thus produced being the outcome of the lumber industry as ordinarily carried on, and being in substance the first result of the application of labour to the standing timber or to windfalls. If the application of labour to the timber when in a state of nature robs it of the character of "products of the forest," then the Act contemplates the bank lending only on timber in a state of nature. Like reasoning as to the "products of the sea, lakes and rivers," would limit lending on fish either to those enjoying their liberty or dead ones in the water, a security in either case hardly contemplated by Parliament. So as to the "products of agriculture." The farmer sows, cuts, gathers, and threshes his grain, sometimes with his own power, sometimes with hired power. Is the standing grain a product and threshed grain not a product of agriculture? The question, I think, answers itself.

In using the word "products," Parliament did not, I think intend to limit its use to things in a state of nature, but to include those to which some labour had been applied. To what extent is not necessary here to determine, but certainly, I think, to the extent of enabling the particular industry of lumbering to produce lumber and the farmer to produce grain. I, therefore, think the second ground of appeal fails.

As to the third objection. The plaintiff's contention is, that the goods claimed by the bank were pledged in respect of prior notes made by Brethour, which had been surrendered to him in exchange for renewal notes, and that such renewal notes were not "negotiated" within the meaning of the Bank Act. Brethour's indebtedness grew out of a credit of $7,000 given by the bank to him, and which he agreed collaterally to secure on certain goods, under the provisions of sec. 88 of the Bank Act. The bank from time to time discounted Brethour's notes, taking with each note a pledge of the goods. When a note became due and was renewed, the goods were again pledged in respect of the renewal note, and the old note was surrendered. The giving of such security was in accordance with the understanding of the parties when the original credit was given; and the inference is, that the bank would not have surrendered a secured note when due unless the security was continued in respect of the renewal; and that such was the view of both parties is evidenced by the fact that each renewal note was similarly secured.

On the surrender by the bank of an overdue note and the security held therefor, on the understanding that it was to receive in exchange therefor a renewal note similarly secured, such exchange was a valuable consideration, and constituted, in my opinion, a negotiation of the renewal note, and supported the

security in respect thereof: *Bank of Hamilton* v. *John T. Noye Manufacturing Co.* (1885), 9 O.R. 631. I, therefore, am unable to give effect to the third ground of appeal, and think the plaintiff's appeal should be dismissed.

The defendant bank, by cross-appeal, claims to be entitled to so much of the book-debts assigned to the bank as represents sales of lumber pledged to the bank, and to all the moneys payable under the Johnson and Saunders contracts. It appears from an examination of the notes of the trial that the cross-examination of Brethour concluded with a reference to the "contracts of Saunders and Johnson," whereupon the plaintiff's counsel began his re-examination thus: "Take, for example, the larger contract; the Johnson contract was the larger?" And, after a few questions regarding the method of working it out, counsel for the bank intervened, saying: "It might facilitate matters if I say the bank does not claim anything that does not represent materials taken from the yard." That statement, having regard to the context, applies, I think, to both the Johnson and the Saunders contracts; and the learned trial Judge has declared the bank entitled to payment out of those contracts in respect of the pledged materials, thus giving the bank all it claimed at the trial in respect of the Johnson and Saunders contracts. It cannot now recede from that position and claim all the moneys payable under those contracts. I, therefore, think that that portion of the cross-appeal should be dismissed.

As to the cross-appeal in respect of the book-debts, the learned trial Judge was apparently of opinion that at the trial the bank had abandoned any claim to the book-debts; but the notes of the trial do not support this view. To the extent that these book-debts represent materials pledged to the bank, the latter is, I think, as against the plaintiff (a mere volunteer), entitled to follow the proceeds, and to that extent the cross-appeal is allowed. If the parties cannot agree as to the amount, there will be a reference to the Master, who will dispose of the costs of the reference.

No costs of the appeal or cross-appeal to either party.

CLUTE, J.:—I agree. Clute, J.

RIDDELL, J.:—Upon the argument of the appeal everything was abandoned by Mr. Laidlaw, for the appellant, except that lumber does not come within the words "products of the forest" in the Bank Act. Riddell, J.

For this contention was cited *Molsons Bank* v. *Beaudry*, Q.R. 11 K.B. 212. I have made inquiry into the facts of that case, and have been furnished with the proceedings therein, and find that it is impossible to distinguish the present case upon the facts. Moreover, the Quebec case has not been overruled or questioned in the Quebec Courts, but is still of full authority, so far as any decision can be of authority in the jurisprudence of our sister Province.

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All respect should be paid to a decision by a Court of the eminence of the Quebec Court, especially when passing upon a statute which is in force in both Provinces; and I have examined with great care the reasons given for the decision.

But I am not able to assent to the conclusion of Sir Alexandre Lacoste, concurred in as it is by Bossé and Blanchet, JJ.—and prefer the result arrived at by the Chief Justice of the Common Pleas and by my Lord.

I think the appeal should be dismissed with costs.

Appeal dismissed; cross-appeal allowed in part.

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Mar. 26.

SCOTT v. GOVERNORS OF UNIVERSITY OF TORONTO.

Ontario Supreme Court. Trial before Meredith, C.J.C.P. March 26, 1913.

1. NEGLIGENCE (§ II A—76)—WHEN CONTRIBUTORY NEGLIGENCE A DEFENCE —DEGREE OF CARE.

In actions for damages for injuries under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, the plaintiff cannot be proved guilty of contributory negligence by proving only that he could have avoided the accident; it must be shewn that he could have avoided it by the exercise of such care as persons acting in the like capacity and under similar circumstances ordinarily would have exercised.

2. MASTER AND SERVANT (§ IV—225)—EMPLOYERS' LIABILITY—COMMON EMPLOYMENT—COMMON LAW—CHANGE OF RULE BY WORKMEN'S COMPENSATION ENACTMENTS.

Although an employer is not liable at common law for injuries to an employee sustained by reason of the negligent act of a foreman, if the machinery supplied is proper and usual and the employer has taken reasonable precautions to insure the safety of his employee; yet, under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, there may be liability in such cases, where the plaintiff (at the instance of a third party, employed by the defendants, to whose orders the plaintiff, in the same employment, was bound to conform) is required by such third party to do, and does, certain work in the doing of which the plaintiff is injured through such third party's negligence.

3. CORPORATIONS AND COMPANIES (§ IV F—100)—UNIVERSITY GOVERNORS—CORPORATE ENTITY—APPOINTMENT BY GOVERNOR IN COUNCIL, EFFECT ON LIABILITY.

The appointment under the authority of a statute by the Lieutenant-Governor-in-Council of members of the Board of Governors of the University of Toronto does not constitute them Crown officers, nor does it confer on them immunity from civil actions.

[See University Act, 1906, 6 Edw. VII. (Ont.) ch. 55, secs. 20 to 46.]

4. CORPORATIONS AND COMPANIES (§ IV F—100)—UNIVERSITY GOVERNORS —CORPORATE ENTITY DISTINCT FROM UNIVERSITY, WHEN—LIABILITY TO SUIT.

Where the Board of Governors of the University of Toronto is erected by statute into a body corporate separate and distinct from the university which they serve, they may be sued in their corporate capacity as governors, apart from the university which they serve.

[See University Act, 1906, 6 Edw. VII. (Ont.) ch. 55, secs. 20 to 46.]

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5. ACTION (§ I B—5)—CONDITIONS PRECEDENT—UNIVERSITY GOVERNORS—ATTORNEY-GENERAL'S FIAT FOR BRINGING ACTION.

The fiat of the Attorney-General of the Province of Ontario which is required under the provisions of sec. 45 of the University Act, 1906, 6 Edw. VII. ch. 55, before action shall be brought against the Board of Governors of the University of Toronto, does not confer any right of action but merely removes the legislative bar to the commencement of any action without such leave.

[See University Act, 1906, 6 Edw. VII. (Ont.) ch. 55, secs. 20 to 46.]

Statement

ACTION by a printer employed by the defendants at the University press for damages for injuries sustained by him while at work for the defendants by reason of the negligence of the defendants or their servants, as the plaintiff alleged.

Judgment was given for the plaintiff.

H. H. Dewart, K.C., for the plaintiff.

J. A. Paterson, K.C., for the defendants.

Meredith, C.J.

MEREDITH, C.J.C.P.:—I retained this case yesterday afternoon for the purposes of further consideration of one or two of the points respecting the legal character of the defendants and of the University, urged very fully, and with much force, by Mr. Paterson in the interests of the defendants.

Under the later legislation affecting the University and creating "The Governors of the University of Toronto"—called "The Board" in such legislation—they are made a legal entity—a corporate body; differing in that respect from the council of a municipal corporation and from any ordinary board of directors of any ordinary corporation; and being so incorporated, and having expressly conferred upon them capacity to sue and be sued; and admitting, as they do, that the work in which the plaintiff was injured was their work, and was under their contract; and that the persons engaged in it were their servants; this action is, I think, quite properly brought against them, in their corporate capacity, instead of against the University.

The contention that the rule that the King can do no wrong applies to the wrongs of "The Governors of the University of Toronto" was ruled against upon the argument. The mere fact that the Lieutenant-Governor in Council of the Province appoints most—not all—of the Governors does not confer upon them the character of Crown officers. Such an appointment, in itself, has no such extraordinary effect; and indeed is not even extremely unusual. I mentioned, during the argument, two other instances: one being the appointment of a member of a municipal hospital board; and the King in council, I believe, appoints the members of a University board in England. There is no reason why the Lieutenant-Governor in Council might not appoint members of a board of directors, or of

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management, of any concern; I mean there is no legal reason; and, if that were done, the effect in law would be none other than the effect of a like appointment made in any other valid manner.

Nor do the other powers, respecting the university, which the Lieutenant-Governor in Council has, under the enactments mentioned, bring to the Governors the character of Crown officers governing Crown property for the use or benefit of the Crown. They are but officers of the University, having power to deal with the property under their control for the uses and benefit of the University only.

The case of the Niagara Falls Parks Commission is quite different; there the Commissioners are Crown officers, dealing with Crown lands in the right of the Crown, and in the public interests only. The University of Toronto is a body having its own separate and independent rights and interests, upon which the Crown cannot infringe; and the University press, in the carrying on of the work in which the accident which is the subject-matter of this litigation happened, is one of those things.

The fiat of the Attorney-General for the Province, giving leave to bring this action, does not confer any right of action; it merely removes the legislative bar to the commencement of any action without such leave. But such legislation shews plainly that the Legislature deemed that actions at law would be against the Governors, as a corporate body and individually; though that will not help the plaintiff if the Legislature were mistaken in that respect. A like legislative bar applies to the Hydro-Electric Commissioners; and, though there is more reason for contending that the rule that the King can do no wrong applies to them than to the Governors, I have never heard of it being contended that there is no remedy in law, applicable to them, for their misdeeds; and they have been, and at one time not infrequently, sued.

Upon the merits of the case, I can but repeat that which I said during the argument.

There is no liability at common law. There was no failure on the part of "The Board" to supply proper machinery, or to take any other reasonable precaution to insure the safety from injury, in their employment, of their servants. A foot-board was not a usual, or indeed a proper, part of a small machine such as that in which the plaintiff was hurt; nor would it have prevented such an accident as that in which he was injured; nor was a switch, to cut off the electric power; the controller was all that was needed for putting, and keeping, the machine in, and out of, operation; nor, if there had been such a switch, would it have availed at all in preventing the accident. These two things really have nothing to do with the case.

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But, under the Workmen's Compensation for Injuries enactments, the plaintiff has, as I find, a good cause of action against the defendants, as such corporate body.

The witness Edwards was a person, employed by the defendants, to whose orders the plaintiff, in the same employment, was bound to conform: the plaintiff was ordered, by Edwards, to oil the tympan of the press, and, while conforming to that order, and by reason of conforming to it, was injured through the negligence of Edwards in setting the machine in motion without first giving the plaintiff some warning of his intention to do so. Both sub-secs. 1 and 2 of sec. 3 of the Workmen's Compensation for Injuries Act seem to me to apply to the case.

I cannot accept the statement of Edwards that his order was not to oil the machine, but was only to get ready to oil it. Such an order is improbable; and it is also improbable that if it, and not the order to do the work, had been given, the plaintiff would have gone at once to do the work without waiting for a later order to do that for which Edwards now asserts he should have awaited another order.

The one difficulty on this branch of the case affects only the question of contributory negligence; and that is a very substantial difficulty; but, upon the whole evidence, my conclusion is, that the defendants have not proved contributory negligence.

I have no doubt that the plaintiff knew that the machine had to be put in motion, in order to turn the tympan so that that part of it to be oiled would be towards him, before he could do the oiling; and that there was no need for him to put his hand over the end of the air-chamber, which was the only place of danger; but the question is not, could he have avoided the accident? it is, could he, exercising ordinary care, have avoided it? not the care of the skilled and careful, for he is yet but a youth, and but a pressman's assitsant. My conclusion is, that, exercising such care as such persons ordinarily would, he might have done as he did depending upon a warning from the pressman to him before any danger from the machine in motion could arise.

Then what is, in money, reasonable compensation, under all the circumstances of the case, for the injury which the plaintiff sustained? In all substantial things that injury was the cutting off of three fingers of the left hand—the little finger and the next two. It was a painful injury; it disabled him for three months; and he must always remain maimed in that way. It prevents him doing the finer work of the trade he was learning; but there are, of course, many other callings and trades in which it would not be any such drawback; and in his work

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of assistant pressman it has not yet caused any reduction in wages, and but little, if any, loss of time after the three months.

Under all the circumstances of the case, I assess the damages at $600; being satisfied that that is reasonable compensation under all the circumstances of the case.

There will be judgment for the plaintiff and $600 damages, with costs on the High Court scale, and without any set-off of costs. The action was commenced in the County Court, and was brought up to this Court by the defendants; and so, as against them, should be treated as if properly a High Court case.

Judgment for plaintiff.

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Jan. 18.

INGLIS v. JAMES RICHARDSON & SONS, Limited.

Ontario Supreme Court. Trial before Sutherland, J. January 18, 1913.

1. SALE (§ I B—9)—WHAT CONSTITUTES—PASSING OF TITLE—SUFFICIENCY OF DELIVERY.

Title to a quantity of grain stored in a grain elevator will pass from the seller to the buyer, where it appears that the buyer had made several purchases of grain from the seller, who carried a stock of grain in the elevator, by placing several orders through the elevator agent and then accepting a draft drawn by the seller for the purchase price each time a purchase was made, the seller in each instance executing an order on the elevator agent requesting him to deliver to the buyer the amount of grain purchased, and where it appears that the grain remained in the elevator subject to the buyer's right to remove any part of it at any time, and that some of the grain had been actually withdrawn by him, notwithstanding that no separation of the grain sold had ever been made from the rest of the grain belonging to the seller and that the elevator agent was not employed by the seller to make such sales, but the parties acted through him as a matter of convenience.

[*Wilson* v. *Shaver*, 3 O.L.R. 110, referred to.]

2. ACCESSION AND CONFUSION (§ I—1)—CONFUSION AND INTERMIXING OF GOODS IN BULK.

Where the damaged contents of a grain elevator are sold *en bloc* at a salvage sale after the destruction of the elevator by fire, the right of a person to whom title had passed before the fire to a specific quantity of the grain, not, however, separated from the bulk, is limited to the proportion which the quantity so purchased was of the total quantity in the elevator.

3. ESTOPPEL (§ III J—120)—BY INCONSISTENCY IN ACTS—SALE OF GRAIN WITHOUT SEVERANCE—PASSING OF TITLE.

Where a part of a quantity of grain stored in a grain elevator was sold to the plaintiff without severance or actual delivery of the part so sold, and where after the sale and before severance or delivery the entire quantity was destroyed by fire, the circumstance that, in an adjustment of the resulting insurance claims under a "blanket policy" between the seller and his insurers, the seller had stipulated with the insurers to stand between them and the plaintiff in the matter of the settlement and payment of the fire loss as a whole to him will not estop the seller as between him and the plaintiff from setting up that title under the stated sale had actually passed to the plaintiff.

ACTION for the return of money paid by the plaintiff to the defendants for wheat stored in an elevator at Owen Sound, and there destroyed by fire; the question being, whether the plaintiff, the buyer, or the defendants, the sellers, should bear the loss.

The action was dismissed.

The plaintiff, who was a miller, carrying on business near Owen Sound, had been in the habit of purchasing grain from the defendants, who had an office in Toronto, and carried a stock of wheat in the Canadian Pacific Railway elevator at Owen Sound. The defendants had, apparently, no agent at Owen Sound, but were in the habit of sending word to and receiving word from the plaintiff about sales of grain through the agent of the railway company in charge of the elevator there.

The plaintiff on the 2nd November, 1911, through the elevator agent, placed with the defendants an order for 2,000 bushels No. 1 Northern wheat at $1.06 per bushel; and on the next day the defendants forwarded to a bank in Owen Sound an invoice, order, and draft. The invoice was addressed to the plaintiff, and stated that he had bought from the defendants 2,000 bushels of No. 1 Northern wheat at $1.06, and that he was charged therefor $2,120. He was credited with elevator and freight charges $35 and sight draft $2,085; and at the end of the invoice were these words: "Track Owen Sound, order on elevator attached to draft." The order was addressed to the elevator agent, and signed by the defendants; it requested the agent, on presentation, to deliver to the plaintiff 2,000 bushels of No. 1 Northern wheat. The draft was for $2,085, drawn upon the plaintiff by the defendants at sight.

The plaintiff paid and took up the draft on the 7th November, and received the order.

On the 30th November, 1911, the plaintiff, by telephone, placed a further order with the defendants for 2,000 bushels of the same kind of wheat at $1.07 per bushel; and similar documents were on that date forwarded to Owen Sound by the defendants, who also wrote to the plaintiff confirming the sale.

The plaintiff paid this draft on the 4th December, and received a similar order on the agent.

The plaintiff testified that he held the orders, and the grain remained in the elevator to suit his convenience—at any time he could telephone those in charge of the elevator, and they would load a car for him. He also said that they could load the wheat when they liked, and make him take it when they wished.

On the 2nd December, 1911, the plaintiff applied to the elevator agent and received a car of 1,000 bushels on the first order; and up to the 11th December, 1911, had not obtained the remaining 3,000 bushels. On that date a fire occurred, which destroyed

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the elevator in which the defendants' wheat of the kind in question, in all about 20,000 bushels, was stored, including the 3,000 bushels belonging either to the plaintiff or the defendants.

W. D. McPherson, K.C., and *W. Masson*, for the plaintiff.
J. J. Maclennan, for the defendants.

SUTHERLAND, J. (after setting out the facts):—The plaintiff contends that, as there had been no separation by the defendants of his wheat from the rest of the wheat of the same quality, the agreement was still executory, and no property had passed.

One of the cases relied on in support of this view is *Lee* v. *Culp*, 8 O.L.R. 210. In that case it was held

that the inference from the circumstances was that the culling was to be done by the defendant with the plaintiff's concurrence; that until the culling took place there could be no ascertainment of the apples intended to be sold; that the property had, therefore, not passed, and that the loss must fall on the plaintiff.

One of the cases cited by Teetzel, J., in *Lee* v. *Culp*, is *Box* v. *Provincial Ins. Co.* (1871), 18 Gr. 280. In this case

a warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a warehouseman's receipt, under the statute, acknowledging that he had received from him that quantity of wheat, to be delivered pursuant to his order to be indorsed on the receipt. The 3,500 bushels were never separated from the other wheat of the seller.

It was held by the Court of Appeal that the purchaser had an insurable interest.

In that case the intention of the parties as to whether the property should or should not pass was discussed and Spragge, C., puts the effect of the conclusion arrived at, p. 290, as follows:—

The judgment of my brother Mowat, upon the rehearing, proceeded upon the ground that it was the intention of the parties that the property should pass to the plaintiffs; and that the law, carrying out the intention of the parties, transfers the property where it appears to be the intention of the parties that it should be transferred. The learned Chief Justice adopts this reasoning.

In *Wilson* v. *Shaver* (1902), 3 O.L.R. 110, it was held

that whether the property in goods contracted to be sold has or has not passed to the purchaser depends in each case upon the intention of the parties, and the property may pass, even though the goods have not been measured, and the price has not been ascertained.

The plaintiff also contends that it was the duty of the defendants to place the wheat in cars on track at Owen Sound, and that the invoices so expressed.

The defendants assert that they paid all charges necessary to have the wheat placed in cars on the track at Owen Sound,

deducting the lake freight and elevator charges for that purpose from the price of the grain, as shewn on the invoices, and from the amount of the drafts drawn on the plaintiff; and the plaintiff, accepting the invoices and drafts in this way when he paid the latter, was in a position then to settle with the elevator people for all charges up to then necessary to enable the wheat to be placed on track at Owen Sound, having the money in his own pocket to do so. It is not denied by the plaintiff that the deducted charges paid up everything in the way of charges to that date. The defendants contend, therefore, that the contract was, and the meaning of the words "track Owen Sound," was intended to be and is, on the basis of track Owen Sound, all charges paid. It could not well be contended by the plaintiff, I think, that, if he left the grain in the elevator thereafter for any period, and there were further charges, he could compel the defendants to pay the same.

It was argued by counsel for defendants that the plaintiff had in the case of previous sales paid the additional elevator charges, and in support of this a reference was made to his examination for discovery. This reference was objected to by the plaintiff's counsel, as the said examination had not been made part of the plaintiff's case.

The course of dealings previously, the terms of the orders, and the course of dealing under the orders in question, I think, bear out the construction of the contract placed on it by the defendants. After he received the orders, the plaintiff applied for the grain purchased by him and for cars in which to receive it, when and as he wanted it, without reference to the defendants at all. They and he treated the grain sold, after the drafts were paid and the orders on the elevator agent taken, as the plaintiff's.

In some cases it has been held that, if the bailee of the commodity in question has not been notified, the property does not pass.

See *Coffey* v. *Quebec Bank*, 20 U.C.C.P. 110, *per* Gwynne, J., at 124.

In that case also at p. 116, Hagarty, C.J., says:—

> As I understand the course of decisions in our Courts, it has been considered that the usage of the trade does not require in wheat contracts that delivery must be made "grain for grain," that delivery of the stipulated quantity of the article, of the quality and character bargained for, generally satisfies the contract.

In this case the defendants did not directly give to those in charge of the elevator such notice of the sales to the plaintiff. It is clear, however, that the plaintiff must have shewn the order as to the first 2,000 bushels to the elevator people when receiving the 1,000 bushels, part thereof, from them. And it can certainly

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be considered that as to this 2,000 bushels there was a notice brought to the attention of the bailee sufficient to cover the case. Both the plaintiff and the elevator people acted on that order.

I have come to the conclusion and I find that the intention of the parties, when the drafts were paid and the orders on the elevator agent taken by the plaintiff, was, that the property in the wheat should pass to the plaintiff.

The defendants make the further contention that "track Owen Sound" means that the cars were to be provided by the plaintiff in which to receive the wheat.

In *Marshall* v. *Jameson*, 42 U.C.Q.B. 115, a case where the contract was for wheat f.o.b., at Clinton, it was held to be the duty of the buyer to provide the cars, and that the defendant not having done so within a reasonable time could not recover in an action against the seller for non-delivery of the wheat.

While the terms of this contract are not identical, it seems to me that the *Marshall* case applies, and that it was the duty of the plaintiff to have provided cars in which to receive his wheat. He paid the first draft on the 7th November, and took delivery, later on, of 1,000 bushels thereunder. He permitted the remaining 1,000 bushels to be left in the elevator from that date until the time of the fire, upwards of a month, when at any time he had a right, under the order in his possession, to get the wheat. He paid the second draft on the 4th December, and allowed the 2,000 bushels paid for by it to remain in the elevator from that date till they were destroyed by fire on the 11th December. I think in each case this delay was unreasonable on his part; and that, the grain being destroyed, he must be at the loss thereof.

If defendants had meantime sold to other persons all the wheat of the kind in question, except the 3,000 bushels, and they had taken delivery thereof, the 3,000 bushels would alone have been left in the elevator. Would not that have been his wheat? His wheat was part of the whole that was there. All was destroyed and so his was destroyed. It was destroyed because he had delayed to take delivery for an unreasonable time.

The defendants had their wheat and other grain in the elevators at Owen Sound insured under what is called a "blanket policy." The practice was, as between them and the insurance company, that from day to day the quantity of grain going out of the elevator was reported, and at the end of the month the premiums were settled and adjusted on the basis of the varying amounts in the elevator during the previous month. The evidence of the defendants at the trial was to the effect that the insurance on each of the 2,000 bushels in question, after payment of the drafts, was taken out of the benefit of the insurance, and the quantity of grain written off their own books as on completed sales.

After the fire, which consumed or damaged a quantity of grain very much in excess of the 20,000 bushels of the kind in question herein, the insurance companies, of which there were several interested in the loss, proceeded to deal with the matter. The underwriters took possession of the damaged grain and made a sale of it. The sale was not one which was advertised, but the representatives of the companies intimated to those whom they thought likely to purchase that a sale would be made, and put it up at auction to those present at the time indicated. It appears that the plaintiff had no notice of this sale. On the other hand, the defendants were present, made the highest offer for and purchased the damaged wheat, afterwards selling and disposing of it. The plaintiff says that he attempted to buy a quantity of the damaged grain which he saw in a certain bin at the elevator, which he thought was uninjured, and would reasonably fill the contracts which he had made with the defendants. One of the defendants, on the contrary, says that he told the plaintiff that he could take wheat from a particular bin, if he watched it himself to see that he was getting what he desired. I am unable to find, on the evidence, that any definite agreement as to this was come to between the parties after the fire.

The plaintiff, however, says that, in the course of the claim made by the defendants or the insurance companies, which was for a very large sum, they practically treated all the wheat of the kind in question herein in the elevator at the time of the fire as their own, ignoring the contention which they now put forward that the 3,000 bushels of wheat claimed by the plaintiff should have been taken away by him was his at the time of the fire, and the loss of which should be borne by him. The plaintiff contends that the defendants are now estopped from denying that the wheat was theirs.

At the time of the fire, the defendants say, they were unaware of the fact that the plaintiff had not withdrawn his 3,000 bushels from the elevator. Later, it was discovered that there was apparently more grain therein than they were claiming, and at first the discrepancy seemed to be 1,000 bushels, later 2,000, and finally the 3,000 bushels in question. There are expressions in some of the documents put in at the trial in which the defendants speak of their contract with the plaintiff "on track Owen Sound," and that they will stand between the insurance companies and the plaintiff in the matter of the settlement and payment of their claim for loss.

One of the defendants, however, says that, in view of the large loss they were sustaining in any event and the large amount of insurance moneys which they were claiming and which was involved, and which they were seeking to obtain payment of as soon as possible, they made these references. They also point

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out, however, that the insurance companies were made aware of the situation, so far as the plaintiff was concerned, and a special cheque for $558 was issued by the insurance companies payable to the order of the plaintiff and defendants jointly as representing the relative share of the plaintiff in the moneys obtained from the sale of the salvage.

It appears that, before he commenced his action, the existence of this cheque, payable as indicated, was made known to the plaintiff. It is said that he declined to accept it. In any event, it is not pretended that he intimated that he would accept it, nor did he so indicate at the trial. I suppose that this cheque is still available for him if he will now accept it. The amount thereof approximately represents the plaintiff's share of the salvage.

I think the plaintiff's action must be dismissed with costs.

Action dismissed.

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Mar. 31.

Re DAVIES.

Ontario Supreme Court, Middleton, J. March 31, 1913.

1. WILLS (§ III G 8—158)—CONSTRUCTION OF GIFT TO PARENT AND CHILDREN—PER CAPITA.

Where there is a gift by will to a parent and her children share and share alike, the parent and children take per capita.

2. WILLS (§ III G 8)—159)—DIVISION "BETWEEN," MEANING OF.

The word "between" in a will does not necessarily import a division into two parts, but may express a division between two or more partakers.

Statement

MOTION by the executors of the will of William Davies junior, under Con. Rule 938, upon originating notice, for an order determining a question arising upon the construction of the will.

A. M. Denovan, for the executors and the widow.

F. W. Harcourt, K.C., for the daughters, now all adults.

Middleton, J.

MIDDLETON, J.:—The testator died on the 22nd September, 1892. By his will a trust fund is created, from which the income is to be paid to the wife until the youngest of the children attains the age of twenty-one years or marries. Upon the youngest attaining age, the wife is to receive an annuity of $800. Certain provisions are made for the creation of a residuary trust fund, to be held in trust for the testator's children in equal shares; the sons to receive their shares on attaining age; the shares of the daughter are to be invested, and the income paid to them without power of anticipation. The will provides that when the residuary trust fund "yields to each of my daughters an income

of not less than $800 per annum all surplus income arising from said residuary trust fund is to be divided equally between my said wife and my said daughters share and share alike." The fund held to answer the wife's annuity is to be ultimately divided amongst the children.

The question raised is as to the meaning of the clause above-quoted, relating to the surplus income from the residuary trust fund. The widow contends that it is to be divided into two shares, one of which is to go to her and the other to her three daughters, share and share alike. The daughters, on the other hand, contend that the income is to be divided into four shares.

I have read many cases, but have failed to find any that throw real light upon the words used; and I have come to the conclusion that the daughters' contention must prevail.

The argument for the widow hinges mainly upon the meaning of the word "between." It is said that this implies a division into two equal parts; but, apart from the fact that the strict etymological meaning of the word "between" is not always observed, and that it is frequently used as equivalent to "among," I find it stated in Murray's Dictionary that the word may be used as "expressing division and distribution to two (or more) partakers;" and, after giving many senses in which the word can be properly used, this note follows: "In all senses 'between' has been from its earliest appearance extended to more than two."

In seeking to ascertain the intention of the testator from the words used, I cannot shut my eyes to the general scope of the will. There is first the setting apart of a fund sufficient to produce an income for the widow of $800. Then there is the setting apart of the residuary fund to produce an income for the daughters. As soon as the income of each daughter equals the income of the mother, then the testator naturally and reasonably provides that the surplus income shall be divided—as I think—into four shares, so that the mother and daughters shall be put in a position of equality as to income.

The costs of all parties may come out of the estate.

Judgment accordingly.

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Jan. 30.

CURRY v. PENNOCK.

Ontario Supreme Court. Trial before Meredith, C.J.C.P. January 30, 1913.

1. LANDLORD AND TENANT (§ II B 1—14)—LEASES—COVENANTS AGAINST ASSIGNMENT—RELIEF FROM FORFEITURE, HOW LIMITED.

The Ontario Supreme Court has no power to relieve a lessee of premises against forfeiture of his term on breach by him of his agreement not to sub-let without the written consent of the lessor, which agreement provided that the lessee's right under it should continue only so long as he strictly observed, complied with and performed the terms of the lease, since, by the statute law of Ontario, though the courts have power to relieve against a right of re-entry or forfeiture for breach of a condition or covenant between the landlord and tenant, it expressly excludes the breach of a condition or covenant against sub-letting or parting with the possession of the leased land.

[Landlord and Tenant Act, 1 Geo. V. (Ont.) ch. 37, sec. 23, taking effect September 1, 1911, considered.]

2. LANDLORD AND TENANT (§ III F—119)—LIABILITY OF TENANT TO ASSIGNEE OF REVERSION.

The assignee of a reversion has a right to enter the premises leased by his assignor, for condition broken, where such right is expressly reserved to the original lessor in the lease and the condition upon which the right is exercisable has happened.

[See Landlord and Tenant Act, 1 Geo. V. (Ont.), ch. 37, secs. 4 and 5.]

3. LANDLORD AND TENANT (§ II E—35)—SUB-LETTING—TENANT'S SERVANTS SLEEPING ON PREMISES, EFFECT.

A condition in a lease that the lessee would not sub-let or permit any person to have any interest in, or to use any part of the property in question, for any purpose whatever, without the consent in writing of the lessor, is not broken where the lessee permits some of his servants to sleep there, the payment for such occupancy by the servants being deducted from their wages.

Statement

ACTION to recover possession of demised premises, for an injunction, and other relief.

Judgment was given for the plaintiff.

T. J. W. O'Connor, for the plaintiff.

J. R. L. Starr, K.C., for the defendants.

Meredith, C.J.

MEREDITH, C.J.C.P.:—If this Court had power to relieve the defendants from the effect of their conduct, which, over their own signatures and seals, they have plainly provided shall be a loss of their rights in the property in question, I would be in favour of giving them another chance to live up to the terms of their agreement, because nothing that they have done, beyond their rights, has been proved to have injuriously affected the plaintiff in any way; but there is no such power; the plaintiff has a right to exact that which the agreement in question provides shall be the effect of a breach of its provisions.

The statute-law has given to the Courts much power to relieve against a right of re-entry or forfeiture for breach of a condition or covenant between landlord and tenant, but has ex-

pressly excluded a condition or covenant against under-letting or parting with the possession of the leased land; and this case is one, in substance, to which such exception is especially applicable. The personality of the occupiers of the property in question, under the writing in question, was and is necessarily a matter of much concern to the plaintiff, as well as to any one else in his position. Though the defendants may well be persons who might confidently be intrusted with the rights conferred upon them by the writing in question, those to whom they might transfer their rights, in whole or in part, even in good faith, might not be—and might very injuriously affect the plaintiff's rights and interest in the land. It was and is essentially a case in which the interests of Wolf and of those claiming through him required and require that he and they should have reasonable control over the power of the defendants to substitute for themselves any one else in the exercise of the substantial rights conferred upon them in the writing in question; and so, by agreement between the parties to it, expressly and plainly set out in it, it is provided that the defendants should have no power to sublet, or to permit any person to have any interest in, or to use, any part of the property in question, for any purpose whatever, without the consent in writing of the other party to it; and that the defendants' rights under it should continue only so long as they strictly observed, complied with, and performed the terms of the writing.

In the autumn of the year 1911, the defendants entered into an agreement with one Brooker, which plainly provided for a breach of the terms of the writing in question. That which was provided for in that agreement was, substantially, a subletting of their rights, under the writing in question, for a rental of $1,500. It was, in no substantial sense, the mere appointment of a manager for them. All the profits were to be Brooker's, and a fixed sum was to be paid to them. Brooker was to have possession, and the plaintiffs were to be out of possession of the property and profits, except an oversight of the property and business, which a landlord, under such circumstances, might well, and indeed ought to, have, to protect his own interests as landlord; and this agreement was carried out accordingly during the year 1912; and an agreement for the continuance of it during the present year has been entered into; and $300 has been paid on this year's rent.

All this is quite in the teeth of the plain words of the writing in question against permitting any one to have any interest in or use of any part of the property; as well as, substantially, against subletting it; and no attempt to procure the consent of any one concerned was made; and it was all done with the knowledge that the plaintiff would take advantage of any and every

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opportunity he could grasp to turn the defendants out—being now able to obtain a much higher rent than they have contracted to pay.

I am unable to perceive anything, of any weight, in the contention made in the defendants' behalf, that the plaintiff is not entitled to evict because the writing in question was not made with him as a party to it, but only with one through whom he claims. The condition broken, the defendants' right of possession ended, and the person entitled to the property, subject to their rights, may assuredly re-enter; see 1 Geo. V. ch. 37, secs. 4 and 5.

The minor points involved in the action were disposed of during the argument, judgment on the main point being withheld at the request of counsel for the purpose of enabling them to refer to some cases which were not accessible to them then; that has now been done, without, however, throwing any obscurity upon that which seems to me to be a very plain case.

Those minor points were dealt with thus:—

The defendants had no right to erect the brick verandah wall without the plaintiff's consent. They might have repaired the wooden verandah; and could have done so without violating the by-law against erections and alterations without the permission of the municipality. But no substantial, or even appreciable, damage was caused to the plaintiff by this wrong; and it would at most be a case for merely establishing the plaintiff's right, and nominal damages.

There was no exceeding the defendant's rights in serving refreshments on the verandah; it was part of the house; refreshments had always been served there, and could not be satisfactorily served in any other part of the cottage. And there was no evidence that the sale of peanuts was not within the business of the keeper of a restaurant or "lunch-counter."

There was no breach of any of the terms of the writing in question in the defendants permitting some of their servants employed in the restaurant or at the lunch-counter to occupy rooms in the cottage, while so employed, nor in deducting from their wages an agreed amount for such occupancy; it was tantamount to paying so much less wages because they were lodged by the master.

The occupation by the Wolfs and a partner of Wolf, of some of such rooms, before Wolf assigned to the plaintiff, gave no right of action to Wolf, who was a party to it; and, consequently, the plaintiff can have no such right.

Some testimony given in contradiction of the writing, or perhaps with a view to proving consent by Wolf not in writing, I gave no credence to; and so would give no effect to it if it could be considered admissible in any manner or for any purpose.

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The Landlord and Tenant Act, 1 Geo. V. ch. 37, was not relied upon or referred to on either side. Section 23 is obviously, for more than one reason, inapplicable.

Judgment for the plaintiff for possession of the land in question with costs, will, substantially, give the plaintiff all that he is entitled to, and no more than that; there will be judgment accordingly; but with a stay of proceedings for thirty days, if either party desires it.

Judgment for plaintiff.

ARMSTRONG CARTAGE CO. v. COUNTY OF PEEL.

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April 3.

Ontario Supreme Court. Trial before Kelly, J. April 3, 1913.

1. DAMAGES (§ III P—330)—LOSS OF PROFITS AS ELEMENT OF DAMAGE—UNREASONABLE DELAY IN HAVING REPAIRS MADE.

Where a chattel has been injured owing to a negligent act, the cost of repairing it, the difference in value between the former worth and that of the chattel when repaired, and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable, as damages, but damages are not recoverable for loss of the use of the chattel during the period of an unreasonable delay on the part of the owner in having the repairs made.

[*The "Greta Holme,"* [1897] A.C. 596, and *The "Argentino,"* 14 A.C. 519, referred to.]

2. HIGHWAYS (§ IV A 1—120)—LIABILITY OF COUNTY FOR DEFECTIVE HIGHWAY—ROAD TAKEN OVER.

Where, under the Highway Improvement Act, 7 Edw. VII. (Ont.) ch. 16, as amended by 2 Geo. V. (Ont.) ch. 11, a county council has assumed highways in any municipality in the county in order to form or extend a system of county highways therein, the county is liable for the maintenance and repair of those roads, and for damages sustained by reason of the non-repair of any of them.

Statement

ACTION to recover $1,500 damages for injuries and loss resulting from injuries to the plaintiffs' auto-truck by breaking through a bridge on the highway between Brampton and Cooksville, which bridge, as the plaintiffs alleged was out of repair.

Counterclaim by the defendants, the Corporation of the County of Peel, for $250 expenses incurred in repairing the bridge, which they said was injured by the plaintiffs' negligence and improper use.

G. S. Kerr, K.C., and *G. C. Thomson*, for the plaintiffs.

T. J. Blain, and *D. O. Cameron*, for the defendants.

Kelly, J.

KELLY, J.:—At the close of the trial, I expressed the opinion that, on the evidence, the bridge in question was, at the time the accident occurred and for many months prior thereto, badly out of repair and exceedingly dangerous for those having occasion to pass over it, and that those whose duty it was to maintain and repair it had ample means of knowing—and must have known

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—of its unsafe condition. It is inconceivable that the defendants could have been in ignorance of its condition, if reliance is to be placed on the evidence offered for the plaintiffs, not only as to want of repair, but also as to the length of time prior to the accident during which evidences of weakness and defects were apparent to those making use of it. That evidence I accept.

The road of which the bridge formed part is an important highway, on which there is much public traffic of all kinds usually seen on leading roads in long and well settled country places.

On the argument, counsel for the defendants contended (though this defence was not expressly raised in the pleadings) that the defendants were not, under the Highway Improvement Act and amendments thereto, liable for maintenance and repair.

This road was assumed by the defendants as part of a county road system under the provisions of that Act, and a great deal of work of construction and repair had been done on it prior to the 22nd June, 1912, when the accident happened which resulted in this action. The defendants' engineer says that the defendants had performed work on the road almost up to the bridge, and were working in its direction, but had not reached it.

Whatever doubt might have been entertained as to the liability, of the defendants, on the law as it stood prior to the passing of the Highway Improvement Act of 1912 (2 Geo. V. ch. 11)—and, on the evidence, I felt no uncertainty about the defendants' liability—such doubts were set at rest by the provisions of that Act. I am, therefore, of the opinion that the defendants are liable.

The other question for determination is the amount of damages sustained by the plaintiffs.

For making repairs to the auto-truck, necessitated by the accident, and including the item of $25 for towing the truck from Cooksville, the plaintiffs are entitled to $279.44.

For expenses at the time of the accident, moving the safe to Toronto, cost of taking the auto-truck from the place of the accident and bringing it to Toronto, freight charges on the safe and truck from Toronto to Hamilton, and telephone charges (all included in the item of $673.35 set out in the plaintiffs' particulars), I allow $147.50, in arriving at which I make a deduction of $25 from the item of $76.80 for moving the safe to Toronto.

Some of the other charges making up this $147.50 may appear to be excessive; but the situation in which the plaintiffs found themselves as the result of the accident was unusual; and they, no doubt, acted as reasonably as the circumstances permitted in their efforts to remedy the trouble with as little de-

lay as possible; and it was shewn that they actually paid the amounts charged for these items.

The remaining item of $733.08 claimed by the plaintiffs is for damages in being deprived of the use of the truck for 82 days. The defendants contend that such damages are too remote to be charged against them.

The question of remoteness of damage has been much discussed by the Courts and text-writers, and the cases bearing upon it are numerous. In Halsbury's Laws of England, vol. 21, at p. 485, it is summarised thus: "Where a chattel has been injured owing to a negligent act, the cost of repairing it, the difference in value between the former worth and that of the chattel when repaired, and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable." Amongst the cases there cited are *The "Greta Holme,"* [1897] A.C. 596, and *The "Argentino"* (1889), 14 App. Cas. 519.

Here it is shewn that the truck which was damaged was in daily use by the plaintiffs in their business; that to supply its place and do its work during the time the repairs were being made thereto, it was necessary for the plaintiffs to hire teams at a cost per day, in excess of what would have been the cost of operating the truck, of $8.94; and this charge they make for 82 days, from the 22nd June, the date of the accident, until the 1st October, when the truck was returned to them repaired.

Admitting the plaintiffs' right to recover for such loss, the amount claimed—or rather the time for which the claim is made—is excessive. The evidence shews that the repairs necessitated by the accident could have been made in from two to three weeks.

On the 11th July, an estimate of the cost of the repairs was furnished to the plaintiffs by the persons who made them; but it was not until the 10th August that the plaintiffs gave instructions for the repairs to be proceeded with. Making an allowance of a reasonable time for delivery of the truck to the company for repair and for arranging about the repairs, and for the time necessary to make the same, and a further reasonable time for delivery to the plaintiffs at Hamilton, when repaired, I think 33 working days is a reasonable estimate of the time for which the plaintiffs were deprived of the use of the truck owing to the damage which it had sustained in the accident. For that time, at the rate of $8.94 per day, the plaintiffs would be entitled to $295.02.

This, with the above items of $279.44 and $147.50, makes a total of $721.96, the amount to which, I think, the plaintiffs are entitled.

In making this calculation, I have not overlooked the ques-

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tion of interest or of probable depreciation of the truck through wear and tear, had it been in service during the 82 days. I may mention, too, in explanation, that it was shewn by the evidence that part of the delay in having the repairs done was due to negotiations for settlement between the plaintiffs and the insurers of the truck, but which resulted in no benefit either to the plaintiffs or defendants.

Judgment will be in favour of the plaintiffs for $721.96 and costs, and dismissing the defendants' counterclaim with costs.

Judgment for plaintiff.

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Feb. 26.

KILMER v. B.C. ORCHARD LANDS CO.

Judicial Committee of the Privy Council, Lord Macnaghten, Lord Atkinson, and Lord Moulton. February 26, 1913.

1. CONTRACTS (§ IV F—371)—TIME OF THE ESSENCE—DEFAULT—PROVISO FOR FORFEITURE OF INSTALMENTS PAID.

Where a contract of sale of lands upon deferred payments stipulates that time shall be of the essence of the agreement and that in default of punctual payment of any instalment of purchase-money or of any part thereof the agreement should be void and all payments absolutely forfeited to the vendor and that the vendor should be at liberty immediately to re-sell, the court should relieve against the strict letter of the contract when the arrears are paid into court in the vendor's action brought shortly after the default for the enforcement of the forfeiture, particularly where the strict wording of the agreement would otherwise involve the right to confiscate sums of money increasing from time to time as the agreement approached completion in case of default occurring upon subsequent instalments.

[*B.C. Orchard Lands Co.* v. *Kilmer*, 2 D.L.R. 306, 17 B.C.R. 230, reversed on appeal.]

2. CONTRACTS (§ V C 3—407)—STIPULATION FOR RESCISSION ON BREACH—PENALTY CLAUSE.

Where there is a stipulation in an agreement that a forfeiture is incurred if on a certain day the agreement remains either wholly or in part unperformed, in which case the real damage may be either very large or very trifling, such stipulation is to be treated as in the nature of a penalty and the court may relieve against it.

[*Re Dagenham (Thames) Dock Co.*, L.R. 8 Ch. 1022, approved.]

3. VENDOR AND PURCHASER (§ I E—28)—RESCISSION OF CONTRACT—PENALTY—EQUITABLE RELIEF.

Where the purchaser, under an agreement for sale of lands on deferred payments was let into possession on paying the first instalment but defaulted upon the second instalment, the vendor's claim in an action to annul the contract and to forfeit the money paid is properly dismissed if the arrears are paid into court when the statement of defence and counterclaim for specific performance of the agreement is filed, if the stipulation for forfeiture is, in fact, one for a penalty.

Statement

APPEAL by the defendant (Kilmer) from the decision of the Court of Appeal of British Columbia, *B.C. Orchard Lands Co.* v. *Kilmer*, 2 D.L.R. 306, 17 B.C.R. 230, 20 W.L.R. 892, whereby the judgment given in defendant's favour at the trial was reversed and judgment directed to be entered for the plaintiff company.

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The present appeal was allowed and the judgment at the trial restored.

The action was brought by the company to declare rescinded a contract of sale of lands upon deferred payments made by it as vendor to Kilmer as purchaser on the ground of the purchaser's default in paying an instalment. The defendant counterclaimed for specific performance and brought into Court the amount of the overdue instalments.

Statement

Buckmaster, K.C., and *Walter Burt*, for appellant.
E. P. Davis, K.C., and *Malcolm Macnaghten*, for respondent.

The judgment of the Board was delivered by

Lord Moulton.

LORD MOULTON:—The question on this appeal arises out of a claim by the respondent company—an unpaid vendor of a tract of undeveloped land in British Columbia—to enforce a condition of forfeiture contained in the agreement for sale. By the terms of the agreement, the purchase-money was to be paid, together with interest, by specified instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment at an appointed date of the instalment of purchase-money and the interest then payable or any part thereof, the agreement was to be null and void, all payments made under the agreement were to be absolutely forfeited to the vendor, and the vendor was to be at liberty to resell the property immediately. The appellant, Kilmer, who was the purchaser, and who had been let into possession upon payment of the first instalment on the execution of the agreement, met the company's claim by a counterclaim for specific performance, and the money then due was paid into Court to the credit of the action. The trial Judge dismissed the action. On the counterclaim he decided in favour of Kilmer with costs. Then there was an appeal. The Court of Appeal, consisting of three Judges, by a majority allowed the appeal and dismissed the counterclaim. Hence this appeal. The trial Judge rested his decision mainly on the view that the conduct of the plaintiff company was oppressive, harsh, and vindictive, and such as to lull the defendant to sleep and justify him in assuming that he would, notwithstanding the terms of the contract, have some indulgence in making his payments. Their Lordships agree to the result at which the learned trial Judge arrived, though not exactly upon the same grounds.

In the case of *In re Dagenham (Thames) Dock Co.*, L.R. 8 Ch. 1022, Mellish, L.J., expresses himself as follows:—

> I have always understood that where there is a stipulation that if on a certain day an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty.

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That was a case like this of forfeiture claimed under the letter of the agreement met by an action for specific performance. James, L.J., seems to have been of the same opinion. He says:—

> In my opinion, this is an extremely clear case of a mere penalty for non-payment of the purchase-money.

He ends by stating that he agreed with the Master of the Rolls that it was a penalty from which the company were entitled to be relieved on payment of the residue of the purchase-money with interest. No doubt the learned Lord Justice referred in detail to the special circumstances of the case, but it appears to their Lordships that that reference was made in answer to the arguments which had been addressed to the Court on behalf of the appellants. As regards the ground of his decision the two Lords Justices seem to have been in perfect accord.

The question raised by the present appeal appears to their Lordships to come within the decision in the case of the Dagenham Dock. The law in British Columbia on such a point must be the same as the law in this country.

The facts of the present case, so far as they are material to the decision, are as follows. By an agreement dated the 14th December, 1909, the respondent company agreed to sell to the appellant, Kilmer, and Kilmer agreed to purchase, certain lands therein described, for the sum of $75,000, payable in manner and on the days and times thereinafter mentioned, that was to say:—

> $2,000 on the execution of these presents, a further sum of $5,000 on or before the 14th June, 1910, a further sum of $5,000 on or before the 14th December, 1910, a further sum of $60,000 in six equal semi-annual instalments of $10,000 each, on or before the 14th days of June and December in the years 1911, 1912, and 1913, and the balance of $3,000 on or before the 14th June, 1914, together with interest on so much of the said purchase-moneys as may from time to time remain unpaid at the rate of seven per cent. per annum, and as well after as before maturity, at the same rate, payable with each said instalment of purchase-money as aforesaid.

Then followed an agreement on the part of Kilmer to pay the said sum of $75,000, together with the interest thereon at the rate of seven per cent. per annum, on the days and times and in the manner above-mentioned, and to pay and discharge all taxes, rates, and local improvement assessments wherewith the said land might be rated and charged, and to take all necessary steps to procure a supply of water for irrigating the said lands, and to defray all the expenses of managing the said lands as from the date of the agreement, and all costs of surveying

and sub-dividing the said lands. Then came the following agreements and declarations, namely:—

(The usual statutory covenants.)

And the party of the first part further agrees with the party of the second part, his heirs and assigns, to sign any plan or plans of sub-division of said lands or any part thereof prepared for or on behalf of the party of the second part, and in the event of a sale or sales by the said party of the second part, his heirs or assigns, of all or any of the sub-divisions of the said lands for a cash consideration, the party of the first part on payment to it of seventy-five (75) per cent. of the price paid to the party of the second part therefor, or seventy-five dollars (875) per acre, whichever shall be the greater sum, will, by a good and sufficient deed or deeds in fee simple, grant and convey to the party of the second part, his heirs or assigns, such sub-division or sub-divisions so sold as aforesaid.

And also shall and will suffer and permit the said party of the second part, his heirs and assigns, to occupy and enjoy the same until default be made in the payment of the said sums of money above-mentioned or the interest thereon or any part thereof, on the days and times and in the manner above-mentioned; subject nevertheless to impeachment for voluntary or permissive waste.

And it is expressly understood that time is to be considered the essence of this agreement; and, unless the payments are punctually made at the times and in the manner above-mentioned, these presents shall be null and void and of no effect, and the said party of the first part shall be at liberty to resell the land, and all payments made hereunder shall be absolutely forfeited to the party of the first part.

It is hereby expressly agreed that the said party of the first part is not to be bound to furnish any abstract of title, or produce any title deeds or other evidence not in its possession or control, or to give copies of any title deeds, but that the party of the second part is to search the title at his own expense; and, if the said party of the first part, without any default on its part, shall be unable to make a good title to the said land within ninety (90) days from the date hereof (if the party of the second part declines to take such title as it is able to make), then he may withdraw from this contract, on the repayment to him of any sum of money paid on account of said purchase-money, and without being entitled to any compensation or expenses in connection therewith.

What happened was this. The first instalment of $2,000 was duly paid on the execution of the agreement. The second instalment of $5,000, with interest as provided by the agreement, was not paid on the day fixed for payment. The date of payment, which by the terms of the agreement was to be on or before the 14th June, 1910, was extended to the 7th July, 1910. On the 8th July, Kilmer wrote to the secretary explaining the circumstances which prevented his making the payment on the 7th, but promising to pay without fail on Tuesday the 12th. On the 9th, the secretary of the company sent a telegram saying the deal was off; and, on the 1st August following, the respondent company brought this action to enforce their rights according to the strict letter of the agreement. This was met by a counterclaim asking for specific performance, and the

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money which ought to have been paid on the 7th July was paid into Court, and remains in Court to the credit of the action.

The circumstances of this case seem to bring it entirely within the ruling of the *Dagenham Dock* case [*Re Dagenham (Thames) Dock Co.*, L.R. 8 Ch. 1022]. It seems to be even a stronger case, for the penalty, if enforced according to the letter of the agreement, becomes more and more severe as the agreement approaches completion, and the money liable to confiscation becomes larger. Clause 1 is not without a bearing on this view of the case. The purchaser was to be at liberty to subdivide the property; the vendor was bound to assent, on receiving three-fourths of the money for which the sub-divisions might be sold. And yet the vendor, if this construction of the agreement be right, reserved the power of forfeiting the money paid in respect of these sub-divisions, because it will be observed that the conveyance of the sub-divisions was not to be made to the respective purchasers but to Kilmer as the party of the second part.

Other points were raised in the course of the argument, but their Lordships do not think it necessary to refer to them.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be allowed, and the judgment of the Court of Appeal be discharged with costs, and the judgment of the Judge at the trial restored. The respondents must pay the costs of this appeal.

Appeal allowed.

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Feb. 10.

AGNEW v. McKENZIE ELLIS WOOD CO., Ltd., and ROMERIL FOWLIE & CO.

Saskatchewan Supreme Court. Trial before Brown, J. February 10, 1913.

1. PLEDGE (§ II A—13)—DEPOSIT OF MONEY—FORFEITURE ON DEFAULT—FORFEITURE OF DEPOSIT.

Money paid in respect of a contract of sale of a business as a guarantee that the intending purchaser would not back down after the seller imparted information of a confidential character to the buyer, cannot be recovered back by the purchaser where the transaction fails of completion through no fault of the seller, if the amount so put up as a guarantee is not unreasonable.

[*Howe* v. *Smith*, 53 L.J. Ch. 1055, 27 Ch.D. 89, specially referred to.]

Statement

THIS is an action to recover $3,500 paid by the plaintiffs, by way of "deposit and part payment" on a contract.

The action was dismissed.

A. E. Doak, and *J. H. Lindsay*, for plaintiffs.

P. E. Mackenzie, and *W. Beattie*, for defendants.

Brown, J.

BROWN, J.:—The plaintiffs have alleged fraud and misrepresentation on the part of the defendants, but have entirely failed to establish such, either as against the McKenzie Ellis Co. or their agents Romeril Fowlie & Co. I am satisfied that all the re-

presentations of fact which were made were substantially correct, and that the many figures which were given as estimates were quite within the mark, and in any event they were only given as estimates. The formal contract which the defendants the McKenzie Ellis Company executed as of January 28, 1910, and which they were willing to carry out, was in substantial compliance with the negotiations previously carried on between the plaintiffs and Romeril Fowlie & Company, and in the course of which the $3,500 was paid. This formal contract of January 28th is not binding on the plaintiffs, simply because it was not executed by them. It purports to be executed by the Saskatchewan Cordwood Company, but that company was not as yet formed or organized; and T. D. Agnew, who signed the same, had no authority to sign as manager of that company and thereby bind the plaintiffs. The terms which were insisted on by the plaintiffs subsequent to the payment of the $3,500 and to the subsequent execution of the formal contract by the defendants McKenzie Ellis & Co., were rejected by the defendants, as such terms were never contemplated during the course of the negotiations. The defendants the McKenzie Ellis Co. were willing to do all that they or their agents had agreed to do, and the deal went off through no fault of theirs. I fail to find any distinction in character between the $500 which was paid in the first instance and the $3,000 paid subsequently. It is true that the $500 is characterized in the receipt as a deposit on account of purchase price, and the $3,000 is characterized in the receipt merely as a payment on purchase price; but to get at the real character of these payments we have got to look at all the circumstances. These amounts were both insisted on and both paid before any contract was executed by the defendants. The amount involved in the contemplated deal was large, and it was on the part of the defendants a serious business to carry on negotiations with, and impart information about their business to strangers. They wanted a guarantee that the intending purchasers would not back down after all this information had been imparted. It was paid as a guarantee against the very contingency which did arise. In view of the nature of the transaction, and the large amount of purchase price—$70,000—I do not think $3,500 was an unreasonable amount to be called upon to put up as a guarantee, and being put up as such, and the defendants being in no way to blame for the deal not going through, the plaintiffs cannot recover: *Howe* v. *Smith*, 53 L.J. Ch. 1055, 27 Ch.D. 89.

There will be judgment for all the defendants on the claim, with costs, and for the plaintiffs on the counterclaim, with such costs as are exclusively applicable to the counterclaim against the defendants, the McKenzie Ellis Co.

Judgment accordingly.

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Jan. 29.

FALCONER v. JONES.

Ontario Supreme Court. Trial before Middleton, J. January 29, 1913.

1. PLEADING (§ I N—114)—AMENDMENTS ON THE TRIAL—NEW THEORY FOR PLAINTIFF DEVELOPED BY DEFENDANT'S EVIDENCE—NEGLIGENCE ACTION.

In an action for damages for the death of an employee by reason of the alleged negligence of the defendant employer, where there were no eye-witnesses to the accident, the plaintiff may, after verdict, be allowed to amend his pleadings to enable him to set up negligence on a different theory from that already set up, where such amendment is consistent with the facts as developed in the course of the evidence of the defendant's employees and witnesses and with the answers returned by the jury to questions submitted.

Statement

ACTION for damages for the death of William Falconer, while engaged at the defendants' factory in operating a machine called a "shaver," by reason, as alleged, of the negligence of the defendants.

Judgment was given for the plaintiff.

John Jennings, for the plaintiff.

H. H. Dewart, K.C., and *B. H. Ardagh*, for the defendants.

Middleton, J.

MIDDLETON, J.:—Most of the facts are not in issue. William Falconer was engaged at the defendants' factory in operating a shaver. This shaver was driven by a belt running from a wooden pulley upon a counter-shaft. The counter-shaft was driven by a belt running from a large pulley upon the main shaft in the basement, and passing through holes in the floor to a small pulley fixed upon the shaft above. When it was not desired to operate the machine, this belt was shifted by a "shifter" on to a free pulley upon the counter-shaft between the small fixed pulley and the large wooden pulley. The entire counter-shaft, with its pulleys, was covered by a box or case, so that when in operation there was no danger to any one arising from accidental contact with the rapidly revolving pulleys and belts.

On the 26th January, 1912, the belt connecting the main shaft and counter-shaft parted and fell to the basement. Falconer went to the basement, procured the belt, and took it to Werlich, the millwright having general charge of the machinery in the mill, for the purpose of having the belt repaired and replaced. Werlich went to the machine and took the cover off the box or casing which enclosed the counter-shaft; the belt could not be replaced without his so doing. He then passed the belt over the counter-shaft and down through the openings, and went to the basement to lace it. Falconer assisted him in uncovering the counter-shaft and in passing the belt through.

When the belt was laced, Werlich came upstairs again, placed the belt upon the loose pulley, and went below again in order to put the belt upon the revolving pulley on the main shaft. Werlich states that at this time he told Falconer to stand clear, as it was his intention to start the belt. The jury have found—and I agree in their finding—that no such statement was made. When Werlich reached the basement, he immediately placed the belt upon the pulley; and there was no eye-witness of what next happened. By some means, something was violently thrown, and struck Falconer upon the breast, breaking three ribs and driving them into his heart, instantly killing him.

The theory put forward by the defendants was, that Falconer had taken a piece of wood—produced at the trial—with the view of holding the belt upon the free pulley while it was being placed on the moving pulley below, and that, when the belt commenced to move, this piece of wood was jerked from his hand and thrown against him with violence.

The piece of wood produced was found immediately after the accident, broken as if it had received some severe impact; and the sides of the box were broken where they had been hit by some such object as the stick produced.

The jury deliberately reject this theory of the accident, and adopt, instead of it, a theory propounded by the plaintiff's counsel and not founded upon any evidence. It was shewn that a band-saw was operated at no great distance from the counter-shaft. What is suggested is, that the man operating the band-saw may have thrown a piece of waste wood over on to the moving belts, and that this may have been thrown in such a way as to bring about the injury.

If this finding were essential to the plaintiff's recovering, I should be much inclined to nonsuit; but I think that the defendants cannot complain if the theory propounded by them is accepted; and upon that there is liability.

The negligence found by the jury is, that the shifter was insufficiently locked, and that it allowed the belt to travel on to the fixed pulley, thereby putting the whole of the counter-shaft in motion at high speed; that the engine should have been slowed down during the operation; and that Werlich was negligent in leaving the cover off the counter-shaft while the shafting was in motion and putting the belt on the wrong side of the drive-wheel. Contributory negligence is negatived.

Accepting the theory propounded by the defendants, all these grounds of negligence are relevant, and are justified by the evidence. On the other hand, if the theory propounded by the plaintiff and accepted by the jury is correct, the only negligence which is applicable is that relating to leaving the cover off the machine by Werlich until he had ascertained that the

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machine was going to operate properly. Even in that view of the case, I think I should accept the findings of the jury, leaving it to an appellate Court to interfere.

The defendants' counsel pressed strenuously for a nonsuit, upon the ground that the only fair inference from the evidence was, that the accident was occasioned by Falconer's own conduct in endeavouring to hold the belt in place upon the free pulley while it was being replaced by Werlich upon the moving pulley below.

Accepting the principle laid down in *Sims* v. *Grand Trunk R. Co.*, 10 O.L.R. 330,* and in *Jones* v. *Toronto and York Radial R. Co.*, 21 O.L.R. 421, this case cannot be said to fall within any of the exceptions to the general rule that the question of contributory negligence is one for the jury.

For the benefit of any Court dealing with the matter, I may say that the impression made upon my mind as to what really happened was this. Falconer probably took the stick produced, and held the belt upon the free pulley. As Werlich had passed the belt down on the wrong side of the moving pulley below, as soon as he placed it upon the moving pulley it would immediately pass over on to the fixed pulley above. The effect of this was to cause the wooden pulley to rotate instead of remaining stationary. This wooden pulley then struck the stick, jerked it out of Falconer's hands, threw it violently upon the box, and it then rebounded and struck Falconer. Falconer would be standing in such a position that the stick, when jerked from his hands, would be thrown away, and would only reach him upon a rebound; and the break in the walls of the cover indicated that there had been such a rebound.

I allow an amendment by permitting the plaintiff to set up the negligent placing of the belt on the wrong side of the pulley upon the main shaft; as, while this was not set up in the pleadings or particulars, it was developed in the course of the evidence of the defendants' employees and witnesses.

Judgment will, therefore, go for the amount awarded, $1,650 (apportioned $500 to the infant son, which amount must be paid into Court, and $1,150 to the widow), and costs.

Judgment for plaintiff.

*Affirmed *Sims* v. *Grand Trunk R. Co.*, 12 O.L.R. 39.

MORAN v. BURROUGHS.

(Decision No. 2.)

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Dec. 28.

Ontario Divisional Court, Boyd, C., Latchford, and Kelly, JJ. December 28, 1912.

1. NEGLIGENCE (§ II B 1—85)—CONTRIBUTORY NEGLIGENCE—OF CHILDREN.

Young children who have attained the age at which criminal responsibility begins (7 years) may be held responsible for contributory negligence debarring them from recovering damages in actions for personal injuries through the negligence of others, if such children fail to exercise that standard of care which may reasonably be expected of children of their age and situation.

[*Moran* v. *Burroughs* (No. 1), 3 D.L.R. 392, reversed; as to contributory negligence of children injured on highways through negligent driving, see annotation to *Hargrave* v. *Hart*, 9 D.L.R. 521.]

Statement

APPEAL by the defendant from the judgment of Britton, J., of May 4, 1912, *Moran* v. *Burroughs* (No. 1), 3 D.L.R. 392, 3 O.W.N. 1214, in an action to recover $3,000 damages from defendant for allowing his son, a boy of tender years, to go on the streets of Smith's Falls with a rifle and ammunition, whereby the plaintiff lost an eye. At the trial judgment was awarded for $300 and costs.

The appeal was allowed.

C. A. Moss, for the defendant.

J. A. Hutcheson, K.C., for the plaintiff.

Boyd, C.

BOYD, C.:—Difficult questions of law appear to be involved in the consideration of the legal liability of the defendant on the findings of the jury in response to questions. The sole ground as given by them is that the father was negligent "in not having the rifle removed the first time he noticed it in the house."

It appears to me, however, that having regard to the question of contributory negligence on the part of the plaintiff, the infant injured, the appeal may be disposed of on that ground alone. The jury find that the boy was guilty of such negligence in that he did not exercise reasonable care, in that he went across in front of the gun instead of behind. The Judge as reported left this to them as a conflict of evidence, but afterwards he vacated the finding on the ground that there was no such conflict on the evidence as justified him in taking the opinion of the jury. He finally found that there was no evidence on the point to be considered by the jury, and he held that the boy exercised reasonable care, or was not guilty of any negligence.

He interprets the answer of the jury (3 D.L.R. 393), to mean that the boy at the time the firing was going on walked in front of the firing line. He says there is no evidence that the

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gun was intentionally fired at the time of the accident. It was on undisputed evidence accidentally discharged when being held by the son of the plaintiff and while a struggle was going on for the possession of the gun between the son and another boy, Morris McComb.

The presumption he says should stand that the infant plaintiff is not responsible for negligence, and that to disentitle the infant to recover it must be shewn that the injury was occasioned altogether by his so-called negligence.

[The learned Chancellor referred to the conflict of evidence on these points, his conclusion being that "the account given by the infant plaintiff does not accord with the position of the gun given by the other witnesses; in fact this account stands alone and is not corroborated. It is not in agreement with the version given by his own witness McComb."]

The conflict of evidence thus appearing which would be proper for the jury to consider is as to the position of the gun. The infant plaintiff is very emphatic and repeats again and again that the gun was pointed the other way, i.e., not in the direction of the puck, when he started across. The evidence of all the other witnesses present is contrary to this; they say that the gun was always pointed towards the puck and the plaintiff himself admits that if the gun was pointed that way it would be dangerous to cross in front of it. The jury have in effect found that it was dangerous to cross in front of the pointed gun and that the infant should have gone round behind—as he at first says he did.

A careful reading of the evidence leads me to conclude that the Judge rightly left it to the jury.

I may further note that the learned Judge seems to have thought there was some presumption which could be brought into the scales in dealing with contributory negligence on the part of the infant. This boy was over 12, had been several years at school, was bright and intelligent according to the witnesses, and as would appear from internal evidence in reading his testimony, and he was also not unfamiliar with guns and shooting (which seems to be rather a common means of enjoyment among the juvenile population of Smith's Falls).

In *Sangstar* v. *T. Eaton Co.*, 25 O.R. 78, the head-note gives, "Semble, that the doctrine of contributory negligence is not applicable to a child of tender years." That is founded on *Gardner* v. *Grace*, 1 F. & F. 359, which is cited for the same purpose in Simpson on Infants, p. 98 (3rd ed. 1909). In the Ontario case the child was 2½ years old, and in the English case the age was 3¼ years. In that case Channell, B., used much the same expressions as those quoted from 22 O.W.R. "Age is the most important factor in the application of this

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rule. Want of ordinary care which might not disentitle a child of tender years to recover would so operate in the case of one of older age. The point is neatly put in Eversley: "the question is really whether an infant of tender years can be said by reason of his want of experience and an incapacity to judge rightly of the probable result of his acts to be guilty of negligence: "Domestic Relations," p. 831, 3rd ed., 1906. As summed up in the latest book of repute, "Halsbury's Laws of England," vol. 21, p. 453, we find "When a child is of such an age as to be naturally ignorant of danger, or to be unable to fend for itself at all he cannot be said to be guilty of contributory negligence in regard to a matter beyond his appreciation, but quite young children are held responsible for not exercising that standard of care which may reasonably be expected of them." (1912) Title, Negligence.

The law as to infants on this head is well stated by Lord Low in *Cass* v. *Edinburgh* (1909), S.C. 1068, 1076. The law is also discussed and the same conclusions reached by Field, J., in *Collins* v. *South Boston R. Co.*, 142 Mass. 301. As to children over the age of criminal responsibility (7 years, see Code sec. 17) and perhaps even younger the alternative for the jury would seem to be well expressed in a New York case: "If you say that the child did what an ordinarily careful child would have done, then it is not negligence;" on the other hand, if the boy failed to adopt the means known to him to be effective in protecting against danger and was injured thereby, then he cannot recover: *Mocbus* v. *Herrman*, 108 N.Y. 349.

Those citations of law shew that on the facts of this case he was capable of contributory negligence, and the jury have found that he was guilty thereof.

Upon the answers to the questions the action should stand dismissed, and the judgment in appeal should be set aside and judgment for the defendant. But it is not a case for costs; the jury have found the defendant guilty of negligence in not removing it from the reach of the boy or sending it home.

LATCHFORD, J., agreed with the judgment of BOYD, C. Latchford, J.

KELLY, J., agreed in the result. Kelly, J.

Appeal allowed.

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Jan. 27.

AUTOMOBILE SALES LIMITED v. MOORE.

Ontario Supreme Court, Middleton, Lennox, and Leitch, JJ.
January 27, 1913.

1. BILLS AND NOTES (§ VI C—167)—DEFENCES—PARTIAL FAILURE OF CONSIDERATION.

Partial failure of consideration is no defence *pro tanto* in an action against the maker of a note by the payee, where such partial failure is not a liquidated amount, and it is error to allow judgment for defendant though the jury finds that there was such partial failure, the proper practice being to give judgment for the plaintiff on the note and award the defendant the amount of such failure of consideration found by the jury, as a counterclaim.

[*Georgian Bay Lumber Co.* v. *Thompson*, 35 U.C.R. 64; *Goldie* v. *Harper*, 31 O.R. 284, applied.]

2. COSTS (§ I—19)—APPORTIONMENT—SUCCESS DIVIDED—PROMISSORY NOTE WITH COUNTERCLAIM FOR DAMAGES.

In an action by the plaintiff on a promissory note for part of the purchase price of an automobile with a counterclaim by the defendant for damages, where the success is divided the costs on appeal may be similarly apportioned.

Statement

APPEAL by the plaintiffs from the judgment of Morgan, Junior Judge of the County Court of the County of York, upon the findings of a jury, in favour of the defendants, in an action upon a promissory note and a counterclaim for the return of $100 paid by the defendants to the plaintiffs.

The appeal was allowed.

R. J. McLaughlin, K.C., and *R. D. Moorhead*, for the plaintiffs.

G. N. Shaver, for the defendants.

Middleton, J.

The judgment of the Court was delivered by MIDDLETON, J.:—The note was given in part payment for an automobile purchased by the defendant Ida Moore, under a written contract dated the 18th April, 1912, which called for the payment of

When the note matured on the 3rd May, Ida Moore gave her $600 cash upon the delivery of the car.

cheque for the amount. Payment of this cheque was stopped.

The contract is in the words following: "I hereby place my order for one Guy car as seen . . . car to be put in good running order. Price, $1,000. Deposit, $100. Date of delivery, when ready. Terms: $600 on delivery of car; balance, note for three months, 6%."

When the car was delivered, the note was given in lieu of the cash payment. Complaint was made that the car had not been placed in good running order; and upon the evidence it appears that this complaint is well-founded. The experts called for the defence place the amount necessary to make the car satisfactory, at various sums, the highest being $200.

The trial was allowed to proceed without any discussion of

the law applicable; and apparently the case went to the jury as though the sole issue was, whether the car had been placed in good running order.

The learned Judge said at the close of his charge: "If you find as a fact that the machine was defective when it was delivered to the Moores, and that they are, therefore, not bound to take it, then you will find a verdict for the defendants; and you will also find a verdict for them for the $100 they had paid. On the other hand, if you find that the machine was in good condition, and you think the plaintiff ought to recover, you will give a verdict for $615."

On this, the jury found for the defendants; and judgment has been entered dismissing the action and for the recovery by the defendants of the $100 paid.

We do not think that this can stand. The rule is stated in Chalmers on Bills of Exchange, 7th ed., p. 108 thus: "Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise."

This is in accordance with the law laid down in our own Courts in many cases. See, for example, *Georgian Bay Lumber Co.* v. *Thompson*, 35 U.C.R. 64. In that case the declaration was upon a promissory note; plea, that the note was given on the purchase of a timber license, and that the contract was based upon the fraudulent assertion on the part of the vendors that they had the right to cut the hardwood timber. Upon demurrer the plea was held bad, as it shewed "only a partial failure of consideration and not of any definite sum." Sir Adam Wilson exhaustively reviews the earlier cases.

Goldie v. *Harper*, 31 O.R. 284, is also in point. Meredith, C.J., says: "It appears to be clear at law that, unless there is a total failure of consideration or unless there is a partial failure as to something that is ascertained and liquidated, the partial failure of consideration is no answer to an action upon the note."

We think justice can best be done in this case by directing that the plaintiff recover upon the note and cheque in question, with costs as of an undefended action upon a promissory note, and that the defendants be awarded $200, the maximum sum named by the witnesses called, as damages upon the counterclaim, with the costs incident to the issue as to the defective condition of the machine, including therein the costs of the trial; and that there should be no costs of this appeal.

Appeal allowed.

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1913

March 18.

MILLER v. HAND.

(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 18, 1913.

1. BROKERS (§ II A—7)—REAL ESTATE AGENT'S PURCHASE IN OWN NAME—LIABILITY TO ACCOUNT FOR PROFITS.

An agent selling land cannot make a profit for himself at the expense of his principal; and so if the agent fraudulently purchases the land himself, and afterwards makes a profit on the re-sale he is accountable to his principal for the amount of his profit less the commission on such profit.

[*Miller* v. *Hand* (No. 1), 8 D.L.R. 465, affirmed on appeal.]

Statement

APPEAL by the defendant from the judgment of Britton, J., 8 D.L.R. 465, 4 O.W.N. 245.

The appeal was dismissed.

G. H. Watson, K.C., for the defendant.

G. H. Kilmer, K.C., for the plaintiff.

Mulock, C.J.

The judgment of the Court was delivered by MULOCK, C.J.:—We are of opinion that this judgment cannot be disturbed. The learned trial Judge has found that the defendant was an agent of the plaintiff merely for the sale of lot 35, and continued as his agent throughout, until the sale was completed; and he was paid for his agency a certain stipulated sum of money.

During the whole of the period, from the time of Hand's appointment until the completion of the sale, the finding of the learned trial Judge as to the question of fact is, and we concur in it, that the plaintiff was not aware that Hand was interested in the sale which he had credited to his principal. It is true that in the examination of the plaintiff in another action he used loose expressions, which, if uncontroverted, would seem to lead to the conclusion that he was willing to sell to Hand; but, immediately after those expressions, he states that he had no knowledge of Hand being interested. Some months afterwards, McDougall sold the property at a substantial advance; and, later on, the plaintiff learned of the fraud, and brought this action.

For the appellant the question was raised as to what principle should be applied in fixing the damages. So long as the land remained in McDougall, so long as it had not passed into the hands of a *bona fide* purchaser for value without notice, it was recoverable by the true owner; and Miller was entitled to set aside the fraudulent deed.

Therefore, until the actual conveyance to Stubbs, the purchaser, the property in reality was the property of the plaintiff, and was thus sold to Stubbs to realise a certain sum of money;

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HAND.

Mulock, C.J.

and the plaintiff is content to have the damages fixed by regard to the amount of money realised from that sale. His right thereto appears to us to be unassailable. If he chooses to adopt a sale, he is entitled to the fruits of it. He chooses to adopt it; and, therefore, we hold that he is entitled to judgment for his share in the profits. He had a co-partner in the enterprise, who is not a party to this action; and, therefore, Miller, the plaintiff, is to recover only to the extent of his damage.

Therefore, we dispose of the case, dismissing the appeal with costs, without, in any way, prejudicing the co-partner, Hearst, in bringing any action such as he may be advised in respect of his claim.

Appeal dismissed.

BASHFORTH v. PROVINCIAL STEEL CO.

ONT.

S. C.
1913

March 31.

Ontario Supreme Court, Middleton, J. March 31, 1913.

1. CORPORATIONS AND COMPANIES (§ IV G 1—105)—OFFICERS — STATUS OF DIRECTORS.

There is no legal incompatibility between the office of director of a company and any other office in the service of the company, for directors do not stand in the position of masters to the officers of the company, but are themselves the servants of the company.

[*King* v. *Tizzard*, 9 B. & C. 418, referred to.]

2. MASTER AND SERVANT (§ I E—22)—GROUNDS FOR DISCHARGE OF EMPLOYEE.

There is no absolute legal rule as to what is a justification for the dismissal of an employee before his term of employment has expired; each case must stand on its own merits; lack of executive ability resulting in great financial loss to a company is sufficient to justify the dismissal of their general works manager.

Statement

ACTION for salary and for a share of profits under the terms of the plaintiff's agreement of hiring with the defendants, an incorporated company, as their works manager at Cobourg. The plaintiff claimed $290.94, balance of salary to the 31st August, 1912; $1,003.35, salary due on the 30th November, 1912; some small sums for light and fuel; and $300 for profits.

The action was dismissed.

By the agreement, which was dated the 22nd November, 1911, the plaintiff was employed for four years from the 1st December, 1911, as general works manager, at a salary of £800 per annum, in quarterly payments, and five per cent. of the net profit over and above £1,500 per annum, and the use of a house and a supply of light and fuel.

In August, 1912, he was suspended by the defendants' board of directors, and on the 25th October received a letter from the secretary which, it was said, amounted to a dismissal.

In April, 1912, he had been elected a director and vice-president of the company.

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Statement

The plaintiff denied the fact of his discharge and its validity, and sued for his salary upon the theory that the agreement was still in force.

The defendants alleged that on the 22nd October, 1912, the plaintiff was, for good cause, dismissed from their employment; and they brought into Court the amount which they said was due to him for salary up to that date, together with the costs of the action up to the date of payment in.

The defendants also counterclaimed for the damage sustained by reason of improper expenditure by the plaintiff.

F. M. Field, K.C., and *W. F. Kerr*, for the plaintiff.

E. F. B. Johnston, K.C., *A. C. McMaster*, and *J. F. Keith*, for the defendants.

Middleton, J.

MIDDLETON, J. (after setting out the facts):—The plaintiff's colleagues on the board of directors were Mr. William Beattie and Mr. Alexander Q. C. O'Brien, the secretary-treasurer of the company. Some difficulty had arisen by reason of the plaintiff taking the position that he was the general manager of the company, instead of the "general works manager."

At a meeting of the board on the 20th August, 1912, Messrs. Bashforth (plaintiff), Beattie, and O'Brien being present, Mr. O'Brien made a statement embodying charges of flagrant misconduct and incapacity on the part of the plaintiff. O'Brien then moved a resolution for an investigation by two members of the board, and that in the meantime the plaintiff be requested to refrain from active participation in the company's business. This was seconded by Mr. Beattie, and is said to have been carried.

Following this, a copy of the resolution was mailed by Mr. O'Brien to the plaintiff, with a letter requesting the plaintiff to govern himself in accordance therewith. Contemporaneously, a notice, dated the 21st August, 1912, was posted at the works, signed by O'Brien, that "until further orders Mr. Davis will take charge of the mill, in the absence of the general works manager."

A special meeting of shareholders was held on the 4th October, 1912, when the directorate was reconstituted; Mr. Sheldon was elected to the directorate.

On the 22nd October, a resolution was passed by the directors as follows: "Whereas, under date of August 30th, 1912, the general works manager, Mr. Andrew Bashforth, was suspended by resolution of the board of directors pending investigation into his conduct, and whereas investigation has been made resulting in confirmation of the allegations, be it resolved to notify Mr. Bashforth that his services will be immediately dispensed with, and the solicitor of the company be instructed to

take the necessary steps to carry out the requirements of the board and to notify Mr. Bashforth forthwith."

On the 25th October, a letter was sent to Mr. Bashforth, signed "The Provincial Steel Company Limited, A. Q. C. O'Brien, secretary," stating: "We beg to advise you that the board of directors, at their meeting on August 30th, 1912, passed a resolution that your services be immediately dispensed with. The grounds of this resolution you are aware of, as you have been on suspension for some time while the directors were investigating your conduct. You will please take this letter as notice accordingly."

It will be observed that there are two errors. The resolution of suspension was on the 20th August, not the 30th; and the resolution of dismissal was on the 22nd October, not the 30th August.

Mr. Bashforth says that, when he got the letter of the 25th October, he knew he was dismissed. I agree with him, and think there can be no question that the letter of the 25th October was an adequate notice of dismissal. It bears the signature of the company, by its secretary, and I think would have been ample justification for Mr. Bashforth then instituting an action for wrongful dismissal, if so advised.

Turning now to the legal question argued, it is said that the positions of director and general works manager are so inconsistent as to make it impossible for the same individual to hold both. This is based upon *King* v. *Tizzard*, 9 B. & C. 418, where it is held that the offices of alderman and town clerk were incompatible, and where Lord Tenterden based his finding upon the statement that "he would fill the two incompatible situations of master and servant."

I do not think it necessary to review the cases bearing upon this topic, because I am convinced that they do not apply here; for there is, in my view, no incompatibility between the two offices. The directors are not the master; they are the servants. The company is the master; and Bashforth was made a director at a shareholders' meeting of the company, after he had been appointed works manager. Nothing in practice is more common than to have those charged with the administration of the affairs of the company as managers also upon the board of directors, who are themselves managers; so as to insure harmony in the workings of the company. Whether this is wise in a particular case must be left to the judgment of the shareholders.

As pointed out in *Re Matthew Guy Carriage and Automobile Co.*, 4 D.L.R. 764, 3 O.W.N. 1233, 26 O.L.R. 377, the Privy Council took the view in *Burland* v. *Earle*, [1902] A.C. 83, 101, that a director was entitled to remuneration payable under an agreement made with him before he became director.

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So that, on all these grounds, the objection fails.

The question whether the company rightfully dismissed Bashforth has given me much anxiety. I realise the serious effect to the parties of any finding; yet I cannot feel doubt as to the result. I think the company were justified in what they did. As is usually the case in actions of this type, when the master seeks to justify the discharge of an employee, the whole career of the employee during the course of the employment is gone into in painful detail, and much is sought to be made of minor matters.

In this case I base my finding upon broad grounds. Before Mr. Bashforth's employment with the company, he had been employed as an engineer; and I have no reason to doubt his ability as an engineer. He was here employed, not merely as engineer, but as general works manager, which involved his taking charge of the operative end of the company's business, and required, if his efforts were to be successful, executive ability of a somewhat high order. This, unfortunately, Mr. Bashforth does not possess. Under the supervision and guidance of a competent executive officer, he, no doubt, had been a great success in his employment in England; but when he came to Canada, and had to face the very difficult situation existing in Cobourg, he did not prove equal to the task. Besides this negative reason for his failure, other serious defects developed. Instead of being content to fill the position he was entitled to by his employment, that of general works manager, he at once assumed the rôle of general manager, and, as a natural consequence, found himself in conflict with Mr. O'Brien, the secretary-treasurer of the company. Being unused to the conditions prevailing in Canada between employer and employee, Mr. Bashforth also fell foul of the men employed, unless these men had been previously trained in England, and were, therefore, prepared for his methods.

In the result, time and energy that ought to have been spent in bringing the factory into satisfactory and economical operation were wasted in useless bickering. This, combined with the lack of executive ability already referred to, resulted in the work of the mill being continued, it is true with some improvement, yet at an enormous loss. Bashforth knew when he was employed that it was the desire of Mr. Heath (the principal shareholder and president) that the works should redeem themselves out of their own earnings. Yet the first thing he did was to spend some $3,000 in fixing up the residence. He also spent $4,000 in the purchase of some new rolls, without having taken any adequate steps to see that they could be used to advantage.

It is impossible to lay down in any satisfactory way, in general terms, what will justify a discharge. Every case must to some extent depend upon its own circumstances. Where, as

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here, the employment is that of the manager of an important branch of an undertaking such as this, and where the failure results in a heavy financial loss, as was the case here, the unfitness here existing would, to my mind, justify the discharge. In addition to this, there was in this case, I think, such misconduct in reference to the matters alluded to as warrants dismissal.

The defendants counterclaim for the damage sustained by reason of the improper expenditure. I gathered from the attitude taken by counsel that the counterclaim was put forward rather as a shield than as a sword. Some minor claims were made by the plaintiff with respect to a balance deducted from his salary cheque in August, and with respect to small sums claimed for fuel and lighting. On some of these items he is probably entitled to recover; but these are not the real subject-matter of the litigation. I think I shall be doing the plaintiff no injustice if I set off anything that may be due to him in respect of these items against the damages which he would be liable to pay upon the counterclaim. The loss in respect of the unauthorised expenditure on the residence building alone would more than counterbalance anything coming to him on this head. If I have mistaken the defendants' attitude, I may be spoken to.

In the result, the action fails, and should be dismissed with costs, if demanded.

The plaintiff has remained in possession of the works house up to the present time. That matter is not before me in any way; and I would suggest to the defendants that they can well afford to be generous, and to forego costs and any claim in respect of occupation rent of the premises, in view of the hardship upon the plaintiff by now having to begin again in England or elsewhere.

Action dismissed.

MORRIS v. CHURCHWARD.

ONT.

S. C.
1913

March 31.

Ontario Supreme Court, Cartwright, M.C. March 31, 1913.

1. PLEADING (§ I C—22)—PARTICULARITY—BREACH OF PROMISE—WHETHER VERBAL OR IN WRITING.

A plaintiff suing for breach of promise of marriage should set up in her statement of claim every material fact upon which she must rely to make out her cause of action; and the pleading should therefore disclose whether the alleged promise was verbal or in writing, and, if it is claimed that the contract of marriage was broken by defendant's marriage to another, the date of such marriage should be pleaded.

2. BREACH OF PROMISE (§ I—3)—AGGRAVATION OF DAMAGES.

It is permissible to plead seduction under promise of marriage in aggravation of damages in an action for breach of promise.

[*Millington* v. *Loring*, 6 Q.B.D. 190, applied; see also *Wood* v. *Durham*, 21 Q.B.D. 501, and *Wood* v. *Cox*, 4 Times L.R. 550; Odgers on Pleading, 7th ed., 103, 104.]

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IN this action, which was to recover damages for breach of promise of marriage, it was not stated in the statement of claim whether the promise was verbal or in writing. In paragraph 3 the plaintiff alleged seduction by the defendant and birth of a child as a result on the 13th May, 1912, with expense to the plaintiff for nursing and medical attendance and maintenance of the child.

The defendant moved, before pleading, for particulars of the alleged promise and of the alleged marriage of the defendant to another person, and to strike out paragraph 3 as not disclosing any right of action in the plaintiff.

W. H. Kirkpatrick, for the defendant.
M. Wilkins, for the plaintiff.

Master in Chambers.

THE MASTER:—The statement of claim should be amended so as to shew whether the alleged promise was verbal or in writing. If the former is the case, then it would be right to give particulars of the time and place, as also of the date of the marriage which is relied on as the breach of the defendant's promise.

Paragraph 3 seems to have been based on the familiar case of *Millington* v. *Loring,* 6 Q.B.D. 190. This justifies the allegation of seduction: see Odgers on Pleading, 5th ed., pp. 398, 419, [7th ed., 103, 104]. But this paragraph must be amended, if the claim in respect of the child is to stand.

Chapter 169 of R.S.O. 1897 gives a right of action to any one who provides necessaries for any child born out of lawful wedlock (sec. 1). But it is provided that the fact of paternity must, in such a case as the present, be proved by other testimony than that of the mother (sec. 2); and, by sec. 3, that no action shall be sustained unless the mother has complied with certain directions therein set out. This paragraph should, therefore, be amended so as to comply with the statute or else limited to the claim for breach of promise as aggravated by the alleged seduction, as in Precedent No. 49 in Odgers, p. 398.

Whatever is essential to the cause of action is a material fact, and should, therefore, be set out in the statement of claim, under Con. Rule 268. See *Phillips* v. *Phillips,* 4 Q.B.D. 127, at 133, where Brett, L.J., said: "If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings. Therefore, they ought to state every fact upon which they must rely to make out their right or claim."

The defendant to have ten days after amendment to plead. Costs of the motion will be in the cause.

Order to amend.

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CITY OF TORONTO v. STEWART.

ONT.

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April 1.

Ontario Supreme Court, Kelly, J. April 1, 1913.

1. BUILDINGS (§ I A—9a)—MUNICIPAL REGULATIONS—LOCATION OF APARTMENT HOUSES—WHAT CONSTITUTES LOCATION.

The staking out of the site for a building, entering into contracts with builders and the commencement of the work of excavation, particularly the construction of a trench for foundation walls, is within the meaning of the word "location" in a by-law prohibiting the location of an apartment or tenement house, and if done before the passing of the by-law exempts the land from the operation of the by-law.

[*City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424; *City of Toronto* v. *Williams*, 5 D.L.R. 659, 27 O.L.R. 186, followed; *Re Dinnick and McCallum*, 4 O.W.N. 687, referred to.]

Statement

ACTION to restrain the defendant from locating or proceeding to locate an apartment house on the east side of Oriole road, in the city of Toronto, in contravention of a city by-law.

The action was dismissed.

Irving S. Fairty, for the plaintiffs.

George Wilkie, for the defendant.

Kelly, J.

KELLY, J.:—The defendant is the owner of a parcel of land, situate on the east side of Oriole road, in Toronto, having a frontage on Oriole road of about 211 feet, and running easterly about 437 feet; the easterly 250 feet of the property has a width of about 224 feet.

Running easterly and westerly through this property, the defendant has laid out a private way, or street, 66 feet wide, the northerly limit of which, at Oriole road, is distant 72 feet 8 inches from the northerly limit of his property. On the part of the property lying to the north of this private way, by a depth of about 142 feet 6 inches, the defendant erected an apartment house fronting on Oriole road, and to the east of it a garage.

On the lands on the north side of the private way, and immediately to the east of the parcel on which are the apartment house and garage, the defendant contemplated building another apartment house, and on the 30th January, 1912, applied to the City Architect for a permit for the erection thereof; the permit was granted on the 2nd February, 1912.

The site for the location of the building was then staked out, and from that time up to April, 1912, the defendant made contracts with some of the contractors for the erection of this building. Prior to the 13th May, when by-law No. 6061 of the City of Toronto was passed, prohibiting the location of an apartment or tenement house "upon the property fronting or abutting upon" Oriole road and other streets therein named, the work of excavation, particularly of a trench for the foundation walls,

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was commenced, but was discontinued for a time, owing, as the defendant says, to his having been unable to obtain brick with which to proceed.

Some time after the passing of the by-law, work was again proceeded with; and on the 25th September, 1912, this action was commenced to restrain the defendant from locating or proceeding with the location of the apartment house referred to.

The defendant sets up that, before the passing of the by-law, the building had been located; that the by-law is invalid; and that the apartment house is not being located on property fronting or abutting on any of the streets named in the by-law.

On the whole evidence, I am satisfied that, prior to the passing of the by-law, there was a location of this apartment house, not merely by defining and staking out upon the ground the position the building would occupy, but by the actual doing of some of the excavation work for it.

Doubts as to this were raised by the evidence of witnesses for the plaintiffs. Some of them, however, frankly admitted that work might have been done without their having observed it. As against this, there is the positive testimony of the defendant and other witnesses, which I have no reason for rejecting, that the excavation work referred to was done prior to the passing of the by-law, it being specially mentioned that on the 6th May workmen were engaged in doing this very work. There was, therefore, more than a design or intention on the part of the defendant to erect this building on this land; there was the actual use of the land for the purposes of the building and work of excavation actually done in furtherance of that purpose.

Following the decision of Middleton, J., in *City of Toronto* v. *Wheeler*, 4 D.L.R. 352, 3 O.W.N. 1424, and of a Divisional Court in *City of Toronto* v. *Williams*, 5 D.L.R. 659, 27 O.L.R. 186, I am of opinion that the defendant had located the apartment house, within the meaning of these decisions, prior to the passing of the by-law.

I have not dealt with the other objections raised by the defendant; a consideration of these may lead to the conclusion that the property on which this apartment house is being built does not front or abut on any of the streets named in the by-law.

The judgment in *Re Dinnick and McCallum*, 4 O.W.N. 687, on appeal from *Re Dinnick and McCallum*, 5 D.L.R. 843, 26 O.L.R. 551, helps to that conclusion.

Finding, as I do, for the defendant, on the ground of location of the building prior to the passing of the by-law, I express no view on the defendant's other objections.

The action is dismissed with costs.

Action dismissed.

THE KING v. LARENCE.

CAN.

Ex. C. 1912

Nov. 21.

Exchequer Court of Canada, Audette, J. November 21, 1912.

1. PUBLIC LANDS (§ I C—17)—DOMINION—VOID PATENT TO PERSON DECEASED.

Apart from statutory validating enactments applicable in certain cases, a Crown lands patent issued in the name of a person already deceased at the date of the grant, with *habendum* to him, his heirs and assigns, is a nullity even where the death is recited in the patent together with a statement that for good and sufficient reasons it is expedient to issue the grant in the name of the deceased.

[*Larence* v. *Larence*, 21 Man. L.R. 145, approved.]

2. PUBLIC LANDS (§ I C—17)—DOMINION—IMPROVIDENT AND VOID GRANTS.

The Dominion Lands Act Amendment, 60-61 Vict. (Can.) ch. 29, validating certain Crown grants notwithstanding the death of the grantee before the date of the patent and directing that the lands shall vest in the "heirs, assigns, devisees or other legal representatives of such deceased person according to the laws of the province," has no application where the death of the person named in the patent as the grantee took place before the territory in which the lands were situate was erected into a "province" of the Dominion.

[*Larence* v. *Larence*, 21 Man. L.R. 145, approved.]

3. PUBLIC LANDS (§ I C—17)—DOMINION—CANCELLATION OF CROWN GRANT.

A Crown grant of Dominion lands which is void by reason of its having been issued in the name of a person already deceased may be set aside and cancelled by the Exchequer Court of Canada, upon the hearing of an information in that behalf exhibited in that court by the Attorney-General of Canada.

4. MISTAKE (§ IV—71)—IMPROVEMENTS UNDER MISTAKE OF TITLE.

Whatever claim the parties in possession of Dominion Crown lands may have to the grace and bounty of the Crown, in respect of improvements or otherwise on the setting aside of a Crown patent improvidently issued in the name of a person already deceased at the date of the grant and through whom the parties in possession claim, it is a matter to be dealt with by the law officers of the Crown rather than by the Exchequer Court hearing the information brought at the instance of the Crown to cancel such patent.

Statement

HEARING of an information exhibited by the Attorney-General of Canada.

The claim made by the Attorney-General on behalf of His Majesty claims as follows:—

(1) An order and judgment setting aside and cancelling said letters patent, and adjudging said letters patent to be void; (2) a declaration as to whether any person other than the Crown has any legal right or interest in such lands and premises, and if so, who is entitled to such lands and premises; (3) such further and other relief as to this honourable Court may seem meet.

H. P. Blackwood and *A. Bernier*, for the Crown.

A. C. Campbell, for Joseph Larence, Julien Larence, and Marie J. A. M. de la Giclais.

N. F. Hagel, K.C., for Hilaire Tardif.

The other defendants did not appear.

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AUDETTE, J.:—From the several affidavits of service of the said information filed of record herein, it appears that the defendants Esther Marion, Sara Marion, Genevieve Genthon, as well in her own personal capacity as executrix of the last will and testament of her deceased husband Elie Genthon, Marguerite Larence, Joseph Gobeil, Louis Witt, were personally served with an office copy of the said information.

At the opening of the trial, Mr. Blackwood, of counsel for plaintiff, moved for judgment by default against these last-mentioned defendants, who although being duly served made default in pleading and in appearing at trial. This motion will be hereafter disposed of.

The defendants Joseph Larence, Julien Larence, and Marie J. A. M. de la Giclais filed one joint plea whereby they say that Charles Larence, referred to in the 2nd paragraph of the information, was entitled as of right to an interest in the St. Boniface Common in respect to Hudson's Bay Co.'s lots 687 and 688, in the parish of St. Boniface, and that Joseph Larence is heir-at-law of the said Charles Larence and as such succeeded to the rights of the said Charles Larence in the St. Boniface Common, and that the same have become vested in the said de la Giclais by virtue of the instruments referred to in paragraphs 11 and 12 of the information. Each of these defendants claim that de la Giclais is entitled to receive letters patent to the lands allotted in respect of the right aforesaid on the subdivision of the said common, and these defendants further claim that it may be declared that Marie J. A. M. de la Giclais is entitled as of right to letters patent conveying to him from the Crown lots 17 and 25, being portions of the St. Boniface Common, as shewn on a map or plan of survey of the said common, approved and confirmed, at Ottawa, on the 5th day of September, A.D. 1900, by Edward Deville, Surveyor-General of Dominion Lands and of Record in the Department of Interior under No. 8542.

The plaintiff joins issue with the defendants Joseph Larence, Julien Larence and Marie J. A. M. de la Giclais and objects that paragraphs three and four of their statement of defence are bad in law and practice; as to paragraph three, on the ground, among others, that it raises no answer or defence to the information; as to paragraph four, on the ground, among others, that these defendants have no rights in law and under the practice to make claim or pray the declaration therein set forth, because the above defendants have not been granted a fiat for any such claim and that they cannot raise or ask for such relief as prayed.

The defendant Hilaire Tardif severs in his defence, files a separate plea and appears at trial by counsel. He admits the

letters patent in question were issued through improvidence and submits his rights to a grant from the Crown to that portion of the land referred to in paragraph 5 of the information to the judgment of the Court and the grace of the Crown, claiming that he has been, as the fact is, in the actual, physical and exclusive possession of the said land for upwards of 10 years, and that he purchased the same in good faith and entered into possession thereof while no dispute existed as to it, and improved the same to the extent of many thousands of dollars by erecting buildings thereon and otherwise, at all times fully believing that the title was properly vested in the person from whom he purchased and he submits that he is entitled to the exercise of the grace of the Crown in his behalf, and to a grant of letters patent to him of that portion of the land in question described in paragraph 5 of the information.

An action having been taken in the Court of King's Bench, in the Province of Manitoba, between Larence and Larence, to recover possession of the said lots 17 and 25 and judgment having been given upon the same by his Lordship Mathers, C.J.K.B. (*Larence* v. *Larence*, 21 Man. L.R. 145), all parties appearing at trial herein, cited and relied upon that judgment in respect of the facts or the history of the case. Mr. Campbell, however, of counsel for the defendants Joseph Larence, Julien Larence and Marie J. A. M. de la Gielais, admitted that the facts stated in that judgment were true, with the addition, however, that he held title not only under the grace of the Crown, but as of right. Counsel for the Crown also admitted that Charles Larence made no will and that the property under the law as then in force, passed to the eldest son. [The learned Judge here quoted the judgment.]

This Court, adopting, without any hesitation the conclusion of his Lordship's view, has come to the conclusion—taking it also for granted as being conceded by all parties—that the letters patent in question in this case should be set aside, cancelled and declared null and void.

Coming now to the second branch of the case whereby a declaration is asked as to whether any person other than the Crown has any legal right or interest in such lands and premises, and if so, who is entitled to such land and premises, this Court hereby declares that the defendants mentioned in the opening as having made default in pleading and from appearing at trial, have no legal rights or interest in the lands in question and are not entitled to the same.

Dealing with the issue as between the plaintiff and the defendant Joseph Tardif, it may be said that the latter's counsel admitted that the letters patent should be cancelled, that Tardif had no legal right and was entirely at the mercy and grace of

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the Crown, but that he should have a grant from the Crown of the land purchased in good faith. Tardif being subsequently heard as a witness testified that it is now going on to nine years since he had come from Crookstown to St. Boniface, and that he expended $4,500 upon the property in question. He has three houses erected upon the land—he lives in one and has sold another for $1,500, but has not been paid for the same. The Crown, by counsel, admits that Tardif bought in good faith as having bought from a person whom he believed had title—that he was in possession since some time in 1904, and resided on the property ever since and that he erected thereon three houses, stables and woodsheds.

Notwithstanding this expenditure by Tardif and his good faith, this Court must come to the necessary conclusion that this defendant had no legal rights or interest in the land in question. Dealing next with the issue as between the plaintiff and the three defendants, Joseph Larence, Julien Larence and Marie J. A. M. de la Gielais, it may be said that the laws in force in Manitoba, in February, 1870, at the date of Charles Larence's death, were the laws of England as they were at the time of the granting of the Hudson's Bay Charter, on the 2nd May, 1670 (22 Car. 11). Whatever rights Charles Larence had at the time of his death in lot 82 and lots 17 and 25 or parts thereof, passed and descended, under the laws of inheritance by primogeniture then in force, to his eldest son Jean Baptiste, and at the death of the latter to his (Charles') grandson Joseph Larence, from whom these three last defendants claim title. Without going into the full details of the contention that, under the order-in-council in 1877 (exhibit No. 8), and the case of the *Attorney-General of Canada* v. *Fonseca*, 17 Can. S.C.R. 612, these three defendants have a right to some commutation in the shape of land, sufficient it is to say that this Court has come to the conclusion, accepting also as *res judicata*, under the case of *Larence* v. *Larence*, 21 Man. L.R. 145, that the defendants de la Gielais *et al.* have failed to establish satisfactory title outside of the letters patent, and that their rights, if any, are not legal rights, but may be undefined rights only that might appeal and commend themselves to the bounty of the Crown.

Moreover, the view of his Lordship, Mathers, C.J.K.B., must be adopted and accepted with respect to the construction of the statute under which the letters patent issued (60-61 Vict. ch. 29) and it must be held that, as the lands in question were not in any province at the date of Charles Larence's death in February, 1870, Manitoba having become part of the Dominion of Canada only on the 15th day of July, A.D. 1870, this Dominion statute does not apply or avail to validate a patent issued under it in the name of this deceased person who did not then reside in the

Dominion of Canada, and such patent without the support of some statute is a nullity. And as Larence was unable to establish a title to the land independently of the patent, he must fail. His Lordship, Mathers, C.J.K.B., went further and decided that although satisfied that there must have been some error or oversight in drafting the statute, that the Court could not correct the error or supply the omission, because that would be legislating and not interpreting the law. This conclusion must also be accepted by this Court.

It will result from the above that Tardif and the three defendants who defended together have no legal rights or interest in the land in question. This Court was, however, requested at the close of the trial, to make a declaration that if these parties could not, in strict law, recover, they were in equity and in justice morally entitled to the exercise of the mercy and bounty of the Crown in their favour. However true that may be, this Court fails to see of what avail this could be to these parties, and it takes it that it is a matter that should be more properly dealt with by the law officers of the Crown, bearing in mind the occupation and expenditure by Tardif and the rights claimed by the defendant de la Gielais.

These two defendants are left with a claim which might commend itself to the benevolence of the Crown, but it is not enforceable in a Court of law.

There will be judgment by default, as prayed, against the several defendants who did not plead or appear at trial.

Judgment will be further entered as follows: 1st. The letters patent mentioned in the information herein are hereby set aside, cancelled and adjudged null and void. 2nd. No person, other than the Crown, has any *legal* right or interest in the lands and premises mentioned in the said letters patent referred to in the information herein. 3rd. Under the circumstances, there shall be no costs to either of the parties in the case.

Judgment for the Crown.

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VOLCANIC OIL and GAS CO. v. CHAPLIN.

(Decision No. 2.)

Ontario Divisional Court, Clute, Riddell, and Kelly, JJ. December 24, 1912.

1. WATERS (§ II B—76)—RIGHT TO LAND FORMED BY ALLUVION OR GAINED BY THE RECESSION OF WATERS—CONTIGUOUS OWNERS—BOUNDARIES —ENCROACHMENT.

Land formed by alluvion or gained by the recession of water belongs to the owner of the contiguous land, to which the addition is made, and, conversely, land encroached upon by navigable waters ceases to belong to the former owner, on the principle that one who derives an advantage should also bear the burden, but, when the boundary of the land along the shore is clearly and rigidly fixed by deed, survey, or otherwise, the principle does not apply, and the owner thereof, who cannot gain by alluvion or recession, does not lose by encroachment.

[*Re Hull and Selby Railway*, 5 M. & W. 327, discussed and followed; *Foster* v. *Wright*, 4 C.P.D. 438, distinguished; *Widdecombe* v. *Chiles*, 73 S.W. 444, not followed; *Lopez* v. *Muddun*, 13 Moo. Ind. App. 467, referred to; *Volcanic Oil and Gas Co.* v. *Chaplin*, 6 D.L.R. 284, 27 O. L.R. 34, 3 O.W.N. 1597, affirmed.]

Statement

APPEAL by the defendants from the judgment of Falconbridge, C.J.K.B., *Volcanic Oil and Gas Co.* v. *Chaplin* (No. 1), 6 D.L.R. 284, 27 O.L.R. 34

The appeal was dismissed with costs.

November 6. The appeal was heard by a Divisional Court composed of CLUTE, RIDDELL, and KELLY, JJ.

Argument

O. L. Lewis, K.C., and *W. Stanworth*, for the defendants, argued that, by the gradual wearing away by the water of the land between the old Talbot road and the lake, and afterwards the road itself and a portion of the plaintiffs' lot 178, the Crown became entitled to the land under the lake to the present water's edge. In support of this contention they cited *Foster* v. *Wright* (1878), 4 C.P.D. 438; *Widdecombe* v. *Chiles* (1903), 73 S.W. Repr. 444; Farnham on Waters and Water Rights, ed. of 1904, p. 332; *Hindson* v. *Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1; Gould on Waters, 3rd ed., pp. 156, 157, 308; Morine on Mining Laws of Canada, p. 75; *In re Provincial Fisheries* (1895), 26 Can. S.C.R. 444; *Barthel* v. *Scotten* (1895), 24 Can. S.C.R. 367; *In re Hull and Selby Railway* (1839), 5 M. & W. 327; *Scratton* v. *Brown* (1825), 4 B. & C. 485; *Rex* v. *Lord Yarborough* (1824), 3 B. & C. 91; *Attorney-General* v. *Perry* (1865), 15 C.P. 329; Encyc. of the Laws of England, 2nd ed., vol. 2, p. 145; vol. 6, p. 204; vol. 14, pp. 624, 625, 626; Ruling Cases (Eng.), vol. 17, pp. 555, 578; vol. 27, p. 50; *Standly* v. *Perry* (1877), 2 A.R. 195; *S.C.* (1879), 3 Can. S.C.R. 356; *Point Abino Land Co.* v. *Michener* (1910), 2 O.W.N. 122.

G. F. Shepley, K.C., and *J. G. Kerr*, K.C., for the plaintiffs, contended that the plaintiffs were not riparian owners, and so would not have been entitled to gain additional land in case

the waters had receded. Therefore, there could be no correlative right in the Crown to gain upon the plaintiffs' land by the influx of the waters of the lake, as the rights of encroachment and recession, to have such a consequence, must be mutual. The boundaries of the plaintiffs' land could now and always could have been definitely shewn by metes and bounds. The point was in a narrow compass. He referred to Farnham on Waters and Water Rights, p. 2499, referring to the *Widdecombe* case, cited by the other side; *Lopez* v. *Muddun Mohun Thakoor* (1870), 13 Moo. Ind. App. 467, especially at p. 472; Farnham on Waters and Water Rights, p. 1462; *Stover* v. *Lavoia* (1906-7), 8 O.W.R. 398, 9 O.W.R. 117; *Servos* v. *Stewart* (1907), 15 O.L.R. 216; *Gilbert* v. *Eldridge* (1891), 13 L.R.A. 411; *Marshall* v. *Ulleswater Steam Navigation Co.* (1871), L.R. 7 Q.B. 166; *Iler* v. *Nolan* (1861), 21 U.C.R. 309; *Regina* v. *Lord* (1864), 1 P.E.I.R. 245. The plaintiffs did not become riparian proprietors, and so entitled to accretion and liable for erosion; and the Missouri case of *Widdecombe* v. *Chiles*, (1903), 73 S.W. Rep. 444, is contrary to the current of America authorities.

Lewis, in reply, submitted that the provisions of 1 Geo. V. ch. 6, sec. 2, applied here, notwithstanding the finding of the earned trial Judge.

Clute, J.

December 24. CLUTE, J.:—In 1825, the Crown granted to the plaintiffs' predecessor in title lot 178, Talbot road survey. The original Talbot road formed the south-easterly (misquoted in the judgment below as the south-westerly) boundary of the said lot. At the time of the survey, the Talbot road ran near the bank of Lake Erie, with a strip of land between it and the lake. The bank, composed of clay, was gradually washed away by the lake until the road became dangerous; and, in 1838, it was abandoned, and a new road opened up and dedicated to public travel. This road is still travelled and known as the Talbot road. The waters of the lake not only washed away the land between the road and the lake, but also the road, and encroached a certain distance upon the plaintiffs' land. These facts are found by the learned trial Judge.

In August, 1911, the Province of Ontario demised and leased to the defendant Chaplin, with other lands, "that parcel or tract of land under the water of Lake Erie in front of lots 178 to 180 inclusive, Talbot road lots." The particular description of the portion material to the present case is as follows: "Commencing at a point on the water's edge of Lake Erie at its intersection with the south-easterly limit of lot No. 178, Talbot road lot; thence south 45° east along the production of said limit 40 chains; thence south-westerly 63 chains, more or less, to a point in the production of the south-westerly limit of lot No. 180, Talbot road, distant 40 chains from the water's edge of Lake Erie; thence north 45° west along said produced limit 40 chains to the water's

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edge of Lake Erie, and thence north-easterly along the water's edge of Lake Erie to the place of beginning, containing 252 acres, more or less, of land covered with water, together with a right to drill and bore for petroleum and natural gas and to remove the same, saving and excepting thereout the small dock the south-easterly corner of lot No. 178, Talbot road lot, and free access thereto for all parties using the same."

In September, 1911, the defendant Chaplin contracted with his co-defendant Curry to sink a well for the production of petroleum and natural gas upon the lands so demised by the Crown to Chaplin. Under this contract Curry entered upon what the plaintiff claims to be his land, and constructed a derrick, an engine-house, etc., and brought thereon a boiler and the usual equipment for drilling operations.

The plaintiff company is a lessee of the plaintiff Kerr, who granted him an exclusive right of boring for natural gas and petroleum on the plaintiff Kerr's lands, viz., the westerly half of lot No. 178, Talbot road survey, containing 100 acres, more or less, with all the rights and privileges necessary therefor.

The plaintiffs claim that the defendants, by the erection of their building and appliances, have trespassed upon the plaintiffs' lands. The defendants answer that the lands in question do not belong to the plaintiff Kerr, but are owned by the Crown, from whom they claim the right under their lease to do as they have done.

The real question in controversy is this: whether, by accretion, the Crown became entitled to what was formerly a portion of lot 178, or whether the plaintiffs are entitled to such lot, to the exclusion of the defendants, under the original grant from the Crown.

The defendants insist that, even admitting that, by original survey, lot 178 was wholly above high water mark and bounded on the south-east by the old Talbot road, yet, by the slow encroachment of water, the land between the road and the lake and afterwards the road and a portion of the plaintiffs' lot was gradually worn away, and the Crown thereby became entitled to the land under the lake to the present water's edge.

The plaintiffs contend that the well-known rule in such a case has no application to the facts here disclosed; that the plaintiffs were not riparian proprietors; that the rights of encroachment and recession are mutual; and that, where there is no right of encroachment in case the waters receded owing to the fact that the plaintiffs were not original riparian proprietors, so there is no correlative right to the Crown.

The cases have been very carefully reviewed by the learned Chief Justice, and it is not necessary to go over the ground covered by his judgment, in the conclusion of which I entirely agree. He finds as a fact that the *locus* now in controversy is part of lot 178 north of the old Talbot road.

There seems to be no English or Canadian case *exactly* covering the question here involved. The principles governing the present case are, I think, to be found in the *Lopez* case, 13 Moo. Ind. App. 467. Lord Justice James (p. 472) refers to the English rule as laid down in Hale, de Jure Maris, p. 15: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or it be by art or industry regained, the subject doth not lose his property." "If the mark remain or continue, or the extent can reasonably be certain, the case is clear." "But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his propriety of the soil, although it for a time becomes part of the sea, and within the Admiral's jurisdiction while it so continues." The Lord Justice points out that this principle is not peculiar to English law, but is founded in universal law and justice; "that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner." He then refers to another principle recognised in English law, "that where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land: *Rex* v. *Lord Yarborough*, 2 Bli. N.R. 147. And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (*In re Hull and Selby Railway*, 5 M. & W. 327). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined." It may very well be said here by the plaintiffs, as was said in the *Lopez* case: "I had the property. It was my property before it was covered by the lake. It remained my property after it was covered by the lake. There was nothing in that state of things that took it from me and gave it to them." The Privy Council held that the part of the case here referred to did not fall within a local statute, but must be determined by general principles of equity. In the *Lopez* case, the facts were different from the present, for there, after the encroachment

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and recession and re-encroachment, the waters ultimately subsided and left the land reformed on its original site. But the principles applied in that case are equally applicable to the present. Reference is made in the judgment given in the *Lopez* case to *Mussumat Imam Bandi* v. *Hurgovind Ghose* (1848), 4 Moo. Ind. App. 403. In that case it was held as follows (p. 406): "The question then is, to whom did this land belong before the inundation? Whoever was the owner then remained the owner while it was covered with water, and after it became dry." The decision in that case was followed in the *Lopez* case.

In a subsequent Indian case, *Katteemohinee Dossee* v. *Ranee Moumohinee Dabee* (1865), referred to in the *Lopez* case, at p. 477, it was held, "that all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river."

Their Lordships, in the *Lopez* case, were unable to assent to any such distinction between surface and site, stating that "the site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained." They were careful, however, to observe in the judgment in that case (p. 478) that they "desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recoverd by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation." It is then pointed out in the judgment that the parties themselves took the proper and prudent means to prevent the necessity of any dispute arising. The plaintiff, as between him and the State, took the most effectual means in his power, by having the description and measurement of the submerged land recorded and continuing to pay rent for it, to prevent the possibility of any question of dereliction or abandonment being raised against him. "Their Lordships are, therefore, of opinion that the property now being capable of identification . . . and having been the property of the plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property."

In the present case the land claimed by the plaintiffs was

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originally laid out by metes and bounds. It was not bounded in any part of it by the lake, between which and its southern boundary lay the Talbot road and land south of the Talbot road. As it stood at the time of the grant, the owner could, by no possibility, obtain any additional land by accretion from the lake. His land was definitely ascertained by metes and bounds, as contained in the original grant from the Crown. This boundary is still easily to be ascertained, and not the less so because a certain portion of the land is now covered with water. The grantee had no riparian rights, and was not, in my opinion, subject to the law of accretion or recession applicable in such a case.

Clute, J.

The site of the buildings erected by the defendants is on the shore, on land not covered by water at low water mark, and the plaintiffs, if they are—as the defendants allege—riparian proprietors, have right of access to the water and to every part of the approach to the water in front of their land. So that, in my opinion, even if this land covered by water had returned to the Crown, the Crown would have no right to make a grant in derogation of the plaintiffs' rights to reach the water: *Pion* v. *North Shore R. Co.* (1887), 14 Can. S.C.R. 677; *North Shore R. Co.* v. *Pion* (1889), 14 App. Cas. 612; *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662.

But I do not desire to put my opinion upon this narrow ground, but rather upon the broad ground that the plaintiffs, claiming under a grant of the land which covers the site of the alleged trespass, continue to own that land, though covered with water, because the grantee from the Crown had no riparian rights, and the same can now and always could be well and definitely ascertained by metes and bounds.

The appeal should be dismissed with costs.

RIDDELL, J.:—This is an appeal from the judgment of Sir Glenholme Falconbridge, the reasons for which are reported in 6 D.L.R. 284. 27 O.L.R. 34.

Riddell, J.

The findings of fact at the trial are wholly justified by the evidence, and are, indeed, but feebly contested on this appeal.

I am of opinion that the result is right, and the appeal must fail. Recognising the care and ability with which the learned Chief Justice has marshalled the authorities and arrived at his conclusion, I think it best to attack the problem independently and from a somewhat different point of view.

There can, I think, be no dispute about the common law principles of the ownership or "propriety" of the King in the soil under the sea, etc.

Sir Matthew Hale has written most learnedly "a work of great authority"—as the Judicial Committee calls it in 13 Moo. Ind. App. at p. 472—the well-known treatise De Jure Maris. It is to be found in a convenient form in Moore's History of the

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Foreshore, pp. 370-413, and I cite from that book. Hale says (p. 376): "In this sea the King of England hath a double right, viz., a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. . . . The King's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow." Our Great Lakes follow in that respect the sea—the beds of all such belong to the King as represented by the Provincial Government: *In re Provincial Fisheries* (1896), 26 Can. S.C.R. 444.

If a person owns land adjoining a lake, such as Lake Erie, and the lake by gradual encroachment eats into his land, he loses this land so eaten away, and the King acquires it: *In re Hull and Selby Railway*, 5 M. & W. 327; *Throop* v. *Cobourg and Peterborough R.W. Co.* (1856), 5 U.C.C.P. 509.

It is contended that this rule could not apply if the land encroached upon had been bounded on the side toward the water by some distinct line irrespective of the water's edge; and two Indian cases are cited.

In *Lopez* v. *Muddun Mohun Thakoor*, 13 Moo. Ind. App. 467, the Judicial Committee quoted part of the following extract from Hale, de Jure Maris: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his property; and accordingly it was held by Cooke and Foster, M. 7 Jac. C.B. though the inundation continue forty years. If the marks remain or continue, or extent can reasonably be certain, the case is clear.—Vide Dy. 326.—22 Ass. 93." I quote from Moore's History of the Foreshore, p. 381. The Judicial Committee, however, did not apply that statement of the law to the case in hand, which was that of a gradual encroachment by the River Ganges and a recession by that river. But they went on to say: "There is, however, another principle recognised in the English law, derived from the civil law, which is this,—that where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land: *Rex* v. *Lord Yarborough*, 2 Bli. N.R. 147. And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (*In re Hull and Selby Railway*, 5 M. & W. 327). To what

extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined." And the Committee, pointing out that the matter had been provided for by statute, determined the case on the "positive written law," and not the English law at all.

That the Committee is contrasting a gradual swallowing up and one produced by "the violence of the sea" is clear enough, but is made even more clear, if possible, by the examples on p. 473 of the report, "covered by lava or ashes from a volcano"—lava and ashes from a volcano do not cover land by slow and imperceptible degrees.

The same difference is to be seen in the argument of the Solicitor-General in 5 M. & W. at p. 329, and also that of Sir Frederick Pollock, at p. 330. Sir Frederick endeavoured to have the Court follow Hale's rule for "sudden . . . overflowing of the land," in the case then under consideration of "an imperceptible overflowing"—but failed.

The case of *Hursuhai Singh* v. *Synd Lootf Ali Khan* (1874), L.R. 2 Ind. App. 28, simply follows the case in 13 Moo. Ind. App. All the cases referred to in the Judicial Committee as "others which have followed it before this Committee" (p. 32), are Indian cases (p. 30).

These cases, being decided upon positive written law, are no authority for the proposition in Theobald's Law of Land, p. 37: "If land is submerged by a river or the sea, and the river or sea retires and leaves the land free from water, the owner is entitled to the land if he can identify the site of it."

Nor am I able to derive assistance from the maxim *Qui sentit onus debet sentire commodum.* The sages of the law were liable at any time to drop into Latin or Law French or a mixture of the two—generally a barbarous mixture—and give utterance to a "maxim." While, to borrow the terminology of formal logic, the maxim was not infrequently made a major premiss of a syllogism, still almost invariably it is apparent that the maxim is really a sententious statement of a conclusion arrived at by the inductive method—a generalisation more or less accurate from a number of decisions or considerations. Not unlike the proverb, which has been defined as being "the wisdom of many and the wit of one," the maxim in most instances requires the modifier "sometimes" expressed or understood. A maxim is a convenient method of summing up conclusions, but is dangerous as a premiss upon which to base an argument.

Taking the maxim in question, I can find no possible reason why the two accusatives should not interchange, and the maxim, with equal accuracy and value, read, "*Qui sentit commodum debet sentire onus.*"

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But, in any case, I cannot see its application as an argument in favour of the respondents—there is no pretence that the rule as to gradual accretion, etc., would apply to lot 178 until it became in fact riparian—becoming so, it is argued that *sentit commodum*, and, consequently, *debet onus sentire*.

The present case must, as it seems to me, be determined upon the principles laid down in cases of gradual accretion—or rather the reasons for these rules.

In *In re Hull and Selby Railway*, 5 M. & W. 327, at p. 333, Alderson, B., gives this as the reason for the rule, that "if the sea gradually covered the land . . . the Crown would be the gainer of the land. . . . That which cannot be perceived in its progress is taken to be as if it never had existed at all."

Lord Justice James, in the *Lopez* case, 13 Moo. Ind. App. 467, at p. 473, bases the rule upon the same principle, expressed in different language, and rather implicitly than explicitly—"from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs."

What this means is something like the following: "Where, to determine whether a piece of land belongs to a person on one side or another of some boundary, it is necessary to find that boundary—then, if the boundary moves one way or the other by insensible and gradual accretion or the like, the position of that boundary at any particular time is the boundary for the owner at that particular time, irrespective of its position either at the time of the deed or any time before or after." A man has a grant of land "to the water's edge," "to the bank of the lake," etc., etc.—to determine his boundary at any particular time, find the position of "the water's edge," "the bank of the lake," etc., at that particular time. The change, being imperceptible, is considered as not having happened at all.

But, if the boundary is fixed and not movable—that is, the words fixing the boundary do not connote a shifting or moving line—the reasons do not apply; and *cessante ratione cessat ipsa lex*.

In my view, no matter how far in the waters of the lake may come, the grantee of the lot 178 does not lose his "propriety" in the land; and, no matter how far out the lake may recede, he cannot get an inch beyond his line as first fixed.

The single case of *Widdecombe* v. *Chiles*, 73 S.W. Repr. 444, 173 Mo. 195, is opposed apparently to that view. This seems to be law still in Missouri—I do not find that it has been overruled, and it is cited without disapproval in *Frank* v. *Goddin* (1905), 193 Mo. 390, at p. 395. But it is not binding on us, and, as has been pointed out in the judgment appealed from, it is opposed to the mass of authority in the United States. It

cannot, I think, be supported on principle, and I decline to follow it.

The case of *Foster* v. *Wright*, 4 C.P.D. 438, cited in support of the appeal, does not assist the appellant when the facts of the case are examined. The owner of the manor of H. "also held the fishery of all the waters of H." He enfranchised a portion of land "A," but in the deed expressly "excepted and reserved from the grant . . . his seignorial rights . . . together also with free liberty of . . . fishing . . . upon the premises or any part thereof. . . ." The manor, being forfeited on attainder, was regranted to the predecessor in title of the plaintiff. The enfranchised land "A" did not at the time of the enfranchisement abut on the river L.; but, in course of time, by imperceptible degrees, the river ate into the land and ultimately encroached to some extent upon the land "A," now the property of the defendant. As a strip of his land now formed part of the bed of the river L., the defendant claimed the right to go upon that part of it and fish for salmon which came there. It is quite true that one of the Judges, Lindley, J., thought that the bed of the river, shifting insensibly as it did, remained, with all its changes, the property of the owner of the manor through and over which it had originally flowed, that is, for all the purposes of the case. "I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner:" p. 446. No quarrel can be raised with this decision so guarded; the question was solely as to the right to fish—and all the learned Judge actually decided was, that, where the owner of a manor reserves the right to fish when enfranchising part of his manor, he has that right over the part so enfranchised *in æternum*, and over any river that may be there at any time. This is the ground taken by the Chief Justice, Lord Coleridge, p. 449. It is quite true that Lindley, J., says (p. 448): "Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river bed, I am of opinion that the plaintiff has that right; for, if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title." It is to be noted that this conclusion is based upon cases such as *In re Hull and Selby Railway*—Lindley, J., saying (p. 447) that the Court in that case declined to recognise the proposed qualification to the general rule "if certain boundaries are not found." But in that case the only "certain boundary" was the bank of the river; and, while the original boundary could be made out by metes and bounds, it

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Riddell, J.

could be done only by determining where the bank was at the time of the grant.

In *Rex* v. *Lord Yarborough*, 3 B. & C. 91, the boundaries were a sea-wall or sea-bank and the sea; in *Attorney-General* v. *Chambers* (1859), 4 DeG. & J. 55, it was the sea-shore or one or other side of it. I do not find any case in which a boundary, a fixed, immovable line, has ever been crossed over on this principle.

It is to be observed that Lindley, J., bases his judgment also on the ground taken by the Chief Justice—and, further, that in none of the cases in which *Foster* v. *Wright* is cited, is the point now under discussion referred to: *Hindson* v. *Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1; *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; *Mercer* v. *Denne*, [1904] 2 Ch. 534.

It may turn out that the land of the plaintiffs, being now under part of a navigable lake, is subject to the right of navigation, etc. That, however, is the right of the public, and gives no right to the Crown to grant away the soil or any interest in the soil.

I am further of opinion that, even if the plaintiffs were only riparian proprietors, they would be entitled to maintain this action and hold the judgment they have obtained; but I do not pursue this inquiry.

I am of opinion that the appeal must be dismissed with costs.

Kelly, J.

KELLY, J.:—There is, to my mind, a distinction to be drawn between those cases where lands border upon navigable waters, the boundary not being otherwise defined, and the present case, where the boundary nearest to the water is "clearly and rigidly fixed" by the Crown grant, the description in which is by metes and bounds.

In the present case, too, there is the further fact that the land so patented was separated from the water, not only by the Talbot road, but also by other lands between that road and the water's edge.

The grantee could not have been said to be a riparian proprietor, and his rights and liabilities differed in that respect from those of an owner whose lands border on navigable waters.

After a careful perusal of the evidence and numerous authorities, I am of opinion that the judgment of the learned Chief Justice of the King's Bench is correct, and it should not be disturbed.

Appeal dismissed with costs.

Re LONDON & LAKE ERIE TRANSPORTATION CO.

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Jan. 20.

(*File No.* 21281.)

Board of Railway Commissioners. January 20, 1913.

1. CARRIERS (§ IV D—565)—TRAIN SERVICE—STOPPING PLACES — STOPS FIXED BY FRANCHISE BY-LAWS OF MUNICIPALITY.

The Board of Railway Commissioners will not permit a railway company to change the places at which its predecessors in title were compelled to make stops where by its Act of incorporation the municipal by-laws granting franchises for the building of road and designating such stopping places were continued in force.

Com. Mills.

January 14, 1913. COMMISSIONER MILLS:—In re the application of W. W. Warburton, general manager of the London and Lake Erie Transportation Company, which operates a line of railway between London and Port Stanley, Ontario, for authority to change the places at which it makes stops in accordance with the terms of certain township by-laws which granted franchises to the said company. The applicant company alleges that the present places of stopping, fixed by the said by-laws, are within unreasonable distances, and it asks the Board to assist it in arranging for new stopping places, regardless of the provisions of the said by-laws.

In a word, I would say, without raising the question of jurisdiction, that, in my opinion, the Board should not assume the responsibility of setting aside agreements covered by by-laws such as those referred to in Mr. Warburton's letter. If any changes in stopping places fixed by the said by-laws are desired, the company should, I think, negotiate with the municipalities interested.

The Chief Commissioner.

January 20, 1913. THE CHIEF COMMISSIONER:—I agree with Commissioner Mills in the disposition that he would make of this case.

The submission of the applicant company is that it should be permitted to change the places at which it is compelled to make stops in accordance with the terms of certain municipal by-laws, on the ground that public convenience will be served by cutting out entirely a number of the stops, the applicant company being of the view that there are too many of them and at unreasonably short distances.

The franchise under which the applicant company operates was granted the South Western Traction Company under municipal by-law. The lines of the South Western Traction Company being taken over by the applicant company, that company is bound by these franchises and by the by-laws.

Section 11 of the Act incorporating the London and Lake Erie Company provides that:—

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The Chief Commissioner.

Nothing in this Act, or done under, or by virtue of the powers hereby granted, shall alter or affect the provisions of any municipal by-law heretofore passed, relating to the South Western Traction Company and confirmed by agreement with the said company, or to any portion of the South Western Traction Company's railway heretofore constructed, or which may be hereafter constructed by the company, or contained in any agreement between any municipality and the South Western Traction Company; but all such agreements and by-laws shall continue and remain in force as between the municipality and the company.

The application must be dismissed.

Application dismissed.

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Mar. 25.

HANEY v. MILLER.

Ontario Supreme Court, R. M. Meredith, C.J.C.P. March 25, 1913.

1. PARTNERSHIP (§ VI—29)—DISSOLUTION—ACCOUNTING.

Where the partnership business has been operated solely through a manager by whom the accounts were kept, such accounts should form the basis of the inquiry directed to be made by a referee under the usual reference for taking the partnership accounts in an action for the winding-up of the partnership affairs; and until some discrepancy appears in the manager's accounts as disclosed on the firm's balance sheet brought in and filed, the plaintiff should not be called upon to file accounts before the referee in like manner as if he were a sole trustee for the firm.

2. REFERENCES (§ I—4)—POWERS OF REFEREE—DIRECTING FURTHER ACCOUNTING.

If in a partnership action in which both partners were equally responsible for the method of keeping the accounts, plaintiff partner files the firm's balance sheet verified by an auditor, or other satisfactory evidence, the plaintiff's case is *primâ facie* proved, and, if the evidence is not answered by the defendant partner, it is the duty of the Master hearing the reference to proceed with the reference without ordering the plaintiff to produce further accounts, saving the Master's right to order the production of such further accounts as he may find necessary as the reference proceeds.

Statement

APPEAL by the plaintiff from an order or ruling of the Master in Ordinary requiring the plaintiff to bring in further accounts.

H. A. Burbidge, for the plaintiff.

G. H. Kilmer, K.C., for the defendant.

Meredith, C.J.

MEREDITH, C.J.C.P.:—This is a partnership action, in which the plaintiff, on the 19th September, 1912, recovered a judgment against the defendant for the taking of the partnership accounts and the winding-up of the partnership affairs.

By this time it might, not unreasonably, have been expected that all that would have been done, and the purposes of the litigation attained; but, instead of that, the parties are yet little, if any, further advanced than they were when the judgment was signed: the months between have been given over to fruitless contention as to the bringing into the Master's office

of partnership accounts, the character of such accounts, and by whom they should be prepared and brought in.

In their general outlines the accounts are quite simple; the parties were co-partners in three public works' contracts only; each had other things to attend to, and so a manager—under the name of "controller"—was appointed to carry on this business in their places; and that was done.

So that the mere taking of the accounts seems to involve the amount of profit or loss on each of these three contracts, and the amount paid into the concern by each of the partners, and the amount paid out, if any, to each of them. With these items in mind, it seems to me that progress might well be made, and perhaps the end well reached without any elaborated accounts. At all events, it would be quite safe to get under way, and to proceed until some real obstacle should arise, if it ever should.

A Rule which we ought all to bear in mind, and which perhaps ought to be written in more conspicuous letters, requires that "the Master shall devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference:" Con. Rule 683.

Every partner is, of course, bound to account to his co-partner for his dealings and transactions in partnership matters: and the Master has, of course, power to require any party to bring in any account that should be brought in by him. But in this case there do not yet appear to have been any such dealings or transactions: the business was done through a manager appointed by the parties to do it for them. So that it seems to me to have been erroneous to treat the case as one of accounting by the plaintiff and surcharging and falsifying by the defendant.

It was the manager's duty to have had proper accounts kept, and balance sheets, and other information as to such accounts and the business generally, rendered to each partner; and it was equally the right and duty of each partner to see that this was done; and there is no good reason for assuming that it was not. How then can the plaintiff be treated as if he alone had managed the whole business of the co-partnership, and were chargeable and accountable as if he were a sole trustee; even if there were need for accounting in the manner in which the Master, from the first, seems to have thought to be, in form at all events, imperative? If further accounts be needed, why should not the manager yet prepare them, and prepare them at the cost of the firm? But I cannot think that anything of the sort is really necessary.

It is said that the plaintiff has already gone to an outlay of $1,000 in having the partnership books and accounts ex-

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amined and audited, and a comprehensive balance sheet made, by accountants. But that may be necessary, on both sides, if there really be substantial differences between the parties as to all or any of the few general items I have mentioned. The plaintiff must prove his case, if it be not admitted; and, he having proved it prima facie, the defendant must meet it with like or other evidence.

The balance sheet is in the Master's office on file; and, if the plaintiff's witnesses prove that, according to the partnership books, it is correct, then the plaintiff's case is established prima facie: and surely that is enough without further waste of time and money in accounts which would be only transcriptions of the books in whole or in part; enough at all events until some real difficulty arises. So too, I cannot but think, would be a simple account of the amount of loss on each of the three contracts and of the amounts paid in by, and paid out to, each of the partners, proved by the manager, by the books and in fact, or by competent accountants, from the books. If any question really arises as to improper entries in the books, that too, of course, is a matter of evidence easily dealt with.

It is not made quite plain just what accounts the plaintiff was directed to bring in. If they were to be merely, or substantially, a copy of the manager's books, that would be a very costly and quite unnecessary undertaking; and quite unnecessary too if it were a somewhat condensed rendering of the same accounts. The books themselves are available, and competent witnesses ought to be able to make plain to the Master, in not many words, whether they shew a profit or loss in each of the three contracts.

I cannot but think that the better way to deal with the matter now is to discharge the order now standing against the plaintiff as to furnishing further accounts; and direct the Master to proceed with the hearing of the matters referred; without in any way restricting his power to direct such further accounts to be brought in as he may find necessary, if any, as the reference proceeds.

I shall not make any order as to the costs of this appeal or as to the proceedings which have given rise to it.

Appeal allowed.

PROWD v. SPENCE.

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Mar. 27.

Ontario Supreme Court. Trial before Lennox, J. March 27, 1913.

1. DIVORCE AND SEPARATION (§ II—5)—JURISDICTION — ANNULMENT OF MARRIAGE.

The Courts in Ontario have no power to annul a marriage.

Statement

ACTION for a declaration of the invalidity of a contract of marriage made in 1908 between Wilson Prowd, the plaintiff, and Margaret Spence, the defendant.

W. H. Wright, for the plaintiff.

The defendant did not appear and was not represented.

Lennox, J.

LENNOX, J.:—The plaintiff asks the Court to declare that what purported to be a marriage, celebrated between him and the defendant on the 19th November, 1908, was not in law a marriage—was "null and void." The plaintiff also asks that "the said alleged marriage be set aside."

I have power, in a proper case, to pronounce a declaratory judgment and to make binding declarations of right, whether consequential relief is or could be claimed or not: Ontario Judicature Act, sec. 57, sub-sec. 5. But this power should be exercised cautiously and sparingly: *Austin* v. *Collins*, 54 L.T.R. 903; *Toronto R. Co.* v. *City of Toronto*, 13 O.L.R. 532; *Bunnell* v. *Gordon*, 20 O.R. 281.

The further question, as to whether the statute in effect creates a new jurisdiction, that is, whether the power to declare extends to a class of cases "in which, whether before or after the Judicature Act, no relief could be given by the Court," was raised in *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, [1898] 2 Ch. 331, and *A.* v. *B.*, 23 O.L.R. 261, but not determined. But for the doubt entertained by the eminent Judges who disposed of these actions, I should have considered it clear that the field of jurisdiction is not extended.

But, at all events, here the plaintiff asks me to "set aside" the marriage, and the other prayer is for immediate relief too; for a declaration that the marriage "was and is null and void" is a doing away with the contract of marriage just as effectively, if it has any effect, as a like declaration as to a contract to purchase land.

When I heard the evidence at Owen Sound on the 18th instant, I had great doubt, as I then stated, as to having jurisdiction at all. Reflection and a re-perusal of the authorities confirm me in the opinion that the Judges of the Supreme Court of Ontario have no power in civil actions, except incidentally or collaterally, to pronounce judgments purporting to affect the conjugal relations or legal status as regards each other of persons who have entered into a *de facto* or *de jure* marriage con-

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tract. Matters directly pertaining to the status of husband and wife and *de facto* marriages, had been relegated to the Ecclesiastical Courts before our adoption of English law; and the contention, sometimes set up, that a concurrent jurisdiction may have been retained by the English Chancery Court, although *not exercised*, down to and beyond 1837, is not *supported* by any clear English authority, and appears to be in direct conflict with the opinion of Sir John P. Wilde, who said in *A.* v. *B.* (1868), L.R. 1 P. & D. 559, at p. 561: "The gradual declension of spiritual authority in matters temporal has brought it about that all questions as to the intrinsic validity of a marriage, if arising collaterally in a suit instituted for other objects, are determined in any of the temporal Courts in which they may chance to arise. Though, at the same time, a suit for the purpose of obtaining a definitive decree declaring a marriage void which shall be universally binding, and which shall ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the Ecclesiastical Courts or the Divorce Court alone."

In our own Courts, *May* v. *May*, 22 O.L.R. 559; *Hodgins* v. *McNeil*, 9 Gr. 305; *Lawless* v. *Chamberlain*, 18 O.R. 296; *T.* v. *B.*, 15 O.L.R. 224, and *A.* v. *B.*, 23 O.L.R. 261, may be referred to.

And, holding the opinion expressed, I make no order herein.

No order.

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Mar. 31.

Re HOPFE'S BAIL.

Alberta Supreme Court, Harvey, C.J., Simmons, and Walsh, JJ. March 31, 1913.

1. BAIL AND RECOGNIZANCE (§ I—4)—CRIMINAL OFFENCES—JURISDICTION OF JUSTICES.

Rape is a capital offence in Canada, and justices of the peace have no jurisdiction to grant bail after the holding of the preliminary enquiry before the justices upon which the accused was committed for trial before a court of competent jurisdiction.

2. BAIL AND RECOGNIZANCE (§ I—17)—ESTREAT OF RECOGNIZANCE—SETTING ASIDE.

Where an order has been made estreating bail and for a writ of *fi. fa.* and *capias*, the court, before which the writ is returned for further disposition of the matter may, with the concurrence of the judge who made the order, set aside the same and the writ issued thereunder, if it appears that the bail was taken by justices in a case in which they had no jurisdiction to bail and that the estreat order was in consequence made improvidently.

Statement

APPLICATION by sureties in custody pursuant to writ of *fi. fa.* and *capias* for their discharge on the return of the writ.

The application was granted.

L. F. Clarry, for the Crown.
J. M. Macdonald, for the accused.

The judgment of the Court was delivered by

WALSH, J.:—One Hopfe, after his preliminary trial before two justices of the peace on a charge of rape was admitted to bail until the then next sittings of the Supreme Court of Wetaskiwin and a recognizance was entered into by him and two sureties before these justices conditioned for his appearance to take his trial at such sittings. Hopfe did not appear for trial at that Court and upon application of the counsel for the Crown, I, as the Judge presiding, made an order estreating the bail. A writ of *fi. fa.* and *capias* was issued upon this order to the proper sheriff commanding him to levy of the goods and lands of Hopfe and his sureties the amounts for which they were respectively bound by their recognizance and if he was unable to do so by reason of the fact that no property could be found belonging to them respectively he should take their bodies and keep them safely in the jail of his district and to return his writ to the Court *en banc* at its March sittings in Edmonton.

The sheriff having failed to find any property belonging to any of these men took into custody the sureties as commanded by the writ and released them upon their giving security for their appearance on the return of the same as he was thereby authorized to do. Upon the return of this writ the sureties appeared and asked to be discharged from further custody under it.

This recognizance was evidently taken by these justices under the authority which they must have thought they had under sec. 698 of the Code as it is the only section conferring upon a justice of the peace any power to admit to bail after a preliminary hearing. The authority conferred by this section only applies, however, to the case of an offence other than treason or an offence punishable with death. Rape is an offence punishable with death, and for that reason no right to admit the accused to bail existed in these justices. Under sec. 699 bail cannot be granted in such a case "except by order of a superior Court of criminal jurisdiction for the province in which the accused stands committed or of one of the Judges thereof." The justices had, therefore, no jurisdiction to take this recognizance and I think it follows that no liability was imposed under it upon those who entered into it, at least no liability which can be enforced in this summary manner. It may, perhaps, be that some civil liability attaches to these sureties in an action brought for that purpose. I express no opinion as to that, however, but merely mention it here so that it may be made quite clear that it is only their liability in the form in which it appears before

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us that we are disposing of. The sureties are released from further custody under this writ and as the matter has been fully argued I think that the order of estreat and the writ of *fi. fa.* and *capias* should be set aside, although no substantive motion to that end has been made. I might add that when I made the order I did not take the precaution as I now see that I should have done, to examine the recognizance, but acted simply on the statement of the counsel for the Crown that one had been entered into, which I assumed to mean properly and regularly entered into. I have no doubt but that this statement was made in perfect good faith, but this case shews that not only officers of the Crown but Judges should be careful to see that process of this character is only issued upon material justifying it.

Application allowed.

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Mar. 31.

OTTAWA and GLOUCESTER ROAD CO. v. CITY OF OTTAWA.

Supreme Court of Ontario, Kelly, J. March 31, 1913.

1. BRIDGES (§ III—21)—TOLL BRIDGES—ABANDONMENT TO MUNICIPALITY.

A bridge is not an intermediate part of a road within the meaning of the General Road Companies Act, when the terminus of the road, including one end of the bridge, is assumed by a municipality which has extended its boundaries; and a road company owning the bridge may then abandon the remainder of the bridge without the consent of the municipality in whose territory such remainder of the bridge lies by passing a by-law to that effect and giving notice thereof under the General Road Companies Act (Ont.).

2. HIGHWAYS (§ V C—260)—ABANDONMENT OF ROAD BY ROAD COMPANY.

A road company incorporated under the provisions of the General Road Companies Act, taking a conveyance of a road from a county corporation upon terms requiring the company to keep and maintain the road in repair is not debarred thereby from exercising its statutory right to abandon the whole or any part of the road, as contemplated by that statute.

[*R.* v. *Haldimand County*, 36 U.C.Q.B. 396, referred to.]

Statement

ACTION against the Corporations of the City of Ottawa, County of Carleton, and Township of Gloucester, for a declaration of the Court determining the question of the incidence of liability for the repair and maintenance of a bridge known as "Billings bridge" crossing the Rideau river at the present southerly boundary of the City of Ottawa.

G. F. Henderson, K.C., and *W. D. Herridge*, for the plaintiffs.

T. McVeity, for the defendants the Corporation of the City of Ottawa.

D. H. Maclean, for the defendants the Corporation of the County of Carleton.

G. McLaurin, for the defendants the Corporation of the Township of Gloucester.

KELLY, J., referred to the incorporation of the plaintiff company in January, 1865, under the Road Companies Act, C.S.U.C. 1859 ch. 49; to an agreement between the plaintiff company and the county corporation of the 4th February, 1878; to a conveyance of the bridge by the county corporation to the plaintiff company on the 21st September, 1878; to an Act, 42 Viet. ch. 48(O.), validating the deed, and declaring that it should be the duty of the plaintiff company to keep and maintain the bridge in good and proper repair; to an order of the Ontario Railway and Municipal Board, made in December, 1907, annexing to the city of Ottawa that part of the township of Nepean between the south limit of the city and the Rideau river through which the plaintiff's company's road ran; to a by-law of the City of Ottawa, passed on the 19th October, 1908, authorising the taking possession of toll roads within the city boundaries, and providing for an arbitration, as a result of which an award was made finding that Billings bridge was worn out and practically useless, and allowing the plaintiff company the value of the piers and abutments at the north end of the bridge; to a conveyance by the plaintiff company to the city corporation of certain parts of the company's toll roads within the new limits, dated the 24th July, 1909; to resolutions passed in December, 1911, by the councils of the County of Carleton and the Township of Gloucester calling on the plaintiff company to repair the bridge; to a prior intimation given by the plaintiff company of their intention to abandon the remaining part of the bridge, unless the municipalities should repair; and to a by-law passed by the plaintiff company on the 21st March, 1912, under the provisions of the General Road Companies Act, abandoning the part of the bridge which still remained the property of the company, notice whereof was given to each of the defendants; and to other facts and circumstances; and proceeded:—

I do not agree that, in the circumstances under which the settlement of the 7th February, 1878, was made, the plaintiff company's rights in that respect are to be determined only by the agreement and deed and Act of the Legislature, or that the settlement excludes the application of the terms of the General Road Companies Act.

The county corporation must be taken to have had knowledge of the purposes for which the plaintiffs were incorporated, and of the application to companies then incorporated of the statute then in force relating to their duties and rights.

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The necessity for the agreement arose from the doubts that existed as to the liability for repairs to the bridge, which, the agreement admitted, was part of the plaintiffs' road, and which was in existence before the plaintiffs were incorporated or took over the road.

The terms of the agreement of settlement as to the liability of the plaintiffs for repairs, etc., must be taken to apply to repairs and maintenance such as the plaintiffs were liable for in respect of other parts of the road, and subject to whatever rights the statute gave them to abandon and relieve themselves from liability on such abandonment.

The agreement of settlement in that respect could not have been intended to do more than make it clear that the plaintiffs, from the time the bridge was rebuilt and reinstated, were to be subject to the obligation of keeping it in repair as provided in sec. 98 of the General Road Companies Act then in force (R.S.O. 1877 ch. 152), and under which Act a road company, notwithstanding the obligation for repair imposed upon it by sec. 98, had the right to abandon and so be relieved from further responsibility.

This view is strengthened when one takes into consideration the provision of the agreement by which the plaintiffs' liability is limited to the time during which they are the owners of and control the road—a provision which, to my mind, indicates that the intention of the parties to the agreement was, to make the plaintiffs liable in respect of the bridge in the same manner as for other parts of the road, and subject to the terms of the statute.

The following statutory provisions have particular application to this case: sub-sec. 2 of sec. 613 of the Consolidated Municipal Act, 1903; 22 Viet. ch. 54, sec. 339; secs. 8, 50 and 103 of the General Road Companies Act, R.S.O. 1897 ch. 193.

The exclusive jurisdiction over Billings bridge, at and prior to the time the plaintiffs were incorporated and acquired the road, was in the county. The part of the bridge which was not taken by the city continued, until the plaintiffs abandoned it, to be a part of their road; and, it not being an intermediate part of the road, was subject to abandonment without the consent of the municipal council of the county.

It was stated in *Regina* v. *County of Haldimand*, 38 U.C.R. 396, at p. 408, that where part of the road is abandoned the statutory provision relating thereto, 29 Viet. ch. 36, sec. 9, would have to be construed so as to correspond with the general provisions referred to in that judgment, and which included the provisions applying to cases of abandonment of the whole road; and R.S.O. 1897 ch. 193, sec. 50, sub-sec. 2, which was

in force at the time the plaintiffs passed the by-law of abandonment, is in effect the same as 29 Vict. ch. 36, sec. 9.

The case above-cited was in many respects like the present one, but differed from it in two important particulars. There the abandonment was not, as required by the statute, made by by-law; and, secondly, prior to the company assuming control, no bridge existed over which the county had the exclusive jurisdiction referred to in the Act; and, as said by Wilson, J., who delivered the judgment (at p. 409), "there was nothing for the county council to resume;" and also (p. 408), "if the municipal body does not assume the road or work, they resume, that is, there is cast upon them again by 35 Vict. ch. 33, sec 12" (afterwards R.S.O. 1897 ch. 193, sec. 51), "only their own original road."

Moreover, there is to be found in sec. 617, sub-sec. 1, of the Consolidated Municipal Act, 1903, the following: "In case of a bridge over a river, stream, pond or lake, forming or crossing a boundary line between two or more counties or a county, city or separated town, such bridge shall be erected and maintained by the councils of the counties, or county, city and separated town."

My conclusion is, therefore, that the plaintiffs had the right to abandon the part of the bridge which they purported to abandon by their by-law of the 21st March, 1912; and that, on passing that by-law and giving the required notices thereof, they were relieved from further liability in respect of the bridge.

As to the other question, namely, on whom the responsibility rests since the abandonment, I am of opinion, having regard to the various statutory enactments in force at that time, that the jurisdiction over the part of the bridge abandoned by the plaintiffs and their responsibility in respect thereof, have fallen back upon the county. In reaching this conclusion, I have not overlooked the fact of the annexation to the city of the lands immediately to the north of the bridge.

The effect of the various statutes does not, in my view, bear out the contention that this jurisdiction and this responsibility have devolved upon the township.

The northerly portion of the bridge became the property of the city, on the extension of the city limits, and the various happenings which followed; and the city and county are together now liable for the erection, repair, and maintenance of the whole bridge.

There will, therefore, be judgment according to these conclusions.

The plaintiffs' costs will be payable by the county corporation; there will be no costs of the other parties.

Judgment for plaintiff.

ONT.

S. C.
1913

April 2.

Re WARREN and TOWN OF WHITBY.

Ontario Supreme Court, Lennox, J. April 2, 1913.

1. HEALTH (§ I—2)—MEDICAL OFFICER OF HEALTH—APPOINTMENT—2 GEO. V. (ONT.) CH. 58.

The Public Health Act, 2 Geo. V. (Ont.) ch. 58, requiring municipalities to appoint medical officers of health, who should hold office during good behaviour and their residence in the municipality for which they are respectively appointed or in an adjoining municipality, and who should not be removed from office except for cause, did not continue in office as permanent officials, Medical Health Officers appointed under the old Act, holding office at the date of the coming into force of the new Act at the will of the council, and does not preclude a municipality from dismissing such a "Medical Health Officer" without cause being shewn, and appointing a "Medical Officer of Health" under the new Act.

2. OFFICERS (§ I F 3—56)—STATUTORY MEDICAL OFFICER OF HEALTH—HOW REMOVED FROM OFFICE.

A "Medical Officer of Health" appointed under the Public Health Act, 2 Geo. V. (Ont.) ch. 58, cannot be dismissed except for cause, and with the approval of the Provincial Board of Health.

Statement

MOTION by Frank Warren, a physician and surgeon, to quash by-law No. 832 of the Town of Whitby, in so far as it related to the appointment of C. F. McGillivray as Medical Officer of Health for the town.

The motion was dismissed.

Eric N. Armour, for the applicant.

J. E. Farewell, K.C., for the town corporation.

Lennox, J.

LENNOX, J.:—Upon the merits this is not a matter inviting judicial action. It does not appear that the appointment made was not a good appointment, or that the council acted in haste, in bad faith, or contrary to the public interest. It is not suggested that the people of Whitby are behind Dr. Warren in his attempt to veto the action of their municipal council.

He is acting solely in his own interest, and for his individual satisfaction or gain.

It could not be pretended that he was harshly treated; for his appointment, as he knew from undeviating practice, terminated at latest in January, 1913; and meantime, under the statute then in force, his tenure of office was always at the will of the council; his engagement was a temporary one, revocable at any time without forfeiture by the municipality, and without the obligation of assigning cause.

The Public Health Act of 1912, amongst other things, inaugurates an essentially new policy as regards local Medical Officers of Health. Their qualifications were not defined under the old Act; they are defined now. There might be such an officer under the old Act; there *must be* such an officer under

the new one. If appointed by the council, his tenure of office was formerly at the will of the council; but, under the Act of 1912, an appointee continues in office during residence and good behaviour, can only be removed for cause, and then only with the approval of the Provincial Board. In addition to all this, new duties are assigned to this officer and new powers are vested in him. Many of these provisions involve, outside of ordinary professional attainments, the exercise of important discretionary functions and the possession of financial and administrative capacity. See, for instance, new sections 38, 40, 41, 42, 52, 72, and 87; not to speak of many other amendments throughout the Act.

I cannot, therefore, accede to the applicant's contention that, upon the new Act coming into force, in June, 1912, a new contract was thereby created between him and the municipality; that he ceased to be a temporary and became a permanent officer of the municipality; and that, from that day on, the council ceased to have any say in the matter; yet the officer, on his part, would not be bound to remain in the service of the municipality. The radical nature of the changes introduced I would take to be an answer to all this.

However, in any case, though I attach no importance to the verbal change from "Medical Health Officer" to "Medical Officer of Health," the applicant could hardly be said to be the officer described in the 37th and other sections of the Act, under the definition contained in sub-sec. (g) of sec. 2, namely: "'Medical Officer of Health' shall mean the medical officer of health of the municipality appointed under this Act." Dr. Warren's apointment was not under this Act.

On the other hand, Dr. McGillivray has been appointed under it, and can be dismissed only under the terms of sec. 37.

I am satisfied that there was no infraction of sec. 320 of the Consolidated Municipal Act, 1903, relating to appointment by tender.

The motion is dismissed with costs.

Motion dismissed.

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C. R.
1913

April 15.

SAAD v. SIMARD.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ.
April 15, 1913.

1. EASEMENTS (§ II C—20)—AS APPURTENANT—LIGHT AND PASSAGE—PRESUMPTION LIMITING AREA.

Where the plaintiff as lessee of certain premises used as a store and residence, claims as accessory thereto the right to use as a light and passage easement, a vacant yard owned by his lessor and lying in the rear partly of the premises occupied by the plaintiff and partly of adjoining premises, there is a presumption against an easement in respect of the yard in its entirety (constituting the vacant space in the rear of both premises) being accessory to the plaintiff's lease, and the onus is upon him to establish strictly his alleged rights of way and of light over the whole yard.

Statement

ACTION to establish an easement of light and right of way.

V. Cusson, K.C., for plaintiff, respondent.

Léon Garneau, K.C., for defendant, appellant.

The opinion of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—The principal plaintiff alleges: That by an authentic lease passed before Lacasse, notary public, on the 15th of February, 1907, he leased from Dame Corinne H. Beaudry, the defendant in warranty, a store, bearing the Nos. 86 and 88 St. Lawrence street, in the city of Montreal; also a dwelling-house over the store, with an extension in brick extending to St. Charles Borromee street, bearing the Nos. 19 and 19½ St. Charles Borromee street; that he took possession of the store, and at the time of the action occupied the same; that at the time of the passing of the lease and his taking possession there was a yard belonging to the said leased premises, with an opening from St. Charles Borromee street, and which was for the use of the leased premises, as well as for the use of the other part of the immovable leased to the defendants; that this yard served, among other things, as a communication by vehicles to the store, and also furnished light to the store on St. Lawrence street, as well as the extension on St. Charles Borromee street; that the defendants have commenced to construct a wall which obstructs a great part of the said yard, leaving only a narrow passage to communicate from St. Charles Borromee street to the rear door of the plaintiff's store—too narrow to permit a vehicle to pass, and diminishing considerably the light supplied to the store and the extension, thereby causing considerable damage to the plaintiff; and the plaintiff concludes that, by the judgment to be rendered, the defendants be enjoined from continuing the construction of the said wall, and to demolish that part already constructed, and to put the said premises in the same condition in which they were before they commenced the said construction, and in default of the defendants conforming to the said judg-

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ment within the delay to be fixed, that the plaintiff be authorized to demolish the said structure and to put the premises in the same condition in which they were before they commenced the said construction, and in default of the defendants conforming to the said judgment within the delay to be fixed, that the plaintiff be authorized to demolish the said structure and to put the premises in the same condition in which they were, the whole at the cost of the defendants.

Now the wording of the lease, so far as the description of the property is concerned, is as follows: "The store bearing the Nos. 86 and 88 St. Lawrence street, Montreal, now St. Lawrence Boulevard, comprising a dwelling house above the store, the whole forming a building in stone and extension in brick facing on St. Charles Borromee street and bearing the Nos. 19 and 19½ of said street." Then follows the declaration: "The whole as presently found, without reserve or exception"—the lessee declaring that he knows well the premises, and does not desire any further description. It will be seen by the lease that no mention is made of the yard in rear of the store in question.

The principal defendants plead, admitting the existence of the lease, but deny that the plaintiff took possession of the leased premises as alleged in par. 2 of his declaration, and say that on the same day that the plaintiff entered into the lease with the defendant in warranty, Madame Roy, he, the plaintiff, sublet the dwelling above the store and the extension in rear to one Joseph Steinberg, and produces a copy of the lease, and subsequently, allege the defendants, viz., on the 26th of February, Steinberg leased to one Solomon Moses the extension facing on St. Charles Borromee street, the plaintiff, therefore, occupying only the lower part of the building facing on St. Lawrence Main street; and, says the defendants, the sub-tenants of the plaintiff never complained of the work done by the defendants, and they were the only parties who could complain; that the plaintiff's entrance was on St. Lawrence Main street, and that from the moment of the plaintiff's lease, and when he took possession, there was no communication from St. Charles Borromee street to his store, the door or gate of the yard being closed; that, moreover, the plaintiff never leased the pretended passage which he alleges exists behind his store; that even if he did lease the same, it could not be more than that part of the passage which is found on the lot or in rear of the lot which he leased, and he, the plaintiff, has no right whatever, either under his lease or otherwise, to that part of the yard or passage which is immediately behind the premises leased by the defendants, and which premises the defendants had leased from the said proprietor, Madame Roy, or rather were in the rights of one Debrofsky, who had leased from Madame Roy; that, moreover, it was with the permission of

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the proprietor, Madame Roy, that the defendants are doing the work of which the plaintiff complains, which work is upon that part of the property leased by Madame Roy to the defendants, and by them occupied, and this permission was given in writing on the 14th of October, 1907, and the work was being done subject to the approbation of the architect of Madame Roy, and the work of the construction of the wall was completed on the 30th of November, 1907; that the plaintiff has no right to complain of the work, the same having been done on the defendants' own property, or the property leased by them.

In the sub-lease made by the plaintiff to Steinberg, there is not a word said about the yard, or the use of the yard. It is simply a lease of the house above the store, with the extension fronting on St. Lawrence Main street; and the same is true of the lease from Steinberg to Moses.

The lease from Madame Roy to Debrofsky contains a description of the leased premises, as follows:—

> A lot of land being the north-west of the lot of land known under the number eight hundred and twenty-two on the official plan and book of reference of the St. Lawrence Ward of the city of Montreal, containing twenty-one feet and one-half in front, by seventy feet in depth, the whole English measure and more or less, and bounded as follows: In front by St. Lawrence street, on one side by the south-east half of the said official lot No. 822, on the other side by the official lots eight hundred and twenty-three and eight hundred and twenty-eight (Nos. 823 and 828) of the said official plan and in rear by the residue of the said north-west half of the said lot No. 822, with a cut stone house erected on said Lawrence street comprising a store and a tenement and the extension house in rear of the said store.

Now it will be seen by this description that the defendants leased a certain lot of land with a stone house erected on St. Lawrence street, comprising a store and tenement, and an extension in rear of the said store. No distinction is made between the buildings and the yard.

Subsequently, on the 14th of October, 1907, the defendant in warranty gave a letter, by which she consented to certain ameliorations or improvements to the property by the defendants being done, and that to the satisfaction of her architect. Subsequently, to wit, on the 27th of December, 1907, after the filing of the defendants' plea, the plaintiff, by separate writ, and under separate number, took an action against Dame Corinne H. Beaudry, the lessor of the plaintiff and of the defendants Simard. By this action, the plaintiff alleges the existence of the lease; alleges his right to the use of the yard; alleges the trespass of the defendants Simard, his co-lessees; alleges the action taken by him against his co-lessees; alleges the plea of the defendants, his co-lessees, to wit, that the work was being done with the authorization and consent of the proprietor; alleges by an amendment that he suffered damages to the extent of $2,000, and con-

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cludes: That the defendant, Mrs. Roy, be condemned to intervene in the action No. 3059, viz., the action against Simard *et al.*, to contest the same, and to cause the dismissal of the plea therein filed; and in default of her intervening, that she be condemned to protect the plaintiff from the consequences resulting, and to pay to the plaintiff the sum of $2,000 damages.

To this action the defendant, Mrs. Roy, pleaded, admitting the existence of the lease; admitting that the plaintiff took possession of the immoveable rented by him; denying that she ever rented to the plaintiff the yard in question, and alleging that the lease to the defendants Simard *et al.* indicates what she rented to them. She reaffirms that the lease between the plaintiff and the defendants Simard sets forth the contract; she alleges that the defendants Simard *et al.* made the wall in question; she alleges that the plaintiff tacitly consented to the construction of the wall; she alleges the sub-lease to Steinberg, as set forth in the principal defendants' plea; she alleges that she never leased the passage in rear, and even if she had, the plaintiff would have no rights in any part except that immediately behind the store fronting on St. Lawrence Main street, and that the wall erected by Simard *et al.* in no way encroached upon that part; she denies the right of action as taken, and in the form taken by the plaintiff, and alleges that at the most, even if the facts alleged were true, what the plaintiff could demand, would be a reduction in the rent, inasmuch as the plaintiff does not demand the cancellation of the lease.

The defendant then inscribes in law against certain conclusions of the declaration. The answer of the plaintiff is general. The cases were united for the purpose of proof and hearing.

The judgment dismissed the action against the principal defendants, and maintained the action against the defendant in warranty; condemned her to pay to the plaintiff $100 damages, and to pay all the costs on the principal action, as well the costs of the plaintiff as the defendants.

It seems to me that the first question to decide is, whether or not by the construction of the wall in question, there was any encroachment upon the property leased to the plaintiff, or upon which the plaintiff had any rights. As already stated, upon examination of the lease to the plaintiff, there is not a word said about his right to any part of the vacant land in rear or alongside of the premises rented by him. Far from the lease giving him a right in common with his co-lessees, Simard & Company, from the wording of the lease there is no mention made or reference to the vacant yard. If, therefore, the plaintiff has any right of usage of any part of the yard in question,

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it must be either from a usage or custom, or as being an accessory to the building itself. Now the fact is that there was a vacant piece of land unseparated or undivided, of a width of 10 feet 6 inches, between the extension behind the plaintiff's store and the extension behind the defendants Simard & Company's store.

In the latter part of November, the defendants, Simard & Company, with the knowledge and consent of the proprietor, Mrs. Roy, demolished the old wall, and started to build a new wall, at a distance of 6 feet 9 inches from the old wall—that is, advancing the wall 5 feet 9 inches nearer to the extension of the plaintiff than the old wall was, but if a straight line was drawn from the west end of the wall dividing the plaintiff's store and the defendants Simard & Company's store, the new wall built by the defendants would not encroach upon the land immediately behind the plaintiff's store, so that unless the plaintiff had a right of usage in all the land behind the two stores, then the wall did not impair or encroach upon his rights. As already stated, if the plaintiff had that right in common, he did not get it from his lease, and I cannot consider that a yard or vacant space behind two buildings can be said to be, in its entirety, an accessory to both, and I am of opinion that if the plaintiff had any right at all, he had the right only to use that part of the yard immediately behind his store, and if the defendants Simard & Company, or the proprietor, had built a small fence separating the passageway directly along the line of the plaintiff's store to St. Charles Borromee street, that there would have been no encroachment or right of action to have it demolished.

On examination of the lease of Simard & Company, it will be seen that they leased a lot of land 21 feet 6 inches in front, by 72 feet in depth, bounded by St. Lawrence street in front, and on one side by the south-east half of lot No. 822; on the other side by the official lots 823-828, and in rear by the residue of the north-west half of said lot No. 822, with a cut stone store and tenement and the extension house in rear of said store. I should say that if the vacant land in rear of the two stores was covered by any lease at all, it is covered by the lease between the defendant in warranty to the principal defendants, Simard & Company. Now the act of the defendants Simard & Company in the construction of the wall in question was certainly the act of one pretending to have a right upon the property, and was not merely a trespass by a third party pretending to have no right. Such being the case, and it being evident to the plaintiff that such was the case, the plaintiff should not have taken an action against Simard & Company; his action against them was unfounded, and his action should have been directed against his landlord, the de-

fendant in warranty, either for a reduction of rent, or a rescission of the lease, with damages. We find that the action against the principal defendants, Simard & Company, was unfounded in law, and was properly dismissed, but we find that the defendant in warranty was wrongly condemned to pay the costs of that action. Now the learned trial Judge condemned the defendant in warranty in the sum of $100 damages. We do not find these damages proven. It is important to notice in the first place that the construction of the wall complained of started about the 14th of October, 1907; the principal action was taken on the 8th of November; the action in warranty was taken on the 27th of December, 1907. The wall which was constructed was brought 6 feet 9 inches nearer to the plaintiff's store than the old wall, and was of about the same height. The side of the wall adjoining the plaintiff's property was whitened. The proof shews that the only provision made for the lighting of the defendants' store from the rear was a small fanlight from a door which was permanently closed. The proof goes to shew, that on the interior, and behind this fanlight, was hung a mirror, which would effectually block any light that otherwise might be given. The chief source of light for the rear part of the plaintiff's store was a skylight, which is shewn on the plan. So little apparent regard did the plaintiff have for a source of light from outside that this skylight was allowed to remain covered with dirt and dust. The proof is not sufficient to base a judgment against the defendant in warranty upon this ground. The damage to the goods of the plaintiff is not proven. The demolition of the old wall took about two days, and certainly from the proof the construction of the new wall could not be the cause of any damage to the goods. In the rear of the store, as above stated, there was but one door, which was closed, and it is impossible to believe that goods could be damaged in the manner as claimed by the plaintiff.

Now, on the question of egress and ingress of the plaintiff from his store to St. Charles Borromee street: In the first place, the wall, we have found, did not encroach upon his ground, and he had all the space, if not more, than his lease entitled him to; but as early as June, 1907, Simard built a garage for his automobile in this passage, and that garage covered within 2½ feet, the whole width of the passage, and it remained there until the middle of October, when the new wall was built, and all this time not a word of complaint was made of this garage.

Upon the whole we have arrived at the conclusion that the plaintiff has not established any damages, and the judgment will be reversed, and the action of the plaintiff dismissed with costs.

Action dismissed.

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C. R.
1913

April 17.

CONTANT v. DUCHARME.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ.
April 17, 1913.

1. LIBEL AND SLANDER (§ II A—13)—PERSON DEFAMED—CERTAINTY OF REFERENCE.

The certainty of the person upon whom the imputation is laid in an alleged slanderous utterance must be shewn by the complaining party; it is not sufficient to support a slander action that some of the persons who were present understood them to refer to the plaintiff, if such be not a plausible and reasonable inference from the circumstances proved in evidence.

[See Odgers on Libel and Slander, 5th ed., 136, 147.]

Statement

APPEAL by the plaintiff from the judgment of the Supreme Court for the district of Richelieu of February 1, 1912, dismissing with costs his action for $5,000 damages for alleged defamatory remarks uttered by the defendant, the curé of Contrecoeur. The plaintiff, a journalist and editor of the Journal du Bulletin of Montreal, where he is domiciled, complained of certain remarks made by the curé of Contrecoeur in the pulpit of his parish, at High Mass, on July 23, 1911, and alleged that he (the plaintiff) was the person referred to, although not mentioned by name; and plaintiff prayed for $5,000 damages. The defendant pleaded that the allegations of the declaration were libellous and untrue and denied the same. The trial Judge, after hearing a great number of witnesses, came to the conclusion that the plaintiff had not proven his allegations, that all the evidence rested purely on conjectures and presumptions which by themselves presented no guarantee of precision and certainty and could not constitute elements of proof sufficiently compelling to justify a judgment in favour of the plaintiff. Basing himself on C.C. 1238 and 1242, he dismissed the action.

Louis Gosselin, for plaintiff, appellant.

V. Cusson, K.C., for defendant, respondent.

The opinion of the Court was delivered by

DeLorimier, J.

DELORIMIER, J.:—The first ground of the plaintiff's appeal is to the effect that if neither party proved anything then at least should his action have been dismissed without costs. Says the plaintiff: The Superior Court has found that the evidence rests only on presumptions; and it found likewise that the defendant's case was only evidenced by presumptions (and less numerous than mine, as he called fewer witnesses). The Court did not find that the defendant had established the allegations of his plea; it simply found that the defendant had established certain presumptions. Now, if all of the evidence, on either side, comes to this, if neither party has proven anything, the Court should simply have put us out of Court, each paying his own costs.

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We do not consider this ground well founded. The plaintiff claims damages from the defendant as a result because such remarks were intended for him. The plaintiff was bound to prove this essential fact. The defendant only had to merely negative or explain away the allegations of the declaration. Once the trial Judge had come to the conclusion, whatever his grounds for this might be, that the plaintiff's evidence was absolutely insufficient, he had the right to decide as to the costs according to his discretion. If he was convinced that the defendant was not to blame and that the plaintiff had brought no certainty to his case, he was right in dismissing the action with costs, and, under such circumstances, it would have been unjust to merely put the parties out of Court, each paying his own costs. (C.P. 549.)

The plaintiff submits, in the second place, that the judgment is contrary to the evidence; and, in short, his contention comes to this: that as certain persons interpreted the defendant's words according to the meaning ascribed by the plaintiff then liability for these must necessarily fall upon the defendant. We have carefully examined the record in this case and find it impossible to assert with any degree of certainty that the words pronounced by the defendant referred to the plaintiff. On this point the plaintiff submits that it is not necessary that the weight of evidence should be in his favour and that, inasmuch as the case is one of defamatory remarks, it sufficed for him to shew that some of the persons present at the time these words were spoken understood them as being meant for and addressed to the plaintiff. This theory is not, in our opinion, a sound one. Because a few persons who hear some remarks being passed see fit to interpret these so to attribute to them an insulting meaning, as regards some one whose name is not mentioned, are we to immediately conclude, with any degree of certainty, that in reality the words spoken had of necessity the meaning attributed to them by these persons even in good faith? I do not think so. The essential fact must be verified, whether from the words themselves and from the evidence of all the witnesses, the interpretation given by these few individuals rests on facts so solidly established that it becomes impossible to give to the words uttered another meaning or interpretation of a plausible and reasonable character.

When an interpretation rests on mere inferences or presumptions, it behooves the Court to carefully scrutinize all the facts and circumstances of each case in order to properly weigh and appreciate the different opinions of the witnesses heard. It does not follow that, because one or more witnesses interpret certain remarks or words as insulting, the party

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uttering them should be condemned, or that the speaker had the evident intention of referring to a given person when the entire body of the evidence shews that these witnesses are mistaken in their opinion, although given in good faith. For these reasons we find the plaintiff's claim unfounded. He claims damages from the defendant for having uttered defamatory remarks to his prejudice. It is he who alleges this positive fact, and to succeed it is necessary for him to establish this by evidence which can leave the Court in no reasonable doubt as to the defendant's responsibility.

We dismiss the present appeal with costs.

Appeal dismissed.

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1912
Nov. 26.

FRASER v. IMPERIAL BANK.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 26, 1912.

1. ASSIGNMENT (§ II—23)—SUB-CONTRACTOR FOR WORK ON IDENTICAL TERMS—EQUITABLE ASSIGNMENT.

An agreement whereby a contractor for work sub-contracts with another to do the same work at the same price as he is to receive and agrees to pay the second contractor in the same instalments as are stipulated for in the original contract with the property owner, constitutes an assignment to the person who performs the work of the moneys to accrue under the original contract made by the property owner, and such transaction is an equitable assignment of a chose in action.

[*Fraser* v. *Imperial Bank et al., sub nom. Fraser* v. *Canadian Pacific R. Co.*, 1 D.L.R. 678, 22 Man. L.R. 58, reversed on appeal.]

2. CONTRACTS (§ II D 4—186)—CONSTRUCTION — SUB-CONTRACT — SUB-CONTRACTEE'S RIGHTS—ASSIGNABILITY.

Where a railway contractor turns over to the plaintiff a number of contracts for the construction of railway stations under an arrangement which was in effect that the plaintiff should supply all materials for and construct the stations in the place and stead of the original railway contractor and that the latter would pay over to the plaintiff the progressive payments as and when they were from month to month received from the company, such a turning over is a valid and enforceable equitable assignment placing the assignee in the shoes of the original contractor, even without the railway company's consent as a literal compliance with the original contract, and the plaintiff can collect for his work and materials.

[*Fraser* v. *Imperial Bank et al., sub nom. Fraser* v. *Canadian Pacific R. Co.*, 1 D.L.R. 678, 22 Man. L.R. 58.]

3. ASSIGNMENT (§ III—26)—PRIORITY BETWEEN ASSIGNEES — BANK'S PRIOR ASSIGNMENT FOR FUTURE ADVANCES—PERMITTING OUTLAY BY JUNIOR ASSIGNEE.

Where, under an equitable assignment of a railway contract for the construction of a number of railway stations the plaintiff, with the knowledge and permission and encouragement of the defendant bank (whose customer he is) goes on supplying materials for and constructing the railway stations, the defendant bank is estopped from subsequently setting up a prior assignment in its own favour for future advances as against the plaintiff's claim for the materials and work

so contributed by him in good faith and without notice; especially where to defeat the plaintiff's claim would be an injustice tantamount to a reproach upon the law, and where the bank failed to notify the plaintiff of its prior assignment.

[*Russell* v. *Watts*, 10 A.C. 590; *Stronge* v. *Hawkes*, 4 DeG. M. & G. 186, applied; *Fraser* v. *Imperial Bank, sub nom. Fraser* v. *Canadian Pacific R. Co.*, 1 D.L.R. 678, 22 Man. L.R. 58, reversed.]

4. EQUITY (§ III A—55)—EQUITY PRINCIPLES—ASSIGNMENT OF FUTURE CHOSE IN ACTION.

An assignment of a future chose in action by way of a construction contract for a number of railway stations operates in equity as an agreement binding the conscience of the assignor and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done and that the agreement imports in equity a trust.

[*Tailby* v. *The Official Receiver*, 13 A.C. 523; *Fraser* v. *Imperial Bank, sub nom. Fraser* v. *Canadian Pacific R. Co.*, 1 D.L.R. 678, 22 Man. L.R. 58, reversed.]

5. BANKS (§ VIII—160)—SECURITY FOR ADVANCES—ASSIGNMENT—CHOSE IN ACTION—UNEARNED FUNDS—PRIORITY—ESTOPPEL.

Where a bank, in order to secure present or future advances to a customer, has taken from him an assignment vesting in it the legal title to a chose in action arising out of a contract and subsequently receives notice of another assignment thereof made for a present valuable consideration by the customer to a third person before moneys have been advanced upon the security held by the bank, the claim of the bank for advances made after notice is postponed to that of the other incumbrancer.

[*Fraser* v. *Imperial Bank et al., sub nom. Fraser* v. *Canadian Pacific R. Co.*, 1 D.L.R. 678, 22 Man. L.R. 58, reversed; *Dearle* v. *Hall*, 3 Russ. 1; *Hopkinson* v. *Rolt*, 9 H.L. Cas. 514; *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29, and *West* v. *Williams*, [1899] 1 Ch. 132, applied; see Bank Act, R.S.C. 1906, ch. 29, sec. 76.]

6. ESTOPPEL (§ III E—70)—BY CONDUCT—UNEARNED FUNDS—CONSTRUCTION CONTRACT—CONTRACTOR—SUB-CONTRACTOR.

Where a railway company pays the monthly estimates on a construction contract to a bank under a notice of prior assignment to it by the original contractor, and where the bank has notice that the beneficiary interest in such estimates has passed by equitable assignment to a sub-contractor, the bank is estopped on its claim for future advances from denying such equitable assignment in defeat of the sub-contractor's claim, if it has with such knowledge silently stood by and permitted the sub-contractor to go on with the construction work under the contract.

[*Fraser* v. *Imperial Bank et al., sub nom. Fraser* v. *Canadian Pacific R. Co.*, 1 D.L.R. 678, 22 Man. L.R. 58, reversed; *Russell* v. *Watts*, 10 A.C. 590, 613; *Stronge* v. *Hawkes*, 4 DeG. M. & G. 186, 196, applied.]

Statement

APPEAL from the judgment of the Court of Appeal for Manitoba, *Fraser* v. *Canadian Pacific Railway Co.*, 22 Man. L.R. 58, affirming the judgment of Mathers, C.J., at the trial, dismissing the plaintiff's action with costs.

In the circumstances stated in the judgments now reported, the action was brought by the plaintiff, appellant, to recover moneys which he claimed as due to him for work performed and materials for the same furnished by him in the construction of a number of buildings for the Canadian Pacific Railway Co. under

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a contract entered into between one William Garson, deceased, and the railway company (alleging that the moneys arising out of that contract had been assigned to him by Garson), and for a declaration that the moneys in question belonged to him and were not affected by an assignment of the same funds made by Garson to the bank. The action was against the bank and the railway company for the recovery of $7,830, part of the moneys earned under the contract which had been received and retained by the bank, and for the balance of $8,433.70 still owing by the railway company. The company deposited the latter amount in Court to be disposed of in such manner as the judgment might direct. At the trial, the claim against the railway company was abandoned and the case proceeded against the bank alone. The plaintiff's action was dismissed by the learned Chief Justice of the King's Bench, and his judgment was affirmed by the judgment now appealed from.

Argument

M. G. Macneil, for the appellant:—No special form of words is necessary to constitute an equitable assignment, and it is clear that the appellant had such an assignment from Garson: Leake on Contracts (6 Can. ed.) 857; *Hughes* v. *Chambers*, 4 Man. L.R. 163. A verbal assignment is good against a subsequent written assignment: *Heyd* v. *Millar*, 29 O.R. 735; *Molsons Bank* v. *Carscaden*, 8 Man. L.R. 451; Pollock, Contracts, 8th ed., 232.

The evidence clearly shews that the bank had knowledge of the assignment to Fraser, and notice thereof to the railway company is not necessary. As Garson had previously assigned the moneys to arise out of the Outlook contract, it cannot be said that he intended to assign or could assign the same funds to the bank. The reasons in the Court below dealing with the question of non-assignability are quite beside the issue: *Burck* v. *Taylor*, 152 U.S.R. 634, and *Re Turcan*, 40 Ch.D. 5, have no application. Notice of assignment is necessary only for the protection of the debtor and, where that protection is not required, the date of the assignment prevails: see *In re Miller*, 1 Sask. L.R. 91, *per* Wetmore, C.J., at page 96. This decision was under a statute exactly similar to the provisions of sec. 39 (*e*) and (*f*) of the Manitoba King's Bench Act, R.S.M. 1902, ch. 40. In *Newman* v. *Newman*, L.J. 54 Ch. 598, and *Dearle* v. *Hall*, 3 Russ. 1, there was an element of fraud; consequently, notice affected the priority. The rule in *Dearle* v. *Hall*, 3 Russ. 1, cannot apply in view of the provisions of the Manitoba King's Bench Act, referred to: *Gorringe* v. *Irwell India Rubber Works*, 34 Ch.D. 128; *Jones* v. *Jones*, 8 Sim. 633; *Rochard* v. *Fulton*, 7 Ir. Eq. 131; *Scott* v. *Lord Hastings*, 4 K. & J. 633; *Re Richards*, 45 Ch.D. 589; *Ward* v. *Duncombe*, [1893] A.C. 369, *per* Herschell, L.C., at page 378, and *per* Lord Macnaghten, at pages 391-394.

C. P. Fullerton, K.C., for the respondent:—We rely upon the reasoning of the Judges in the Court below: *Fraser* v. *Canadian Pacific Ry. Co.*, 1 D.L.R. 678, 22 Man. L.R. 58. There is no evidence of record that there was an equitable assignment by Garson to Fraser and all that took place between them, as well as the conversations and correspondence with the officials of the bank at Winnipeg, are consistent with Fraser being an employee of Garson, or a sub-contractor for the works on the Outlook branch. Indeed, this is the irresistible conclusion to be drawn from all the facts and the absence of any proof whatever of express or implied notice to the bank that there had been an assignment of any kind by Garson to Fraser. At the same time, to the knowledge of both these parties, the bank had given notice of their assignment to the debtor, the railway company, and obtained its assent thereto, signified in various ways and, particularly, by the actual payment of the amounts of all the progressive estimates, up to the time of Garson's death, by the company directly to the bank. Even assuming the evidence established an equitable assignment, the respondent, by giving notice to the railway company obtained priority: *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, 3 Russ. 32; *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Re Freshfield's Trust*, 11 Ch.D. 198; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26; 4 Halsbury, Laws of England, p. 379; *Re Lake*, [1903] 1 K.B. 151; Pollock on Torts (5 ed.), p. 209; *Marchant* v. *Morton, Down & Co.*, [1901] 2 K.B. 829.

The Chief Justice. (dissenting).

THE CHIEF JUSTICE (dissenting):—In April, 1910, William Garson had two contracts from the Canadian Pacific Railway Co.; one to build roundhouses at Calgary, and the other, to erect six stations on what is called the "Outlook Branch" of that railway. The appellant's claim is for the price or value of work done by him in and about the erection of these six stations. Both contracts provide, amongst other things, that all the work should be proceeded with "under the personal supervision of Garson until completed," and that the agreements "should not be assigned or the work sub-contracted without the written assent of the company's engineer." A short time after the contracts were made, Garson had some conversation with the appellant, as the result of which, it was agreed between them that the latter should take over the building of the six stations on the Outlook Branch. It is admitted on this appeal that the company had no knowledge of that arrangement.

Subsequently, on the 24th June, 1910, Garson, for valuable consideration, assigned in writing and under seal to the respondent bank

all his claim and demand against the C.P.R. Co. for moneys then due or thereafter to accrue due to him from the said company.

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Of this assignment the railway company was duly notified. At the time this action was brought the company had paid (of the moneys earned under the contract) to the respondent, as assignee of Garson, in all the sum of $14,850 and a balance of $8,433 was still owing. The bank made advances to Garson on the faith of the assignment to the extent at least of the amount due under the contract and how much more does not appear. Garson died in February, 1911.

The railway company, sued originally as joint defendant with the bank, denied all knowledge of the arrangement between Garson and the appellant and brought the balance due under the contract into Court to be disposed of as the rights of the parties might appear. The company was not made a party to the appeal either below or here. The issue, therefore, is narrowed down to the contest between the appellant and the bank, and the result depends chiefly upon the legal effect of the arrangement made between Garson and the appellant under which the latter built the stations in question.

The appellant's case on the pleadings was novation; his contention then was that by virtue of his arrangement he took the place of Garson on the contract, with the assent of the company, and that the moneys were his from the beginning. On the evidence this position could not be maintained. It was abundantly proved that the railway company only knew Garson in the transaction and dealt with him alone throughout. The moneys paid Fraser as the work progressed were paid by Garson's cheque on the respondent bank in which both Garson and Fraser kept their accounts.

On this appeal two questions arose for consideration: 1st. Did the arrangement between Garson and Fraser under which the latter carried on the work constitute an equitable assignment of the moneys earned? 2ndly. Did the assignment to the bank, duly signified to the railway company, give the bank priority? In case the first question is answered in the affirmative, the second becomes important.

It has been assumed throughout the argument here that the trial Judge found there was an equitable assignment from Garson to Fraser, as the result of the arrangement made with respect to the stations. I prefer to quote the language of that learned Judge; he says, *Fraser* v. *Canadian Pacific R. Co.*, 22 Man. L.R. 58, at 64:—

> I think it is fairly clear that he (Garson) intended to have the plaintiff take his place under this contract in so far as it was possible for that to be done without the knowledge or consent of the railway company. I think the real arrangement was that the plaintiff should construct the stations in the place and stead of Garson and that the latter would turn over to him the progressive payments as and when they were received from

the company. The moneys were Garson's as between him and the railway company and what took place between Garson and the plaintiff at most amounted to an equitable assignment of these moneys to the plaintiff.

In appeal it was held by Howell, C.J., *Fraser* v. *Canadian Pacific R. Co.*, 22 Man. L.R. 58, at 67:—

> I think it would be unsafe from the evidence to find as a fact that there was an equitable assignment of this chose in action. For all that appears in the evidence, the bargain might have been (and indeed it seems to have been) that the plaintiff was to do the work for the deceased for the same sum which the latter had contracted for, and that he would be paid for the same from time to time as the deceased received the money therefor from the company. This would not be an assignment of the chose in action.

The first question, was there an equitable assignment by Garson to Fraser, must, I think, be answered in the negative. The railway company recognized in Garson no right to part with any portion of his contract. He was under an obligation to personally supervise the work contracted for, and no attempt was made to prove that, to the knowledge of the company, Fraser ever occupied with respect to the work any position other than that of an employee of its contractor. The arrangement between Garson and Fraser, said to have been reduced to writing at the time, is not now forthcoming, and we are obliged to rely upon the appellant's recollection of what occurred, Garson having died before these proceedings were instituted. I cannot find in Fraser's evidence an intention on the part of Garson to transfer the money payable under the contract. Fraser's failure to notify the railway company of his agreement, Garson's assignment of the same fund to the bank a few weeks later, the way in which the parties dealt with the money after it was paid over to the bank as assignee, all convince me that Garson never intended, when the agreement was made, to part with his control over the moneys and that Fraser relied for his payment upon Garson's general business credit.

It is quite true that no particular form of words is required to operate an equitable assignment, but there must be proof of an engagement to transfer the right, here the claim to the money, or to provide for the payment of that money out of a particular debt or fund. A mere agreement to hand over work to be done does not operate an assignment of the money to be earned if the agreement is silent as to this. There must be evidence of an intention to assign the very fund which will be created by the execution of the work or to give a charge upon it. I cannot find any evidence of an intention on Garson's part to assign the money to be earned under the contract, although he undoubtedly undertook to pay Fraser the same price that he was to receive for the work. They are both presumed to have had present to their minds the conditions of the contract with

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the company; Garson remained liable at all times for its complete and exact fulfilment by Fraser and it does not appear probable that Garson would abandon all control over the payments made on the progress estimates so long as his liability under the contract remained. On the other hand it is not to be lightly assumed that Fraser, if the money as earned was available to him, would have neglected the very elementary precaution of notifying the railway company of his assignment, which he now swears was in writing.

I will briefly examine Fraser's testimony, having in mind his interest, the form in which his claim was first presented, and the finding in appeal that his evidence is "conflicting and unsatisfactory."

In answer to his own counsel Fraser says "he took over the construction of the six stations from Garson." Being pressed to tell all that took place between himself and Garson at the time of the arrangement in question, he says

> the latter 'phoned over to him if he would take them off his hands, that he would turn them over to him if they were any good,

and being pressed repeatedly by his own counsel for a more favourable reply, he says

> that he was to do the work at the same price as Garson;

finally he says, in answer to the question,

> Go on and tell us what was said, what took place and what was said?
>
> A. Well, we arranged to meet, and it was either that day or the next day that he came over, and he brought the plans with him, and the specifications, and I estimated, and I told him that I would take them over at that price, that is, the price that he had for them, and he agreed to it, *and there was nothing more said about it.* So we used to meet occasionally and speak over it.

What does all this mean if not as found in appeal that the appellant undertook to do the work for Garson for the price the latter was to receive for it, without reference to a special fund out of which he was to be paid?

As I have already said, the case turns entirely upon the effect of Fraser's evidence and I cannot find in it sufficient to justify me in reversing the judgment below. The appellant's version of the agreement with Garson, as I understand it, is at most evidence of a promise by the latter to pay for the work when he received the funds from the railway company, but not to pay over the moneys when and as received. There is no evidence of a distinct unequivocal agreement, such as is necessary to constitute an equitable assignment, that the particular funds received should be appropriated to the payment of Garson's liability to Fraser under the contract. Read in its entirety his evidence points to the conclusion that Fraser relied

upon Garson's credit; and I am much impressed by the absence of notice to the company. Such a notice, it is true, was not necessary to complete the arrangement, but it is, in the circumstances, an ingredient in considering the effect of the evidence. If he relied upon the payments made under the contract he would have taken steps to protect himself. All the facts of the case point irresistibly to the conclusion that Fraser must have known the money earned was paid when and as due to the bank and he never made any inquiry or protest. He nowhere says that he was to have the benefit of the fund as and when created. When examined as a witness at the trial he tells us that "nothing was said as to who was to pay him," and on discovery he says "that he did not expect the moneys would be paid to him, but to Garson direct." I must confess to some doubts on this branch of the case. The law on the subject, as Brett, J., said, "is brought to such an exquisite degree of refinement that it is by no means easy to understand it," but I certainly do not feel justified in reversing the unanimous judgment below.

Dealing now briefly with the second branch, I agree with the learned trial Judge, who says: "But if notice was material I could not find that the bank had notice of what the plaintiff's claim to those moneys actually was until after the commencement of this action." The assignment to the bank was made to secure past and future advances to Garson and there is no evidence to justify the assumption that at the time it was made the bank had knowledge of the previous arrangement between its assignor and Fraser. The fact from which we are asked to draw the inference of notice is connected with a conversation that Fraser says he had with two of the bank officials on the subject of advances he required and during the course of which he pretends to have given them a list of his contracts, including the one now in question. He does not pretend to say that he intended to give the bank notice of his assignment, but we are asked to draw from this casual conversation the inference that the bank knew of the arrangement between Garson and Fraser and this notwithstanding the positive denial of the two bank officials who were believed by the trial Judge. I cannot go that far and I respectfully urge that to do so would be to establish a precedent which would seriously disturb the business of banking so largely dependent upon good faith and plain, straightforward dealing. The bank took the assignment, notified the company and made the advances as agreed, and to defeat its claim upon such flimsy evidence as is relied upon here is, I repeat, to create a dangerous precedent. Why did Fraser not say plainly that he had an assignment instead of leaving that fact to be inferred, and further, why, with the knowledge of such an assignment, should the bank have undertaken to make advances to Garson on the credit of the same fund?

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The same observations apply to the subsequent alleged conversation with Garson during the course of which he is supposed to have told the bank officials that money received on the progress estimates belonged to Fraser. If it was Fraser's why not have paid it to him instead of depositing it to Garson's credit to be drawn against for his general liabilities? I quote Leslie's version of the incident from which we are asked to draw the inference of notice:—

Q. Now, when did you first become aware of the fact *that Mr. Garson had transferred* the Outlook Branch contracts to Mr. Fraser? A. Never knew it.

Q. You never knew it? A. No.

Q. When did you first become aware of the fact *that Fraser was building* these Outlook Branch stations? A. I don't know the date. Mr. Garson and Mr. Fraser came in and Mr. Garson said, "I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser," and that is the only interview or knowledge I have of the matter.

Q. Can you fix the date at all? A. No.

Q. You say it would be after the assignment? A. Yes, it was some time in the summer.

Q. Some time in the summer? A. Yes.

Q. Apart from that, did you know the arrangements, or anything about the arrangements between Garson and Fraser? A. None, nothing whatever.

In any event the rights of the parties cannot be affected by anything that happened after the assignment was executed and when advances had actually been made on the faith of it. The law surely is that the subsequent assignee must know of the prior assignment at the time he takes his security: *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch.D. 460.

This may be in some of its aspects a very hard case, but in the general shipwreck the "Tabula" is, in my opinion, with the bank—"*Durum est sed ita lex scripta est.*"

I would dismiss with costs.

Davies, J.

DAVIES, J.:—This was an action brought by the appellant to recover from the bank and the Canadian Pacific Railway Co. certain moneys claimed by the appellant as the unpaid balance of the contract price of six railway stations known as the Outlook Branch stations constructed by the appellant.

The contract for the construction of these stations had been entered into on the 11th of April, 1910, between one William Garson and the railway company, and the appellant's case was that some days after entering into the contract Garson offered Fraser that if he would take these stations off his hands he, Garson, would turn them over to him. That Fraser after examining the plans and specifications agreed to take them and to take over his contract with the Canadian Pacific Railway Co. for

their construction, and that the agreement between them which was verbal only was then settled and concluded. That Fraser afterwards completed the buildings according to contract and became entitled to the contract price.

So far as the railway company was concerned there was practically no contest. They had not received any notice of any assignment of the contract to Fraser, but had been notified by the bank on the 24th of June, 1910, that Garson had assigned to it

> moneys now due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Co.,

and had in consequence paid over to the bank the different instalments as earned under the contract for the construction of the Outlook stations and some extras amounting in all to the sum of $14,850, leaving a balance of $8,433.07 still owing. This balance the railway company brought into Court to be paid over as directed by the Court.

So far as the railway company is concerned they practically drop out of the case, and the contest is one between Fraser and the Imperial Bank as to the moneys paid by the railway company for the construction of these Outlook stations.

There seems to be two questions on the determination of which the rights of the contestants rest, first: Whether there was an equitable assignment from Garson to Fraser of the former's contract with the Canadian Pacific Railway Co. for the construction of these stations. If so, was the notice of such assignment given to the bank before they made the advances to Garson which the bank's assignment was intended to cover and secure? The trial Judge, Chief Justice Mathers, held, as I understand his judgment, that there was such an equitable assignment, but that

> when the bank took its assignment from Garson (on the 24th June, 1910) it had no notice of any interest that the plaintiff had acquired in any Garson contract with the railway company or of any arrangement that had been made between Garson and the plaintiff with respect thereto. That as soon as the bank took its assignment it perfected it by notice to the railway company and thus gained priority over the plaintiff's assignment of which no notice was ever given.

For these reasons he dismissed the plaintiff's action. So far as advances made by the bank to Garson up to the time of the assignment to it are concerned these reasons might be good. I cannot see their application to subsequent advances made by the bank after notice of Fraser's assignment.

The Court of Appeal for Manitoba dismissed the appeal to it on the ground that it "would be unsafe from the evidence to find as a fact that there was any equitable assignment." The facts of this case are somewhat unique. There was, of course,

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at the time of the alleged equitable assignment from Garson to Fraser of the former's contract, no fund in existence to assign, there was simply Garson's contract rights which were as and when he built the stations to receive the contract price as stipulated for. There never was any work done nor materials supplied by Garson under the contract and the work done and the materials supplied were done and supplied by Fraser. There was not any assignment from Garson to the bank of any specific moneys to accrue due to the former under the contract relating to the Outlook stations. It was a general assignment of

> all my claim and demand for moneys due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Co.

The consideration for the assignment was $1 and its object and purpose as explained by the manager of the bank was to secure the bank for any then existing or future advances made to Garson. So far as advances made by the bank to Garson at the time it took this assignment and before it had notice of the equitable assignment to Fraser are concerned, of course, no question arises. With regard, however, to any subsequent advances made by the bank *after* such notice it would be plainly unjust and inequitable to permit the bank to hold these moneys received from the Canadian Pacific Railway Co. as the price of construction of the Outlook stations as against the equitable assignee who had done the work and notified them of his assignment. And so with regard to the balance due by the Canadian Pacific Railway Co. on the contract and brought into Court the bank would, in the event of its being held to have had notice of the equitable assignment from Garson to Fraser, only be entitled to claim this balance to the extent of the advances made prior and up to the receipt of the notice.

I entertain grave doubts whether the words of the assignment to the bank, construed in the light of the manager's evidence as to its object and purpose, cover moneys earned by the assignee of the contract, Fraser, after the bank had notice of his assignment. Technically, they may be said to be moneys "accrued due to Garson," in whose name the contract was made and remained, but really and equitably they were not, but accrued due to the assignee who by the expenditure of his time and money had earned them. Assuming the equitable assignment and the notice to the bank as proved, then the bank receiving the money legally enough from the Canadian Pacific Railway Co. would hold it in trust for its real owner, the assignee. All it could claim would be the right to have any advances made by it, before it received notice, repaid out of the moneys it received.

Now, was there an equitable assignment to Fraser of Gar-

son's Outlook contract? I agree with the trial Judge that there was. No form of words is necessary to create such an assignment. It is always a question of fact and of the intention of the parties to be gathered from what they said and did and from all the surrounding circumstances. Garson died before the suit began and the only direct evidence of what took place between Garson and Fraser is that of the latter. Reading it as I have done several times over and applying it to the admitted facts of this case, I cannot doubt that if believed, and the trial Judge who saw Fraser and heard his evidence believed it, the intention of both parties was that the entire contract and Garson's rights under it should, as expressed, be "taken over" by Fraser at the price Garson had for the stations to be built and that Fraser should supply all the materials, do all the work and become entitled as between him and Garson to the contract price. As a matter of fact he did supply all the material and did all the work and in equity as between Garson and Fraser no doubt could arise as to his being entitled to the moneys to be paid by the railway company therefor.

We are not left, however, to Fraser's evidence alone on this point. We have the conduct and actions afterwards of Garson before his illness and his conversations and correspondence with and to the bank's officials. Mr. Leslie, the manager of the bank, himself says that Garson and Fraser came in together to see him at one time and that Garson said:—

> I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser,

which stations Mr. Leslie understood as the Outlook stations. If Garson was only sub-letting to Fraser there would be no reason in his giving the bank notice of it. He gave notice because he was assigning and ceasing to have further interest in it. As to when Garson made this statement Mr. Leslie seems very uncertain and hazy. He seems clear that it was before the $3,000 advance made in November, 1910, but how long before he could not say. It might be, he thought, a month, could not say whether it was two months, and the nearest he could get to the time was that it was *sometime during the summer* after the assignment to the bank. Mr. Leslie evidently did not pay much attention to this statement of Garson's relative to the turning over of the Outlook stations to Fraser, because at the time the bank took the assignment from Garson the only contract that he knew definitely that Garson had with the Canadian Pacific Railway Co. was for the roundhouse at Calgary. While the words of the assignment may be, and doubtless are, large enough to embrace these Outlook stations contract it seems clear alike from Garson's conduct in assigning it over to Fraser and from the bank officials' conduct and attitude towards it that they

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themselves did not intend the general words of the Garson assignment to include in them moneys becoming due on a contract standing in his name it is true, but which he had turned over to another contractor without investing a dollar either in labour, materials or otherwise, and which moneys only became due at all by the labour and expenditure of his assignee. That was doubtless one of the reasons why the manager of the bank paid little attention to the express notice Garson gave him in Fraser's presence that he had handed over this contract to Fraser and was unable to fix the time he received it more accurately than that it was sometime during the summer after the assignment. I conclude that as between Garson and Fraser it was not a mere sub-letting of the Garson contract, but a complete equitable assignment of it and that when Leslie swears that Garson told him he had called to tell him that he had handed over his Outlook contract to Fraser, who was then present, all parties understood that by handing over the contract he meant assigning it over. But the knowledge brought home to the bank of the assignment of this contract does not rest here. Fraser swears, though on this point he is contradicted by Morris, the assistant manager, that some two weeks or so after taking over from Garson these Outlook stations he went to the bank, saw the manager and assistant manager and gave the latter a memo. of the contracts he had, including the six Outlook stations, stating he wanted some financial assistance. He said he was told to call again, that he afterwards did so and was told by Mr. Leslie, the manager, that "perhaps when he got those stations well through" the bank could advance the money. If Fraser's evidence on this point is accepted following Garson's admitted notice to the manager the question of notice to the bank might be well determined in his favour. But apart from this evidence I think the dealings Fraser had with the bank respecting the moneys paid to it by the Canadian Pacific Railway Co. under the Outlook contract, shew clearly that it had full notice of the assignment of the contract to Fraser. It is urged that the conduct of the bank officials is consistent with their belief that the work was being done by Fraser as a sub-contractor under Garson merely and not as an assignee. I do not think so. First we have Fraser on August 25th, 1910, going to the bank, as he says, with reference to the payment of the first estimate on his work. The bank had not received the money, but Morris, the assistant manager, filled up a ten-day note for $800 which Fraser signed, and received the amount less discount. Fraser swears that this was an advance on the first estimate of $1,620, which was then discussed between them, and that it generally took about 30 days to get the money after the estimate passed. Morris denies that this $800 was advanced on the $1,620 esti-

mate or had anything to do with it and says that he first learned Fraser was building the stations or had taken them over from Garson *when this action first started.* I am not, however, able to reconcile this denial and this statement of Morris's with his actions respecting the cheque for the $1,620 estimate when received by the bank or with his correspondence referring to the subsequent estimates on the same contract.

On August 22nd, 1910, Garson drew a cheque in Fraser's favour on the bank for $1,620, expressing on the face that it was for "payment of first estimate Outlook contract, C.P.R." On the 9th of September the bank received and credited Garson with the amount of the estimate and marked the cheque "Accepted, Sept. 9th, 1910, Imperial Bank of Canada." Fraser indorsed the cheque and the bank put it to his credit. Morris, the assistant manager, initialled the cheque himself, and it would seem idle for him now to say that he *first learned* Fraser was building the stations or had taken them over from Garson when this action first started. Fraser on the 24th of August drew a cheque for $700 in favour of his foreman, Simmons, who was erecting the stations, and in the body of it stated that it was "A/C stations." He says that he told Morris that it was for the building of these stations that he was sending the money. The bank with Morris's knowledge remitted the money to Simmons at Keeler, where he was erecting one of the stations, and the cheque itself contains a memo. indorsed in Morris's handwriting, "Keeler, Sask." There were other cheques given by Fraser for the same purpose and remitted in the same way. On October 6th the bank received the second instalment of $5,400 on these stations contract. Before that, however, on September 20th, 1910, Garson had written the bank from Calgary, saying:—

> As C. P. August estimate is now overdue I enclose a cheque in favour of W. H. Fraser with *amount blank*, which you will oblige by *filling in for the su returned in the August estimates for the stations he is building and hand same to him* as soon as the cash comes in.

This blank cheque on its face read: "*Aug. estimates Outlook stations,*" and when a few days later the blank was filled in with $1,000, the abbreviation "a/c." was placed before the words "Aug. estimates Outlook stations." Mr. Morris received and, on the 24th, answered this letter, enclosing this blank cheque, as follows:—

> Referring to your letter of the 20th instant *re* W. H. Fraser we are advised by Mr. Fraser that *his* August estimates amount to about $5,400. We have filled in your cheque in his favour for one thousand dollars ($1,000) in the meantime. Yours truly, M. Morris, Assistant Manager.

In the face of this correspondence it is clear that Morris's memory must have failed him when he stated that he first learned when this action began that Fraser was building the stations or had taken them over from Garson.

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Fraser swears that he was advised by Garson of his having sent the bank a blank cheque for the second estimate and that he went to the bank, saw Morris, who told him the money had not up to that time been received and asked him to fill in the blank with $1,000. As Morris himself writes Garson that Fraser then advised him that his August estimates amounted to about $5,400, it would seem there was no room for doubt that at that date at any rate the bank had full knowledge not only that Fraser was building the stations, but that he was building them under an arrangement with Garson which entitled him to receive the estimates as they were passed and paid in by the Canadian Pacific Railway Co. On October 8th on another cheque being received by the bank from Garson in favour of Fraser the balance of their estimates, namely, $4,400, was paid by the bank to Fraser's credit and this cheque again on its face expressed that it was "estimate No. 2, Outlook stations."

Later on, in November, Fraser states that he became aware the third estimate for $7,800 had been passed, but not paid and that he and Garson went to the bank to see about getting an advance. Fraser got the advance on a note signed by both Garson and himself on the 21st of November, payable on demand. Morris again denies that this $3,000 was being advanced "in anticipation of the estimate." It is worthy, however, of note that some days previously, namely, on November 9th, Garson wrote a letter to the bank on his general business matters, which contained the following sentence:—

> It is likely the C.P.R. estimate in Outlook work will be paid in shortly *It belongs to W. H. Fraser.* When it comes let him draw on me at sight for the amount and transfer it to him,

and in another paragraph:—

> Let me know if you approve of my keeping the money in your bank here.

To which letter Mr. Morris signing himself "assistant manager" replies on the 14th November as follows:—

> I am in receipt of your letter of the 9th and *note your advices.* There is no objection to your retaining money in Calgary for your Calgary contracts providing that proceeds of your C.P.R. contract will be sufficient to protect advances in this office.

Not a single word throwing a doubt upon Garson's statement that the November estimate on the Outlook work belonged to W. H. Fraser and was to be transferred to him. Surely if any doubts existed as to the bank's knowledge that Fraser was the real contractor for the Outlook stations and entitled to receive the estimates as they were paid into the bank, this letter should have set them at rest. This third estimate was for $7,800. $3,000 had been advanced on Garson and Fraser's note to the bank and $1,000 of the three forwarded by the bank

by express on the same day to Fraser's foreman, Simmons, on Fraser's cheque expressing that its "A/C. Simmons, C.P.R. stations." This cheque was initialled by Morris and indorsed by Fraser with the words "Glenside, Saskatchewan," indicating the place where the money was to be spent, that being one of the places where he was erecting a station. There were also cheques drawn by Fraser on the bank, one for $1,002.50 on October 18th, 1910, favour of "Dfts. Moose Jaw and Keeler," the other for $1,003.25 on October 28th, favour of "cash," each of which contained in the margin the words and figure "C.P.R. 6 S.," which I conclude meant the 6 Outlook stations being built by Fraser and the amounts of each of which cheques were forwarded by the bank at the places indicated, the latter cheque being accompanied by a requisition from Fraser, "Required a draft on Broderick in favour of J. H. Simmons. Applicant, W. H. Fraser." "Broderick" was the name of one of the stations and Simmons the name of Fraser's foreman building them. Sometime after the 21st November, 1910, when the $3,000 were advanced to Garson and Fraser on their note taken "on demand," the $7,800, being amount of the third estimate, was received by the bank. The exact date of its receipt I do not find, but Garson was then ill in the hospital at Calgary and his account at the bank in an unsatisfactory condition. Fraser made repeated applications to the bank for this money, which were rejected and ultimately he went to Calgary and, Garson being sick in the hospital and not able to be seen, obtained from his foreman or manager a cheque for the amount of $7,800 expressed as "Transfer re C.P.R. Outlook stations," and signed "pp. Wm. Garson, John Sweeny, attorney." This cheque the bank refused to honour. Garson subsequently died, and this action was brought in which the Canadian Pacific Railway Co. was joined, inasmuch as they had not paid the balance of the contract into the bank. That balance, $8,503, remained unpaid in respect of the contract for the Outlook stations the railway company brought into Court, claiming no interest in it other than for costs and leaving it for the disposal of the Court between the contestants Fraser and the bank.

The Canadian Pacific Railway Co. or their interests are, therefore, in no wise concerned in the result of this case. Their stations were admittedly built for them by Fraser. The money contracted to be paid became due. Whether they had notice or not of the assignment to Fraser by Garson or whether they did or did not waive the clause in the contract prohibiting its assignment without the written consent of the engineer cannot have anything to do with the issues as between the bank and Fraser. The money had been paid in part, $7,800 to the Imperial Bank, who still claim to hold it presumably for advances due them by

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Garson, and the $8,503 is in Court payable to the bank if their legal contentions are maintainable, and if there is still that amount due them for advances to Garson, or payable to Fraser if he was the equitable assignee of Garson's Outlook contracts and if the bank had notice of such assignment before making the advances.

As I have previously stated I do not myself think there can be any doubt as to what was meant by the parties, Garson and Fraser, when after the former had asked the latter to take over this contract and Fraser having first examined the plans and specifications and made his own estimates told Garson he would take them over at the price he had for them and Garson agreed to it. By "taking over" the contract the parties meant that Fraser should stand with respect to it and its obligations and rights in Garson's shoes. If there was any doubt as to what "taking over" at his tender price meant, the subsequent conduct and actions of the parties sets that doubt at rest. Garson never claimed a cent of the estimate paid on the work by the Canadian Pacific Railway Co., but, on the contrary, until his fatal illness occurred, the contract standing in his name, gave Fraser cheques, one of them in blank, for the amount of these estimates as they were paid into the bank and in his letters to the bank used language which could only have one meaning, and that was that the contract was entirely Fraser's, who did the work, supplied the material and became entitled to the moneys earned under it for his own benefit. As to the bank having notice I think they had full and ample notice in the summer of 1910.

I do not know whether an earlier date than August is necessary to maintain the plaintiff's contentions as the bank's account with Garson is not in evidence and we do not know the dates when they made the advances to Garson, but I see no reason for refusing to accept Fraser's statement that within two weeks after his taking over the contract he was seeking financial assistance from the bank and left the list of the contracts he had, including the one now in question, with them, and that he then gave them the necessary notice. If there is doubt with respect to that then, in my judgment, the evidence of their having had notice in August and the early part of September, when the first estimate was passed to his credit is sufficient to fix the date and the cumulative evidence which follows in the correspondence between the bank and Garson and in the dealings of the bank with Fraser, is overwhelming. I cannot myself see how in the face of this correspondence and these dealings, so corroborative of what Fraser has sworn to, the bank could for a moment seek to appropriate the fruits of Fraser's labours and expenditure towards the payment of advances made by them to

Garson, which advances it cannot be seriously contended were in any wise made on the strength of the assigned Outlook contract.

The appeal should be allowed with costs in all Courts against the bank. Canadian Pacific Railway Company's costs to be paid out of money in Court. Judgment to be entered for Fraser for $7,830 admitted in the 6th paragraph of the bank's defence to have been received by it, with interest at statutory rate, from the date of its receipt, and also for the moneys paid into Court by Canadian Pacific Railway Co., less its costs.

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IDINGTON, J.:—The late Mr. Garson tendered to the Canadian Pacific Railway Co. by separate tenders put in at the same time, for the construction of its roundhouse at Calgary and also six stations on its Outlook Branch, and was awarded the contracts therefor. The former was a large contract and Garson seems to have thought there was not enough in the latter to render it worth his while distracting thereby his attention from the former and other contracts he had undertaken, and hence offered the appellant to take the latter off his hands, do the work, supply the material and receive the entire amounts named in the tender therefor or accruing under the contract. Appellant accepted his proposal. Garson being alone known to the company had of necessity to sign the contract. As between him and the company he was the contractor responsible for the execution of the work. As between him and the appellant the contract being non-assignable he was bound to appellant to see that he got all moneys accruing thereunder in respect of work done by appellant.

The learned trial Judge held rightly that there was thus created an equitable assignment of said moneys.

Two months later and after the appellant had entered upon the work pursuant to this understanding the respondent obtained from Garson an assignment dated 24th June, 1910, of which the operative part is as follows:—

> Know all men by these presents that William Garson, of the city of Winnipeg, in the Province of Manitoba, for and in consideration of the sum of one dollar paid to the said William Garson by the Imperial Bank of Canada (the receipt whereof is hereby acknowledged) doth hereby sell, assign and transfer unto the said Imperial Bank of Canada all my claim and demand against the Canadian Pacific Railway Company for moneys now due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Company.

There follows this a power of attorney to collect the moneys referred to for the use of the bank absolutely as its own forever.

It is to be observed that on its face this assignment is only in consideration of one dollar.

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Obviously on the evidence this document does not tell the whole of what it was intended for. The bank manager who witnessed its execution says in his discovery examination

it was given as security for the advances made from time to time to Garson,

and proceeds as follows:—

Q. Was it for advances already made or for future advances? A. It was both.

Q. Did you know at the time of taking that assignment what contracts he had with the C.P.R.? A. No.

Q. What moneys were owing to him? A. Not definitely.

Q. Why do you say "not definitely"? A. I knew that he had contracts with the C.P.R., but I knew nothing as to the amount definitely coming to him.

Q. Did you know what kind of contracts he had? A. No, not—I knew that he had—nothing definitely. The only thing I can remember that he had was some contract for roundhouses or something of that kind.

Q. Do you remember him stating that he had contracts for stations and roundhouses? A. Not definitely; the only thing I can remember that he had some contract for roundhouses at Galgary; that is the only definite contract that I——

Q. He told you that he had tendered? A. Yes.

Q. And you remember that distinctly, and you remember definitely about the roundhouse at Calgary? A. Yes, I am pretty sure that is right. But we never made any inquiry as to the nature of his contracts or where they were.

In his examination-in-chief at the trial to the question put thus: "Q. Under this assignment from Garson to yourselves—the bank—was any money advanced by the bank?" he answers, "No, not at the time." And later the question was repeated with the added words, "on the strength of this assignment." "A. Why, I can't remember just now. It strengthened Garson's credit." And he continues:—

Q. It was advanced on the strength of Garson's credit? A. Yes.

Q. After this assignment was made were moneys advanced to Garson? A. Yes; that is my recollection, at least.

Q. Would all the moneys in question in this action be sufficient to pay off Garson's indebtedness to the bank?

Mr. Elliott:—I object to the question.

HIS LORDSHIP:—I will allow it.

A. No.

Q. You say no? A. Yes—I am not positive about that. Yes, I think I can say no.

Q. You say no? A. Yes; that is the moneys coming from here would not be sufficient.

In other parts of his evidence he indicates inquiries were sometimes made of the Canadian Pacific Railway Co. respecting the amounts due on specific contracts on faith of which or to

subserve the purposes of which advances had been asked by Garson.

The bank cannot, therefore, claim that it ever knew of and as result of definite knowledge relied upon this alleged assignment of the Outlook stations contract as security for either past or future advances.

There appears in the letter of September 20, 1910, from Garson to the bank, which I will deal with presently, a report, as it were, of the progress he was making in his several contracts, and I think it fairly inferable from that and other evidence that the bank from time to time relied upon similar reports from Garson as well as answers of the Canadian Pacific Railway Co.'s officers for information as to the progress of his contracts when making advances either to help out the execution of such contracts or make the money earned therein the basis for further advances or security for past indebtedness.

I cannot find a single instance of such inquiry or report relative to the Outlook stations' contract, save when the facts relative thereto were, as I am about to shew in detail, so coupled with respondents' rights as should have put it on inquiry and have destroyed any right to claim reliance on the proceeds from said contract for any advances made to Garson outside of the scope of said contract.

Such is the nature of the claim set up by respondent to deprive the appellant of his equitable assignment and to despoil him of his labour, his money and his property spent in reliance thereon.

Having regard to the express non-assignability of the contract between Garson and the Canadian Pacific Railway Co.; to the want of definiteness in the form of assignment respondent relies upon; to the non-existence, at the date of the assignment, of any debt due or known to the respondent to be accruing due as arising out of this contract now in question; to the want of proof of any debt due from the assignor Garson to the respondent at the said date and remaining due when the assignment could have acquired any conceivable operative effect; and in short to the entire history of legal assignments of choses in action, including the King's Bench Act of Manitoba, section 39, and the effect thereof I submit that the said assignment, if anything, cannot be treated as any higher or stronger than an equitable assignment and that the rights of respondent and respective rights of the parties hereto must be determined by the principles of law governing equitable assignments and the equities between them as will be developed presently.

It is said respondent must succeed by virtue of notice to the Canadian Pacific Railway Co., within the rule laid down in *Dearle* v. *Hall*, 3 Russ. 1, and a long line of cases of a like kind

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ever since. But I cannot find such a case as this in all that long and varied line.

The only notice given the debtor, the Canadian Pacific Railway Co., was a delivery of the assignment accompanied by a letter as indefinite as the instrument itself.

The language used by Lord Cairns in *Shropshire Union Railways and Canal Co.* v. *The Queen*, L.R. 7 H.L. 496, at page 506, and quoted with approval by Lord Macnaghten in *Ward* v. *Duncombe*, [1893] A.C. 369, at page 391, is so comprehensive and forceful and expresses so much better than I can exactly what I feel should not be lost sight of in dealing with so remarkable a claim as respondent presents herein, that I cannot forbear quoting the entire passage as presented by Lord Macnaghten. He says:—

> The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in *Shropshire Union Railways and Canal Company* v. *The Queen*, L.R. 7 H.L. 496, at p. 506: "A pre-existing equitable title," said Lord Cairns, "may be defeated by a supervening legal title obtained by transfer"—he was there speaking of an equitable title to shares. Then he goes on: "And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced."

How can such a requirement of the law thus defined be held to have been complied with by the delivery of such an assignment as this now before us?

The further expressions of Lord Macnaghten himself on pages 392 to 394 of latter case criticizing the expressions so usual as to "perfecting" or "completing the title" of an assignee and constituting the debtor in a contract or the holder of a fund "a trustee" for the assignee and the duties or rights of a trustee in such a position are worthy of note in the same connection.

The assignment if purely voluntary could not acquire, even with notice, priority over an earlier one for valuable consideration. See *Justice* v. *Wynne* (1860), 12 Ir. Ch. R. 289, which is the only express authority on the point, cited in the textbooks, but I take the principle of law involved therein to be undoubted, when regard is had to the doctrine, speaking generally, that Courts of equity will not aid a mere volunteer in any case to enforce a gift failing in anything essential to its completion.

I shall advert to this principle later when I come to deal with the respondent's claim as presented on the evidence outside this instrument. I am only concerned here just now with the bare question of the effect of notice when resting on such a foundation as presented here.

This assignment on its face is purely voluntary. How can it be that such notice as that carried should be converted into something higher than it seemed by its terms to express? If it had purported to be by way of security as now claimed, then this might have been of less consequence, but it appears from its contents as if an absolute gift. The alleged basis of the principle upon which notice is given such effect as it has is said by Lord Lyndhurst in *Foster* v. *Cockerell*, 3 Cl. & F. 456, at page 475, to have been founded on the reason

> that if a contrary doctrine was allowed to prevail, it would enable a *cestui que trust* to commit a fraud, by enabling him to assign his interest, first to one and then to a second incumbrancer, and perhaps, indeed, to a great many more; and these later incumbrancers would have no opportunity of ascertaining, by any communication with the trustees, whether or not there had been a prior assignment of the interest, on the security of which they were relying for provision of their claims.

And he adds later on:—

> in a case of this sort it is necessary that a party claiming advantage from a title, should do everything that is requisite to complete that title before he sets up a claim in respect of it.

Such being the purpose of the rule as to notice, how can it operate when the reason for its application ceases, and it is sought to so extend its application as to enable the assignee in a kind of case without precedent, to rake in not only the whole or part of an ascertained fund, but of one to be created by the prior assignee's own labour and material? When and how does this fraud then appear? And when and how can we find in this notice a doing of everything requisite to complete title?

Giving the doctrine full force and effect one would imagine that a thing so very important should be true and not as false as the notice relied upon herein. Again, in every one of the authorities the respondent sets forth in its factum in this regard the notice given was clear, specific and related to a well-defined claim or fund existent or to arise from another source than at the prior assignee's expense.

In the case of *Marchant* v. *Morton, Down & Co.*, [1901] 2 K.B. 829, the facts suggested to Mr. Justice Channell a feature that might possibly, on a slight variation of fact, have raised a question remotely resembling this relative to sources to feed the fund.

But a somewhat diligent search has failed to discover for me a single authority of an assignment and notice thereof sub-

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stantially failing in these characteristics yet having been upheld.

In this case there is nothing specific, definite or clear in the notice which is the assignment itself. How could a debtor or trustee of a fund if such had existed be held bound to trouble himself with such a notice of a voluntary assignment? And how much less so in a case where he was not bound to recognize any assignment and had reserved the right to himself to resist and discard any assignment?

Surely the paymaster, or trustee if you will, in such a case had a right to discard as notice that which might have entitled him, if set forth truly and at length, to elect to declare the whole contract, which is to produce the fund assigned, void and ended forever. Of what value, moreover, could a notice be, which neither pointed to one contract nor another? Is it possible to argue this one in question is wide enough in its terms to cover all past and possible future relations between the assignor and the Canadian Pacific Railway Co. during the entire lifetime of the deceased? I think not.

Let us then examine its terms closely and see if we can find anything definite.

The singular number is used in describing the thing assigned. It is not several claims, but Garson's single claim that is assigned. We know he had more than one claim, but from the evidence of the respondent's manager, who was the witness to this assignment, we find he only knew of one claim and the appellant is not concerned with that. If we must, as the language requires, restrict respondent to one claim, then that of which respondent had some knowledge or notice must be the one, rather than one absolutely unknown. Surely this ought, if the notice is not definite, to end the contentions set up. If not good notice then as appellant's equity is prior respondent must fail.

I wish also to draw attention to the very peculiar language of this assignment.

How did the assignment get its very peculiar wording? It begins in the third person, but when it describes the claim it changes and takes the unusual form in the peculiar phrase, "my claim," etc.

It looks as if Garson had orally or in writing referred to "my claim" in some instructions he had given to distinguish that to be assigned from claims merely standing in his name as trustee in effect, as he did in subsequent letters to respondent, not only in the reference made to the appellant's rights, but as he did in that of the 20th of September, 1910, when he refers to a Minnedosa account and says,

this really belongs to Snyder. I have sent him a cheque accordingly.

I think this alleged notice of an equitable assignment held

in the Courts below as sufficient to give respondent priority fails for the reasons I have given. And I may add that the same reasoning is destructive of the assignment itself as covering the contract in question, whatever other contract it may cover.

I have combatted thus far that line of argument which prevailed below, but incidentally have noted as relative thereto other facts and circumstances which in another light are equally fatal to the respondent's claim.

A perusal of the entire evidence in this case has deeply impressed me with the conviction that Garson never intended by this assignment to pass to respondent, for its own benefit, or deprive appellant of, what he had undoubtedly promised him, and that he had made this clear to some one in such manner as to render respondent's officers indifferent regarding the stations contract in question.

The respondent's manager was applied to by appellant shortly after his agreement with Garson to furnish financial assistance in case of his making further arrangements with Garson for other work, but was refused.

Both are agreed appellant was then asked for a statement of his affairs. Whilst the manager admits he saw such a statement he denies hearing then of this Outlook stations contract. The appellant distinctly says he then told him of his arrangement with Garson for that contract.

It may be that the manager attached so little importance to the contract that he had forgotten it. I see no reason for disbelieving appellant's version which seems highly probable. It was part of the very business both agree was considered and must have concerned them both in the consideration thereof.

At all events the appellant, who was refused on that occasion, was a short time after given accommodation and later on several occasions further accommodation and each was, curiously enough, connected with the estimates for the work done under the very contract now in question. These estimates were the property of respondent if it ever had a claim; yet its manager and assistant manager let them be so dealt with by the appellant or by him through Garson as if they belonged to appellant.

The documents themselves in these transactions by the very language used therein seem to earmark the first two estimates so dealt with as appellant's property; the figures involved therein seem to fit in with and, as it were, to emphasize these facts, and taken therewith the letter of the 20th September from Garson to the respondent's manager clearly demonstrated appellant's claim to the eyes of respondent's officers; and the letter of the 24th September in reply thereto from the assistant manager to

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Garson conclusively proves that demonstration of fact had reached him. It must be presumed from all these and other facts, to have so reached the understanding of all concerned on behalf of respondent, that we can safely say these moneys were being treated to their knowledge by both Garson and appellant as the money and the property of the latter.

Then the letter of the 9th November from Garson to the respondent's manager as to the third estimate after dealing with a variety of his contracts and the moneys earned thereon expressly states:—

> It is likely the C.P.R. estimate on Outlook work will be paid in shortly. Belongs to W. H. Fraser. When it comes let him draw on me at sight for the amount and transfer it to him.

The answer to this last letter fails to repudiate such a suggestion, and in the first sentence says:—

> I am in receipt of your letter of the 9th instant, and note your advices,

but makes no remonstrance in answer to such a claim. That claim ought by this time, if the pretension now set up by respondent is well founded, to have been repudiated in no uncertain terms, but it was not. It was acquiesced in.

Throughout the whole of these dealings the respondent never, either to appellant or Garson, disclaimed the grounds for such pretensions as implied therein.

This silence on the part of respondent's officers, and this manner on the part of all concerned of treating the claim of appellant, is consistent with the truth of his statements relative to what had taken place between him and the manager, and hardly consistent with any other theory than its truth; save and except a theory of the entire ignorance of the officers of respondent of any claim it had under the assignment and want of reliance by the respondent on any claim to, or to charge, the fund in question. It is absolutely inconsistent with a proper realization by respondent's officers of the legal and moral duty resting upon them under the circumstances which had transpired under their eyes, if their present pretensions herein were well founded.

I cannot agree with the view of the learned trial Judge that what transpired after the date of the assignment can have no effect on the light in which it is to be considered.

Respondent's mode of treating what transpired after that is cogent evidence corroborative of what appellant states had taken place relative to his rights in the premises and of the notice he claims respondent had.

Besides it could not be permitted to any one claiming under an equitable title the moneys in question to maintain under such circumstances such silence relative to such a claim, if it ever

had existed, and then to try to set up such a claim as now set up by respondent as against him whose labour and money were creating and had at the institution of these proceedings created the fund now claimed by respondent.

But there is another ground yet which to my mind should bar the respondent's claim. It sets up by evidence I have quoted above, that the assignment was in truth not what it expresses, but was taken by way of security for advances to be made as well as for past advances.

No past advance is shewn to have existed unpaid when this suit began, and hence, as already stated, it cannot be held as security for that. No specific advance ever was made on the faith of this security. And no further advance was made before appellant's equity had, to the respondent's knowledge, clearly intervened.

If this claim relative to later advances is to be treated, as I think it can well be treated in such case as the like advances were treated in the case of *Hopkinson* v. *Rolt*, 9 H.L. Cas. 514, as between a first and second mortgagee then the claim of what respondent had acquired by reason of its advances on the faith of its bargain and charge must be subject to the claim of the appellant for his labour and expenses which created the fund in dispute.

That was a case as between first and second mortgages in which the first was held good only as to advances made when it was taken, or before the second was acted upon, but as to future advances which the first was intended to secure, they were held, so far as made after the advances on the second mortgage had intervened to be subject thereto. Assuming that by the assignment and notice to the Canadian Pacific Railway Co., the respondent had obtained in form a first mortgage to secure future advances then applying the principle involved in said case it was incumbent on it to have shewn it had made such future advances in priority to those of the appellant. This mode of dealing with equitable claims to secure future advances was followed in the case of the *Bradford Banking Company* v. *Briggs*, 29 Ch.D. 149, 12 App. Cas. 29, where the facts were as stated in the head-note as follows:—

> The articles of association of a company registered under the Companies Act, 1862, provided that the company should have "a first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due and to become due on his current account, and the bank gave the company notice of the deposit. The certificates stated that the shares were held subject to the articles of association.

It was held the moneys which became due to the company

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after notice of the deposit of share certificates could not take priority over the equitable claim of the bank for its advances of which the company got notice.

Holding, as I do, that if the respondent had not before its alleged assignment, it had at least shortly thereafter notice of the appellant's claim, then in any event the appellant obtained priority over it in respect of any later advances.

It may be said the case was not so treated below as to call for a determination of the exact facts that might have to be investigated if we had to decide on this ground alone.

It was, however, I submit, respondent's own course of dealing with the case and contentions at the trial that led to this situation and hence its own fault.

As I have come to a decided view on the other grounds taken, I need not enlarge on this latter ground. Though it falls in line with the main argument taken to shew, in any view, what a hopeless case respondent in truth had, yet if the case had to turn exactly on this ground alone an opportunity should be given to shew that in fact the future advances were made before what I hold to have been notice.

This, I say, however, is only in deference to the finding of fact by the learned trial Judge as to anterior notice, for my own impression does not quite coincide therewith. I should imagine it is the case of the man having only one thing of the kind to remember and so remembering it as against the man having possibly scores of the same sort to pass upon and dismiss and not quite so sure to remember.

I would allow the appeal with costs throughout and award judgment against the respondent for the moneys in question come to its hands and interest thereon and judgment for the moneys paid into Court and direct the costs of the Canadian Pacific Railway Co. to be fixed as between solicitor and client, and to be paid by respondent to the company, or if already deducted to be recouped by the respondent so that appellant get from the funds or moneys what he would have got but for respondent's wrongful interference.

Since writing foregoing I have agreed to the variation thereof as to costs embodied in memorandum prepared by my brother Mr. Justice Davies.

Duff, J.

DUFF, J.:—This appeal arises out of an action in which the appellant, Fraser, as plaintiff, and the respondent bank, as defendant, each claimed to be the owner of two certain sums of money. These sums had been earned under a contract to which the parties were the Canadian Pacific Railway Company and one Wm. Garson, by which Garson was to build six stations on the "Outlook" Branch of the Canadian Pacific Railway.

Under an arrangement with Garson the stations were in fact built in the summer and autumn of 1910 by the appellant Fraser entirely at his own expense and the moneys in question formed part of the price payable under the contract for this work done by Fraser. Fraser's claim is based upon an alleged term of his agreement with Garson by which the moneys paid to Garson under the contract were (it is said) to be paid by him to Fraser as and when they should be received by Garson. The bank's claim rests upon an assignment dated 24th June, 1910, by which Garson professed to assign to the bank

all his claim and demand against the railway company then due or thereafter to accrue due to him from the railway company,

of which assignment the railway company was immediately notified by the bank and by which Garson also appointed the bank his attorney to receive such moneys from the railway company. One of the sums in controversy ($7,830) was paid by the railway company to the bank, the other ($7,020) was paid into Court. The trial Judge held that:—

> The real arrangement was that the plaintiff should construct the stations in the place and stead of Garson and that the latter would turn over to him the progressive payments as and when they were received from the company.

But he held also that the bank having given the railway company notice of its assignment before having any knowledge or notice of the arrangement between Garson and Fraser had the better title to the moneys in question; and allowed the claim of the bank in its entirety. The Court of Appeal held that the appellant must fail on the ground that he had not satisfactorily established an assignment from Garson. I have gone over the evidence repeatedly with care and I am quite satisfied that the appellant has established his title to these moneys as between himself and Garson and that the rival claim of the bank is without substance. The case has been beset with confusion from the beginning of it, but when the facts, either admitted or established almost indisputably, have been grasped the rights of the parties fall to be determined by the easy application of one or two well established principles of law.

It was in April, 1910, that Garson entered into an agreement with the Canadian Pacific Railway Company by which he was to construct for them certain roundhouses at Calgary and the six stations already referred to and to finish them by the 1st September. Shortly afterwards Garson proposed to Fraser that he should take over the contract so far as it related to the stations; to this Fraser agreed and a memorandum signed by Garson and Fraser was indorsed upon a document which Garson had in his possession and which appears to have contained the terms of an intended formal contract between Garson

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and the railway company providing for the construction of both these sets of buildings. This document apparently never went into effect for the reason it seems that the company's engineers wished the contract with respect to each set of buildings to be embodied in a separate instrument. At the trial, Fraser was unable to produce the memorandum signed by Garson and himself, and although he proved that the document on which it was written was not to be found at any of Garson's places of business the learned trial Judge refused to allow him to state the purport of it. It is, I think, immaterial whether or not this ruling of the trial Judge was right. Garson unfortunately died before the action was begun; but it is clear that Garson and Fraser both acted upon the footing that these moneys were Fraser's and that such was the understanding between them; and that on the faith of that understanding the contract was performed by Fraser will abundantly appear from the evidence to which I shall have to refer in discussing the claim of the bank. The appropriate principle of law is stated by Lord Macnaghten in *Tailby* v. *The Official Receiver*, 13 App. Cas. 523, at page 546:—

> Long before *Holroyd* v. *Marshall*, 10 H.L. Cas. 191, was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust:" *Legard* v. *Hodges*, 1 Ves. 478.

This arrangement, therefore, constituted Garson trustee for Fraser of any sums which should be paid to him under the contract in question; and the real point in controversy is whether the bank did or did not by virtue of what subsequently occurred acquire a superior right to them. Before proceeding to discuss the facts specially bearing upon the bank's position it is convenient to refer to one of the provisions of the contract between Garson and the railway company which was the subject of some discussion on the argument here as well as in the Courts below. It is as follows:—

> (4) This agreement shall not be assigned, nor shall the said work or any part thereof be sub-contracted without the written consent of the engineer to every such assignment or sub-contract.

This conditional prohibition against assignment is susceptible of being read as a prohibition against the assignment of any of Garson's contractual rights arising out of this contract, including, for example, the payment of moneys earned and pay-

able. It is also open to a construction which would disable Garson from vesting in another (without the prescribed consent) the right to perform the obligations which Garson had undertaken and by which such moneys were to be earned, but which would not disable him even in the absence of such consent from vesting in another the right to claim such moneys after they had become due in consequence of Garson by himself or his agents or servants having performed his obligations under the contract. There is something to be said in favour of the first mentioned construction, but it is not necessary to decide the question whether it is or is not the true construction.

I shall assume in favour of the bank that the other view which is the view most favourable to its claim is the correct one. The required consent does not appear to have been obtained to the substitution of Fraser for Garson as contractor and, as between the railway company and Garson, Garson continued to be treated as the contractor responsible to it, although the evidence of Simmons makes it clear enough that the officials of the railway on the ground knew the work was being done by Fraser. Under the terms of the contract there was to be an approximate estimate of the value of the work done at the end of each calendar month, the amount of which was to be paid on the 20th of the next ensuing month less 10 per cent. which was retained as security. The railway company was apparently not notified of Fraser's title to those moneys (except as to the sum paid into Court) and saving that sum all the moneys payable under the contract were paid by the railway company to the bank for the credit of Garson's account under the authority of the assignment to the bank mentioned above, of which notice had been given by the bank. The railway company apparently never disputed its accountability for these moneys either to Garson or to the person who as against Garson should prove to be best entitled to them.

Fraser then having an arrangement with Garson by which the moneys earned under the contract (though payable to Garson as between him and the railway company) were to be subject to a trust in favour of Fraser, we come to consider the effect upon Fraser's rights of Garson's subsequent dealings with the bank.

In discussing this question, I proceed as if the bank were not in respect of any of its transactions with Garson under any of the disabilities affecting a bank deriving its power to carry on business from the provisions of the Bank Act, but had in respect of these matters all the powers of a natural person who is *sui juris*. I do this because an examination of what restrictions such a bank may be subject to by virtue of section 76 of the Bank Act in respect of advances upon the security

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of a transfer of the borrower's contingent right to moneys not yet owing or to moneys owing, but not yet payable under a contract such as that between the railway company and Garson might lead us into the consideration of points of some nicety and considerable practical importance upon which we have not had the benefit of argument; and since in my view of the case it is unnecessary to pass upon any such points it is, I think, altogether desirable to refrain from any discussion of them.

It was argued on behalf of the appellant that by virtue of the Manitoba statute (the King's Bench Act, R.S.M. 1902, ch. 40, sec. 39, sub-sec. (*e*)) an assignment of a future chose in action by itself vests in the assignee a legal title to the subject of the assignment as soon as it comes into existence and that notice to the debtor is unnecessary to perfect the title of the assignee; and it was said that as a consequence of this the rule in *Dearle* v. *Hall*, 3 Russ. 1, does not govern the rights of the parties under an assignment taking effect by virtue of the statute. Assuming all this to be true, it can have no application to the arrangement between Garson and Fraser if the real intention of the parties was (as it seems to have been) that the moneys should continue as between the railway company and Garson to be payable to Garson, who was to receive them as trustee for Fraser. On the other hand, the assignment from Garson to the bank appears to have been in conformity with the statute and quite sufficient (in the view of the statute just indicated) to vest in the bank the legal title to the moneys dealt with as soon as they should become payable and the fact of the bank's notice to the railway company having been given before the moneys were earned (which was pressed upon us in argument) would appear in that view to be beside the question. I shall proceed on the assumption that the appellant's title was an equitable title only, and that on the other hand the bank under its assignment acquired by force of the statute a legal title to the moneys as soon as they were earned, the real point in issue being whether the bank has a title to the beneficial interest in them which is superior to the appellant's.

The bank's contention at the trial was that its assignment had been taken without notice of Fraser's rights and that this circumstance alone gave it priority. The learned trial Judge, as I have mentioned, accepted this—holding that the effect of the assignment to the bank followed by notice of it to the railway company was to give the bank a right to intercept the ultimate fruits of the appellant's exertions in performing Garson's contract and that an indefeasible title to appropriate those fruits when realized became forthwith vested in the bank. Early in the trial the learned Judge ruled that nothing which occurred after its notice to the railway company could

prejudicially affect the position of the bank, and it was by this ruling as a guide that his judgment against the appellant was finally determined.

This ruling might be capable of support if it had appeared that the assignment had been taken as security for debts contracted at the same time or anterior thereto and that these debts to the amount of the moneys in dispute were still unpaid, and if we leave out of view the effect of the bank's subsequent conduct in giving rise to an equitable estoppel. But assuming at the time the assignment was taken the bank had no notice of the appellant's rights—then the bank's priority must rest on one of two foundations: 1st, the present existence of some debt which was incurred at the time of or prior to the taking of the assignment and for which the assignment was to stand as security, or, secondly, the present existence of some debt incurred on the security of the assignment and subsequent to the taking of it without notice of the appellant's rights. And, of course, the limit of the interest in respect of which the bank can in any case maintain its priority must depend upon the extent to which debts belonging to one or other of these classes remain still unpaid. This is so rudimentary that the citation of authorities ought to be superfluous. It may be observed, however, that there is an interesting application of the principle involved in *West* v. *Williams*, [1899] 1 Ch. 132, at page 143.

In this case the facts in evidence seem to be sufficient to establish, 1st, that the bank had notice of Fraser's rights before any debt was incurred for which the assignment was to stand as security and which is still unpaid; and, 2ndly, even if any such debt remained unpaid the conduct of the bank would preclude it from asserting as against Fraser any title to the moneys in question.

The first point to consider is: When did the bank receive notice of an understanding between Fraser and Garson by which Fraser was to build the stations and to be entitled to the proceeds of the contract? The learned trial Judge found that the bank was aware of such an arrangement as early as the beginning of September and that finding alone seems sufficient to entitle the appellant to judgment in his favour. It seems, however, not open to dispute that they had this knowledge as early as the month of July; and there are certainly powerful considerations in support of the view that they had it before the execution of Garson's assignment to the bank. Fraser himself says that shortly after making his arrangement with Garson he applied to Mr. Leslie, the bank's manager at Winnipeg, for an advance and gave him a list of his contracts. Leslie admits that the application was made and that Fraser gave him a statement of his affairs, but declares that nothing was said of the Outlook

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contract. There are grave difficulties in the way of accepting Leslie's recollection upon the point. Fraser had been a customer of the bank for some years; he was a man of limited means, and while the Outlook contract was not the only work he had in view for the ensuing season, it is obvious from an inspection of his bank account (which is in evidence) that it must have been by far the most important one. Why, in making an application for financial assistance largely with a view to enable him to carry out this contract, he should have omitted all mention of the contract does not appear to be easily explained.

Evidence of notice, however, at a date not later than July is supplied by the testimony of Leslie himself. Garson had a number of contracts to execute in the summer of 1910 in or in the vicinity of Calgary; and some time in July he left Winnipeg for Calgary and remained there until late in November. It is clear that before Garson left Winnipeg he had a conversation with Leslie in the presence of Fraser, the substance of which Leslie professes to state. In effect Leslie's account of the interview is that Garson with Fraser called at the office of the bank and said to him, "Mr. Leslie, I have come to tell you that I have handed over my stations to Mr. Fraser."

Leslie's evidence on his *vivâ voce* examination for discovery touching this conversation is as follows:—

A. He came in. Oh, I don't know when it was; some time in the fall, or later on, he came in with Mr. Garson and wanted some money and we gave him three thousand dollars, but Garson signed the note.

Q. At that time when the three thousand dollar note was arranged, you conducted the negotiations with the plaintiff? A. Yes.

Q. Your assistant took no part in it? A. Oh, he may have put it through.

Q. But you had the conversation? A. Yes.

Q. And you say at that time that you had *no knowledge of what the indebtedness* of Garson to Fraser was? A. No, none whatever. *About that time Fraser and Garson were here, and Garson told me that he had handed over the C.P.R. station work to Fraser.*

Q. *He told you that?* A. *That was the first intimation I knew of the connection, just about the time that note went through; it may have been a little before, or it must have been a little before or a little after; it was about that time.*

Q. It was not at the time that this note went through? A. No, it isn't at the time. *It may have been a little before that—it must have been a little* before that time.

Q. A little before? A. Yes.

Q. Did he say—— A. He just came in and he said: "*I wish to tell you that the C.P.R. station work is to be handled by Fraser.*"

At the trial he said:—

Q. When did you first learn that Mr. Fraser had any business relations with Mr. Garson? A. *Well, I can't give you the date definitely, the*

interview was so short, and there was nothing resulted from it that would lead me up to the time as to when it did take place.

Q. Do you mean the interview between *Mr. Garson, Mr. Fraser and yourself?* A. Yes.

Q. Do you know when that took place? A. No, I don't know.

Q. Was that the occasion when you authorized the discounting of the $3,000 note? A. Well, it might have been about that time, and it might have been before.

Q. It might have been before the 21st day of November, 1910? A. Yes.

Q. *Was it an occasion when Mr. Garson was here in the city?* A. Yes.

Q. *Do you know whether Mr. Garson was here during the summer at all?* A. I could not say.

Q. Did you see him during the summer? A. *I couldn't swear definitely.*

Q. Could you tell me how long prior to the 21st of November it would be when you had the conversation with Mr. Garson? A. The time Mr. Garson and Mr. Fraser were in.

Q. That was the date the note was discounted, was it? A. Well, no. I am not sure that it was. I had a conversation with Mr. Fraser at the time that this note went through, but I think the other conversation *I refer to must have been before that.*

Q. Who would that be with? A. *Mr. Garson—and Mr. Fraser was there.*

Q. *Mr. Garson and Mr. Fraser were there?* A. *Yes.*

Q. You say you think that would be before *November 21st?* A. I think, probably, about that time.

Q. Can you give me any idea how long before November 21st? Can you give me any idea how long before that—*a month?* A. It may be.

Q. Would it be two months? A. *Well, I couldn't say; some time during the summer.*

Q. Some time during the *summer?* A. Yes.

Q. Was it before or after you had taken this assignment from Garson of the 21st of June? A. Oh, I suppose *it would be after that.*

Q. *It would be after that?* A. *Yes.*

. . . . . .

Q. When did you first become aware of the fact that Fraser *was building these Outlook Branch stations?* A. I don't know the date. *Mr. Garson and Mr. Fraser came in and Mr. Garson said, "I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser," and that is the only interview or knowledge I have of the matter.*

Q. Can you fix the date at all? A. No.

Q. *You say* it would be after the assignment? A. *Yes, it was some time in the summer.*

Q. *Some time in the summer?* A. *Yes.*

The nature of the conversation alone suggests the improbability of its having occurred in November, when the work referred to had been almost, if not entirely, completed; and there can be no doubt that Leslie is quite right in his impression that it took place not later than some time in "the summer." The conversation must, therefore (since Garson was absent from Winnipeg from July until November) have taken place as early at least as July. Morris also says that he knew in August

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that Fraser was building these stations and that he must have learned of it from conversation with Garson.

It seems probable, indeed, that the conversation between Garson and Leslie took place shortly after Garson's arrangement was made with Fraser. Fraser wishing to obtain financial assistance from the bank it is natural to suppose that Garson and Fraser would inform the bank of what had occurred between them and do so without delay. Then as we shall see it is clear that Garson never concealed from the bank the fact that he regarded these moneys as Fraser's and it seems unlikely that he would give a formal assignment of moneys coming from the Canadian Pacific Railway Co., without informing Leslie of Fraser's interests in the proceeds of the Outlook contract.

Leslie's evidence upon this point is so vague and hesitating, so self-contradictory even, as to suggest an entire want of such recollection on his part as would entitle him positively to affirm that this conversation occurred at a time subsequent to the assignment rather than anterior to it; and I think it would not be quite fair to read his language as involving such an affirmation. For all these reasons I am far from satisfied that we should not be entitled to disregard the finding of the learned trial Judge that the assignment was taken without notice and give effect to the great weight of probability which favours the opposite view. We have, however, the indisputable fact that the conversation occurred at least as early as July, and that is sufficient for my purpose.

That conversation, accepting Leslie's account of it, must, I should have thought, have apprised Leslie as a business man of the fact that Garson had in a practical sense no further interest in the contract for the construction of the stations—at least as between himself and Fraser. I do not suppose the attention of Leslie or Garson or Fraser would be directed to the point of the technical legal position created by the arrangement Garson and Fraser had made; but I should have thought such a statement as that reported by Leslie must have left him with the idea that Fraser was to execute the contract and was also to have the benefit of the payments under it.

The interview was no casual talk. From Leslie's account of it, it appears that Garson and Fraser called upon him with the express purpose of informing him of their arrangement; and one at least of their objects in doing that undoubtedly would be—if the interview took place after the assignment—to instruct Leslie that moneys due under the Outlook contract and paid to the bank under the authority of the assignment were to be treated as Fraser's. But whatever construction might be placed upon Garson's words as reported by Leslie when taken by themselves—their subsequent conduct shews conclusively the view all

parties took of Fraser's rights. On Garson's side, his cheques and his letters written to the respondent bank unmistakeably treat the moneys paid under this contract as Fraser's moneys. On the side of the bank, the conduct of Leslie and Morris in respect of transactions either between the bank and Fraser or between the bank and Garson, or between Garson and Fraser themselves taking place directly under the observation of those officers of the bank, during the months of July, August, October and November, establishes, I think, beyond controversy these facts; Leslie and Morris knew that Fraser (whose business, to their knowledge, was that of a contractor) was building the Outlook stations, and that he was providing the means for doing so out of his own resources quite independently of Garson; they knew, moreover, that the moneys received by Garson from the Canadian Pacific Railway Co. on account of Outlook stations were scrupulously treated by Garson as Fraser's moneys. Leslie and Morris, moreover, acquiesced in this treatment of these funds as if in accordance with a course of business perfectly well understood among all parties concerned. Interpreting the conversation between Garson and Leslie by the light of these facts, I see no escape from the conclusion that it conveyed to Leslie's mind the idea that, in the sense I have mentioned, Garson's interest in the contract had passed to Fraser.

Let us look at the evidence a little more closely. The bank became aware in July that Fraser was drawing on his own resources for funds to build the Outlook stations. Fraser remained in Winnipeg and early in July sent forward his foreman Simmons to Moose Jaw to begin work on the Outlook Branch. Fraser, as I have mentioned, had for some years been a customer of the respondent bank and kept his account in the Winnipeg branch. From time to time during the months of July, August, October and November remittances were forwarded by or through the bank to Simmons in order to provide him with money to pay wages and other bills requiring payment in cash. The first of these remittances was expressed (in blank bills) to Simmons by Morris on the 30th or 31st July. Morris admits that he assumed these moneys were to be used in connection with the Outlook contract. To provide for one of these remittances (on the 25th August) it was necessary, as appears from the state of Fraser's bank account, to make arrangements for an advance from the bank. The advance was made, the bank taking Fraser's promissory note at ten days. This note was filled in by Morris personally; and the cheque for the amount of the remittance is expressed to be made on "account stations," and was initialled by Morris, who also in a memorandum on the back of the cheque noted the destination of the remittance. Such remittances continued (as I have said) during the ensuing four

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months in circumstances shewing conclusively to the knowledge of Morris that they were being provided by Fraser from his own capital. There is not a suggestion anywhere in the case that it occurred to anybody that in making these remittances Fraser was acting in any way on behalf of Garson.

Then as to the payments under the Outlook contract. Under the contract "approximate estimates" as they were called, were made at the end of each calendar month and the amount of each such estimate (less 10 per cent. which the company retained as security for the due completion of the work) became payable on the 20th of the next ensuing month. The sum ascertained to be payable under the estimate for July became payable on the 20th of August. This sum was, in fact, paid into the bank on the 9th September. It does not appear in the record whether the railway company's cheque was made payable to the bank or to Garson, but at all events the amount was by the bank placed to Garson's credit. Garson's account with the Winnipeg branch was at that time overdrawn, but the amount of the estimate ($1,620) was immediately transferred to Fraser's credit upon the authority of a cheque drawn by Garson. This cheque was expressed to be in "payment of first estimate Outlook contract" and was initialled by Morris, Garson being at this time in Calgary. It does not clearly appear how the cheque reached the bank, but the bank produced no communication from Garson in the month of August. Either then the bank had some explanation from Garson which is not now forthcoming, or Garson's cheque transferring the estimate to Fraser was honoured as a matter of course in consequence of information the officers of the bank already had touching the title to these moneys. But there is a little more. Garson's cheque is dated 22nd August. That was two days after the day on which the July estimate was due (20th August) under the contract with the railway company, and Garson had been informed as to the amount, for the cheque is drawn for the exact sum afterwards paid. On the 24th, two days later, Fraser applied for an advance. He says he asked for the advance on the strength of this estimate. Leslie, in examination for discovery, in effect admitted the advance was made in the expectation of a payment being made under the Garson contract. All this points to the existence at this time of a common understanding among all concerned that these moneys, although nominally Garson's, were really the property of Fraser.

The conduct of the parties in respect of the August estimate is yet more significant. This estimate was, under the terms of the contract, payable on the 20th September. On that date Garson wrote from Calgary the following letter:—

Manager, Imperial Bank,
Winnipeg.

Dear Sir,—Yours of the 17th received O.K. As C. P. August estimate is now overdue, I enclose a cheque in favour of W. H. Fraser with amount blank, which you will oblige by filling in for the sum returned in the August estimate for the stations he is building and hand same to him as soon as the cash comes in. I also enclose a cheque in favour of the Guerney Foundry Co., also in blank, on account Kenora Bank. The balance accruing due to them on this account is $909.80. Fill the cheque out for this or any part of it the Kenora special account will stand and send it to them, the balance of August will keep for a time. I have Kenora practically finished and quite a lot coming yet. I understand a payment has come in on Minnedosa account; this really belongs to Snyder. I have sent him a cheque accordingly. I have given a cheque to Ashdown here for $500 on account. Kindly honour it. Work going well. Weather fine. Have broken all records for Calgary in reinforced concrete construction by putting in 152 cubic yards in a 6-inch floor in one run.

Yours truly,

WM. GARSON.

And on the 24th September Morris sent him this reply:—

Dear Sir,—Referring to your letter of the 20th instant *re* W. H. Fraser, we are advised by Mr. Fraser that his August estimates amount to about $5,400. We have filled in your cheque in his favour for one thousand dollars ($1,000) in the meantime.

Yours truly,

M. MORRIS, *Assistant manager.*

The cheque referred to as actually filled in by Morris is in the following form:—

Calgary, Alta., Sept. 20, 1910.

IMPERIAL BANK OF CANADA.

Pay W. H. Fraser or order one thousand dollars ($1,000.00).

A/c. Aug. Est. Outlook Stations.

WM. GARSON.

On the 8th October the estimate was received by the bank and on the same day the balance, after deducting the $1,000 already transferred, was transferred to Fraser's account by a cheque of Garson's marked "Estimate No. 2, Outlook stations." In this instance also both on the occasion of the transfer of the first sum of $1,000 and afterwards of the second sum of $4,400, Garson's account at the Winnipeg branch appears to have been overdrawn. Comment upon this transaction seems superfluous. Garson's letter and the action of the bank upon it shew that both parties regarded the estimate for August, whatever might be the amount of it, as belonging to Fraser. Morris's language: "We are advised by Mr. Fraser that *his* August estimates amount to $5,400" is no slip of the pen; it expressed in words the conception of Fraser's rights which, as these transactions shew, was acted upon by everybody.

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There is still another exchange of letters. On the 9th of November Garson writes to the bank about the September estimate; and he uses these words:—

It is likely the C.P.R. estimate on Outlook work will be paid in shortly. It belongs to W. H. Fraser. When it comes let him draw on me at sight for the amount and transfer it to him.

Let me know if you approve of my keeping the money in your bank here. I know it would make your account look better if I sent it to Winnipeg, but it looks rather awkward to send you the money one day and have you wire it back the next. As it is, if you take the balances of both accounts into consideration I have had my slate cleaned again on this transaction. And will probably repeat the clean up again this month.

Yours truly,

WM. GARSON.

P.S.—I have just been advised that the Strathcona Post Office contract has been awarded to me.

In reply Morris, on the 14th, writes:—

Imperial Bank of Canada,
Winnipeg, Man., 14th November, 1910.

Wm. Garson, Esq.,
Dominion Hotel,
Calgary, Alta.

Dear Sir,—I am in receipt of your letter of the 9th instant, and note your advices.

There is no objection to your retaining money in Galgary for your Calgary contracts, providing that proceeds of your C.P.R. contracts will be sufficient to protect advances in this office.

Yours truly,

M. MORRIS, *Assistant manager.*

The sum received by the bank under the estimate referred to forms part of the moneys in dispute. To appreciate the significance of these letters it is necessary to recall the fact that the bank had been receiving moneys from the Canadian Pacific Railway Co. for Garson's credit in respect both of the Calgary and Outlook contracts. The latter moneys, as we have seen, had been appropriated to Fraser; the others had been applied in satisfaction of the bank's advances to Garson. Garson's letter was a reminder to the bank that the moneys coming under the Outlook contract were Fraser's; and this statement is accepted without a word of comment by Morris. The phrase "proceeds of your C.P.R. contract" obviously refers to the Calgary contract. The inference seems irresistible. It was understood by everybody that the bank had no interest in or claim upon the Outlook moneys.

From all this I conclude that Leslie and Morris, as well as Fraser and Garson understood, at least from the time of the interview mentioned by Leslie (which must have occurred, as we have seen, not later than July), that under that arrangement

Fraser was to build the Outlook stations and was to be entitled to the moneys thereby earned, or in the words of the learned trial Judge, in 22 Man. R., at p. 66: "These payments (under the Outlook contract) were to be handed over to the plaintiff."

The bank's knowledge, however, of Fraser's rights would not in itself prejudice its claim to have the moneys assigned applied in liquidation of any debt incurred before that time (for which the assignment was to stand as security) which is still unpaid. The exact particulars regarding the bank's advances to Garson have not been put in evidence. There is, however, sufficient, I think, to enable us to say with confidence that no such debt is now in existence.

It is stated by Leslie that no advance was made on the security of the assignment at the time it was executed; and that his intention in taking it was not to make advances on the security of Canadian Pacific Railway moneys generally, but only from time to time on the security of some specific sum known to have been earned and to be payable at a definite time.

The following passages from Leslie's evidence at the trial make this very clear:—

Q. Under this assignment from Garson to yourselves—the bank—was any money advanced by the bank——

Mr. Elliott:—I object to that. It is not an issue here.

Mr. Fullerton (continuing the question):—To Mr. Garson? A. No, not at the time.

Mr. Fullerton:—I will say this, if we had not set up all that I had proposed to ask for an amendment to that record, that on the strength of the assignment we advanced moneys from time to time, and our position was prejudiced.

HIS LORDSHIP:—I think I will allow it, because it seems to me that it ought to be material.

Mr. Elliott:—That changes the whole nature of the case. That changes the whole nature of this case, it should not be gone into now on amendment.

HIS LORDSHIP:—I will allow it, subject to your objection, in the meantime. What is your question again?

Mr. Fullerton:—What do you say as to that? Were any advances made, were any moneys advanced by the bank on the strength of this assignment? A. Why, *I can't remember just now*, it strengthened Garson's credit.

Q. *It was advanced on the strength of Garson's credit?* A. *Yes.*

Q. *After this assignment was made were moneys advanced to Garson?*

A. *Yes; that is my recollection at least.*

Q. Would all the moneys in question in this action be sufficient to pay off Garson's indebtedness to the bank?

Mr. Elliott:—I object to the question.

HIS LORDSHIP:—I will allow it.

A. No.

Q. You say no? A. Yes—I am not positive about that. *Yes, I think, I can say no.*

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Q. *You say no?* A. Yes; that is the moneys coming from here would not be sufficient.

Q. Let me ask you this question: Did you take any steps from time to time to ascertain what moneys were coming from the C.P.R.? A. Yes.

Q. *You did that?* A. *Yes.*

Q. And did the question of the advances that you were making from time to time depend to any extent upon your inquiry?

Objected to by Mr. Elliott.

HIS LORDSHIP:—I don't think you should ask the question in that way.

Mr. Fullerton:—What practice did you follow with regard to making advances to Mr. Garson?

Mr. Elliott:—That is not a material fact here, as to what his practice or habit was, and I object to that.

HIS LORDSHIP:—I don't think so.

Mr. Fullerton:—I want to shew that he would come along for the advances, and they would ask the C.P.R. if an estimate were passed, and if the estimate were passed they would advance the money on the strength of that estimate being passed, and that is the question I want to ask.

Mr. Elliott:—That does not concern us.

HIS LORDSHIP:—I don't know.

Mr. Fullerton:—It depends upon that, whether on the strength of these estimates being passed money was advanced, and I want to shew that really when an advance was asked for the C.P.R. would be asked as to whether there was any estimate passed or to be passed, and on the strength of the inquiry, or the answer received to it, the advance was made.

HIS LORDSHIP:—You can probably get at it without putting a leading question to him. He says that he did take steps from time to time to find out if there were any moneys coming from the C.P.R., and if you ask him why he did that you may get at it.

Mr. Fullerton:—Why did you do that?

Mr. Elliott:—I object again to that. His object and purpose in doing that would not, surely, affect us.

HIS LORDSHIP:—It may.

Mr. Elliott:—How?

HIS LORDSHIP:—If it does not, it will not do you any harm.

Mr. Elliott:—I object to it, my Lord.

HIS LORDSHIP:—I will allow the question.

Mr. Fullerton:—You made inquiries from the C.P.R. from time to time as to moneys coming from them to Garson? A. Yes.

Q. Why did you make those inquiries? A. Well, to ascertain whether we would be justified in paying his cheques.

This is the evidence given by Leslie at the trial.

On his examination for discovery he had made the following statement:—

Q. I see, Mr. Leslie, you witnessed this document. Just tell us all the circumstances and your reasons for taking that? A. *This assignment was given to us as security for the advances made from time to time to Garson.*

Q. Was it for advances *already made or for future advances?* A. *It was both.*

Q. Did you know at the time of taking that assignment what contracts he had with the C.P.R.? A. No.

Q. What moneys were owing to him? A. Not definitely.

Q. Why do you say "not definitely"? A. I knew that he had contracts with the C.P.R., but I knew nothing as to the amount definitely coming to him.

Q. Did you know what kind of contracts he had? A. No, not—*I knew that he had—nothing definitely. The only thing I can remember that he had was some contract for roundhouses or something of that kind.*

Q. Do you remember him stating that he had contracts for stations and roundhouses? A. Not definitely; the only thing I can remember that he had *some contract for roundhouses at Calgary; that is the only definite contracts that I*——

Q. He told you that he had tendered? A. Yes.

Q. And you remember that distinctly, and you remember definitely about the roundhouses at Calgary? A. Yes, I am pretty sure that that is right. But we never made any inquiry as to the nature of his contracts or where they were.

Q. Why? A. *We could find out how much was coming from the C.P.R. before we would lend him any money.*

Q. Did you find out in this case? A. *I must have found out in this case what he said was due, and had it corroborated to some extent.*

Q. What amount did he say that was due? A. Oh, I don't know. We generally figure on keeping a good margin.

Q. Did you call up the C.P.R. after you got this? A. No. I wouldn't say that I did. I wouldn't state positively—at the time.

Q. Was all the conversation with regard to this assignment made with you? A. Well, I think it was. I would say, "Here, if you are dealing with the C.P.R. and moneys are coming from there, we need an assignment of all the moneys coming from there, in a general way." *Garson would come in and when he was in need of money would say: "Now there is so much due me by the company." We would endeavour* to have that verified in some way or other, and telephone down to the depot, or engineers, and if they said "Yes," why we would take that for granted.

Moneys advanced in this way would, in the ordinary course, be repaid as soon as the bank received the payment in anticipation of which the advance had been made; and the natural inference from this course of business seems incompatible with the supposition that any debt remains unpaid which was incurred as early as July, 1910. The evidence afforded by Garson's pass-book and correspondence with the bank is also inconsistent with it. So are the dealings with the July and August estimates already discussed and the correspondence between Garson and Morris in November. It is almost impossible to believe, for example, if Leslie regarded the moneys payable under the August estimate as security for an existing debt owing by Garson that he would have made an advance to Fraser in anticipation of these moneys being paid to Fraser as he admitted he did; or that the dealings with the July and August estimates already discussed could have taken place. And perhaps still more diffi-

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cult to believe that Leslie and Morris would have abstained from comment upon Garson's statement in his November letter that the overdue estimate under the Outlook contract was Fraser's.

The only difficulty I have felt with regard to this matter of advances is this. I have not been altogether free from misgiving that the learned trial Judge's ruling to which I have referred may be accountable for the lack of explicit evidence as to the dates of the bank's advances to Garson and I have carefully considered the question whether if the appeal should turn upon this point the bank ought not to have an opportunity of supplying such evidence. In a case which has been marked by so much misconception as to the legal principles governing the rights of the parties one naturally hesitates to proceed upon any merely technical rule as to the burden of proof. I am satisfied, however, that we have before us all the relevant facts that could lend support to the claim of the bank. The facts touching the matter of advances were all, of course, within Leslie's knowledge. On Leslie's *viva voce* examination for discovery the bank's solicitor took the position and adhered to it that the appellant was not entitled to any information touching Garson's indebtedness to the bank. In the affidavit of discovery Leslie states that the only book or document in the bank's possession containing anything relating to the controversy is the assignment itself. The bank's position, in a word, was that Fraser was a stranger having no interest in the moneys in question and the bank's relations with Garson had, of course, no bearing upon the issue thus raised. At the trial Fraser's counsel objected to evidence shewing advances by the bank on the ground that the bank by assuming and maintaining the position above mentioned had defined the issue and limited it to the single question whether or not Garson had assigned these moneys in question. With this counsel for the bank appeared to agree and there was some suggestion about an amendment. The learned trial Judge eventually permitted, as appears from the extract quoted above, an examination of Leslie upon the subject of advances; but notwithstanding the fact that such evidence was permitted to be given, none was offered to shew when the debts were incurred which the bank claims the right to have paid out of the moneys in question. Indeed, while Leslie's evidence was explicit that no advance was made at the time the assignment was given, there was not a suggestion that any debt remains unpaid that had been incurred as early as July, 1910—a suggestion which, as I have pointed out, is not easily to be reconciled with the inference to be drawn from Leslie's account of the course of business.

In point of fact that suggestion was not put forward, even in argument on behalf of the bank; and from the circumstances

I have mentioned I think we are entitled to conclude that there is, in fact, no foundation for it.

But there is another ground upon which the appellant is entitled to succeed.

> Where one man induces another to alter his position by active misleading, or by silence, where there is by contract, usage of trade, or otherwise, a duty to speak, or in an equitable case, one may say, where the circumstances are such as to make it against conscience to be silent, his rights must be regulated by what he has himself brought about.

In these words Lord Blackburn, *Russell* v. *Watts*, 10 App. Cas. 590, at 613, states a familiar principle of law; and in *Stronge* v. *Hawkes*, 4 DeG. M. & G. 186, at 196, a great equity Judge, Turner, L.J., gives an illustration of the application of that principle to a particular class of cases in these words:—

> It has long been settled that where a party having a charge upon an estate, encourages or even permits another to advance money upon security of the estate without giving notice of the charge, the party who has thus been encouraged or permitted to make the advance is entitled to priority over the party who has thus encouraged or permitted the advance to be made. The fact of the party having the charge standing by and permitting the further advance to be made, without giving notice of the charge, is alone sufficient to support this equity on the part of the subsequent incumbrancer.

The circumstances of this case already mentioned fairly bring it within both the general doctrine and the particular rule expounded in these passages. I assume for the purpose of applying this principle that when Garson and Fraser had their interview with Mr. Leslie and informed him of their arrangement, Garson was indebted for advances secured by the assignment which advances are still unpaid. If I am correct in my interpretation of that interview and of the subsequent conduct of Leslie and Morris, Leslie as a result of the interview was aware that Fraser had taken the Outlook contract off Garson's hands on the understanding that the moneys earned were to be his. He knew that both Garson and Fraser assumed that Garson was entirely free to make that arrangement. He subsequently became aware that Fraser was proceeding with the performance of the contract on the faith of that arrangement. During the months of July, August, September, October and November while, to Leslie's knowledge, Fraser was devoting his time and his capital to the completion of the contract, he and Morris co-operated with Garson and Fraser in treating the moneys arising from the contract as Fraser's. It was only after the contract had been completed by Fraser's exertions and at his own cost and Garson was in his last illness that the claim to appropriate the reward of Fraser's work under the bank's assignment was, for the first time, suggested. It would be something

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of a reproach upon the law if in such circumstances such a claim could be allowed to prevail in a Court of justice.

To summarize for the sake of clearness these rather lengthy reasons for disagreeing with the Court below. The evidence, and notably that which discloses the conduct of the parties, conclusively justifies the finding of the trial Judge that there was in April an arrangement between Garson and Fraser by which Fraser was to assume the building of the stations on the Outlook Branch in performance of Garson's contract with the Canadian Pacific Railway Co. and that by the same arrangement the moneys paid under that contract by the railway company to Garson were by him to be paid over to Fraser. It is, moreover, established that the bank had notice that an arrangement of this character had been made between Fraser and Garson at least as early as July. The proper inference from the facts in evidence (including the course of the bank in the conduct of its defence) is that no obligation from Garson to the bank which came into existence as early as July, and for which the assignment was to stand as security, is still unsatisfied. It follows that assuming the assignment of June to have been taken without notice of the appellant's rights and to have the effect of vesting in the bank the legal title to moneys (as soon as such moneys should be earned) which should become payable to Garson under the Outlook contract—still the bank having had notice of Fraser's rights before any debt was incurred for which it is now entitled to hold the assignment as security, cannot on well-known principles successfully assert any claim upon those moneys as against Fraser. Moreover, the conduct of the bank in not only standing by and permitting Fraser to proceed, but in effect encouraging Fraser to proceed with the work of performing the Outlook contract on the faith of his arrangement with Garson that he was to have as his own the proceeds of that contract when realized (without disclosing its own claim to retain those proceeds until after they had been earned by Fraser's exertions), disqualifies the bank on equally well-known principles as against Fraser from enforcing rights which otherwise might have been permitted to take effect.

Anglin, J.
Brodeur, J.

ANGLIN, and BRODEUR, JJ., concurred with DUFF, J.

Appeal allowed with costs.

Annotation—Assignments (§ II—20)—Equitable assignments of choses in action.

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Annotation

Equitable assignments

SCOPE NOTE.

It is not to be attempted herein to consider the law of assignments in general, but rather to advert to or point out the rules or decisions, or at least some of them, which have a direct bearing upon the creation of what is known as "equitable assignments," or those transfers of future, possible, or contingent interests, as well as choses in action, as contra-distinguished from assignments of concrete, tangible and potential interests *in esse* and capable of manual and physical possession. It is well to bear in mind that the term "equitable assignment" is the outcome of the application of the rules of a Court of equity, enforcing the rights of an assignee of a chose in action, and not to any aboriginal or primary distinction in the form or mode of making an assignment.

Courts of common law regard an assignment as only applying to the transfer of something tangible, or having an actual or potential existence, and not to anything not in possession or not capable of being transferred. This rule was not followed by Courts of equity, and they extended the bounds or limitations it put upon assignments of future interests of every kind as well as of choses in action; and those assignments not cognizable by a Court of common law, from their lack of potentiality or tangibility, became enforceable in a Court of equity, and are known as "equitable assignments": Cyc. volume 4, page 7.

An orderly and logical consideration of the law of *equitable assignments* demands a primary reference to "choses in action," upon the transfer of which the doctrine equitable assignments hinges; and for the purposes of this note it will be sufficient to refer to the meaning of the term *choses in action* and to the assignability of the subjects the term may embrace.

CHOSES IN ACTION.

Definition.—The expression "choses in action," in the literal sense, means something recoverable by action, in contrast with a chose in possession, or a thing of which a person has not only ownership, but also actual, physical possession. From time to time the meaning of the expression has been changed, but at the present time it is used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession. It is used in respect of corporeal and incorporeal personal property which is not in possession; a chose in action, being a mere right to recover by action, has no absolute local existence: 2 Bl. Com. 389, 396; Blount, Law Dictionary, subject "Chose in action"; Williams, Personal Property, 16th ed. (1906), 27 and 29.

Chose in action has been used to denote both a right of action to recover a chattel and the chattel itself; Jacob's Law Dictionary (1744), *sub voc.* Choses; and further includes, in some writers, mere symbols of property, as a bond: Co. Litt., 120, 232; and it has been held that debts due on foreign bonds are choses in action, which are not in fact recoverable by action and are, therefore, strictly not choses in action: *Re Huggins* (1882), 21 Ch. D. 85; and Government stock (same case), and probably copyright and patent right; and a shareholder's right to obtain payment of his proportion of a declared dividend is a debt and, therefore, a separate chose in action: *Dalton* v. *Midland* (1853), 13 C.B. 474.

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Equitable assignments

Annotation (*continued*)—Assignments (§ II—20)—Equitable assignments of choses in action.

The different and various kinds of property included within the phrase or term "chose in action" have really very little in common, beyond the one attribute or characteristic quality of not being subjects of actual physical possession. Indeed, it, at one time, seems to have been used as an equivalent to a right of action: Jacob's Law Dictionary (1729), 2 Bl. Com. 389, 396; Pollock on Contracts, 7th ed. (1902), 217, appendix F; Williams, Personal Property, 16th ed. (1906), 27, 29.

The meaning of the word *chose* in law is "thing" and a *chose in action*, sometimes termed also a *chose in suspense*, is "a thing which one has not in actual possession or enjoyment, but which he has a right to demand by action or other proceeding, as a debt, bond, etc.": Wharton's Law Lexicon, 10th ed. (1902), 151. And see Cyc., vol. 4, p. 8, *sub* "Assignments," and Am. & Eng. Enc. of Law, 2nd ed., vol. 2, 1010.

Assignability.—As a general rule choses in action may be transferred from one person to another by assignment, but there are some choses in action which have never been assignable, and broadly speaking, it may be said that the ground of their non-assignability is denoted by that comprehensive expression "public policy"; thus, public policy forbids that effect should be given to assignments of pensions and salaries of public officers, or the salary of a Judge, or of a clerk of the peace, or an officer in the army or navy, and in general the profits of a public office are not assignable.

A person having a claim against the defendants for unliquidated damages in respect of a breach of contract, became bankrupt; his trustee in bankruptcy assigned to the plaintiff the good-will together with "the plant, stock-in-trade and other debts, securities, moneys, credits, contracts, and engagements to which the vendor as such trustee is entitled" and it was held that the claim for damages passed under the assignment: *Weinberg* v. *Ogden*, 93 L.T.R. 729.

An assignee for value of a debt has priority over a person who, after the assignment, but before receiving notice thereof, obtains an order appointing him receiver by way of equitable execution over such debt: *Re Bristowe*, [1906] 2 Ir. Rep. 215.

To constitute a good equitable assignment of a debt, it is sufficient to cause the debtor to understand that the vendor has made over the debt to a third person: *Brand* v. *Dunlop*, [1905] A.C. 454.

An assignment in writing of a debt was made in the following form: "In consideration of money advanced from time to time we hereby charge the sum of £1,080, which will become due to us from on the completion of the above building, as security for the advances, and we hereby assign our interest in the above mentioned sum until the money with added interest be paid to you," and it was held that this was not an absolute assignment within sec. 25 of the Judicature Act, 1873: *Durham* v. *Robertson*, [1898] 1 Q.B. 765; *Jones* v. *Humphries*, [1901] 85 L.T. 488; *Stanley* v. *English*, [1899] 68 L.J.Q.B. 839; *Bateman* v. *Hunt*, [1904.] 2 K.B. 530; *Bank of London* v. *Evans*, [1899] 2 Q.B. 613.

Notice to a debtor, who has given a negotiable instrument in payment of his debt, that the debt has been assigned by the vendor, while retaining the negotiable instrument in his possession, can be disregarded by the debtor: *Bence* v. *Shearman*, [1898] 2 Ch. D. 582.

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Annotation

Equitable assignments

Annotation (*continued*)—**Assignments (§ II—20)—Equitable assignments of choses in action.**

A father endorsed a banker's deposit received, "pay my son" and signed his name to the endorsement and then handed the document so endorsed to his son, saying, "here you are, this is yours," the father appointed this son as one of the executors, and it is held that there was a complete gift or equitable assignment of the amount on deposit at the bank: *Re Griffin*, [1899] 1 Ch. 408.

A testator a few days before his death bought through a broker certain stocks and shares. On the day before his death, in accordance with his instructions his wife's name was passed as the transferee of the stocks and shares, it also being the name-day on the stock exchange. The testator dies before the transfers were executed and it was held that the gift of the stocks and shares was complete as the testator had left nothing undone to complete the transaction in favour of his wife: *Re Smith, Bull v. Smith* (1901), 84 L.T. 835.

A leading English case upon the law of equitable assignments is *Holroyd v. Marshall*, 10 H.L.C. 191, 7 L.T. 172, decided in 1862. A manufacturer, who was in financial difficulties, sold all the machinery in his mill to the appellants. It was conveyed by deed to a third person, as trustee for all parties, subject to the right of the manufacturer to re-purchase. One of the provisions of the deed was a covenant to convey any "added or substituted machinery, implements or things" fixed in or about the mill. The deed was held to be a valid equitable assignment of the existing machinery, and conferred an equitable interest in the added or substituted machinery, as and when acquired; and that the appellants had a better title than the execution creditor under a judgment against the manufacturer.

It will be observed that this case involves two points, (1) the form of an equitable assignment; (2) the subject-matter of an equitable assignment.

Writing was not, nor is it now, necessary to the validity of an equitable assignment: *Gurnell v. Gardiner* (1863), 4 Giff. 626.

In some cases it has been provided that the agreement shall not be enforced unless there be proof in writing, as by the Statute of Frauds, but even then it is the verbal assignment which is operative, and the agreement takes effect from that date: *Re Holland, Gregg v. Holland* (1902), 71 L.J. Ch. 518, [1902] 2 Ch. 360.

No particular form of instrument or of words is necessary to constitute an equitable assignment: *Lambe v. Orton* (1860), 29 L.J. Ch. 319; *Bennett v. Cooper* (1846), 15 L.J. Ch. 315, 9 Beav. 352; *Bentley v. Mackay* (1851), 15 Beav. 12; *Alexander v. Steinhardt* (1903), 72 L.J.K.B. 490.

It is beyond the limitation of this note to engage in detail with the varied forms of expression which have amounted to an equitable assignment, further than to warn the reader to carefully distinguish between these and words which have been held to be no more than a revocable mandate: *Scott v. Porcher* (1817), 3 Mer. 652; *Ex parte Hall* (1879), 48 L.J. Bk. 79.

A document may be operative as an equitable assignment, although it would not entitle the assignee to sue in his own name, which he would be entitled to do if operative as an assignment under sec. 25 of the Judicature Act, 1873: *Durham v. Robertson* (1898), 67 L.J.Q.B. 484, (1898), 1 Q.B. 765

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Equitable assignments

Annotation (*continued*)—Assignments (§ II—20)—Equitable assignments of choses in action.

(see the judgment of Chitty, L.J., to which the other Lord Justices assented).

The *Holroyd* case above noted also confirms the extreme doctrine that a possibility may be assigned. The leading English case usually referred to for this proposition is *Warmstrey* v. *Tanfield* (1629), 1 Ch. Rep. 29, 1 Wh. & Tud. Lead. Cas. 93.

As a matter of fact, a Court of equity did not recognize the validity of an assignment of a chose in action, any more than did a Court of law: *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481; *Re Paris* (1877), 5 Ch. D. 959. In permitting a chose in action to be assigned, the Courts of equity did not disregard this principle, but it was because the bringing of an action is a mere incident and not a necessary consequence of the assignment, that the assignment was permitted. This distinction should be borne in mind, and it finds its best illustration in the decision of Wigram, Vice-Chanc., and classed as a very able English Judge, in *Wilson* v. *Short* (1848), 17 L.J. Ch. 289, 6 Hare 366. In that case brokers delivered to their principal bought notes in which the name of the seller was not disclosed, intending, in fraud of their principal, themselves to execute the contract. The principal deposited these notes with the plaintiffs to provide himself with funds to pay part payment of their price. Before the contract was completed by payment of the balance of the purchase-money and the delivery of the iron, which was the subject-matter of the contract, a transaction took place between the plaintiffs, the principal and the brokers, which the Court found as a fact was an agreement by the plaintiffs to waive their priority in order to enable the principal to find further money. In this attempt he did not succeed, and the plaintiffs were allowed to recover from the brokers the amount of the deposit. In the course of his judgment the learned Judge pointed out that as both the principal and the plaintiffs were ignorant of the position which the brokers occupied, and that they were dealing upon the footing of a contract valid upon its face, the fact that, upon subsequently discovering the truth, they were able to repudiate the contract and sue for a return of the money did not involve illegality on the ground of champerty.

The distinction between assignments and bills of exchange and orders for the payment of money is one that has been recognized for a long time, and has been frequently the subject of decision. The case of *Diplock* v. *Hammond* (1854), 23 L.J. Ch. 550, was one in which a document was held to be an assignment of the whole of a fund. The Court refused to force the construction of that document by holding it to be a bill of exchange.

The *Diplock* case, *supra*, was referred to in *Ex parte Shellard* (1873), 29 L.T. 621, and distinguished by Baron, C.J., who held in the last named case that the document then under consideration was an order for payment of money out of a particular fund at a future day not then fixed, and as such was liable to be stamped as a bill of exchange, and is an order for payment (even if not strictly a bill of exchange), within the meaning of the Stamp Act.

But in the subsequent case of *Buck* v. *Robson* (1878), 48 L.J.Q.B. 250, *Ex parte Shellard, supra*, was not followed, but practically disregarded, in the following extract from the opinion of Cockburn, C.J., concurred in by Mellor, J.: "Being ourselves decidedly of the opinion that an order from a

Annotation (*continued*)—**Assignments (§ II—20)—Equitable assignments of choses in action.**

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Annotation

Equitable assignments

creditor to his debtor, under an ordinary contract for the price of goods, or for work and labour and the like, to pay a third party, can confer a right on the latter only so far as it operates as an assignment of the debt, we feel ourselves warranted, on the authority of *Brice* v. *Bannister*, in acting on that view, notwithstanding the decision in *Ex parte Shellard*."

Brice v. *Bannister* (1878), 47 L.J.Q.B. 722, which was followed in the *Buck* case, *supra*, and was approved in *Ex parte Hall* (1879), 40 L.T. 179, and distinguished in *Re Jones* (1883), 22 Ch. D. 782, received considerable discussion in *Durham Bros.* v. *Robertson* (1896), 67 L.J.Q.B. 484, by Chitty, L.J., as follows: "In the *Brice* case, there was an assignment of £100, out of money due, or to become due, to the assignor under a contract to build a ship, with a power to give a good discharge or release to the debtor. Coleridge, C.J., held the assignment was within the provisions of sec. 25 of the Judicature Act, 1873. But the Court of Appeal decided the case quite apart from the Act. Cotton, L.J., decided the case on the ground of equitable jurisdiction. That is shewn by the opening sentence of his judgment, where he says the letter was a good equitable assignment. Bramwell, L.J., reluctantly assented to this view. Brett, L.J., dissented on general principles. The decision of Coleridge, C.J., in the *Brice* case seems to me to be open to question, that the case fell within the Judicature Act. That Act speaks of an absolute assignment of any debt or chose in action, and not of any part of a debt."

The Judicature Act of 1873 (*English*).—The provisions of the above Act do not create any new rights, but enable the legal right to a debt or other chose in action to be assigned, with all legal remedies necessary for its enforcement, including the right to sue in the name of the assignee.

The conditions, which must be complied with, are:

(*a*) The assignment must be in writing and signed by the assignor;

(*b*) It must be absolute on its face as an assignment, and not as a charge or encumbrance;

(*c*) Actual and express notice thereof in writing must be given to the debtor or person from whom the assignor himself could claim the debt or chose in action.

Such an assignment takes effect from the date of the notice, and will be subject to any equities which would have been entitled to priority if the said Act had not been passed, such as those arising out of the doctrine of constructive notice: *Schroeder* v. *Central Bank* (1876), 24 W.R. 710; *Bateman* v. *Hunt*, [1904] 2 K.B. 530, 538 (C.A.).

The Act has not made assignable any contracts which were not assignable under equitable rules before the Act: *Tolhurst* v. *Cement Mfrs.*, [1903] A.C. 414, 424.

Neither does it impair the effect and efficacy of equitable assignments which would previously have been valid: *Brandt* v. *Dunlop*, [1905] A.C. 454, 461.

The term "chose in action," as used in the Judicature Act, is not confined to what may be, or are called strictly legal choses in action, but includes all those rights or choses in action which the common law refused to recognize as subjects of assignment, but of which a Court of equity took notice and enforced.

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Annotation

Equitable assignments

Annotation (*continued*)—Assignments (§ II—20)—Equitable assignments of choses in action.

Torkington v. *Magee*, [1902] 2 K.B. 427; see on this point the case of *Victoria Insurance Co.* v. *King* (1895), 6 Queensland L.J.R. 203.

The above rule was apparently affirmed in *King* v. *Victoria Insurance Co.*, [1896] A.C. 250 (P.C.), but a close examination of the opinion of the Court discloses an absence of an expression of any opinion whatever on this point, and in *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, Farwell, J., apparently regarded the quotation from the judgment of the Queensland Court, as it appeared on appeal in *King* v. *Victoria Insurance Co.*, *supra*, at 254, as part of the judgment of the Privy Council, but as to this see the last named case at page 256, and also *Torkington* v. *Magee*, *supra*: compare *Mercantile Bank of London* v. *Evans*, [1899] 2 Q.B. 613 (C.A.).

It will be observed that the Judicature Act applies to an assignment of the beneficial interests in funds in the hands of a trustee, yet a claim to such an interest would, before the Act, have been primarily enforceable in equity and not in a Court of law. Again, the provision that the assignment is to be subject to all equities which would have had priority before the Act, seems to shew that cases are included in which the right of the assignee had been previously recognized by a Court of equity: see *Torkington* v. *Magee*, [1902] 2 K.B. 427.

It has been held that the following choses in action are not within the statute: the equity of redemption in a mortgage debt already assigned by way of mortgage, nor the right to sue for damages for a breach of contract already committed, nor for damages for a tort; nor the benefit of a contract to lend money, nor shares in a company, nor contracts involving special personal qualifications on the part of the one claiming performance.

Cronk v. *McManus* (1892), 8 Times L.R. 449; *May* v. *Lane* (1894), 64 L.J.Q.B. 236; see *Western Wagon Co.* v. *West*, [1892] 1 Ch. 271; *Tolhurst* v. *Cement Mfrs.*, [1902] 2 K.B. 660, [1903] A.C. 414.

In the case of *Odger* v. *Weinberg*, 95 L.T. 567, (1906), H. L., an assignment of a right to sue for damages for breach of a contract already committed was held good, but it undoubtedly was owing to the fact that such a right from the facts in that case, was incidental to the transfer of a business.

And in the case of *King* v. *Victoria Insurance Co.*, [1896] A.C. 250, it was held that a right of action for damages for negligence was within the Queensland Act under consideration in that case, the provisions of which correspond with those under the Judicature Act as to the assignability of choses in action.

The following choses in action have been held to be within the Judicature Act, viz., a claim for compensation in respect to lands injuriously affected under the Land Clauses Consolidation Act, 1845; the benefit of a contract to supply goods of a particular kind, if the contract is not of a personal character; the benefit of a contract for the purchase of a reversionary interest and the benefit of a covenant by the tenant of an hotel to purchase all beer from a certain brewery: *Dawson* v. *Great North R. Co.*, [1905] 1 K.B. 260, 275 (C.A.); *Tolhurst* v. *Cement Mfrs.*, [1903] A.C. 414; *Kemp* v. *Baerselman*, [1906] 2 K.B. 604 (C.A.); *Torkington* v. *Magee*, [1902] 2 K.B. 427; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608.

Annotation (*continued*)—Assignments (§ II—20)—Equitable assignments of choses in action.

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Annotation

Equitable assignments

In *Waterloo Mfg. Co.* v. *Kirk*, 21 Man. L.R. 457, S., being indebted to the plaintiffs and pressed for payment, gave to the defendant an order upon A. to pay to the defendant money which A. owed to S. At the same time, S. told the defendant to pay the money, when collected, to the plaintiffs, and the defendant undertook to do this. The defendant did collect the money from A., and intimated to the plaintiff's agent that he had collected from A. $250 for them, whereas he had in fact collected $288. It was held that there was a complete assignment to the plaintiffs of the money collected by the defendant, on the order given by S., to the extent of $288.

In *Wellband* v. *Walker*, 20 Man. L.R. 510, plaintiffs authorized the defendant M. to purchase in his own name, but as trustee for them, certain shares in a company from the defendant W., the price being payable by instalments as provided for in an agreement between M. and W. They furnished the money to M. to make the payments, and did not disclose to W. their interest in the shares. Afterwards M. procured from the defendant S. a loan of $2,830, giving as security an assignment of all his interest in the agreement with W. respecting the said shares and handing over the original agreement to W. S. had at that time no knowledge of the plaintiff's interest in the shares. It was held that the plaintiffs were estopped from setting up their prior equitable title as against S. and could only get the shares from W. on payment to S. of the amount he had lent to M. on the security referred to with interest. See also *Quebec Bank* v. *Taggart* (1896), 27 O.R. 162, and *Goodwin* v. *Robarts* (1876), 1 A.C. 476.

The plaintiff being liable as surety for P., P. gave him an order for the amount on the Government, for whom P. was working. This order P. countermanded before any acceptance by the Government. The debt having been paid by the sale of the plaintiff's property, and P.'s contract having been assigned to M., who received from the Government the money due upon it; it was held, that M. was bound to pay the amount of the order: *Foote* v. *Matthews*, 4 Gr. 366.

To enable the assignee of a chose in action to proceed in equity for its recovery, he must shew the existence of some difficulty or obstacle to prevent him from recovering at law: *Ross* v. *Munro*, 6 Gr. 431.

The Trust and Loan Co., being the holders of a mortgage bearing 8 per cent. interest, transferred the same to a private individual, it was held, that the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the company only could legally have reserved such a rate of interest: *Reid* v. *Whitehead*, 10 Gr. 446.

Where a person having a demand against another, gave to a creditor of his own an order on his debtor for a portion of his demand, which order the debtor was notified of, but did not accept; it was held, notwithstanding, that the order and notice formed a good equitable assignment of the portion of the claim which it covered: *Farquhar* v. *City of Toronto*, 12 Gr. 186.

Although an order operates as an equitable assignment of a debt due to the drawer, and that without any acceptance by the drawee; still, if the person to whom the order is given accepts it conditionally, agreeing only to give up his claim against the drawer on the order being accepted and paid, and if not paid, to return the order, and he subsequently proceeds

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Annotation

Annotation (*continued*)—Assignments (§ II—20)—Equitable assignments of choses in action.

Equitable assignments

against the drawer, in respect of such claim, he cannot afterwards enforce his equitable claim against the drawee: *Muir* v. *Waddell*, 14 Gr. 488.

Where a party gave a draft on a corporation indebted to him, but the proper stamps were not on the draft when it was discounted, and the holder neglected to put on double stamps as required by the statute, it was held not to constitute an equitable assignment of the fund of the drawer in the hands of such corporation. But the drawer having written to the corporation directing them to pay such draft from the fund coming to him, such letter was held to constitute a good equitable assignment: *Robertson* v. *Grant*, 3 Ch. Ch. 331.

It is no objection to an assignment in equity of a claim against a third person, that the work upon which the claim is to arise has yet to be performed: *Buntin* v. *Georgen*, 19 Gr. 167.

A printer being about to execute a contract of printing for a customer, applied to a paper maker for a supply of paper, but which he refused to supply unless secured therefor; thereupon a memorandum was signed with the printer's name, by one, with the cognizance of the other, of two persons having the general management of the printer's business, agreeing to hand over to the manufacturer a draft upon their customer for the amount of the account, payable at three months from the completion of the work; it was held, that such document was a sufficient assignment of the claim in equity, and that the giving thereof was within the general authority of the managers of the business. The customer, after having been notified of this arrangement, paid the amount to the printer. It was held that such payment was made in his own wrong; and he was ordered to pay the amount to the plaintiff, the assignee: *Ib.*

An order upon a township, by a contractor who has also brought an action for damages, directing the payment of a certain sum to a specified person, to be charged to the contract or damage suit, is a good equitable assignment, payable from the contract fund, where no fund arises from the damage suit because of its settlement: *Quick* v. *Colchester Township*, 30 O.R. 645.

A bond to secure payment of alimony to the wife held not to be assignable: *Reiffenstein* v. *Hooper*, 36 U.C.R. 295.

Where defendant, a debtor, paid a draft for the price of goods to a bank after the creditor's insolvency drawn upon defendant by the creditor while solvent, it is no defence against an action by a purchaser, from the official assignee, of the creditor's estate, for the price of the goods sold by the creditor to the defendant and represented by the draft: *Lamb* v. *Sutherland*, 37 U.C.R. 143.

A letter written by a creditor to his debtor, a corporation, to pay a draft from the fund coming to him is a good, equitable assignment, the draft being null and void as not being in compliance with the Stamp Act: *Robertson* v. *Grant*, 3 Gr. 331.

A contractor gave plaintiff an order to "please pay to H. the sum of $138.40 for flooring supplied to your building and charge same to my account" which was held to be not an equitable assignment, but a bill of exchange, and unless accepted in writing the defendant was not liable: *Hall* v. *Prittie*, 17 A.R. (Ont.) 306.

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Annotation (*continued*)—Assignments (§ II—20)—Equitable assignments of choses in action.

The mere fact of a cheque being drawn in the holder's favour gives him no right of action in equity against the drawee bank as upon an equitable assignment: *Caldwell* v. *Bank of Canada*, 26 U.C.C.P. 294.

A contractor building a church gave to a creditor, who furnished material an order on defendants, the trustees of the church, "Pay to the order of D. the sum of $306, out of certificate money due me on June 1st, for materials furnished to above church." Defendants refused to accept it, and subsequently paid out of moneys applicable to the contract, a larger sum, to another person under an arrangement between them and such other person, and it was held there was a good equitable assignment in favour of the first assignee and that defendants were liable to him: *Bank of B.N.A.* v. *Gibson*, 21 O.R. 613.

And see *Lane* v. *Dungannon Association*, 22 O.R. 264, where orders for money were held not to be equitable assignments in themselves, but the reason seems to have been that no specific fund was named in the orders out of which they were to be paid, and the case of *Hall* v. *Prittie*, 17 A.R. 306, was followed; but the Court, going beyond the orders themselves, and considering the evidence, that there was only one fund from which they could be paid; that this was known to all the parties, and other facts, all going to shew the real intention of the parties to the transaction, gave effect to the orders as equitable assignments.

Assignment of debentures and coupons for interest. See *McKenzie* v. *Montreal and Ottawa Junction R.W. Co.*, 27 C.P. 224, 29 C.P. 333.

The interest of the insured in a policy of insurance upon chattels may, before loss be validly assigned by him to a person who has no interest in them at the time of the assignment, the insured remaining owner of the chattels: *McPhillips* v. *London Mutual Fire Ins. Co.*, 23 A.R. (Ont.) 524.

Plaintiff sued on an arbitration bond, alleging an award that defendant should pay the plaintiff a sum of money, and convey to him certain lands, and assigning as breaches non-payment and neglect to convey. Defendant pleaded as to the first breach, that since 35 Vict. ch. 12 (O.), the plaintiff had assigned to one B. the money awarded, of which defendant had notice; it was held, a good plea; for that such assignment of the money alone, without the bond, was valid under the Act: *Wellington* v. *Chard*, 22 U.C.C.P. 518.

Where a person having a demand against another, gave to a creditor of his own an order on his debtor for a portion of his demand, which order the debtor was notified of, but did not accept; it was held, notwithstanding, that the order and notice formed a good equitable assignment of the portion of the claim which it covered: *Farquhar* v. *City of Toronto*, 12 Gr. 186.

A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another, and by the latter to the plaintiff: *Per* Armour, C.J.: The claim did not by virtue of R.S.O. 1887, ch. 122, sec. 7, pass to the plaintiff so as to enable him to maintain an action therefor in his own name, but in any event no negligence was proved. On appeal to the Divisional Court the judgment was affirmed on the ground of the absence of any proof of negligence, but *per* MacMahon, J., if negligence had been proved, the plaintiff could properly have maintained the action in his own name: *Laidlaw* v. *O'Connor*, 23 O.R. 696.

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Equitable assignments

Annotation (*continued*)—Assignments (§ II—20)—Equitable assignments of choses in action.

A parol assignment of a chose in action is valid, notwithstanding sec. 7 of the Mercantile Amendment Act, R.S.O. 1887, ch. 122: *Trusts Corporation of Ontario* v. *Rider*, 24 A.R. (Ont.) 157, affirming 27 O.R. 592.

A present appropriation by order of a particular fund not yet realized operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity. A married woman, as agent of her husband, who was indebted for costs to a firm of solicitors, instructed one of the firm, after its dissolution, to sell certain land and retain the costs out of the proceeds as a first charge. The land was sold by a new firm, in which one of the old firm was a member: Held, that the wife's instructions amounted to an equitable assignment, and that the solicitors were entitled to the proceeds of the sale as against an assignee under a written assignment of the same, subsequently made. Held, also, that the transaction was not a contract concerning land, but an agreement to apply the proceeds of land when sold: *Heyd* v. *Millar*, 29 O.R. 735.

It is no objection to an assignment in equity of a claim against a third person, that the work upon which the claim is to arise has yet to be performed: *Buntin* v. *Georgen*, 19 Gr. 167.

A printer being about to execute a contract for printing for a customer, applied to a paper maker for a supply of paper, which he refused to supply unless secured therefor; thereupon a memorandum was signed with the printer's name, by one, with the cognizance of the other, of two persons having the general management of the printer's business, agreeing to hand over to the manufacturer a draft upon their customer for the amount of the account, payable at three months from the completion of the work; it was held, that such document was a sufficient assignment of the claim in equity, and that the giving thereof was within the general authority of the managers of the business. The customer, after having been notified of this arrangement paid the amount to the printer; it was held, that such payment was made in his own wrong; and he was ordered to pay the amount to the plaintiff, the assignee: *Ib.*

AMERICAN CASES.

The law of equitable assignments, in the main, is the same in the United States as in England, and below are some expressions of different American Courts.

One to whom a depositor in a bank gives a cheque thereon for value, with intent to transfer the credit, becomes at least the equitable owner of the fund, and so entitled thereto as against one thereafter garnishing as creditor of the depositor: *Dillian* v. *Carlin*, 105 Wis. 14.

Where persons contract to improve an avenue for a village to be paid from a special assessment and from that only, an order given by the contractors on the village to pay a certain amount for work done thereon "and charge the same to our account on avenue," is equivalent to a direction to pay from the proceeds of the assessment fund stated in the order: *Dolese* v. *McDougall*, 182 Ill. 486.

An order by a distributee to the trustee to pay a certain sum to another out of his share of the proceeds, which order was accepted by the trustee, operated as an assignment of the assignor's interest in the proceeds, giving

Annotation (*continued*)—**Assignments (§ II—20)—Equitable assignments of choses in action.** CAN.

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Equitable assignments

the assignee priority over one to whom the assignor subsequently executed a mortgage on his interest in the land: *Brow* v. *Stockton*, 54 S.W. 854.

An executory promise to pay a sum of money out of an endowment fund, when it should be received by the obligors, does not create an assignment of the fund: *Addison* v. *Enoch*, 62 N.Y. Supp. 613.

A building contract provided that any assignment by the builder of money due or to become due to him on the contract, should at the option of the other party, be null and void, and it was held that if the other party, on being notified of such an assignment, did not object for two months thereafter, when the assignee brought suit, the option had then expired, and the assignment was valid: *Turner* v. *Wells*, 45 A. 631; *Griggs* v. *Laundis*, 21 N.J.E. 341, 352.

One to whom certain payments under a building loan contract were payable, agreed to withhold a stated amount, and pay it to the contractor. The contractor assigned a portion of this amount to a third person and it was held that the assignment was an assignment *pro tanto* of the fund, and the demand of the assignee for payment was notice of the assignment: *Danvers* v. *Sugar*, 61 N.Y. Supp. 778.

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Sept. 20.

EX PARTE DESROSIERS; RE BOARD OF LICENSE COMMISSIONERS OF MADAWASKA COUNTY.

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. September 20, 1912.

1. INTOXICATING LIQUORS (§ II A—37)—LICENSES—PETITIONS AND OBJECTIONS.

License Commissioners have no jurisdiction to grant a certificate for a license under the Liquor License Act (N.B.), unless the inspector has reported favourably upon the applicant.

[*Ex parte Demmings*, 37 N.B.R. 586, followed.]

2. INTOXICATING LIQUORS (§ II A—37)—LICENSES—NOTICE OF HEARING PETITION FOR LICENSE.

To bring up for re-consideration a liquor license application at a special meeting of the License Commissioners under the Liquor License Act (N.B.), after the refusal of same at a regular meeting, the same notices must again be given as were necessary for the first hearing.

[*Miles* v. *Rogers*, 36 N.B.R. 345, followed.]

Statement

APPLICATION for writ of prohibition against the Board of License Commissioners of the license district of Madawaska county, to prohibit them from granting liquor licenses to certain persons.

A rule was granted for the writ of prohibition with costs.

A. B. Connell, K.C., for the License Commissioners.

J. D. Phinney, K.C., for the applicants.

The judgment of the Court was delivered by

McLeod, J.

McLEOD, J.:—In this case a rule *nisi* was granted calling on the Board of License Commissioners of the license district

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of Madawaska county to shew cause why a writ of prohibition should not be issued to restrain them from granting tavern licenses to Pat Cyr, Alphonse Belle-fleur, Fred L. Cyr, John LaPointe, Albeni J. Voilette, and a wholesale license to Cyrille Gervais.

The grounds were:—

1. That there was no petition from any of the applicants praying for a license.

2. That there was no report, in writing, from the Inspector of Licenses to the License Commissioners that the applicants were fit and proper persons to have a license, as required by sec. 11 of the Liquor License Act.

3. That there was no report that the applicants were known to the inspector to be of good character and repute, or that any of them were so known, as required by the said section.

4. That the License Commissioners exceeded their powers by recommending or directing more licenses to issue than the law allowed, as directed by sec. 19 of the Liquor License Act.

5. That the License Commissioners having at a general meeting refused to grant the license to Albeni J. Voilette, had no authority, at a special meeting, without any petition requesting a reconsideration of such decision, or additional facts or grounds, to reconsider the decision.

These are the grounds on which it is contended this writ should issue.

With reference to the first three points, that is, shortly stated, that there was no petition by the applicants to the License Commissioners and no report by the inspector as to whether the applicants were fit and proper persons to have a license and were known to the inspector to be of good character and repute, these questions have already been before the Court in *Ex parte Demmings*, 37 N.B.R. 586, and this Court then decided that

License Commissioners under the Liquor License Act have no jurisdiction to grant a certificate for a license unless the inspector has reported the applicant to be a fit and proper person to have a license, and the other requirements provided for in sec. 11 of the Act have been complied with.

Neither of these things were done. It was a condition precedent to granting a license that they should be done. Therefore the License Commissioners were without jurisdiction to grant the licenses. This is the result of the decision in *Ex parte Demmings*, 37 N.B.R. 586.

With reference to the license being granted to Albeni J. Voilette. He was refused a license at the regular meeting of the board held on January 17, 1912, but at a special meeting held on April 11, 1912, the License Commissioners, or a majority of them, without any petition praying for a reconsideration of the question of granting a license or without any additional or other facts before the License Commissioners than these that had been originally before the License Commissioners, recommended the granting of a tavern license for the parish of St. Leonards. This question has also been decided by this Court in *Miles* v.

Rogers, 36 N.B.R. 345. In considering the granting of a license at a special meeting the same notices must be given and the same care taken that is taken in granting the license in the first instance.

The rule will be absolute for the writ of prohibition, with costs.

Prohibition granted.

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EX PARTE DESROSIERS.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 26, 1912.

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Nov. 26.

1. ACTION (§ I B 3—17)—NOTICE OF ACTION—PUBLIC OFFICERS.

The provisions of article 88 C.P. (Que.) as to the giving of a preliminary notice of action to a public officer sued for damages by reason of an act done in the exercise of a public function or duty do not apply to an action brought against a notary public in Quebec simply for the return of money entrusted to him for investment on real estate security, and which it is alleged was lost by his investing the same upon new terms not authorized by his instructions.

2. APPEAL (§ IV D—125)—APPEAL CASE OR RECORD—AMENDING OR PERFECTING.

Upon an appeal to the Supreme Court of Canada, where either party desires to include in the record the written reasons of one of the judges below which were not available until after the appeal case had been formally settled, an application may be made to the Supreme Court for an order giving leave for that purpose, on affidavits shewing the special circumstances upon which the application is based.

[*Mayhew* v. *Stone*, 26 Can. S.C.R. 58, approved; *Canadian Fire Ins. Co.* v. *Robinson*, Coutlée's S.C. Dig. 1105, referred to.]

Statement

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, which affirmed the judgment of Demers, J., in the Superior Court, district of Montreal, maintaining the respondent's action with costs.

The respondent, plaintiff, brought the action against the appellant, defendant, to recover $5,000, with interest, which, it was alleged, had been placed by him in the hands of the defendant, who was his notary, with instructions to invest the amount on loan secured by a second mortgage upon certain real estate in Montreal. It was charged that the defendant had not followed the instructions given by the plaintiff in regard to the security to be obtained, but that he had, without authorization, made new terms and that, in consequence, the money had been lost. No notice of action was given according to the provision of article 88 of the Code of Procedure of Quebec respecting suits against public officers. The effect of the defendant's pleadings and of his contentions in the Courts below was that the plaintiff had been kept informed of all that transpired during the transaction of the business relating to the making of the loan and that he had acquiesced in all that had been done in

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the matter, and that, therefore, the loss of the money was not due to anything which he had done in the matter, but that it was the result of neglect and delay for which the plaintiff himself was responsible. The question of want of notice was not raised.

At the trial, Demers, J., found that the defendant had not fulfilled his mandate, that he had acted contrary to explicit instructions of the plaintiff, and rendered judgment maintaining the plaintiff's action for the sum claimed with interest and costs. This judgment was affirmed, on appeal, by the Court of Review, Mr. Justice Tellier dissenting.

Proceedings were commenced upon an appeal to the Supreme Court of Canada by the defendant, and, on 19th June, 1912, an order was made by the Court of Review settling the contents of the "case" on the appeal, and the certified case, as settled, was filed in the office of the Supreme Court on the 11th September, 1912. Up to this latter date no notes of reasons for judgment had been delivered by Mr. Justice Tellier, but on the 20th of September, 1912, the learned Judge delivered notes of his reasons for dissent from the judgment rendered in the Court of Review, and these notes were printed as an appendix to the case as filed and were deposited in the office of the Supreme Court on the 26th of October, 1912, during the session of the Court at which the appeal was to come on for hearing.

Upon the appeal coming on for hearing before the Court, Mr. Rinfret, of counsel for the respondent, moved the Court to strike out from the record on the appeal the document purporting to contain the reasons of Mr. Justice Tellier on the ground that it had been irregularly filed after the appeal had been taken, that it did not form part of the record in the Court below, and that it had the effect of prejudicing the respondent, who was not aware of the contents of the document. On behalf of the appellant, Aimé Geoffrion, K.C., shewed cause, stating that similar reasons had been verbally delivered by Mr. Justice Tellier for his dissent at the time the judgment of the Court of Review had been rendered, but, owing to certain circumstances, that he had been unable to deliver the written notes until a later date.

The Court referred to the case of *Mayhew* v. *Stone*, 26 Can. S.C.R. 58, and *Canadian Fire Insurance Co.* v. *Robinson*, Cout. Dig. 1105, and expressed the opinion that the rule laid down in *Mayhew* v. *Stone*, 26 Can. S.C.R. 58, was the correct one to apply in cases where reasons for judgment were delivered subsequent to the launching of the proceedings on an appeal to the Supreme Court of Canada, although there could be no objection to making use of reasons where their non-delivery was accounted for on the ground of illness, absence, etc.; that, by

the statute and the rules, appeals were to be heard on the case as settled and that no additional material should be considered in ordinary cases. At the same time, the Court did not preclude itself, in a proper case and upon a proper application, from receiving reasons for judgment which have been delivered by Judges after the appeal has been taken. In the present case leave was granted to counsel for the appellant to make a subsequent application, supported by affidavits, etc., shewing the circumstances which, in the view of counsel, might justify the Court in receiving the notes in question.

Statement

In the meantime the appeal was heard upon the merits.

Argument

Aimé Geoffrion, K.C., and *Richard Beaudry*, for the appellant:—The contract of agency was not proved by the plaintiff; no mandate can result from the receipt of the cheque merely. Any instruction which may have been given as to the investment of the money was modified subsequently by conversations over the telephone; this parol evidence can be legally received under article 4585 of the Revised Statutes of Quebec, 1909, which has full and unrestricted application in the circumstances of this case; it is, moreover, supported by a *commencement de preuve par écrit*, the letter from the plaintiff.

We also submit that the action ought to be dismissed because it was not preceded by the necessary notice of action required by article 88 of the Code of Civil Procedure; the appellant, being a notary public, and having been employed in this matter to act for the plaintiff as such, is a "public officer"; art. 4575, R.S.Q., 1909; the article 88, C.P.Q., gives him this protection. Although not pleaded it is a provision of which the Court is obliged to take judicial notice in this case; on the face of the proceedings it appears that the defendant is charged with the responsibility, if any, for which it is sought to make him liable, in his capacity as the notary and professional adviser of the plaintiff. We rely upon the following authorities: *Lasnier* v. *Dozois*, Q.R. 15 S.C. 604, *per* Lynch, J., at page 604; *Gervais* v. *Nadeau*, 3 Que. P.R. 18, confirmed on appeal, and arts. 1065 and 1709, C.C. The action, in any event, is based on liability for damages; the plaintiff was bound to allege notice in his statement of claim and to prove such notice, and, having failed to do so, his action must fail.

Rinfret and *Genest*, for the respondent:—As to the facts we have the findings of both Courts below in our favour; these findings ought not to be reversed on appeal. The respondent has acknowledged the receipt of the plaintiff's letter instructing him in respect to the investment of the money; the proof has failed as to the alleged modification of the mandate; parol evidence is not admissible to contradict the terms of the letter, and, moreover, the verbal evidence as to the alleged change has been

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denied and that denial accepted in favour of the plaintiff. We refer to Gouillard, no. 45; Guzier-Herman, art. 1985, nos. 57, 59; Rolland de Villargues, Rep. du Notariat, no. 211, vo. "Responsabilité des Notaires"; *O'Malley* v. *Ryan*, Q.R. 21 S.C. 566; *Brownlee* v. *Hyde*, Q.R. 15 K.B. 221; Langelier, "Preuve," p. 246 *et seq.* The provisions of art. 4585, R.S.Q., 1909, can have no application in a case such as this; it is governed by arts. 1233 and 1234, C.C., which preclude parol testimony for an amount such as is in dispute in this case. See also Taylor on Evidence, vol. 2 (9 ed.), p. 742, par. 1132; Greenleaf, Evidence (16 ed.), vol. 1, pp. 404, 405; Phipson, Evidence (5 ed.), p. 536; Best, Evidence (11 ed.), p. 218; 8 Aubry & Rau, p. 320, note 2 to sec. 763; Pand. Fr. vol. 45, "Preuve," *nn.* 165, 424-430, 432, 448, 451, 454-456; *Gilchrist* v. *Lachaud*, 14 Q.L.R. 278, confirmed in review; *West* v. *Fleck*, 15 L.C.R. 422; *Hamel* v. *Smith*, 17 Rev. de Jur. 490; Laurent, vol. 19, *nn.* 558, 559, 564; *Moody* v. *Jones*, 19 R.L. 516, 19 Can. S.C.R. 266.

No notice of action was necessary; the present action is not for damages by reason of any act done by defendant in the exercise of his functions as a notary, but for an omission to do what he was bound to do, as a simple mandatory: *Lachance* v. *Casault*, Q.R. 12 K.B. 179; *Price* v. *Perceval*, Stu. K.B. 179; *Jodoin* v. *Archambault*, M.L.R. 3 Q.B. 1; *Chagnon* v. *Quesnel*, 2 Que. P.R. 509; *Irvin* v. *Boston*, 2 L.C. Jur. 171. Notice is not necessary where the action is for breach of contract: *Davis* v. *Curling*, 8 Q.B. 286; *Fletcher* v. *Greenwell*, 4 Dowl. 166; *Davies* v. *Mayor of Swansea*, 8 Ex. 808. This objection should have been raised by way of exception, or in the plea to the merits, and not for the first time before the Supreme Court: *Gale* v. *Bureau*, 44 Can. S.C.R. 305; *Davey* v. *Warne*, 14 M. & W. 199; *Richards* v. *Easto*, 15 M. & W. 244; *Law* v. *Dodd*, 1 Ex. 845, at p. 848; *Bédard* v. *Corp. Comté de Québec*, Q.R. 33 S.C. 188; *Kelly* v. *Montreal Street Railway Co.*, Q.R. 13 S.C. 385; *Gauthier* v. *Municipalité de St. Louis*, Q.R. 9 S.C. 453; *Sullivan* v. *Ville de Magog*, Q.R. 18 S.C. 107; *Papeau* v. *Corp. St. Ambroise*, 10 Que. P.R. 208; *Corp. de Douglas* v. *Mahar*, 11 Q.L.R. 294; *Legault* v. *Lee*, 26 L.C. Jur. 28; *Turner* v. *Corp. de St. Louis du Ha! Ha!*, 16 Q.L.R. 260; *Laurin* v. *Corp. du Sault au Récollet*, 7 Legal News 318; *Boulay* v. *Saucier*, 7 Que. P.R. 344; *Harrison* v. *Brega*, 20 U.C.Q.B. 324; *Harold* v. *Corp. of Simcoe*, 18 U.C.C.P. 9.

In *Gervais* v. *Nadeau*, 3 Que. P.R. 18, the defendant was sued in damages for a deed improperly drawn, against the law, and the question of notice had been raised in the plea.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This is an appeal from a judgment in an action brought to recover the sum of five thou-

sand dollars which the plaintiff, respondent here, says was given by him to the defendant, appellant here, to be applied to the purchase of a piece of property. The case turned in both Courts below on the nature of the instructions subject to which the money was deposited with the defendant. Both Courts found on that issue of fact against the defendant, and he was condemned to refund the money.

Here, for the first time, the defendant raises the point that he being a notary public and, consequently, "a public officer," was by virtue of article 88 of the Code of Civil Procedure entitled to notice of this action, and that notice not having been given that the action must fail. It is doubtful whether such an objection, even if well founded, should be allowed to prevail here: *Devine* v. *Holloway*, 14 Moo. P.C. 290.

The complete answer to the objection, however, is that this is not an action in the form of an action for damages. It may be that it is difficult to find a distinction in substance between such an action as this and one simply for negligence; but the case has been treated throughout as an action "*en repetition*" pure and simple and we cannot change its nature here, even to allow the defendant to take advantage of this highly technical objection. Of course, it was open to the plaintiff to sue for damages (art. 1709, C.C.), in which case he might have recovered a sum in excess of the amount now claimed. If he chose, however, to limit his recourse, without prejudice to the defendant, and to adopt an action in this form—how can this right be denied him?

It is further to be observed that the defendant in his plea to the action takes pains to deny that he acted as a notary public in this transaction.

For these reasons I am of opinion that the objection of want of notice cannot be allowed to prevail.

On the merits I can see no reason to reverse the concurrent judgments of the Courts below. The money in question was advanced in the form of a bank cheque made by the plaintiff to the order of the defendant, and it is found as a fact that the cheque was given with definite instructions as to the conditions under which it was to be used and that the defendant accepted it subject to those instructions. He subsequently parted with the cheque in violation of those instructions and without the most elementary regard for the interest of his principal, to whom the money was, in consequence, lost. On these facts also we have the concurrent findings of the two Courts below. How, in these circumstances, can the appellant hope to escape liability?

I would dismiss the appeal with costs.

DAVIES, J., concurred with the Chief Justice.

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Idington, J.

IDINGTON, J.:—I think this appeal should be dismissed with costs. And, as to the proposed defence of want of notice of action, I think it cannot be permitted to raise such a defence at this stage for the first time.

Besides, even if a notary public, as such, is entitled to a notice of action (as to which I say nothing) the facts in this case do not seem such as to have enabled the appellant to avail himself of it if he had pleaded it.

Duff, J.

DUFF, J.:—I concur in dismissing the appeal. The highly technical objection based upon article 88 of the Code of Civil Procedure ought not, in my opinion, to be entertained. The objection was not taken in the pleadings nor at the trial nor before the Court of King's Bench. In his defence the appellant alleged that in the transactions out of which the respondent's claim arose he was not acting in his capacity as a notary public. There can be no risk of injustice in refusing to permit it to be raised now. In these circumstances I think the objection based upon the absence of notice of action, if it ever had any substance, comes too late.

Anglin, J.
Brodeur, J.

ANGLIN, and BRODEUR, JJ., concurred with the Chief Justice.

Appeal dismissed with costs.

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Jan. 30.

BADENACH v. INGLIS.

Ontario Supreme Court. Trial before Falconbridge, C.J.K.B. January 30, 1913.

1. WILLS (§ I D—36)—WHO MAY MAKE—DEGREE OF MENTAL CAPACITY—"GENERAL PARETIC INSANITY"—LUCID INTERVALS.

The burden of proof on the part of the contestant of a will to shew that the testator lacked testamentary capacity at the time of the execution of the instrument, is not satisfied, though the evidence shews that the testator suffered at the time from general paretic insanity, where it appears by expert testimony that persons afflicted with such insanity frequently have lucid intervals when the mental irregularities are quite in abeyance, and it further appears that the legal practitioners who drew and witnessed the will which was a simple one, were men of good standing in their profession and were able to determine whether a person making a will appeared to have efficient mental capacity.

Statement

ACTION for revocation of letters probate of a document dated the 10th June, 1909, alleged to be the last will and testament of Edgar A. Badenach, deceased, and for a declaration that neither that document nor a former testamentary document was the true will of the deceased, because, when he signed the documents, he was not of testamentary capacity.

The action was dismissed.

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C. H. Porter, for the plaintiff.
A. F. Lobb, for the defendant Inglis.

FALCONBRIDGE, C.J.:—The plaintiff is a brother of Edgar A. Badenach, deceased. The defendant Inglis, formerly Badenach, is the widow, and the defendant Sarah Badenach is the mother, of the said Edgar Badenach.

Two alleged wills of the said Edgar A. Badenach were prepared. The first one was signed on the 24th August, 1908. It provided for the converting of the estate into money and the investment of the same, paying one-fourth of the income to the mother during her lifetime, and the balance to the wife during her life, with provisions in case of the mother predeceasing the wife, or vice versa, and for the support and maintenance of children, if any.

The second will was signed on the 10th June, 1909. It revoked all former wills and gave everything to his wife and constituted her his sole executrix.

The plaintiff alleges that, at the times the alleged wills were executed, the said Edgar A. Badenach was not of testamentary capacity.

Edgar A. Badenach died on or about the 5th February, 1910.

On or about the 28th September, 1910, letters probate were granted by a Surrogate Court to the defendant Annetta Blanche Badenach, now Annetta Blanche Inglis, of the last will and testament which was signed on the 10th June, 1909.

It is alleged that the deceased suffered from general paretic insanity, commonly known in the profession as G.P.I. The evidence, both of experts and laymen, is, as usual in such cases, contradictory and conflicting.

Without giving any close analysis of the same, I have come to the conclusion that the plaintiff has failed to satisfy the burden of proof which admittedly lies upon him. The great contest between the different sets of medical witnesses is as to the possibility in this disease of a period of remission or what is commonly known as a lucid interval.

A medical witness for the defence, whose experience as an alienist is probably greater than that of almost any person in the Province, testified that there might exist all the symptoms which the testator is said to have displayed—difficulty of walking, want of concentration, want of control of the sphincter of the bladder, and illusions of grandeur—and still there might be capacity to make a will; that there might be remarkable periods of remission when the mental irregularities would be quite in abeyance. In this statement he is strongly corroborated by the opinion of Dr. Mercier, of London, England, which was ad-

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mitted without objection, and an extract from which here follows:—

"Lastly, the validity of a will made by a general paralytic may be in dispute. It is, of course, well established that a lunatic may make a will which will be upheld by the Court. The question in every case is, whether the testator was, at the time the will was made, of disposing mind; and the mere fact that he was then the subject of general paralysis will no more invalidate the will than the fact that he was suffering from any other form of insanity. There are general paralytics in whom the prominence of delusions, and the confusion of mind, are so continuous, that at no time in the course of the disease are they of disposing mind; but such cases are by no means the rule. Apart from the relatively prolonged periods of remittence and intermittence, during which the testator may be without question competent to make a will, the disease is, as has been described, a fluctuating one; and there may be, in the course even of the second stage, days on which he is quite capable of appreciating the amount and nature of his property, the claims of those whom he may or may not benefit by his will, and the nature of the business that he is transacting."

The legal practitioners who drew and witnessed the wills are men of good standing in their profession, and men who are very well able to determine whether a man making a will appears to be of sufficient mental capacity. The solicitor who drew the first will was also well acquainted with the testator.

It is to be remarked also that the second will is a remarkably simple one. Nor is the first one at all complicated in its character. Neither of them is in any sense inofficious. It would not avail the plaintiff at all to destroy the second will and set up the first, because the defendant Inglis has effected a settlement with the mother of the testator, and so Mrs. Inglis would be in as good a position as she is with the probate of the second will. Both are attacked, but there is, of course, less question about the first than the second will.

The action must, therefore, be dismissed; but, under all the circumstances, without costs. I cannot possibly see my way to saddling the successful party with the plaintiff's costs.

Action dismissed.

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Feb. 1.

Ontario Supreme Court, Britton, J., in Chambers. February 1, 1913.

1. PROHIBITION (§ IV—15)—DIVISION COURT (ONT.)—SUIT IN WRONG DIVISION.

Prohibition may be ordered against the enforcement of a judgment entered in a Division Court in Ontario for defendant's non-appearance at the hearing, where a notice disputing the jurisdiction had been regularly filed and the action was in fact brought in the wrong district; and this notwithstanding the failure of defendant to make application to the Division Court for a transfer of the cause to the proper division or district.

Statement

MOTION by the defendant for prohibition to prevent further proceedings in the 9th Division Court in the United Counties of Northumberland and Durham, and also in the 2nd Division Court in the County of Bruce.

The order for prohibition was granted.

G. H. Kilmer, for the defendant.

A. B. Colville, for the plaintiffs.

Britton, J.

BRITTON, J.:—The facts are as follows. On the 2nd March, 1910, the plaintiffs left their claim for suit with the clerk of the 9th Division Court in the United Counties of Northumberland and Durham.

The claim was:—

	May, 1910.
1 yearling heifer	$100.00
By cash	60.00
	$40.00
Interest for 21 mos. 5%	3.50
	$43.50

On the same day, a summons issued, which was served, on the 14th March, upon the defendant, who then resided and now resides in the county of Bruce. On the 15th March, the defendant instructed his solicitor to file a dispute-notice, and on the 18th March the clerk of the said Court received the notice disputing the plaintiffs' claim and also disputing the jurisdiction. The defendant did not file any affidavit, nor did he apply to the County Court Judge to have the case transferred, nor did he attend the trial. At the trial, one of the plaintiffs gave evidence of the debt, but gave no particulars as to where the cause of action arose. The learned Judge, on the 14th May, 1912, gave judgment for the plaintiffs for $35 debt and $3.50 interest, and for costs.

On the 7th November, 1912, a transcript of judgment was sent to the 2nd Division Court in the County of Bruce, and an

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execution was issued thereon against the defendant. On application by the defendant to the Judge of the County Court of the County of Bruce, this execution and transcript were set aside; and that matter is not before me, other than as part of the history of the proceedings. The order of the Judge of the County Court of the County of Bruce was made on the 2nd December, 1912; and on the 10th December the notice of motion for prohibition was served upon the plaintiffs.

The defendant's only excuse for delay in moving is, that he thought his attendance unnecessary, and that the action had been withdrawn or dismissed. Why he was not informed by his own solicitors that the case should be looked after, does not appear. The defendant states where his residence is and has been, and states with full particularity what the plaintiffs' cause of action is, if any. Upon that statement, if true, there was no jurisdiction to bring this case in the 9th Division Court in the United Counties of Northumberland and Durham. The defendant also states his defence; and, if what he says is true, he has a good defence upon the merits. The plaintiff Edwin Mitchell made an affidavit, used upon this motion, and he does not deny anything stated by the defendant material to be considered. This plaintiff says that he thought he had done everything that possibly could be done. I shall refer to his affidavit later.

The proceedings are governed by 10 Edw. VII. ch. 32 (1910). Upon the facts before me, the plaintiffs had no right, under sec. 72 (subject to what is provided by secs. 78 and 79), to enter the suit or have the case tried in the 9th Division Court in the United Counties of Northumberland and Durham. The defendant gave the notice required by sec. 78, and that notice was transmitted to and received by the plaintiffs. Notwithstanding that, and with the knowledge the plaintiffs had of how the cause of action arose, they gave no information of it to the trial Judge. By sub-sec. 1 of sec. 79, there is power to transfer if it appears to the Judge that the action should have been entered in some other Court of the same or some other county. Apparently it did not so appear, and no order to transfer was made or asked for.

The changes made in the law as it was in ch. 60, R.S.O. 1897, by the new Act of 1910, are very important. Section 91 of ch. 60, R.S.O., required that the party making application for transfer should satisfy the Judge by affidavit of the alleged want of jurisdiction. Section 205 of the same Act provided that prohibition would not be granted when notice disputing the jurisdiction had not been given. That section (205) is in part contained in sec. 78 of ch. 32 of 1910, but the affidavit is not required to support the objection to the jurisdiction—and the

words in regard to prohibition are omitted. It is not *lex scripta* that a defendant must apply to the Judge of a Division Court for transfer before applying for prohibition.

Then the question is, has the defendant been guilty of such laches that, as a matter of discretion, I should not make the order?

The cases *Mayor, etc., of London* v. *Cox*, L.R. 2 H.L. 239, 283, and *Broad* v. *Perkins*, 21 Q.B.D. 533, cited by my brother Middleton in *Re Canadian Oil Companies* and *McConnell*, 8 D. L.R. 759, 4 O.W.N. 542, 27 O.L.R 549, shew when discretion should be exercised against an applicant.

Has the defendant shewn what amounts to a sufficient excuse for his delay in satisfying the Judge that the action was not one within his jurisdiction?

Assuming that it was the defendant's duty, it was not so explained to the defendant. He thought he had nothing more to do unless further notified, and he received no notice. He had disputed the jurisdiction, and he had disputed the plaintiffs' claim; and, because he did not think it necessary, he did not attend Court. On the other hand, one of the plaintiffs did attend Court. He knew all about the transaction, but gave no information to the Judge as to how the sale of the heifer was made. He simply spoke of it as if the sale was upon his own premises.

The Judge was not bound to cross-examine the plaintiff; and the facts as stated in the defendant's affidavit, and not denied by the plaintiffs, did not come out. The judgment was recovered on the 14th May. No notice of it was given to the defendant, and he did not in fact know of it until the 16th November, 1912, when the execution was issued in the county of Bruce.

As to the merits, the plaintiffs, as I have said, do not contradict the defendant upon anything material. Some of the statements, not of fact but of opinion, in the affidavit sworn by Edwin Mitchell, one of the plaintiffs, are grossly improper. He probably did not appreciate or understand the true meaning of part of this affidavit. The blame for it should fall upon the plaintiffs' solicitor. I feel quite sure that, upon the attention of the solicitor being called to the 12th paragraph of that affidavit, he will express his regret for its insertion.

The order will go prohibiting any further proceedings in this action in the 9th Division Court in the United Counties of Northumberland and Durham.

If the plaintiffs desire to bring suit in the 2nd Division Court in the County of Bruce, they can do so.

The order will be with costs to the amount of $15, payable by the plaintiffs to the defendant, at which amount I fix these costs.

Order granted.

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Feb. 3.

LONG v. TORONTO R. CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Sutherland, Middleton, and Leitch, JJ. February 3, 1913.

1. NEGLIGENCE (§ I A—3)—CONCURRENT NEGLIGENCE.

Where an injury is the direct immediate result of two operating causes, viz., the negligence of the plaintiff and that of the defendant, the plaintiff cannot recover damages.

Statement

APPEAL by the defendants from the judgment of Falconbridge, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, Mary Long, in an action for damages for the death of her husband, Francis Long, who was killed by one of the defendants' cars upon Queen street, in the city of Toronto, on the evening of the 3rd April, 1912. The jury assessed the plaintiff's damages at $4,000, and judgment went in her favour for that sum and costs.

The appeal was allowed.

H. H. Dewart, K.C., for the defendants.
W. E. Raney, K.C., for the plaintiff.

Mulock, C.J.

The judgment of the Court was delivered by MULOCK, C.J.:—There is evidence to the following effect. Shortly after eight o'clock in the evening, the deceased endeavoured to cross from the south to the north side of Queen street, proceeding in a slightly north-easterly direction, and, when he had about reached the north rail of the north track, was struck on the legs by the north-west corner of the car-fender of a west-bound car. The effect of the impact was to take his feet from under him, causing his body to fall towards the car to the pavement—he being killed either by striking the car or the pavement.

At the place were the deceased was crossing Queen street, there are two lines of railway—one, the southerly one, being used for east-bound, and the northerly one for west-bound cars. Immediately prior to the deceased stepping off the kerb, at the south side of the street, an east-bound car had passed him, and a west-bound car was proceeding westerly on the northerly track; and there was nothing to prevent the deceased, if he had looked, from observing the approaching car from the time of his leaving the kerb until he stepped in front of it; but he walked across the street slowly, looking downwards, and finally stepped upon the track within ten feet of the approaching car.

The motorman was examined on behalf of the plaintiff, and testified that when about fifty yards away from the deceased he saw him leave the kerb, and that he watched his movements and sounded the gong continuously from that moment until the collision; that he threw off the power shortly after the deceased

stepped off the kerb, and had his car under control, but did not stop it, not anticipating the deceased stepping in front of it; that, when the car was about ten feet away from the deceased, he, for the first time, thought the deceased might step in front of it, and that he then reversed the power, and had the car under such control that it stopped within less than one-half of its length, which was about thirty feet. The deceased was not thrown forward by the collision; and his body was found lying, feet foremost, alongside the forward trucks of the standing car and slightly under the portion of it which overhung the northerly rail.

The following are the questions submitted to the jury, with their answers:—

"1. Was the death of the plaintiff's husband caused by any negligence of the defendants, prior to negligence of plaintiff's husband? A. No.

"2. If so, wherein did such negligence consist?

"3. Was the plaintiff's husband guilty of negligence which caused the accident, or which so contributed to it that but for his negligence the accident would not have happened? A. Yes.

"4. If you answer 'yes' to the last question, wherein did his negligence consist? A. In not looking for a car.

"5. Notwithstanding the negligence, if any, of the deceased, could the defendants, by the exercise of reasonable care, have prevented the collision? A. Yes.

"6. If so, what should they have done which they did not do, or have left undone which they did do? A. By putting on the brakes, and having the car under proper control.

"7. Could the motorman and the deceased, each of them, up to the moment of collision, have prevented the accident by the use of reasonable care; in other words, was the negligence of the deceased the contributing act up to the very moment of the accident? A. Ten say no, two say yes,

"8. If the Court should, on your answers, think the plaintiff entitled to damages, what sum do you assess as damages, distributing it: (a) to the mother of the deceased, aged 71 years: (b) to the wife, aged 32 years; (c) to the daughter, aged 8 years? A. Ten for $4,000."

The learned trial Judge, in explaining question 7 to the jury, said: "In other words, was the negligence of the deceased the contributing act up to the very moment of the accident? . . . Did, in fact, the deceased's act contribute up to the very moment of the accident? . . . Did he become aware that the car was approaching, and was he able to avoid the danger? That is the sense in which that question is put. . . . Now, you will understand the sense in which the question is launched . . .

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It is true that, physically, as far as his actions went, he did contribute to it up to the last moment, but did he do it in that negligent sense that he was aware that the car was approaching, and was he able to avoid the danger?''

There is, I think, no evidence to support the jury's answer to question 6, to the effect that the accident could have been averted after the deceased's negligence in stepping in front of the car, by the motorman then ''putting on the brakes and having the car under proper control.'' The evidence of the motorman—that, when the deceased stepped off the kerb at the south side of the street, he threw off the power; that it remained off from that time until the reverse power was applied, when the car was brought to a stop; that, as soon as he supposed that the deceased contemplated stepping upon the track, he reversed the power, a method more effective in stopping the car than applying the brakes; and that he brought the car to a stop within less than half of its length—is uncontradicted and its correctness not challenged, and is in material parts corroborated by witnesses who spoke as to the movement of the car. Nor was there any attempt to shew that, at this stage, anything could have been done to prevent the accident happening. The motorman was, I think, justified up to a certain point in assuming that the deceased would exercise reasonable care; and nothing is shewn that would suggest a different conclusion until the deceased actually stepped upon the track.

As to the answers to questions 3 and 4, their evident meaning is, that the deceased failed to exercise reasonable care, by not looking for an approaching car, and by negligently stepping upon the track and endeavouring to cross in front of it, thereby causing, or contributing to, the accident. If these answers stood alone, the plaintiff, notwithstanding the answer to question 6, even if supported by evidence, must fail, the rule being that where damage is the direct, immediate result of two operating causes, viz., the negligence of the plaintiff and that of the defendant, the plaintiff cannot recover. It was, however, argued that the answer to question 7 relieved the plaintiff of the consequences of the deceased's negligence. But there is, I think, no evidence to support the answer to question 7. The deceased was guilty of but one act of negligence, viz., endeavouring, under the circumstances of this case, to cross the track almost immediately in front of the car; and its negligent character was continuous. From the time of his stepping upon the track until the accident, he, in fact, undertook to clear the track before the car, which was within ten feet of him, would strike him.

The evidence shews that, under the circumstances, the motorman used all reasonable means to avert the accident, but that it

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was not preventible. I, therefore, think there is no evidence to justify reasonable persons in finding, as the jury in their answer to question 7 have found, that the negligence of the deceased did not contribute to the accident up to the very moment of its happening. Thus eliminating the answers to questions 6 and 7, there remains the finding (which cannot be successfully attacked) that the deceased's negligence caused the accident.

I, therefore, think the appeal must be allowed with costs and the action dismissed with costs.

Appeal allowed.

BANK OF HAMILTON v. DAVIDSON.

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Ontario Supreme Court, Lennox, J., in Chambers. February 3, 1913.

1. JUDGMENT (§ I—1)—SUMMARY JUDGMENT—PARTNERSHIP.

Rule 603 (Ont. C.R. 1897) does not authorize a summary judgment against one who is alleged to be a member of a firm against which a judgment was previously obtained, but who was out of the jurisdiction when the writ in the original action was issued, and who entered no appearance and did not admit himself to be and was not adjudged a member of the firm.

2. JUDGMENT (§ I—1)—SUMMARY JUDGMENT.

Summary judgment should be ordered under the provisions of Ontario Con. Rule 603 only in clear cases.

[*Jacobs* v. *Beaver*, 17 O.L.R. 496; *Bristol* v. *Kennedy*, 4 O.W.N. 537; *Farmers Bank* v. *Big Cities Realty and Agency Co.*, 1 O.W.N. 397, and *Jones* v. *Stone*, [1894] A.C. 122, referred to.]

Statement

APPEAL by the defendant Charles Hilton Davidson from an order of one of the Local Judges at Hamilton allowing the plaintiffs to sign summary judgment under Con. Rule 603 in an action against John Davidson & Sons and Charles Hilton Davidson upon a judgment recovered against the firm of John Davidson & Sons, of which Charles Hilton Davidson was alleged to be a member.

The appeal was allowed.

W. Laidlaw, K.C., for the appellant.

C. J. Holman, K.C., for the plaintiffs.

Lennox, J.

LENNOX, J.:—The plaintiffs recovered judgment against the defendants John Davidson & Sons in an action upon their promissory note, on the 9th June, 1892. The defendant Charles Hilton Davidson was, at the time the writ issued in that action, a member of the firm; but the plaintiffs shew that at that time this defendant was a fugitive from justice and out of Ontario. He was not served with the writ, did not appear, did not admit himself to be and was not adjudged a partner or member of the firm. The plaintiffs sue upon this judgment; the writ is en-

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dorsed for recovery of the amount of the judgment and interest, and purports, and is contended to be, specially endorsed, within the meaning of Con. Rule 138. The plaintiffs, applying under the provisions of Con. Rule 603, have obtained judgment against the defendant Charles H. Davidson. This defendant claims to have a good defence to this action upon the merits, duly entered an appearance, and desires to defend.

With great respect I am of opinion that the learned Local Judge erred in granting the plaintiffs' application, I have not been referred to any case in which the Rule has received judicial construction; but, to my mind, the concluding part of Con. Rule 228 is clearly sufficient to prevent the entry of judgment under Con. Rule 603. The last clause of Con. Rule 228 is as follows: "Except as against any property of the partnership, a judgment against a firm shall not render liable, release or otherwise affect any member thereof who was out of Ontario when the writ was issued, and who has not appeared." Adding —and these qualifications have no application here—"unless he has been made a party under Rules 162 to 167 or has been served within Ontario after the writ was issued." This is, I think, sufficient to bar the way to a summary judgment.

Con. Rule 603 is for clear cases: see authorities collected in Holmested and Langton's Jud. Act, 3rd ed., p. 802; *Jacobs* v. *Beaver*, 17 O.L.R. 496, at 501; *Bristol* v. *Kennedy*, 8 D.L.R. 750, 4 O.W.N. 537, 539; and *Farmers Bank* v. *Big Cities Realty and Agency Co.*, 1 O.W.N. 397, in which Mr. Justice Riddell says, at 398: "It must not be forgotten that Rule 603 is to be applied only with caution and in a perfectly plain case." Reference may also be made to *Jones* v. *Stone*, [1894] A.C. 122, in which Lord Halsbury, delivering the judgment of the House of Lords, and dealing with a similar provision, said: "The proceeding established by that Order is a peculiar proceeding, intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay."

But, although resting my judgment, as I do, upon Con. Rule 228, it is not the only point. Here again I am not referred to any authority; and, in the absence of authority to the contrary, I question whether a judgment can be made the subject of a special endorsement under Con. Rule 138. If it can, it can only be under clause (*a*), and this seems to be limited to a "simple contract debt," whether "express or implied." It is enough if it is doubtful—and every reasonable doubt is a reason for trial in the ordinary way.

The order and judgment of the learned Local Judge will be set aside, and the defendant Charles Hilton Davidson will be at liberty to defend the action, unconditionally.

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The costs of the proceedings before the Local Judge and on this application will be costs in the cause.

On the judgment being vacated, the plaintiffs will have the option, before further costs are incurred by this defendant, to dismiss the action as against him individually without costs.

Appeal allowed.

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Feb. 3.

Ontario Supreme Court, Falconbridge, C.J.K.B. February 3, 1913.

1. COURTS (§ I D 1—124*b*)—JURISDICTION—MUNICIPAL MATTERS—MANDAMUS.

The right of action for a mandamus to compel a municipal corporation to give a water supply to an annexed district will not be held to have been taken away in favour of the jurisdiction of the Ontario Railway and Municipal Board merely by reason of the fact that the Board's order for the annexation had provided that the taxation rate should not be increased until the municipal water supply had been extended to the annexed district.

[*Town of Waterloo* v. *City of Berlin*, 7 D.L.R. 241, referred to.]

Statement

ACTION for a mandamus to compel the defendants, the Municipal Corporation of the City of Hamilton, to supply water to a district annexed to the city.

Judgment was given for the plaintiff.

M. Malone, for the plaintiff.

F. R. Waddell, K.C., for the defendants.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—The only question submitted to me for adjudication was, whether, if the plaintiff has any rights in the premises, he can invoke the aid of this Court or whether his proper and only remedy is by application to the Ontario Railway and Municipal Board.

I am of the opinion, after review of the statute 6 Edw. VII. Ont. ch. 31, and of the cases cited, that the plaintiff is *rectus in curiâ* on this point.

The order of the Board of the 3rd September, 1908, annexing this section of the township of Barton to the city (sec. 7), did not impose any obligation on the defendants. It simply provided that, until the defendants should introduce and have in operation a water supply for the section annexed, the defendants should not increase the amount of taxes above the rate fixed for 1908; but, after water is introduced and ready for supply, properties in the annexed section shall be assessed and taxes levied in the same manner and at the same rates as apply to property-owners within the original city limits.

Thus, I take it, the Board has never laid hold of the matter, to use the Chancellor's phrase in *Town of Waterloo* v. *City of*

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Berlin, 7 D.L.R. 241, 4 O.W.N. 256, 257, so as to be seized of it for purposes of working out details.

There will be judgment for the plaintiff on this issue, with costs. Thirty days' stay—which is not to apply to the trial of other issues at the Court to be held on the 17th inst.—my intention being that there shall be only one appeal to the Appellate Division.

Judgment for plaintiff.

VAN HUMMELL v. INTERNATIONAL GUARANTEE COMPANY.

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Feb. 5.

Manitoba King's Bench. Trial before Macdonald, J. February 5, 1913.

1. CORPORATIONS AND COMPANIES (§ IV H—162)—PROMOTERS—COMPENSATION FOR SERVICES BEFORE INCORPORATION.

A company is not liable to a promoter for services rendered or expenses incurred by him before its incorporation in promoting the company, unless after its incorporation it expressly agrees with him to make such payment, or such other facts exist from which the court can infer a new contract to reimburse him as by the acceptance of the benefit of the services.

[*Re National Motor, etc., Co.*, [1908] 2 Ch. 515, referred to.]

2. CORPORATIONS AND COMPANIES (§ IV G 3—120)—OFFICERS—COMPENSATION—APPOINTMENT OF DIRECTOR AS MANAGER, WHEN LAWFUL.

In the absence of express statutory provisions, the general rule that a director of a company cannot take the benefit of a contract entered into between himself and the company, does not apply to a contract of employment between the company and the director, whereby the latter is engaged as manager of the company, if it appears that such engagement is more in the interest of the company than the appointment of some one outside of the directorate.

[*Albion Steel and Wire Co.* v. *Martin*, 1 Ch.D. 580, referred to; *Birney* v. *Toronto Milk Company, Ltd.*, 5 O.L.R. 1, distinguished.]

3. CORPORATIONS AND COMPANIES (§ IV H—161)—PROMOTERS—LIABILITY FOR SERVICES OF FELLOW-PROMOTERS, HOW LIMITED.

In the absence of an express agreement, one of several promoters has no right of action against another for remuneration for promoting services, with respect to a projected company or corporation.

[*Holmes* v. *Higgins*, 1 B. & C. 74, referred to.]

Statement

THE plaintiff brings this action claiming compensation for services rendered in and about the organization of the defendant company, and for moneys expended in connection therewith, and against the personal defendants for damages for breach of an agreement claimed by him to have been given and made by those defendants that he, the plaintiff, should be employed as general manager of the defendant company for a period of not less than three years at a salary of not less than twelve thousand dollars per year, and that he should further be given the exclusive right of selling for a reward the whole of the authorized capital of the company, amounting to $2,500,000 at a premium of $20 per share.

Judgment was given for the plaintiff for $1,000.

W. H. Curle, for plaintiff.
J. B. Coyne, for defendants.

MACDONALD, J.:—After hearing all the evidence on behalf of the plaintiff, I granted a motion for nonsuit as against all the personal defendants, with the exception of the defendant Robinson, and reserved judgment as against him and the company.

The plaintiff was a company promoter, and enlisted the support of the personal defendants in the proposal of establishing in this country a company, known as the International Casualty Company of Spokane, and secured their subscriptions to an amount aggregating $64,500. The defendant Robinson paid one thousand dollars on account of his stock, and the defendant Atchison paid twelve hundred and fifty dollars. The other subscribers gave their notes.

Shortly after this the subscribers, because of a reported arrangement between this Casualty Company and another American company, of which they knew nothing, and of which the plaintiff knew nothing at the time of subscribing for stock, became dissatisfied and sent for the plaintiff, and expressed their intention of withdrawing their subscriptions. The defendant Robinson then suggested the organization of the defendant company. This was followed by the plaintiff severing his connection with the Casualty Company and undertaking the organization of the defendant company. The compensation to be allowed the plaintiff was mentioned on several occasions, the first occasion being with the defendant Robinson. The plaintiff suggested being paid by way of commission, to which this defendant objected, and suggested instead payment by way of bonus in the same manner that the Alexanders, a firm of company promoters, were compensated. This was followed by a conversation with the defendants Hudson and Ormond, and the compensation received by the Alexanders discussed and satisfaction with such compensation expressed by the plaintiff, who thereupon entered upon the work of the formation of the new company. The stock issued to the subscribers to the Casualty Company was delivered up and the notes given in payment returned on the understanding, and as the plaintiff says, in consequence of the new company. The plaintiff started a stock subscription canvas, the defendant Robinson being the first subscriber, the plaintiff himself subscribing for a number of shares equal to that of the defendant Robinson.

The company was duly incorporated through the guidance and instrumentality of the plaintiff, and its first meeting was held on the 1st April, 1912. At this meeting the defendant

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Robinson was elected president, the defendant Boyd, vice-president, and the plaintiff second vice-president and general manager.

A meeting of the executive was held on the 9th April, at which the plaintiff was authorized to complete the organization by securing offices and office furniture and supplies, including printing matter and make out and publish a prospectus to all of which the plaintiff gave faithful and satisfactory attention.

Up to the 8th May, nothing had been said or done with reference to the plaintiff's compensation, other than as stated, and up to this point there was no liability incurred by any one for the plaintiff's services.

On the 8th May, a meeting of the directors was held, at which the question of remuneration was discussed, and the following resolutions were passed:—

> Moved by Mr. Bull, and seconded by Mr. Bawlf, that Mr. Van Hummell be authorized to spend six dollars per share for selling stock and he be paid five hundred dollars per month as salary to start from first November, 1911. Carried.
>
> Moved by Mr. Bull, seconded by Mr. Boyd, that the sense of this meeting is that if the sale of stock under the direction of Mr. Van Hummell is satisfactory to the board they will vote him a bonus additional. Carried.

The bonus addition the plaintiff understood to be whatever amount he could make out of the six dollars per share allowed for selling stock, although there was no reference to this at the meeting; but the plaintiff claims this was his understanding with the defendant Robinson after the meeting. But he was uneasy in mind and not satisfied with the assurance he had, and was advised by one of the directors to learn the meaning of this resolution, and he then called upon several other shareholders and directors, and they individually agreed that the additional compensation should be as desired by the plaintiff. He then called upon the defendant Robinson, who expressed disapproval of his conduct in the interviews mentioned, and at a meeting of the directors on the 20th May, the following resolution was passed:—

> Moved by Mr. Persse and seconded by Mr. Boyd, that that portion of the minutes of the previous meeting re remuneration for sale of stock be rescinded and the following substituted: That Mr. Van Hummell be engaged as manager at a salary of five hundred dollars per month to date from first November, 1911, and that the sale of stock be proceeded with and that the manager consult with the president and vice-president as to the details of same. Carried.

On the 23rd May, the plaintiff, by letter to the president and board of directors rejected the proposition contained in the above resolution, and made counter-proposals, which were in

turn rejected by the defendants, and the following resolution passed:—

> That the resolution of the directors passed at the meeting held on the 20th May, inst., as to the acknowledgment and remuneration of Mr. Van Hummell be rescinded, he having refused to accept same.

From these facts it is clear that the plaintiff was not engaged by the company after its incorporation unless the resolution of the 8th May, has that effect. But the question arises, who is responsible for compensation for his services prior to the 5th day of May.

I fail to find any liability on the part of any of the personal defendants. True there were a number of interviews with some of the defendants, and the question of remuneration discussed; but there never was any pretence of any undertaking by any one of them to become personally liable. The discussions were all as to what would be done by the company, and as the company was then controlled by these defendants, much was taken for granted.

I grant a nonsuit as to all the personal defendants, and enter a verdict for the defendant Atchison on his counterclaim for $1,250, with interest at five per cent. per annum, and to the defendant Robinson on his counterclaim for $1,000, with interest at the same rate. I refuse the nonsuit as to the defendant company.

On hearing further evidence and argument as to the liability of the defendant company for wrongful dismissal and breach of contract, there can be no liability, as the contract submitted by the company was rejected by the plaintiff, and none other was made. The liability for his services promoting the company and securing stock subscriptions with his claim to wages for the time he was in employ of company are the only points remaining for consideration.

The law seems clear that a promoter has no right of indemnity against the company which he promotes in respect of any obligation undertaken on its behalf before its incorporation, nor can he claim upon any agreement made in its behalf by an agent or trustee before incorporation.

> Nor is the promoter or a person employed by him entitled to sue the company in respect of any payment for services rendered or expenses incurred before its incorporation in promoting it, unless after its incorporation it expressly agrees with him to make such payment or from other facts the Court can infer a new contract to reimburse him.
>
> Nor is a company bound in equity to pay the preliminary expenses because it has adopted and derived benefit from services previous to its incorporation: 5 Halsbury's Laws of England 56.
>
> A promoter cannot claim from the company he promotes any payment for his services or expenses in prompting it, unless in the case of

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a company incorporated by special Act or charter, the Act or charter so provides, or unless the company after its incorporation agrees with him to make such payment or *semble* takes the benefit of his services or expenditure: Hamilton's Company Law 69.

The Act incorporating the defendant company makes no provision for payment of these expenses, nor is this a case in which the company could be held because of its acceptance of the benefits of the services rendered and therefore an equitable liability falling upon it: *Re National Motor Mail Coach Co., Ltd.* (Clinton's claim), [1908] 2 Ch. 515.

The personal defendants, as well as the plaintiff, were the projectors of the company, and in a sense the promoters. None of them undertook personally any liability other than as subscribing shareholders.

In the absence of an express contract one of several promoters cannot sue another for remuneration for promoting services: *Holmes* v. *Higgins* (1822), 1 B. & C. 74.

It was the intention that the expenses connected with the incorporation would be paid by the company after its incorporation, and if things had gone on smoothly and the company entered upon business, no doubt they would have been; but the company did not commence business, stock subscriptions were not paid, nor any part of them, and the trouble with the plaintiff, it would seem, contributed to these results.

The plaintiff relies on the resolutions of the 8th and 20th May as an adoption by the company of the understanding with the promoters to compensate him and as constituting an agreement to do so.

A company cannot ratify a contract which was made by its promoters when the company was not in existence: *Re Empress Engineering Company*, L.R. 16 Ch.D. 125.

But an agreement entered into between certain individuals before a company is formed can be adopted by the company after it is formed: *Spiller* v. *Paris Skating Rink Co.*, L.R. 7 Ch.D. 368; *Touche* v. *Metropolitan R. Warehousing Co.*, L.R. 6 Ch.D. 671.

In this latter case the articles of association provided for promotion expenses, and the company, then incorporated, agreed to the payment for such expenses.

Without the resolution referred to there is nothing to evidence an adoption, nor do I think that these resolutions can have that effect so as to make the company liable to the plaintiff for promoting expenses. It is to secure his services as manager of the company, and in consideration of securing him as such that they provide for his salary, dating back in order to compensate him for his previous services. It is not likely the company would so compensate the plaintiff if they were not securing a continuation of his services, as the success of the undertaking was

largely dependent on him, and his refusal to accept the proposition made would justify the company in rescinding the resolutions and dispensing with his further services.

He was engaged, however, as general manager on April 1, 1912, and continued as such until May 29, and during that time he worked for the company, and is entitled to compensation for that time.

It is well established that a director cannot take the benefit of a contract entered into between himself and the company in such cases as that of *Albion Steel and Wire Co.* v. *Martin*, 1 Ch.D. 580, cited by counsel for the defendant company; but the principle in such cases is not applicable here.

The case of *Birney* v. *Toronto Milk Company, Ltd.*, 5 O.L.R. 1, is strongly relied upon by the defendant company. That case is, however, governed by the Ontario Companies Act, ch. 191, R.S.O. 1897, sec. 47, which provides that a contract such as the engaging of a manager, must be by by-law. There is no such provision applicable here.

I do not think the circumstances of this case to be within the mischief to which the principle of law was intended to be applied.

It seems to me the appointment of one of the directors as manager of the company is more in the interests of the company than the appointment of some one having no interest in it.

There will be judgment against the defendant company for $1,000, together with costs, and judgment for the personal defendants for $3,064.60, being the amount assigned to them by the Northern Crown Bank as representing the plaintiff's indebtedness to the bank, also with costs.

Judgment for plaintiff.

Re CAMPBELL.

Ontario Supreme Court, Lennox, J. February 6, 1913.

1. WILLS (§ III A—77)—LEGACY IN TRUST—VAGUE OR INDEFINITE AMOUNT.

Where the testator requires a fund to be set aside and declares the trusts thereof, but the amount is not specifically mentioned other than that a loan up to a specified sum is authorized to be made out of same, the court may construe the will as constituting a trust to the extent of the sum specified, subject to proportionate abatement of legacies if a deficiency exists.

Statement

MOTION by the executors of the will of Charlotte Campbell, deceased, for an order determining the construction of certain clauses of the will, and for advice and direction under the Trustee Act, 1 Geo. V. ch. 26(O.)

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D. T. Symons, K.C., for the executors.

A. J. Russell Snow, K.C., for the Reverend F. Wilkinson and the general legatees.

J. A. Scellen, for Moses Bricker.

R. U. McPherson, for Wycliffe College.

Donald B. Campbell, though duly served, was not represented.

LENNOX, J.:—Application by executors for construction of certain clauses of the will of one Charlotte Campbell, and advise and direction. They specifically ask:—

(a) Have the trustees, before payment of the general legacies, to set aside any sum to form a trust fund for the benefit of Donald B. Campbell, or, in the event of the said Donald B. Campbell dying before the 1st August, 1920, without having been married, for the benefit of Wycliffe College, and, if so, what amount?

(b) Does Moses Bricker take the property 265 Jarvis street charged with the sum of $9,000, or any smaller sum, to be held in trust for Donald B. Campbell, thus exonerating the general estate of the testatrix from providing for the same?

Reversing the order in which the questions are put, I am clearly of opinion that Moses Bricker, in taking the property 265 Jarvis street, does not take it charged with the sum of $9,000, or any smaller sum, to be held in trust for Donald B. Campbell. It is quite clear, I think, from the language of the will, that the testatrix had it in her mind that a sum of money derived in some way from her estate should be paid to Donald B. Campbell on the 1st August, 1920, or upon his marriage if he marries before that date—also the income of this money while thus outstanding—and to be paid to Wycliffe College if Campbell should die unmarried before August, 1920.

Again, whether the language used is or is not sufficient to create a trust, it is reasonably clear that the testatrix proposed that the money to be devoted to this purpose should be as much as $9,000, and that this money should be so employed as to produce an income.

It is also clear upon the will that Moses Bricker was a person standing high in the confidence and regard of the testatrix.

If these conclusions are well founded and are kept in mind, it is easy to understand that a suggestion or direction as to a method of profitably and securely employing the trust funds, with possible benefit or accommodation to Moses Bricker, and not the imposition of a burden upon him, was what prompted the testatrix to insert the provisions: "I hereby authorise my trustees to lend the sum of $9,000 or any smaller sum to the said Moses Bricker on the security of a first mortgage on my

residence 265 Jarvis street, Toronto, for a period not later than the 1st August, 1920, the interest upon the mortgage to be at the rate of six per centum per annum payable quarterly." "And I hereby relieve my trustees from all responsibility in connection with such loan to the said Moses Bricker if the security should for any reason prove insufficient."

But it is not easy to understand that a testatrix, who has just used clear, exact, and apt expressions in charging a legacy in favour of Mildred Bell upon the same land, would, in the next paragraph of her will, use the expressions above set out, including the exoneration of her executors from responsibility, and by it intend to charge another and larger sum upon the property of Moses Bricker; and, if this property is impressed with a trust at all, it is here and by this clause, and nowhere else.

I know, of course, that, coupled with the devise of 265 Jarvis street, is this clause, "subject, however, to the above-mentioned charges on the said lands and premises in favour of Mildred Bell and also in favour of the said trust for Donald B. Campbell."

The fact that there is a definite charge in favour of Mildred Bell, and that the Campbell trust is here joined with it, and the same language used, is certainly significant. But a reference to a non-existent or assumed charge will not of itself constitute a charge.

There is only one other paragraph in the will referring to the matter of this trust, as it affects the estate of Moses Bricker, and I shall refer to it in connection with the other question. It, however, goes to emphasise what, I think, is already abundantly clear—that the only contemplated connection of Moses Bricker with the trust funds was as a possible borrower of the whole or a part of it; and, when the testatrix refers to a charge "in favour of the said trust," I read it as a reference to a mortgage charge voluntarily assumed by Moses Bricker, if assumed at all, and for which he gets an equivalent in the use of money of the estate for so long as it continues to be a charge.

Additional evidence that the testatrix did not intend to charge the Jarvis street property with this trust fund is found in the fact that the testatrix contemplated the possibility of a deficiency of personal estate for payment of the pecuniary legacies in full; and this could only be possible if the trust fund is treated as a pecuniary legacy payable out of the general personal estate.

The next consideration is, has there been a trust created at all? I have already stated that undoubtedly the testatrix had it in her mind to establish a trust; and, after some hesitation,

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I have come distinctly to the conclusion that she has used language sufficiently definite for that purpose.

That the testatrix aimed at the creation of a trust fund, and that its existence or the amount of it was not to be dependent upon whether Moses Bricker borrowed or how much he borrowed, is clear, for the testatrix says: "I hereby declare that my trustees shall stand possessed of the income derived from the said investment, including the mortgage from the said Moses Bricker, upon the following trusts, that is to say: upon trust to pay the income derived therefrom to my grandson Donald B. Campbell, quarterly, until the 1st day of August, 1920, then to pay and transfer to the said Donald B. Campbell the said trust fund;" with provisions for contingencies which need not now be referred to.

Here it is clearly stated that there is to be an investment; but the amount of it has to be otherwise or elsewhere ascertained. It is stated, however, that the investment includes "the mortgage from the said Moses Bricker;" that is, that it is a part of the trust fund.

Turning back, then, I find, from a clause already quoted, that this mortgage, as to the times for payment of interest and the time within which the principal money must be paid, fits in exactly with the provisions in favour of Donald B. Campbell, and that any sum up to $9,000 of the funds so to be invested may be lent to Moses Bricker.

The result, as I understand, is, that the will shews that the testatrix intended to create a trust fund for the purposes specified; and, as the trustees are authorised to lend as much as $9,000 out of this trust to Moses Bricker, the total trust investment must at least be as much as $9,000.

As to the first question, therefore, I am of opinion that the trustees must set aside a fund out of the estate of the testatrix not specifically disposed of, for the benefit of Donald B. Campbell, and contingently for the benefit of Wycliffe College; and that, subject to the question of a deficiency of assets, the sum to be set apart or set aside as such trust fund is the sum of $9,000.

If the estate of the deceased not specifically devised or bequeathed, after payment of the debts of the deceased and of her funeral and testamentary expenses and of the costs of administering her estate, and after payment of the pecuniary legacy of $3 per month to Bella Doherty, as mentioned in the will, and after providing for payment of legacy and succession duties as mentioned in the will, is not sufficient to provide for the setting apart of the whole of this sum of $9,000, and for payment in full of all the pecuniary legacies or bequests set out or provided for in the will—other than the legacy to Bella

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Lennox, J.

Doherty as aforesaid and other than the $4,000 bequeathed to Mildred Bell, which is specifically charged upon and payable out of the real estate—the said trust sum or fund of $9,000 and the said several pecuniary legacies or bequests shall all abate pro rata, and the sum to be set aside as a trust fund shall be $9,000, less its said proportionate abatement.

The annuity or annual payments to Sarah McGarven may delay final distribution, but can create no embarrassment, as the principles above stated apply to the fund set apart to produce income for this purpose, when it falls in.

I am not aware that anything further is desired of me. If there is, I may be spoken to before the judgment is entered up.

There will be costs to all parties out of the estate; to the executors as between solicitor and client.

Judgment accordingly.

REX v. LAPHAM.

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Ontario Supreme Court, Middleton, J., in Chambers. February 17, 1913.

1. EXTORTION (§ I—3)—BY THREAT OR ACCUSATION OF CRIME—CONSTABLE WITH WARRANT.

A constable who is given a warrant of arrest for theft to have executed in another county on its being endorsed by a magistrate there and who, at the same time, acts for the private prosecutor in attempting to settle the charge with the accused is properly convicted of extortion under Cr. Code (1906), sec. 454, if he accuses or threatens to accuse the person against whom the warrant is directed of the criminal offence therein mentioned and thereby obtains from such person a payment of money as representing the value of the article alleged to have been stolen and a reimbursement for expenses.

Statement

MOTION by the defendant, on the return of a habeas corpus and a certiorari in aid, to quash his conviction and for his discharge.

J. P. MacGregor, for the defendant.
E. Bayly, K.C., for the Crown.

Middleton, J.

MIDDLETON, J.:—The defendant was found guilty of an offence against sec. 454 of the Criminal Code, in extorting $45 from one Susan McCoppin, by accusing and threatening to accuse one William McCoppin, her husband, of stealing a fox terrier. The defendant, a county constable of Simcoe county, had placed in his hands a warrant for the arrest of McCoppin on the charge of stealing the dog in question from one Hastings. He also received from Hastings written authority to settle with McCoppin. Armed with these documents, he saw Mrs. McCoppin and extorted $45—said to be $35, the value of the dog, and $10 for expenses.

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His counsel argues, among other things, that what was done was only a threat to execute the warrant in his hands, and not an accusation of the offence. This question would be difficult if the facts required its determination. It may be that a constable, armed with a warrant, who extorts money from any person by the mere threat to arrest upon a warrant in his possession, for an offence of which the informant accuses that person, is not within the statute. If so, the statute should be amended so as to make it plain that no peace officer can use his office and his duty to arrest under process, as a means of extortion.

In this case the facts quite warrant the finding that the constable did accuse and threaten to accuse McCoppin of the theft.

Notwithstanding Mr. MacGregor's strong plea based upon the well-meaning ignorance and stupidity of this constable, who, it is said, was really playing the part of a peacemaker, I cannot interfere. That was a question for the magistrate; and I incline to the same view. The conduct of the defendant seems to me to have been high-handed, as well as stupid. That astute observer Bunyan long ago remarked that the Town of Stupidity was not far from the City of Destruction.

The motion is refused, and the prisoner is remanded.

Motion refused.

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BOULTER v. STOCKS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, and Brodeur, JJ. February 18, 1913.

1. FRAUD AND DECEIT (§ IV—16)—PURCHASE INDUCED BY FALSE STATEMENTS.

Where one was induced to purchase a farm, together with the stock and implements thereon, through false statements of the acreage knowingly made by the vendor, for the purpose of inducing the prospective purchaser to close the sale upon the vendor's assurance so given as to the quantity of land, and the purchaser is deceived by reliance thereon, the transaction will be set aside.

[*Stocks* v. *Boulter*, 5 D.L.R. 268, 3 O.W.N. 1397, affirmed; *Campbell* v. *Fleming*, 1 A. & E. 40, distinguished.]

2. FRAUD AND DECEIT (§ IV—16)—MISREPRESENTATION OF VENDOR — ABSTRACTING PART OF SUBJECT-MATTER.

It is ground for rescission of the sale of farm lands that the vendor planned a deception of the purchaser by retaining a portion of same consisting of 30 acres separated from the remaining 270 acres by a road, while representing by the advertisement of sale, and otherwise, that he was selling a farm of 300 acres, although the thirty acres was not specifically indicated to the purchaser as a part of what he was getting, if the latter relied upon the vendor's representation as to the quantity being 300 acres without suspicion of any shortage.

[*Stocks* v. *Boulter*, 5 D.L.R. 268, affirmed; *Campbell* v. *Fleming*, 1 A. & E. 40, distinguished.]

3. ESTOPPEL (§ II G 2—102)—PURCHASE INDUCED BY MISREPRESENTATION—LACHES—OMISSION TO ASSERT CLAIM—DISCOVERY OF FRAUD.

It cannot be held that one who was induced to purchase land through fraud and misrepresentation, elected to abide by the sale, because of delay thereafter in suing for redress if the deception that had been practised upon him was of such a character as to preclude the discovery of the fraud until the time of bringing the action.

[*Stocks* v. *Boulter*, 5 D.L.R. 268, affirmed.]

4. CONTRACTS (§ V C 2—397)—CANCELLATION OF CONTRACT—FRAUD AND MISREPRESENTATION—RESTORATION OF BENEFITS.

The leasing of an orchard upon land the lessor had been induced to purchase by false representations, does not amount to such dealing with the property as will take away his right to rescind upon the ground of fraud, where the lease had been cancelled and the vendee was in a position to restore the land to the vendor practically as he received it.

[*Stocks* v. *Boulter*, 5 D.L.R. 268, affirmed.]

5. FRAUD AND DECEIT (§ IV—16)—FINDINGS OF FRAUD—MEANING OF "OVERREACHED."

A finding in an action where the pleadings presented a question of actual fraud, that a vendee "was overreached" in a sale of land, and that the vendor "must or should have known that [his] representations were false" means that the vendor's representations were not merely false, but known by him to be false, and that he made them for the purpose of deceiving the vendee.

[*Stocks* v. *Boulter*, 5 D.L.R. 268, affirmed.]

Statement

APPEAL by the defendant from the decision of the Ontario Court of Appeal, *Stocks* v. *Boulter*, 5 D.L.R. 268, 3 O.W.N. 1397, affirming the judgment of Clute, J., at the trial in favour of the plaintiff.

The appeal was dismissed with costs.

Argument

Anglin, K.C., for the appellants:—The respondent cannot succeed unless he proves actual fraud: *Bell* v. *Macklin*, 15 Can. S.C.R. 576; *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326; *Angel* v. *Jay*, [1911] 1 K.B. 666, and this he has not done. The respondent made his irrevocable election when he leased the orchard and no discovery of further facts restores his right to rescind: *Campbell* v. *Fleming*, 1 Ad. & El. 40; *Law* v. *Law*, [1905] 1 Ch. 140, at 158, 159; *Frye* v. *Milligan*, 10 O.R. 509.

McKay, K.C., for the respondent referred to *Wall* v. *Cockerell*, 10 H.L. Cas. 229; *La Banque Jacques-Cartier* v. *La Banque d'Epargne*, 13 App. Cas. 111.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I agree that this appeal should be dismissed with costs. To what my brother Davies says I wish merely to add this. The plaintiff complains in his demand for rescission of three distinct false and fraudulent misrepresentations not in any way connected and each calculated according to the evidence to operate on his mind as an independent inducing cause. The trial Judge found in his favour on all three grounds and in the Court of Appeal it is expressly held "that the learned Judge's conclusions are entirely

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justified" by the evidence. Therein lies the distinction between this case and *Campbell* v. *Fleming*, 1 A. & E. 40, so much relied on by the appellant. In that case, the contract was induced by a single representation of the vendor and the purchaser, with the knowledge of its falsity, affirmed the contract. He cannot escape if, since the affirmation, he discovers another particular in which the same representation departed from the truth. (Halsbury, No. 1767.)

It was argued here that the respondent had in some way elected to affirm the transaction, but there is no evidence to support any act of election after he became aware of the facts. The lease of the orchard is relied upon as evincing an intention to affirm or as a dealing with the land which precludes the respondent from seeking rescission. That lease has been cancelled and is now deposited in Court, so there is no obstacle in the way of restoring the premises to the appellant free from any obligation arising out of the lease. Further assuming that the respondent elected to affirm with a knowledge of the facts concerning the orchard that was not the only discrepancy and the plaintiff was not debarred from relief on the other grounds if sufficient to justify rescission because he elected to affirm the contract with knowledge as to the orchard and as found by the trial Judge in ignorance of the truth with respect to the other causes of rescission. The presumption of an intention to affirm does not arise out of an act done without knowledge of all the facts (*Banque Jacques-Cartier* v. *Banque l'Epargne*, 13 App. Cas. 111, at 118). The plaintiff may have been willing to hold to his bargain notwithstanding the misrepresentation as to the orchard, but if to that were added the deficiency in the number of acres and the presence of the noxious weeds he might take a different view of his position, and this action is the best evidence of his change of mind.

Davies, J.

DAVIES, J.:—At the conclusion of the argument on this appeal I was quite satisfied that the findings of fact of the trial Judge, based as they were upon ample evidence and subsequently confirmed by the Court of Appeal, should not be disturbed by us.

The three matters upon which the trial Judge found there had been fraudulent misrepresentations made which had induced the plaintiff (respondent) to purchase the appellants' farm and stock and which in his opinion justified rescission of the contract, related (1), to the quantity of land in the farm; (2) to the condition of the soil of the farm; (3) to the number of apple trees in the orchard.

Mr. Anglin strongly contended that as the true facts with respect to the condition of the farm and the number of trees in the orchard were known to the plaintiff at any rate on or about

the 13th June, 1911, when he executed a lease of the orchard for ten years, he had, by that solemn act made his election, affirmed the contract, and could not afterwards revoke his election. In support of his contention he relied mainly upon the case of *Campbell* v. *Fleming*, in 1843, 1 A. & E. 40. He submitted that assuming the representations with regard to the condition of the farm and size of the orchard to have been fraudulently made and to have induced the respondent to enter into the contract, he had, nevertheless, after he had gained a true knowledge of the facts relating to the fraud practised upon him, elected to confirm by granting the orchard lease, and could not afterwards, on discovering a further misrepresentation with regard to the acreage, revoke his election.

In the report of the case of *Campbell* v. *Fleming*, 1 A. & E. 40, so strongly relied upon by Mr. Anglin, it is stated that "after the purchase of the shares" (which the defendant in that case was seeking to repudiate)

was concluded, he discovered that the statements in the advertisement and many of the representations made to him in the course of the negotiation were fraudulent and that the whole scheme was a deception.

The decision of the case is based upon these facts, that the representations made to him were fraudulent and that to his knowledge "*the whole scheme was a deception.*" With this knowledge

he formed a new company by consolidating the shares originally purchased by him with some other property and he sold the shares in the new company thereby realizing a considerable sum of money.

Having thus elected to confirm what he knew to have been a fraudulent transaction, he afterwards discovered another material fraudulent misrepresentation as having been made to him, and it was held that this discovery, though only made by him after he had made his election, did not entitle him to revoke the election he had made on the ground, as put by Patterson, J., that it was merely a "new incident in the fraud." He said:—

This can only be considered as strengthening the evidence of the original fraud and it cannot revive the right of repudiation which has been once waived.

Now in the case before us, I do not think the facts brought to the plaintiff's knowledge from time to time as he began cultivating the land in the spring, as to the dirty condition of the soil and the presence of large quantities of noxious weeds, would of themselves be sufficient to satisfy plaintiff that the sale of the farm to him was a fraud and a deception.

The evidence was of a character, no doubt, to raise grave and serious doubts in his mind as to whether he had not been deceived in the transaction, but nothing more. Then as to the lease of the orchard. It was the day after that lease was signed

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that he first learned from the lessees' expert of the shortage in the number of the apple trees. Even that important fact only caused him still more seriously to deliberate and consider his situation. It did not give him positive assurance that he had been the victim of a fraud. When, however, the shortage in his acreage of some 46 acres was shewn to him in the month of June "his eyes were finally opened." This, he says, "was the climax." And he, within a very reasonable time afterwards, took steps to have the lease he had given cancelled and to express his election to rescind the contract for the purchase of the farm and stock.

Considering, as I have done, all the facts and circumstances, I am of opinion that the judgment below was right, that the principle of the decision in *Campbell* v. *Fleming*, 1 A. & E. 40, is not applicable to the facts of this case, that the plaintiff exercised his right of election to rescind in due time after he had found out that he had been the victim of a fraud, and that the appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—It is to be regretted that one bearing a Christian name which stands almost synonymous with fidelity to truth, should in trying to sell his farm have so far forgotten himself as to describe it in terms so flagrantly false as the evidence proves. He makes these misrepresentations not only by the advertisement he put forth for all the world to read, but also by affirming in the letter he wrote to one inquiring on behalf of respondent as a possible purchaser that the advertisement was a fair description and by reiterating some of details therein.

The learned trial Judge's findings of fact upheld by the Court of Appeal maintain the falsity of many of the material statements in these documents. And the falsity thereof invented for the purpose of inducing a purchaser to rely thereon, was clearly so fraudulent as entitled respondent on discovery thereof to a rescission of the contract unless and until he had clearly condoned the fraud. Not content with that, after leading respondent, living in British Columbia, to believe he was buying a three hundred acre farm, to conclude a bargain therefor subject to inspection, and to come all the way thence to Ontario to inspect it, he contrived to get him to suppose he was carrying out that bargain when he signed an agreement, which on its face specified no definite acreage, but in fact only covered about two hundred and fifty-five acres.

He has a shuffling story to tell about thirty or forty acres he had across the road from his farm to which he pretends such reference was made on the respondent's inspection as to justify this abstraction of that quantity of land from the bargain without any allowance therefor by way of reduction from the price.

When this latter feature of his explanation is pressed on him by the learned trial Judge, he says he calculated when giving him the canning factory he was giving him a good bargain.

He seemed to forget this canning factory was part of the very property he had advertised as in "A-1" state and going with the three hundred acres. And he seeks to cheapen this thirty or forty acres as comparatively worthless. Either it was part of the three hundred acres or it was not. If it was part and so comparatively worthless, then the farm did not measure up to the standard in the description. And if it was not part then he never had intended selling more than two hundred and fifty-five acres, yet induced the respondent to buy that under the belief he had fraudulently induced, that it was three hundred acres. Besides the attempt now made in appeal to induce us to accept these excuses and infer a mutual agreement by which respondent was to abandon this thirty or forty acres or forego in some way getting what he expected, and thus reverse the findings of fact below, we are asked as a matter of law to say that the respondent had by a lease made in May of the orchard then discovered for the first time to contain only about half the apple trees represented, he had elected to abide by his bargain and overlook all this fraud or these frauds.

The respondent had not then discovered that in truth he had only got two hundred and fifty-five acres when thinking he was getting three hundred acres. Nor had the season so advanced as to disclose to him the fine crops of weeds he might reap. Neither the case of *Campbell* v. *Fleming*, 1 A. & E. 40, relied upon to uphold this contention relative to election, nor any other case deserving to be called authority, binds us to hold in face of such facts that a purchaser so induced to rely upon such fraudulent representations and contrivance of which he knew not the falsity is to be defeated in his right to rescission by calling such an incident as this lease under such circumstances an election to adopt the contract.

The appeal must be dismissed with costs. If there is any chance of too wide a meaning being attached to the word "damages" in the third paragraph of the formal judgment of the trial Judge, it can be amended, though I do not deem it objectionable if used in the sense it ought to be.

DUFF, J.:—I think the appeal should be dismissed. Duff, J.

The defence upon which the appeal is based is that the respondent after knowledge of the fraud practised upon him elected not to disaffirm the sale. The act relied upon as shewing such election was the granting of a lease of the orchard for a period of seven years. I shall assume that what the respondent did in the matter of the orchard was inconsistent with an intention to disaffirm and that if the respondent had at the time he did it a

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knowledge of the fraud of which he had been the victim it would be sufficient evidence of an election in the sense contended for. I think the appellant has not shewn that the respondent had such knowledge. It is clear on principle that where an election is implied from conduct one essential element in the circumstances upon which the inference rests must be this. It must be shewn that at the time of the acts relied upon as evidencing the election the person to whom the election is imputed had a knowledge of such facts as would entitle him to impeach the transaction. In the case before us it must be shewn that Stocks was aware that the representations of the respondent were fraudulent representations—that is to say, that they had been made with such a knowledge of their falsity or with such reckless indifference upon the subject of their truth or falsity as to form a sufficient basis for an action of deceit.

At the time of the execution of the lease of the orchard Stocks knew that the number of apple trees had been grossly overstated by the appellant, and he knew also that the farm was much affected by noxious weeds. He may have had his suspicions as to Boulter's entire honesty; but it is quite clear that the possibility of shortages in acreage had not then occurred to him and he had no suspicion that the whole transaction had been on Boulter's part the swindle it ultimately proved to be. It would probably seem to him to be most unlikely that the misrepresentations as to the number of apple trees—so easy to expose—had been made deliberately, and as to the prevalence of noxious weeds, that is a matter respecting which he may well have thought some exaggeration was to be expected. I think the evidence is quite consistent with the view that his discoveries in regard to these two matters did not bring home to his mind a conviction that a fraud had been practised upon him such as would entitle him to impeach the sale. In weighing Stocks's evidence upon this point the course of the action must be considered. The contention now advanced was not set up in the pleadings and the cross-examination in so far as it was directed to the conduct of Stocks, which is now relied upon seemed rather to aim at shewing that charges of fraud upon which the action was founded were the result of an afterthought. Stocks was not asked squarely at the trial to meet the objection that he had with a knowledge of his rights elected against the disaffirmance of the sale.

The appellants cite *Campbell* v. *Fleming*, 1 A. & E. 40. Some of the expressions attributed to the learned Judges who decided that case may appear to draw the line more strictly against persons complaining of fraud than Courts of equity have done in similar cases (compare, for example, the judgment of Lord Redesdale in *Murray* v. *Palmer*, 2 Sch. & Lef. 474); but it

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is quite clear that the plaintiff in *Campbell* v. *Fleming*, 1 A. & E. 40, had before doing what was set up as constituting an election discovered, as the report says, that the whole transaction "was a deception." With full knowledge of his right to repudiate on that ground he had dealt with the shares as his own. The case is, therefore, clearly distinguishable from the present; and the judgment when fairly interpreted by the light of the facts do not, I think, enunciate any principle at variance with the views above expressed.

Brodeur, J.

BRODEUR, J.:—I am of opinion to dismiss this appeal for the reasons given by the Chief Justice.

Appeal dismissed with costs.

PICKLES v. CHINA MUTUAL INS. CO.
CHINA MUTUAL INS. CO. v. SMITH.

(Decision No. 2.)

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. February 18, 1913.

1. INSURANCE (§ I C—19)—MUTUAL COMPANY—COMPULSORY LIQUIDATION —LIABILITY OF MEMBERS ON PREMIUM NOTES.

The amounts unpaid upon the premium notes of subscribers to a marine mutual insurance company organized under the laws of Massachusetts constitute an asset of the company applicable to the discharge of the company's obligations and recoverable as such in Nova Scotia by the receiver or liquidator appointed in involuntary liquidation proceedings taken against the company under the law of its domicile, although the insurance for which the notes were given had ceased by reason of the involuntary liquidation.

[*China Mutual Ins. Co.* v. *Smith*, 3 D.L.R. 766, affirmed on appeal.]

2. INSURANCE (§ I C—17)—COMPULSORY LIQUIDATION OF MUTUAL COMPANY —RIGHTS OF MEMBERS.

When a policy of mutual insurance upon the premium note plan contains a stipulation that the company is to "return" a certain percentage of the premium for the unexpired time should the policy be "cancelled," the assured is liable upon the involuntary liquidation of the company to pay the whole of the premium note given in respect of the entire term for which the insurance was contemplated by the contract and not merely the proportion to the date of the liquidation when the insurance ceased by operation of law; any claim which the assured may have in respect of a return of a part of the premium is one to be advanced in the liquidation proceedings and not by way of defence to an action brought in the name of the company by the receiver in the liquidation.

[*China Mutual Ins. Co.* v. *Smith*, 3 D.L.R. 766, affirmed on appeal.]

3. INSOLVENCY (§ III—11)—WHAT PASSES TO RECEIVER—LIABILITY OF INSURED ON PREMIUM NOTES.

The fact that a permanent fund required by the charter of a mutual insurance company to be maintained for the security of its policyholders was depleted and non-existent when a policy of insurance was issued, does not render the contract null and void so as to relieve the insured from liability on a note given for the premium thereon for an insurance upon the "mutual" plan.

[*China Mutual Ins. Co.* v. *Smith*, 3 D.L.R. 766, affirmed on appeal.]

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Statement

APPEALS by defendants, F. W. Pickles and J. W. Smith, from a decision of the Supreme Court of Nova Scotia, *China Mutual Ins. Co.* v. *Smith*, 3 D.L.R. 766, 46 N.S.R. 7, affirming the judgment at the trial in favour of the plaintiffs.

The plaintiff company was incorporated in 1853 by the legislature of Massachusetts for the purpose of carrying on marine insurance "on the mutual principle" subject to the laws of the State then existing, and all subsequent laws in force relating to such insurance companies. The company successfully carried on business for many years; but on the nineteenth day of March, 1908, at the instance of the insurance commissioner under the Massachusetts statute (chapter 76, Acts of 1907) its affairs were placed in the hands of a receiver and its officers and agents were enjoined from further proceeding with the business of the company. This proceeding cancelled all policies. In the late fall of 1907 and the early part of 1908, the respondent Pickles had insured a number of vessels in the company and had given his notes for the premiums aggregating thirty-five hundred and fifteen dollars and ninety-two cents ($3,515.92). There were many similar transactions of the company both in Massachusetts and the Maritime Provinces of Canada, and the question arose after the receiver's appointment as to his right to collect in full the outstanding premium notes, and as to the right of policy holders who had paid their premiums in cash or who had paid premium notes maturing before the date of receivership to recover back *pro ratâ* returns in the State of Massachusetts. A number of actions were brought at the instance of the receivership and the result of the litigation is reported in the case of *Hill* v. *Baker*, 205 Mass. 303.

Subsequently actions were brought in Nova Scotia in the name of the company at the instance of the receiver of which the Pickles and Smith cases (now on appeal to the Supreme Court of Canada) are two which have been tried, and another case not under appeal was also tried and abides the result of these appeals.

The following defences were raised in Nova Scotia:—

(1) That the company when it entered into the insurance contracts, held itself out as solvent, whereas it was insolvent to the knowledge of its officers, and was fraudulently carrying on business, and that, therefore, it could not recover on the premium notes or on any contracts.

(2) That there was no consideration for the notes.

(3) That the makers were liable only for the proportion of the premium accruing *pro ratâ* from the date of the note up to the date of the receivership.

(4) That the contracts of the company, including the premium notes, were illegal and void because the company had not kept up as required by the Massachusetts statute a deposit of two hundred thousand dollars ($200,000), which had to be subscribed before the company could commence to do business and which it was required to maintain.

The actions were tried before the Honourable Mr. Justice Meagher, who gave judgment in favour of the company. Defences one and four were then principally relied upon, although the others were argued and are dealt with briefly by the learned Judge.

On the appeal to the Supreme Court of Nova Scotia defences (1) and (2) were not pressed, and the findings and judgment of the trial Judge on those defences are not now in question. The defendant urged, however, defences (3) and (4), and especially that by reason of a provision in the Pickles policy as follows:—

Statement

The consideration for this insurance is hereby fixed at the rate of 9¼ per cent. To return —— per cent. for every thirty days of unexpired time if this policy be cancelled;

and in the Smith policy the same except that the —— for return was filled in with a specified percentage, 75 per cent., the defendant could only be held for payment *pro ratâ* of premium up to date of the receivership, the contention being that the appointment of the receiver was a cancellation of the policy contemplated by the foregoing excerpt.

The appeal was heard by Justices Graham, Russell and Drysdale. Mr. Justice Russell delivered the judgment of the Court (Graham, J., concurring) affirming the right of the plaintiff company to recover the full amount of the notes, while Mr. Justice Drysdale dissented, acceding to the contention of the defendant just mentioned.

Argument

Mellish, K.C., for the appellants:—*Hill* v. *Baker*, 205 Mass. 303, and similar American cases deal with insurance policies which do not contain the return premium clause. Consequently, they have no application to this case.

The permanent fund required by the Massachusetts statute to protect policy holders was not kept up. The issue of the policies to Pickles and Smith was, on that account, unauthorized and even prohibited and the policies were void: *Reliance Mutual Ins. Co.* v. *Sawyer*, 160 Mass. 413. The learned counsel referred also to *Fayette Mutual Fire Ins. Co.* v. *Fuller*, 8 Allen (Mass.) 27, and *Adamson* v. *Newcastle Steam-Ship Freight Ins. Assoc.*, 4 Q.B.D. 462.

Rogers, K.C., for the respondent:—The cancellation mentioned in the policy must be by act of the company: *The Commonwealth* v. *Massachusetts Mutual Fire Ins. Co.*, 119 Mass. 45, at p. 51, *per* Morton, J.; *Hill* v. *Baker*, 205 Mass. 303, and cases therein cited; *Lion Mutual Marine Ins. Assoc.* v. *Tucker*, 12 Q.B.D. 176.

Sir Charles Fitzpatrick, C.J.

THE CHIEF JUSTICE:—I am of opinion that this appeal should be dismissed with costs for the reasons given by Mr. Justice Duff.

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Idington, J.

DAVIES, J.:—For the reasons given by Mr. Justice Russell in delivering the judgment of the Supreme Court of Nova Scotia in this case, adopting and applying the principle of the decision of *Hill* v. *Baker*, 205 Mass. 303, with which reasons I entirely concur, I think the appeal should be dismissed with costs.

IDINGTON, J.:—The appellants gave their respective promissory notes by way of payments of premiums for insurances effected by the policies issued by respondent which was a mutual insurance company incorporated under and by virtue of Massachusetts statutes.

Respondent failed to comply with said statute and during currency of these policies in question was put in liquidation by direction of the Court upon the application of the authorities having supervision of such institutions. These actions are brought to recover the amounts respectively unpaid by the insured. The appellants each acknowledge liability for the proportionate amount earned up to the order of liquidation, but claim that beyond that no liability exists because of a clause written in each policy. This clause fixes the premium and provides for a partial "return" thereof, as it is expressed, to be made on cancellation. The cancellation of the policy here in question is alleged to result by operation of law from the order for liquidation.

The frame of the said clause is as follows:—

> The consideration for this insurance is hereby fixed at per cent. To return per cent. for every thirty days of unexpired time if this policy be cancelled.

In the Pickles policy the fixed rate intended by this clause is written in with figures "9¼," but the rate to be returned is left blank, and in the Smith policy there is written in for fixed rate "10" and in the blank for return "75."

It is conceded the insurance ceased with the suspension of the company. The question raised in each case must be dependent upon the position occupied by the insured in his relation to the company. If we could treat these notes as ordinary promissory notes then something might be said in answer to the claim thereupon on the ground of a partial failure of consideration. The term used is "to return," and hence partial failure of consideration as usually understood relative to promissory notes is not capable of application, but even so, if no others interested than the parties hereto an equitable plea might conceivably be so framed, to avoid circuity of action, as to afford a complete answer to that part of the premium note never earned or possible now of being earned. That is not, however, the actual position, for these notes are part of the security other policy holders are entitled by the law governing all concerned

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Idington, J.

to look to for compensation of their losses which had been incurred before the liquidation proceedings.

What right has any one giving such a promissory note for such purpose to withdraw from what he had undertaken to meet or assist up to the limit of his promise in meeting?

By the law constituting the company each person insured became a member of the company and entitled during the currency of his policy to take a part in its management. He became at once insurer and insured. He has no more right to escape from this position than a partner with limited liability in any other venture where the fundamental principle is that what he has given or promised shall stand good for losses though he may when all losses and liabilities are satisfied be entitled to rank upon any fund left for distribution when these are satisfied. Then legal effect may be given the right expressed in the above clause to "a return."

For these considerations I do not think the cancellation referred to in the clause covers the kind of cancellation resulting from the failure of the insured.

As to the other ground of defence that the violation of the law which led to suspension was such a fraud in itself apart from actual misrepresentation of the condition of things (of which there is no evidence) it seems to me hardly arguable.

I think the appeal should be dismissed with costs. But lest there be ultimately a fund such as I have indicated upon which appellants may become entitled to rank, the judgment herein should not operate as an estoppel in answer to any such claim and if desired should be amended so as to avoid any such consequence by declaring it to be without prejudice to any such possible right.

Duff, J.

DUFF, J.:—The respondent company was incorporated in 1853 by the Legislature of Massachusetts for the purpose of carrying on marine insurance "on the mutual principle." On the 18th of March, 1908, (the assets of the company appearing to be insufficient to meet its liabilities) the company and its affairs were placed in the hands of a receiver at the instance of the insurance commissioner of Massachusetts pursuant to certain statutory provisions (chapter 576, Acts of 1907), and its officers and agents were restrained by the same order from continuing the business of the company. In the years 1907 and 1908 each of the respondents, Pickles and Smith, insured a number of vessels in the company, and the actions out of which these appeals arise were brought by the receiver in the name of the company upon the premium notes given under these contracts of insurance. In the Nova Scotia Courts judgment was given against the appellants. In this Court the

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defence relied upon rests upon a clause found in both sets of policies in terms which in the view I take of the case may be treated as identical.

In the policies issued to the appellant Pickles the clause is as follows:—

> The consideration for this insurance is hereby fixed at the rate of 9¼ per cent. To return per cent. for every thirty days of unexpired time if this policy be cancelled.

In the policy issued to the appellant Smith the blank in the second sentence is filled in, 75 per cent. being specified. The contention is that the proceedings already referred to in the Massachusetts Courts constitute a cancellation of each of these policies within the meaning of this clause, and further, that the appellants are entitled to a deduction from the amount of the premium note in each case of the sum returnable by the company under the clause. In the view I take of the case it does not appear to be necessary to decide the question whether or not the order of the Massachusetts Court appointing a receiver and restraining the company from further continuing its business (which admittedly had the effect of making legally impossible any payments under any of these policies in respect of losses occurring thereafter) constitutes a cancellation of the policies within the meaning of this clause. The conclusion to which I have come is this: Assuming the appellant's construction to be on this point correct, and assuming further that in the events which have happened a right to recover a proportionate part of the premium has become vested in the appellants, this right is one which they can only assert as creditors of the company in the insolvency proceedings in Massachusetts and that in the actions with which we are concerned on these appeals they are liable for the full amount of their premium notes.

The appellants by accepting these policies became, by the by-laws of the company of which they had notice in the policies, members of the corporation. By virtue of the contract of insurance the insured stands in a two-fold relation to the company and the other policy holders. To the extent of his own policy he is insured; to the extent of his own premium note he is an insurer in the sense that he is a holder of unpaid capital in respect of which he is entitled to share in the profits of the company, and to the extent of that capital he is liable to contribute to the discharge of the obligations of the company. That this, according to the settled law of Massachusetts, is the position of the appellants is put beyond dispute by the decision of the Supreme Court of that State in *Hill* v. *Baker*, 205 Mass. 303, and the cases therein referred to; and it is, of course, indisputable that the appellants being members of the respondent corporation their relations, as members of the cor-

poration, to the corporation itself as well as to other members of the corporation as such, are governed by the laws of Massachusetts. By the law of that State

the premiums paid or absolutely agreed to be paid by the members for their policies constitute a fund for the payment of losses; and the principle is the same whether the payment is in cash or by note, so long as the policy is issued upon the mutual principle to one who by accepting the insurance becomes a member of the insurance company: *Hill* v. *Baker*, 205 Mass. 303, page 308.

The appellants premium notes forming part of a fund for the payment of losses, the effect of the proceedings in insolvency on general principles would be that the company being insolvent would hold this fund in trust for a distribution among its creditors, according to the order and priority ordained by the *lex fori concursus: Galbraith* v. *Grimshaw*, [1910] A.C. 508, at p. 512; *Chartered Bank of India, Australia, and China* v. *Henderson*, L.R. 5 P.C. 501, at 513. And this appears, from the authorities referred to, to be the law of Massachusetts; see also May on Insurance (4th ed.), 1900, sec. 596.

The receiver is, therefore, entitled to have the premiums which the appellants have agreed to pay applied in liquidation of the company's obligations generally; and these premiums, although recovered in the name of the company, are affected by a trust for that purpose. Assuming then that the appellants have a just claim to recover a proportionate part of each premium from the company under the clauses relied upon that claim in the circumstances can only be recognised as a right to rank *pro ratâ* upon the assets available for the purpose of liquidating it together with other claims of equal rank, and it is a claim which must be presented and passed upon in the insolvency proceedings.

ANGLIN, J.:—The insurance policies in question should, in my opinion, be construed according to the law of the State of Massachusetts. According to that law, as proved in this case, I agree that there was not a cancellation of these policies within the meaning of the clauses in them providing for a rebate or return of premium on cancellation. For the reasons stated by Mr. Justice Russell [3 D.L.R. 771] I would dismiss this appeal with costs.

Anglin, J.

BRODEUR, J.:—I would dismiss this appeal with costs.

Brodeur, J.

Appeal dismissed with costs.

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New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, and Barry, JJ. November 22, 1912.

1. PLEADING (§ I U—155)—MISJOINDER—TORT AND EX CONTRACTU CAUSES —DIFFERENT DEFENDANTS—TARDY OBJECTION.

Where a plaintiff misjoins two separate causes of action (tort and *ex contractu*) against different defendants, either defendant ordinarily may force the irregular plaintiff to his election between the two causes; but where both defendants, without taking objection, proceed to trial, and, after separate verdicts against them, one acquiesces, while the other then for the first time objects to the misjoinder on his appeal for a new trial, the objection will not be given effect, particularly where the verdict against the appellant was trifling and the justice of the case is best met in this way.

[See N.B.S.C. Rules (1909), O. 16, rules 1, 4 and 11.]

Statement

APPEAL by defendant Andrew Ferguson from judgment at trial awarding plaintiff damages for ousting her from the premises in question, to which she was entitled to an undivided part as tenant in common.

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

W. B. Wallace, K.C., for the defendant Andrew Ferguson, appellant.

J. D. Phinney, K.C., for the plaintiff, respondent.

Barker, C.J.

BARKER, C.J. (oral):—My view in this matter is that the principal, in fact the only, question to cause very much discussion, is as to the point that these causes of action had been improperly joined in the one suit. If either of the defendants objected to the joinder the point should have been taken at an early stage in the proceedings, because it must have been known before the cause was tried. The application should have been to stay the proceedings, unless the plaintiff would elect upon which cause of action she intended to proceed. What the effect of such an application made now would be, I am not prepared to say, but I think the only order we should make on the motion before the Court is to refuse to grant a new trial. To grant a new trial would not get rid of the difficulty. The parties would be in precisely the same position as they are now, except that the verdict would be set aside. There is no judgment signed yet; and if the defendant asking for a new trial desires to do so, it is open to him to move that the proceedings be stayed until the plaintiff elects for which cause of action he will proceed. Whether such a motion would be entertained at this stage of the case I am not prepared to say, but I think the mistake in the procedure is no ground for a new trial.

Landry, J.

LANDRY, J. (oral):—I agree that these causes of action were improperly joined in the beginning, but I think it is in the interests of all parties that the verdict should not be disturbed. One

of the defendants is satisfied with the verdict; the plaintiff seems to be satisfied with it, and the defendant who asks for a new trial is the one who had a small verdict entered against him, and I think it would not be to his advantage to grant a new trial as against him where the verdict is so small, as the result in all probability would be the same and at much more cost to himself.

White, J.

WHITE, J. (oral):—I agree that the causes of action were improperly joined, but as the objection was not raised until after the verdict, and then was raised only in the form of a motion for a new trial, which would not rectify the error or make the proceedings regular, or, in fact, as far as I can see, give any advantage or relief to the party complaining, while it would put to considerable disadvantage the other defendant, who is not complaining here, I think this motion should be refused. In doing that I do not say that there may not be some other redress that the parties may obtain. It will be time enough to decide that question should it arise.

McLeod, J.

MCLEOD, J.:—This action is brought by Sarah A. Wathen against Andrew Ferguson, and John Ferguson and Mary A. Ferguson, his wife. The plaintiff claims in the first place against Andrew Ferguson damages for trespass for breaking and entering certain premises, consisting of a lot of land with a house and barn on it, situated at Harcourt, in the county of Kent, then in her possession and which she claims was owned by her. And she claims in the alternative against John Ferguson and Mary A. Ferguson, his wife, for damages for breach of covenant of title.

The facts are shortly as follows: The premises in question were purchased by the plaintiff from the defendant John Ferguson on November 2, 1910, and the deed of conveyance from John Ferguson and wife to the plaintiff contained a covenant for a good title.

On and prior to November 19, 1888, the property was owned by one Hannah Elizabeth Graham, wife of James Graham, and their son, Oswald Smith Graham, as tenants in common. Hannah Elizabeth Graham and her husband James Graham had four children, the said Oswald Smith Graham, and William T. Graham, Harrison T. Graham and Hattie H. Godfrey.

On November 19, 1888, James Graham and the said Oswald Smith Graham joined in a mortgage of the whole of the property to one Kennedy F. Burns to secure the payment of eight hundred and fifty dollars. Mrs. Graham was not a party to this mortgage.

Kennedy F. Burns died in or about the year 1898, and by his will devised the lands and premises in question to Patrick J. Burns and appointed him executor of his will. Hannah Elizabeth Graham died intestate in or about

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the year 1892, leaving her surviving her husband, the said James Graham, and the four children already mentioned. In September, 1895, the said Oswald Smith Graham by deed conveyed all his interests in the property to the said Patrick J. Burns. In May, 1902, Patrick J. Burns by deed made a conveyance of the whole of the property to the defendant John Ferguson.

On behalf of Andrew Ferguson it is claimed that this deed would not convey the interests of three of the children of Hannah Elizabeth Graham, that is, the interests of William T. Graham, Harrison T. Graham, and Hattie H. Godfrey. John Ferguson, however, appears from the evidence to have been in possession of the whole of the property and to have collected the rents from it from the time he purchased to the time he sold to the plaintiff.

On or about August 19, 1903, William T. Graham, Harrison T. Graham and Hattie H. Godfrey, three of the heirs-at-law of Hannah Elizabeth Graham, conveyed their interests in the property to their father, James Graham, and he, on July 29, 1910, conveyed the interests so obtained by him to his son Harrison T. Graham.

The property was then owned as follows: One undivided half and one undivided quarter of the other half by the plaintiff; the other interests by Harrison T. Graham. The plaintiff from the time she received the deed from the defendant John Ferguson and his wife was in possession of the property and received the rents from it. Some rooms in the house were rented, and some were not.

In December, 1910, and again in April, 1911, the defendant Andrew Ferguson, acting as the agent or lessee of Harrison T. Graham, entered the house, and as the plaintiff claims, took entire possession of the house and property and collected the rents from the tenants and completely dispossessed her; and the learned trial Judge so found.

The defendant Andrew Ferguson and the defendants John Ferguson and wife, appeared separately. The case was tried without a jury, and the trial Judge found against John Ferguson and his wife for a breach of covenant of title, and assessed damages against them at ninety dollars. Against that verdict there has been no appeal. The trial Judge also found that the defendant Andrew Ferguson had absolutely ousted the plaintiff from the premises, to an undivided part of which she was undoubtedly entitled as a tenant in common with Harrison T. Graham, and he assessed the damages at twenty dollars; and it is from this latter verdict that this appeal is taken by the defendant Andrew Ferguson.

On the argument practically two grounds were relied on by the defendant appealing. First, it was claimed that he, Andrew Ferguson, should not have been joined as co-defendant with John Ferguson and his wife, as the causes of action were separate and different against each defendant.

There is no doubt that the causes of action set out in the statement of claim are different and do not arise out of the one transaction. The claim against John Ferguson and his wife was for a breach of covenant of warranty. The right of action in that case arose immediately on the giving of the deed and was not dependent at all on any trespass that might have been committed by Andrew Ferguson. The claim against Andrew Ferguson was simply for trespass, for trespassing on the plaintiff's property, or what she alleged was her property, and dispossessing her of it.

It was claimed that Order 16, rule 4, authorized the joinder of these causes of action. It is extremely difficult to reconcile all the decisions under this rule. Of course it is a copy of the English rule of the same number, and it was formerly held by the English Courts that it related to the joinder of parties and not to the joinder of causes of action. Rule 1, however, of Order 16, was altered by the Rule Committee in 1896, and made to read as at present, and our rule 1, Order 16, is a copy of the English rule so altered. Since the change in this rule 1 it has been held by the English Courts that rule 4 does to some extent deal with joinder of causes of action: see *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Ltd.*, [1910] 2 K.B. 354, at 365; but the causes of action if joined must arise out of the one transaction. Two separate and distinct causes of action against different parties cannot be joined. In this case, as I have said, there are two separate causes of action, one an action of trespass, and the other an action for breach of covenant. I think they could not be properly joined.

In the Annual Practice, 1911, at 179, in notes on Order 16, rule 4, it is said:—

> The general principle governing the joinder of defendants would seem to be that there must be a common question of law or fact in which all the defendants are more or less interested, although the relief asked against them may vary; but that distinct causes of action against different defendants unconnected and not involving any common question of law or fact cannot safely be joined in one action.

But no objection was taken to the misjoinder before the trial or at the trial; the defendants, as I have said, appeared separately and defended and neither objected that there was a misjoinder. The plaintiff moved to make some amendments to her statement of claim, to which counsel on behalf of the defendant Andrew Ferguson objected, but the amendments were properly allowed. It is now too late to take objection to the misjoinder.

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If the objection had been taken at the trial the necessary order could have been made by the learned trial Judge under Order 16, rule 11.

The defendant Andrew Ferguson does not appear to have been in any way prejudiced in his defence from the fact that John Ferguson and his wife were joined with him. It is true both causes of action were tried, but they were tried out fully and no injustice appears to have been done to Andrew Ferguson in consequence of the joinder.

Bullock v. *The London General Omnibus Co.*, [1907] 1 K.B. 264, is a case in which after the verdict an objection was taken to an order made by the trial Judge as to costs, and on appeal one of the defendants took the objection that there had been a misjoinder of parties. Collins, Master of the Rolls, at 270, says:—

> An elaborate argument has been addressed to us upon another point which is said to afford a ground for impugning the order, the point being that there had been a misjoinder of separate causes of action. If in fact there was such a misjoinder, it was for the defendant to take steps to remedy it; no steps were taken, and it is much too late to complain of the irregularity, if there was one.

Cozens-Hardy, L.J., expressed the same opinion.

The next objection was that Andrew Ferguson was acting as the agent or lessee of Harrison T. Graham, who was a tenant in common with the plaintiff, and he entered by authority of Harrison T. Graham, taking possession of the premises as being vacant.

The plaintiff claimed that James Graham and those claiming under him would be estopped from setting up a title to the premises by virtue of the mortgage given to him, James Graham, and Oswald Smith Graham, to Kennedy F. Burns.

The learned trial Judge held that he would not be estopped by that deed. I do not propose to discuss that branch of the case and offer no opinion on it. The learned trial Judge, however, found that Andrew Ferguson had absolutely ousted the plaintiff from the premises and therefore the plaintiff could maintain an action.

It is well established that one tenant in common may maintain an action of trespass against a co-tenant in common if there has been an absolute ouster from possession. It is true that in *Cubitt* v. *Porter* (1828), 8 B. & C. 257, Littledale, J., at 269, expressed some doubt about it, saying that if there had been an actual ouster by one tenant in common, ejectment would lie at the suit of the other, yet he was not aware that trespass would lie, for he said: "In trespass the breaking and entering is the gist of the action; and the expulsion or ouster is a mere aggravation of the trespass, and that therefore if the original entry was lawful, trespass would not lie. But in a subsequent case of *Murray*

et al. v. *Hall et al.* (1849), 7 C.B. 441, the Court distinctly held that if there was an actual ouster trespass would lie. Coltman, J., in delivering the judgment of the Court, alluded, at 454, to what Littledale, J., had said in *Cubitt* v. *Porter* (1828), 8 B. & C. 257, but did not agree with him, and said:—

It appears, however, to us difficult to understand why trespass should not lie if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established in the case of *Goodtitle* v. *Tombs*, 3 Wils. 118, that a tenant in common may maintain an action of trespass for mesne profits against his companion, it appears to us that there is no real foundation for the doubts suggested.

And the Court held that the action would lie. See also *Stedman* v. *Smith* (1857), 8 E. & B. 1, to the same effect.

That reduces the question simply to one of fact. Did the defendant Andrew Ferguson actually oust the plaintiff from the premises? The learned trial Judge found that he did, and there is ample evidence on which he could so find.

It appears from the evidence that Harrison T. Graham leased the whole premises to Andrew Ferguson, I gather with a view to Ferguson taking possession. Ferguson did go and take possession, prevented one of the tenants from paying rent to the plaintiff and collected the rent himself, and he appears to have acted entirely with a view of taking entire possession of the premises. The learned Judge has so found, and as I have said, the evidence warrants that finding. I think there is nothing in the objections to the admission of evidence.

The appeal should be dismissed with costs.

Barry, J.

BARRY, J. (dissenting):—In this action the plaintiff claims against the defendant Andrew Ferguson for two several trespasses committed upon certain lands and premises of the plaintiff, and the dwelling house and shop thereon, situate in the parish of Harcourt, in the county of Kent, the first of such trespasses having been committed on December 10, 1910, when it was alleged the defendant Andrew Ferguson dispossessed her of a part of the premises and himself entered and continued in possession thereof; and the second of the alleged trespasses having been committed on April 3, 1911, when the same defendant dispossessed her of the remaining part of the premises, and himself entered into the possession thereof; or, in the alternative, the plaintiff claims against the defendants John Ferguson and Mary A. Ferguson, his wife, to recover damages for the breach of a covenant of warranty and good title contained in a conveyance of the same premises from these two defendants to the plaintiff, of date November 2, 1910. This conveyance, which purports to convey a good and indefeasible title in fee simple of the premises in question, was made upon the consideration of $240 and contains the following covenant:—

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And the said John Ferguson and Mary Ferguson, his wife, for themselves, their heirs, executors and administrators, do hereby covenant to and with the said Sarah B. Wathen, her heirs and assigns, that they are lawfully seized of the before granted and bargained premises, and have good right to bargain and sell the same in manner and form as before written, and that they will warrant and forever defend the same unto the said Sarah B. Wathen, her heirs and assigns, against the lawful claims and demands of all persons whomsoever.

The plaintiff claims against the defendant Andrew Ferguson $200 damages in respect of the first and $200 in respect of the second mentioned trespass; or, in the alternative, she claims against the defendants John Ferguson and Mary A., his wife, $400 for the breach of the covenant above set forth.

The case was tried before McKeown, J., without a jury, who found that the defendant Andrew Ferguson had certain rights in the premises which would have to be dealt with as between his lessor (Harrison T. Graham) and John Ferguson's grantee (the plaintiff) and by virtue of those rights, Andrew Ferguson was entitled to exercise some authority and control over the property in question, but not to the extent of ousting the plaintiff from her possession, which the learned Judge finds, as a fact, that he did. The learned Judge therefore arrives at the conclusion that the plaintiff had good cause of action against both defendants—against John Ferguson and wife for the breach of covenant, and against Andrew Ferguson for the ouster of the plaintiff from the premises, to a part of which she was clearly entitled. The learned Judge's findings are summed up in these words:—

In the statement of claim relief is prayed alternatively as between the defendant Andrew Ferguson, on the one hand, and John Ferguson and Mary A. Ferguson on the other. I think rules 4 and 5 of Order XVI. are comprehensive enough to enable me to enter a verdict against both defendants for the separate causes of action. I therefore award damages against the defendants John Ferguson and Mary A. Ferguson in favour of the plaintiff in the sum of $90, having regard to the fact that the price paid by the plaintiff was $240, and she has received one undivided moiety as well as a quarter of the remaining undivided moiety or half of the property, and damages against the defendant Andrew Ferguson in favour of the plaintiff in the sum of $20; and further, I adjudge that the plaintiff do receive from the defendants her costs of suit to be taxed in the usual way against all defendants, and as between the defendants, half such costs to be paid by the defendant Andrew Ferguson, and the other half by the other defendants to the suit.

The result is that the plaintiff and Harrison T. Graham (Andrew Ferguson's lessor) are found to be tenants in common of the premises in question, the former being entitled to five undivided eighth parts, and the latter to the other three undivided eighth parts of the property; and the covenant for title in the conveyance of the premises to the plaintiff having thus failed as to the three undivided eighth parts found to be vested

in Harrison T. Graham, damages to the amount of $90, i.e., three-eighths of the purchase price of $240, are awarded plaintiff for the breach of covenant on John Ferguson and wife's part, and damages to the amount of $20 are awarded against the defendant Andrew Ferguson for his disseisin or complete ouster of the plaintiff from the premises in which she certainly had some rights as a tenant in common.

I understand it to be now conceded that the plaintiff and Harrison T. Graham are seized of and entitled to the premises as tenants in common, and that the learned Judge's finding as to the respective interests of the tenants in common is not disputed. The defendants John Ferguson and wife are, apparently, satisfied with the verdict, because they say nothing against it, but the defendant Andrew Ferguson appeals against the verdict upon several grounds, only two of which I shall mention:—

1. The causes of action set out in the plaintiff's claim, being separate, and against different defendants, the said defendants cannot be joined as co-defendants; and

2. The defendants are improperly joined in the alternative, and a verdict cannot be entered against both defendants for the separate causes of action as found by the Judge, and a judgment cannot be entered against both, as the action is brought in the alternative.

Under these objections, the question for determination is whether under the rules of pleading prescribed by the Judicature Act these two separate and distinct causes of action against different defendants can be joined in the same action. That they are separate and distinct causes of action against different defendants appears to me to admit of no doubt. The cause of action against Andrew Ferguson arises *ex delicto* and is for a trespass, or rather two distinct trespasses, i.e., in ousting the plaintiff from that possession and right of ownership which she, as a tenant in common, had in the premises in question. The other two defendants, John Ferguson and Mary, his wife, were in no way concerned with the acts of dispossession committed by the defendant Andrew Ferguson against the plaintiff, nor were they, so far as I can see, interested in the result. It might also be noted that, although bearing the same surname, John and Andrew Ferguson are in nowise related. The cause of action against John Ferguson and wife, on the other hand, arises *ex contractu*, and is for a breach of the covenant of warranty and good title contained in the conveyance of the premises from these two defendants to the plaintiff, and the other defendant had nothing to do with either the making of the covenant or its breach. The statement of claim itself, as I have already noticed, plainly shews this to be so, for it in terms sets up two distinct causes of action against different defendants, and claims, not against both defendants, but, in the alternative, against one or the other of them. And the learned Judge, in his

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judgment, proceeds upon the footing of their being two distinct causes of action, and assesses the damages separately and apportions the costs between them.

I think rules 4 and 5 of Order 16 must be read in connection with rule 1 of the same Order, and that in construing those rules, rule 7 of the same Order ought to be considered. Where a plaintiff has but one cause of action, which entitles him to a judgment against either one of two defendants, but not against both, he may join the two on the same writ as defendants in the alternative and so determine which of them is liable. (O. 16, r. 7.) In *Thompson* v. *London City Council*, [1899] 1 Q.B. 840, plaintiffs were owners of a house which fell down in consequence, as they alleged, of negligent excavation by defendants of adjoining land. Defendants denied the alleged negligence, and intimated by their defence that they would, if necessary, contend that the injuries were caused wholly or in part by the Central London Railway, who were excavating a large shaft for one of their stations close to the premises, and by the negligence or default of the New River Company in leaving their water-main at a point in front of the premises, unstopped, or insufficiently or improperly stopped. Plaintiffs thereupon applied to add the New River Company as defendants under O. 16, r. 7, but the application was refused on the ground that there was no transaction common to the London County Council and the New River Company, out of which plaintiffs' grievance was alleged to have arisen.

This division was based upon a definite judgment in the House of Lords, *Sadler* v. *Great Western Railway Co.*, [1896] A.C. 450, which was an action against two defendants, and the statement of claim alleged that each of the defendants by their several acts, and both of them by their combined acts, obstructed the plaintiff's access to his premises, and claimed damages against them and each of them and an injunction, but it was held that the action could not be maintained in this form, and that one of the defendants must be struck out. Lord Halsbury, L.C., in summing up his judgment in the case, at page 454 of the report, says:—

> The whole point here is this. The pleader having set out the separate causes of action, which he has carefully and accurately described as separate causes of action, how can he combine these separate causes of action so as to bring one action against two defendants, in respect of their several liability on separate causes of action? It seems to me that it is impossible to maintain such a proposition.

Lord Watson said:—

> I take the same view. It is perfectly obvious that the statement of claim for the appellant sets forth two separate and distinct causes of action against two separate defendants. I do not think that upon any fair construction of his pleadings there is set forth any joint claim against the defendants. In these circumstances it has been painfully apparent

from first to last of the learned argument we have heard, that the contention of the appellant (i.e., that the causes of action were properly joined) is not only unsupported by authority, but is in the teeth of authority.

Order 16 of our own Judicature Act includes the alterations made in r. 1 of that Order, in England, in October, 1896. Before the alteration, *Sadler* v. *Great Western Railway*, [1896] A.C. 450, was the governing authority as to the joinder of defendants under r. 4, O. 16; but it is said (Annual Pr. 1912, 219) that this is no longer so. Rule 1 of O. 16 in terms permits the joinder of plaintiffs having different causes of action, and although r. 4, which relates only to the joinder of defendants, has not been altered in terms, its construction has, by reason of the alterations made in r. 1, been greatly enlarged in effect.

Stroud v. *Lawson*, [1898] 2 Q.B. 44, is a case decided since the alteration in the rules. In that case the plaintiff in his statement of claim, on his own behalf claimed damages from the defendants, who were directors of a company, for inducing him by fraud to purchase shares in the company, and stated in his particulars of the alleged fraud that the defendants had declared and paid a dividend on the shares of the company when there were no profits; and he claimed in the same action, on behalf of himself and all the other shareholders of the company, a declaration that the payment of the dividend as aforesaid was *ultra vires* and illegal, and judgment against the defendants for repayment of the amount of the dividend to the company. It was held by the Court of Appeal that the plaintiff was not entitled under O. 16, r. 1, to join both causes of action in one action, as the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders, did not arise out of the same transaction or series of transactions within the meaning of the rule mentioned. And the statement of claim was ordered to be struck out, unless the plaintiff elected between the two causes of action included therein.

In a case which was relied on by the plaintiff, and which, in some respects, resembles the case here, it appeared that the Rev. A. D. Wagner, by an agreement made in December, 1865, agreed to grant to the lessors of J. and A. Stenning a lease for ninety-nine years of certain lands at Brighton. By another agreement made in May, 1874, Mr. Wagner agreed to demise to S. Child a piece of land adjoining the land so demised to J. and A. Stenning, and on the 24th of August, 1876, an indenture of demise, with the usual covenants, was accordingly made between Mr. Wagner and Child. J. and A. Stenning claimed under the first agreement a right of way over the piece of land demised to Child, and Child brought his action against Mr. Wagner and J. and A. Stenning, claiming an injunction and damages against J. and A. Stenning, and in the alternative, if the Court should be

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of opinion that J. and A. Stenning were entitled to a right of way, then for damages against Mr. Wagner under the covenant for quiet enjoyment in the lease to Child.

It was decided on demurrer that the two defendants were rightly joined in the action: *Child* v. *Stenning* (1877), 5 Ch.D. 695; but on the trial before Fry, J., 7 Ch.D. 413, his Lordship held on the construction of the demise to the lessors of J. and A. Stenning, that they had the right of way claimed by them, and gave judgment for them with costs. Counsel for Wagner then admitted the right of the plaintiff to indemnity, and damages were assessed against Mr. Wagner at £400; but his Lordship refused to order Wagner to pay to the plaintiff the costs he had incurred by making J. and A. Stenning defendants.

Where a plaintiff has but one cause of action which entitles him to a judgment against either A or B, but not against both, he may, as we have seen, under O. 16, r. 7, join A and B on the same writ, as defendants in the alternative, and so determine which of them is liable, but in such a case he will probably have to pay the costs of the defendant who is held not liable, though he may, in a proper case, recover them back again from the defendant who is liable: *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K.B. 533.

It is said in Odgers' Pl. and Prac., 6th ed., p. 27, that

> Those who look only at the language of the rules would infer that greater liberty existed in the matter of joining several defendants. "It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest": Order 16, r. 5. "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment": Order 16, r. 4.

But the wide and general terms of these rules have been restricted by the decisions I have cited. And the rules relating to the joinder of defendants have not been modified in any way since the decision in *Sadler* v. *Great Western Railway Co.*, [1896] A.C. 450, to make them correspond to the amendment made in the rule as to joinder of plaintiffs (Order 16, r. 1), so that the decision in that case remains clear law: *Gower* v. *Couldridge*, [1898] 1 Q.B. 348.

A late case upon the question under discussion, and one in which the cases I have mentioned, and many more besides, were considered and commented upon, is *Campania Sansinena, etc.* v. *Houlder*, [1910] 2 K.B. 354. In that case Buckley, L.J., bases his judgment upon grounds which enabled him to avoid laying down any general principles, whilst the views of Vaughan Wil-

liams, L.J., and Fletcher Moulton, L.J., upon the general question would seem to be widely divergent. The rule deducible from the facts and judgment in the case is, that the power to join several defendants in the same action for the purpose of claiming relief against them severally or in the alternative under O. 16, r. 4, is not confined to cases in which the causes of action alleged as against the several defendants are exactly identical, but extends to cases where the subject-matter of complaint as against the several defendants is substantially the same, although the causes of action as against them respectively are, to some extent, based on different grounds. The Court, in referring to *Thompson* v. *London County Council*, [1899] 1 Q.B. 840, distinguished, but did not denounce it, so that it cannot be regarded as overruled.

I am therefore disposed to think, upon a fair consideration of the authorities, although some of them are difficult to understand and in some cases almost confusing, that there has been an improper joinder of defendants here, and I do not see how, under the rules of procedure which have been enacted for our guidance, the verdict can stand, unless it can be said that O. 70, r. 2, cures the misjoinder. I base my judgment upon *Sadler* v. *Great Western R. Co.*, [1896] A.C. 450, and *Thompson* v. *London County Council*, [1899] 1 Q.B. 840, neither of which cases, as I have already pointed out, has been overruled, although they have not been allowed to remain wholly unquestioned by text-writers. The subject-matter of the complaints against the several defendants here is in no sense the same. There is no set of circumstances common to the two defendants, treating John Ferguson and his wife as one, out of which plaintiff's grievances are alleged to have arisen. Neither is there any question of law common to both. The case does not, in my opinion, come even within *Campania Sansinena* v. *Houlder*, [1910] 2 K.B. 354, which goes further perhaps than any other in the direction of allowing the joinder of diverse causes of action, because here the subject-matter of the complaints against the different defendants cannot, by the most strained construction, be said to be even substantially the same.

If, therefore, I am correct in the conclusion that these defendants and these causes of action were improperly joined, it follows that, had a proper application been made by either defendant, the plaintiff's claim would have been struck out unless she elected to proceed against one of the defendants and released the other. But the defendants have gone down to trial without objection to either the joinder of parties or the joinder of causes of action. This is not a case where the plaintiff, being in doubt under the facts known to her, as to which one of two defendants is liable, brings her action in the alternative against both in order to ascertain which one is liable. The statement

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of claim shews a separate and distinct cause of action against each, based upon alleged facts not common to both. The joinder is not, I think, warranted by the rules, and if the joinder of the defendants is not warranted by the rules, this is not a mere irregularity of which the plaintiff can now take advantage under Order 70, rule 2; per Lord Herschell in *Smurthwaite* v. *Hannay*, [1894] A.C. 494, at 501. It is something more than an irregularity and is not, in my opinion, cured by the verdict.

At first view, *Bullock* v. *The London General Omnibus Co.*, [1907] 1 K.B. 264, might appear to be at variance with this conclusion, because it was there held that after verdict and judgment it was too late to object to the jurisdiction to try the action on the ground that torts were alleged severally against the two defendants. But the facts were entirely different from the facts in the case before us. The action was brought to recover damages for injury sustained by the plaintiff through a collision between an omnibus and a cart. The omnibus belonged to one defendant and the cart to the other. The statement of claim alleged that the injury to the plaintiff was caused by the joint negligence of the two defendants, and it also alleged in the alternative, negligence on the part of each defendant causing the injury. At the trial the jury found negligence on the part of the defendant first named on the record, and negatived negligence on the part of the other defendant. The Judge entered judgment for the plaintiff against the first named defendant, and judgment for the successful defendant, with costs in each case. Besides there being an allegation of the joint negligence of the two defendants, the facts in the case were common to both, and judgment was entered against but one of them, the successful defendant getting his costs.

The plaintiff was at fault in joining the two causes of action in the one statement of claim, and the defendants also must be said to be at fault, because the statement of claim shewed plainly upon its face separate and distinct causes of action against different defendants, and upon the application of either of them these causes of action would assuredly have been severed and the plaintiff put to her election as to which defendant she would proceed against. And I can see no other course open than the adoption of that procedure now. I am therefore of the opinion that the verdict and judgment herein should be set aside, and the plaintiff put to her election as to which cause of action she will proceed with and which defendant she will strike out of the record. As to the cause of action abandoned, she can commence *de novo*, or pursue such course as she may be advised. In the circumstances there should be no costs to either party either here or in the Court below.

Appeal dismissed, BARRY, J., *dissenting*.

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Judicial Committee of the Privy Council. Present: Lord Macnaghten, Lord Atkinson, and Lord Moulton. December 16, 1912.

1. PARTNERSHIP (§ V—20)—RIGHTS OF MEMBERS AS TO EACH OTHER — DIVERTING PARTNERSHIP FUNDS TO PRIVATE INVESTMENTS, LIABILITY THEREFOR.

Under the Partnership Act, R.S.M. (1902), ch. 129, sec. 24, unless the "contrary intention" appears, property bought with money belonging to a partnership firm is deemed to have been bought on account of the firm; and in a business carried on by the plaintiffs and the defendant as builders' contractors and brick-makers in a partnership at will, where the defendant, without the consent of his co-partners, from time to time during the partnership diverted certain moneys from the resources of the partnership firm and used such moneys in certain outside speculations and investments out of which certain profits were realized, the principle of sec. 24 is applicable and the benefit of such speculations and investments accrues to the partnership firm.

[*Kelly* v. *Kelly*, 20 Man. L.R. 579, reversed.]

2. PARTNERSHIP (§ V A—21)—ACCOUNTING—PARTNER'S PROFITS FROM INVESTMENT OF PARTNERSHIP FUNDS—"CONTRARY INTENTION" CONSTRUED.

Under the provisions of sec. 24 of the Partnership Act, R.S.M. (1902), ch. 129, the "contrary intention" which may waive or defeat the right of the partnership firm to the beneficiary interest accruing from the outside speculations and investments of a partner diverting the resources of the firm to such speculations and investments, means a "contrary intention" concurred in by the other members of the partnership firm and not that of the speculating partner alone.

[*Kelly* v. *Kelly*, 20 Man. L.R. 579, reversed.]

Statement

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Manitoba, reversing (Cameron, J., dissenting) the judgment of Macdonald, J., at trial in favour of the plaintiffs, *Kelly* v. *Kelly*, 20 Man. L.R. 579.

The appeal was allowed.

Sir Robert Finlay, K.C., *J. E. A. Connor*, K.C., and *R. O. B. Lane*, for plaintiffs, appellants.

S. S. Taylor, K.C., and *J. S. Ewart*, K.C., for defendant, respondent.

The judgment of the Board was delivered by

Lord Macnaghten.

LORD MACNAGHTEN:—On December 13, 1909, Macdonald, J., made a decree for the dissolution of the partnership of Kelly Bros. and Co., builders, contractors and brick manufacturers, as from April 1, 1909. The partners in the firm were the plaintiffs, Michael and Martin Kelly, and their brother, Thomas Kelly, who was defendant in the action. The business, which began in a small way, though it ultimately became very prosperous, belonged originally to Michael and Thomas. In 1886 they took Martin into partnership with them. He received a one-fourth interest. The other two had three-eighths each.

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There were no articles, nor was there any agreement in writing defining the terms of the partnership. Up to a short time before the institution of this action the three brothers worked together in perfect harmony. Then differences arose as to certain speculations and investments which Thomas claimed as his separate property, while the two others maintained that they belonged to the firm, having been made, as they alleged, with money of the partnership. The trial lasted 22 days. Every item in dispute was investigated in open Court and keenly contested. The view of the learned Judge was that Thomas Kelly intended all along to keep the profits of these speculations and investments to himself as his separate property, but, inasmuch as they were made by the use of partnership money without the consent of his co-partners he was accountable to them for the firm. The decree contained special directions with regard to all the items in dispute.

From this decree Thomas Kelly appealed to the Court of Appeal for Manitoba. The Court, consisting of Richards, Perdue, and Cameron, JJ.A., by a majority reversed the decree appealed from so far as it was adverse to Thomas Kelly. [*Kelly v. Kelly*, 20 Man. L.R. 579.]

Richards, and Perdue, JJ.A., who formed the majority, both held that Thomas was justified in using the moneys of the firm for his private purposes because his brothers, who had absolute and unlimited confidence in him, left the management and direction of the concern in his hands without, in any way, interfering with his discretion, and so clothed him with authority to do what he pleased in dealing with the assets of the firm, provided he did not draw upon its resources so as to hamper or embarrass its operations.

The Manitoba Partnership Act is a reproduction of the Imperial Act (1890), sec. 24, of the Manitoba Act, which is word for word, the same as sec. 21 of the Imperial Act, declares that

> unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Perdue, J.A., disposed of an argument founded upon that section without much difficulty; he said:—

> It appears to me that the intention to be considered in the present case is that of Thomas Kelly alone. It is admitted by all that he did not consult his co-partners in making the purchases, and that they had no knowledge of them until after the purchases had been made. Michael and Martin could not, therefore, have exercised intention in respect of any of the transactions. The properties were not bought to be used in the trade. They were bought by one partner with the intention of holding them as his separate estate. . . .

Richards, J.A., who agreed with Perdue, J.A., did not go quite so far:—

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"In my opinion," he observes, "the present case is governed by the words in sec. 24 of the act: 'Unless the contrary intention appears.'"

The contrary intention, to my mind, is clearly shewn. Whether it is sufficient that such "contrary intention" should be that only of the partner drawing the firm's money for his private speculations, or must be that of the entire firm, I do not now propose to discuss, although the principle on which *Re Harris*, 2 V. & B. 210, 1 Rose 129, 437, and *Ex parte Hinds*, 3 DeG. & Sm. 613, 14 Jur. 286, were decided, would seem to be that in such a case as the present the intent of the drawing partner is sufficient. To my mind, the facts shew most distinctly that Thomas was to be the sole arbiter, at least so far as concerned the withdrawing of profits for private uses, and that this was fully understood, and, at least, tacitly assented to, by both of the plaintiffs. I, therefore, am of the opinion that it has been shewn that the intent of all the parties was that Thomas should be at liberty to use the funds as he has done. I am unable to agree with the learned trial Judge that he was in any way in a fiduciary position towards the plaintiffs with regard to these drawings."

Cameron, J.A., the other member of the Court of Appeal, took a different view. In the result he agreed with the trial Judge, though he did not agree with some of the views expressed by that learned Judge. His judgment of the statement of the relevant facts and the statement of the law applicable to those facts leaves nothing to be desired. Their Lordships concur in it entirely.

The learned Judge begins with a careful review of the facts from which the intention of the partners as to the terms of their partnership was to be gathered. His conclusion on this matter is expressed in the following paragraph.

It was a partnership at will, out of the profits of which the partners were at liberty to draw monthly or twice a month, or oftener, if required, or convenient, such sums as might be severally necessary for their maintenance and living expenses, such withdrawals to be approximately according to the proportionate interest of each partner in the partnership. The remaining profits after such withdrawals, were to be carried forward as dividends as earned but undivided, constant accretions to the resources or capital account of the firm, without any provision being made or contemplated as to the ultimate division and distribution of these resources. That this organization was, throughout its existence, indebted for its success to the capacity and personal qualities of the defendant, is, to my mind, beyond question. But that fact cannot alter the relations of the partners, their rights and liabilities as to each other, if the terms of the partnership were as I have stated. The defendant's leadership in the firm was conceded by his brothers from the first, and there occurred nothing to disturb their unbounded confidence until the profitable real estate speculation became known. The contention that the defendant made the firm in the first instance, furnished it with money, founded and carried on that credit with its bankers that was absolutely necessary for its existence as an operating concern, dealt with the various problems arising out of securing government and corporation contracts, and skilfully conducted the management of the heavy contracts undertaken by the firm is a contention

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that I think can be fairly, if not unreservedly, admitted. It can also be accepted that his conduct towards his brothers was generous. But all these considerations, accepted as established to the letter, cannot alter, in the slightest, the legal relationships established when once the three entered upon their business as builders, contractors and brick-makers, under the terms of partnership I have above set forth.

It may be the belief of the defendant, looking at matters in retrospect, that the rule as to drawing promulgated by him was not intended to apply to himself. But if that was the fact, the others did not know it. If that was his intention he does not appear to have communicated it to them, but, on the contrary, to have acted in conformity with the understanding as I have stated it. The plaintiffs accepted the arrangement, acted pursuant to it, and evidently regarded it as an agreement binding on themselves and the defendant. And that is the conclusion to be drawn from the evidence as I read it.

Under these circumstances, was it open to the defendant by virtue of the unfettered discretion confided in him by his brothers, without their consent expressed or implied, to divert moneys from the resources of the firm and use it in private speculation? To borrow from the language used in corporation law, would not such action on his part be *ultra vires* and in violation of his obligations as a member of the co-partnership, constituted as this co-partnership was in my view as above set out?"

The learned Judge then goes through the various items in dispute, and shews, as indeed was demonstrated to their Lordships on the hearing of the appeal, that all the important items in controversy were entered in the books of the firm, which were kept under the direction of Thomas Kelly and entered up from information supplied by him and by no one else, and also appear in certain annual statements signed by the three partners as part of the available resources of the firm. Finally, he comes to the conclusion that, with the exception of three items of comparatively trifling amount, as to which his opinion was that the proof was not sufficient, the special directions given by the trial Judge should stand.

Their Lordships think it would serve no useful purpose to repeat the argument of Cameron, J.A. It is, in their Lordships' opinion, in every respect satisfactory and conclusive.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, the order of the Court of Appeal discharged with costs, except so much of it as dismissed the cross-appeal of Martin Kelly, and the decree of the trial Judge restored, subject to the eleventh paragraph being varied by excluding from the stock speculations therein referred, to those relating to the stocks of the Chicago Subway Company, the Hudson Bay Company, Limited, the Northern Pacific Railway Company, and the Louisville and Nashville Railway Company, and confining the declaration therein contained to such speculations, investments, and ventures of the respondent as were entered into by him with the moneys of the partnership, and sub-

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ject, also, to the variations contained in paragraph 2 of the judgment of the Court of Appeal as to the costs of the issues raised by the appellant Martin Kelly, in relation to the Manitoba Construction Company's stock. Their Lordships will further advise His Majesty that it should be referred to the Master to inquire whether any, and, if so, what, sums were either paid by the respondent out of his own moneys in respect of the properties in question in this action, or debited to his account in the partnership books in respect of those properties, and in taking the partnership accounts he ought to be credited with any sums found to have been so paid or debited.

As regards the costs of this appeal, under the peculiar circumstances of the case, their Lordships do not propose that any order should be made.

Appeal allowed.

Re CANADIAN PACIFIC R. CO. and TOWN OF WALKERTON.

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Ontario Supreme Court, Middleton, J., in Chambers. February 4, 1913.

1. COSTS (§ II—34)—AGREEMENT FOR COMPENSATION—SCOPE AS TO COSTS "INCIDENTAL TO THE REFERENCE."

Where a railway company agreed with a town corporation to pay the latter any damages accruing by reason of the building of a bridge by the railway company, such damages to be ascertained in a summary manner by a Referee appointed by the Dominion Railway Board for the purpose, and subsequently pursuant to this agreement an application was made to the Board and a referee appointed, in which order of appointment it was provided "that the costs of and incidental to the reference, including those of the Referee shall be in the discretion of the said Referee," the Referee has power to award the costs of the application to the Board, notwithstanding the general policy of the Board not to award costs of proceedings before it.

[*Curry* v. *Canadian Pacific R. Co.*, 13 Can. Ry. Cas. 31, criticised; *Re Bronson and Canada Atlantic R. Co.*, 13 P.R. (Ont.) 440, applied; see also *Re False Creek Flats Arbitration*, 8 D.L.R. 922.]

Statement

APPEAL by the railway company from the taxation against the company of the town corporation's costs awarded by a Referee.

The appeal was dismissed.

Angus MacMurchy, K.C., for the railway company.
G. H. Kilmer, K.C., for the town corporation.

Middleton, J.

MIDDLETON, J.:—The question raised is a narrow one, of some difficulty, but of no great practical importance.

The Dominion Railway Board in *Curry* v. *Canadian Pacific R. Co.*, 13 Can. Ry. Cas. 31, has determined that, as a matter of general policy, it will not award costs of any proceedings taken before it.

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I am not concerned with the wisdom of this decision, opposed as it is to the principles laid down in other high places: see, for example, the statement of Sir George Jessel in *Cooper* v. *Whittingham* (1880), 15 Ch.D. 501, and in *Johnstone* v. *Cox* (1881), 19 Ch.D. 17, and of Lord Esher in *The Monkseaton* (1889), 14 P.D. 51.

By an agreement made the 30th December, 1908, the railway company agreed with the town corporation to pay the town corporation, and all persons who might be injured by the construction of a railway bridge and embankment through the town, all damages sustained from flooding which it was anticipated might be occasioned thereby; the damages to be ascertained in a summary manner by a Referee to be appointed by the Board for the purpose, upon the application of the company or the town corporation or of any person injured.

Pursuant to this agreement, an application was made to the Board, and, on the 2nd May, 1912, a County Court Judge was appointed Referee. It was provided "that the costs of and incidental to the reference, including those of the Referee, shall be in the discretion of the said Referee." The Referee has found damages and has awarded to the town corporation against the railway company all the costs over which he has power.

It may be that unintentionally the Board has departed from the general principle laid down in the case of *Curry* v. *Canadian Pacific R. Co.*, 13 Can. Ry. Cas. 31. My function is simply to determine the meaning of the words used, quite apart from any presumption arising from the general policy of the Board; and I think that the Taxing Officer was right in giving to these words a wide meaning, and that they are sufficient to include the costs of the application to the Board for the appointment of the Referee.

There was an agreement for a reference. The only thing to be done, when a claim was made, was to apply to have the Referee named. It seems to me clear that the costs of this application fall within the general expression "the costs of and incidental to the reference."

In *Re Bronson and Canada Atlantic R. Co.*, 13 P.R. (Ont.) 440, the Chancellor indicates the general principles which here apply. Upon the taxation held under his order in that case the costs of the appointment of the arbitrators were allowed as falling within the expression "all costs incidental to the arbitration."

The appeal will, therefore, be dismissed with costs, which I fix at $10.

Appeal dismissed.

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Feb. 5.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, and Ritchie, JJ. February 5, 1913.

1. PLEADING (§ I S—149)—STRIKING OUT PART OF PLEADING ON GROUND OF FALSITY—MOTION ON AFFIDAVITS.

In an action to recover a balance alleged to be due under an acceleration clause of a contract making the entire balance due and payable on default in the payment of any instalment, a paragraph in defendant's defence denying the making of the contract alleged, is properly struck out under the Nova Scotia practice as being false, where the fact of the execution of the contract is established by affidavit and not denied, and the defendant has further pleaded, by another paragraph of the defence, that when he signed the contract, the fact of its containing an acceleration clause was not disclosed to him, and that he could not read or write in English.

2. PLEADING (§ I S—148)—STRIKING OUT—SUFFICIENCY OF ALLEGED DEFENCE.

A plea, in an action to recover a balance alleged to be due under an acceleration clause of a contract, making the entire balance due and payable on default in the payment of any instalment, that the defendant's signature to the contract was fraudulently obtained by plaintiff's agent, who concealed from defendant the fact that the contract contained such acceleration clause, cannot be struck out on the ground that it discloses no reasonable answer to the action, under the Nova Scotia practice.

3. PLEADING (§ I S—149)—STRIKING OUT PART OF PLEADING—NON EST FACTUM—NATURE DISTINGUISHED FROM EFFECT OF CONTRACT.

A misrepresentation as to an instrument which causes a total misapprehension of its nature by the person who signed it will entitle him to plead *non est factum* in an action on the instrument, but not where the person signing knew the nature of the instrument, but laboured at the time under a misapprehension of the effect or contents of the instrument.

[*Carlisle* v. *Bragg*, [1911] 1 K.B. 489, and *Howatson* v. *Webb*, [1908] 1 Ch. 1, referred to.]

4. PLEADING (§ I S—149)—STRIKING OUT PART OF PLEADING — ENTIRE PLEADING RELIED UPON, WHEN.

Under the modern practice in Nova Scotia, separate paragraphs of a statement of defence are not to be regarded as separate pleas, as was the former practice, but the defendant may rely upon the whole statement of defence.

[*Holmes* v. *Taylor*, 32 N.S.R. 191, cited.]

Statement

APPEAL from the judgment or order of Drysdale, J., at Chambers, striking out pars. 2 and 3 of the defence. Plaintiff's claim was for money due under a contract in writing on or about the 1st day of November, 1911, by which defendant agreed to pay the plaintiff company the sum of $175 in consideration of plaintiff shipping to defendant a computing scale, which was alleged to have been duly shipped and received. Said sum of $175 was to be paid $10 in cash; $25 as an allowance for a scale received by plaintiff from defendant and the balance of $140 as evidenced by a promissory note attached to the contract, in monthly payments of $10 each at the times set forth. There

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was a provision that if on presentation there should be failure on the part of defendant to pay said note in instalments as provided, the full face amount of the contract in writing and of said note should become due and payable. It was alleged that defendant failed to pay three of the instalments and plaintiffs claimed payment of the balance due, $130.

Par. 2 of the defence, set aside, denied the making of the contract alleged, and par. 3 was to the effect that defendant's signature to the contract was fraudulently obtained by plaintiff's agent who concealed from defendant the fact that the contract contained a provision that the full face amount of the contract and of said note should be come due and payable if there should be failure to pay any of the instalments when the same became due.

It appeared from defendant's affidavit that he was born in Russia and lived there until about five years ago, when he came to this country; that his native language was Yiddish and that while he could sign his name in English he could not read the English language.

The appeal was allowed as to paragraph 3, and dismissed as to paragraph 2.

F. L. Milner, for defendant, appellant.
J. L. Ralston, for plaintiff, respondent.

Graham, E.J.

GRAHAM, E.J.:—The defendant acquired from the plaintiff a computing scale for $150 to be paid for on the instalment principle, ten dollars per month.

This instrument contained a clause that if there should be failure to pay any instalment that the full face amount of the contract should become due and payable and the defendant authorized any attorney of the province to enter judgment against the defendant for the entire balance.

The defendant is a native of Russia and his language is Yiddish and although he can now speak the English language he cannot read it. In his affidavit he says:—

> 2. I remember very well agreeing to purchase a scale from the plaintiff's agent and he and I agreed upon the price of the same and that plaintiff should accept in part payment a scale of mine and that I should pay a certain sum down and the balance in monthly payments of ten dollars each to be drawn for by drafts through the Royal Bank of Canada, but we did not agree that if I failed to pay any of the said payments when the same became due the whole of the said balance then remaining unpaid should become due and payable or anything to that effect.
>
> 3. After making the aforesaid agreement with the said agent he asked me to sign a paper and I asked him what it was and he told me it was a form of agreement which I understood to mean the agreement above mentioned and he said he had to have the agreement so

that the company would know how much he sold the scale for or words to that effect, and he did not explain to me that it contained anything about the whole amount becoming due and payable if I made default in paying any of the instalments and I did not know when I signed the said document that it contained anything of that kind. I cannot read the said document.

There was a failure to pay an instalment and the action is brought on the acceleration clause of the instrument to recover the whole amount. The pleader for the defendant apparently was aware of the fine distinction shewn by the cases of *Carlisle* v. *Bragg*, [1911] 1 K.B. 489, and *Howatson* v. *Webb*, [1907] 1 Ch. 537, on appeal, [1908] 1 Ch. 1; namely, when there is a misrepresentation in such a case as to an instrument which causes a total misapprehension of its nature by the person about to sign it, and one which only causes a misapprehension of the effect or contents but the party knows what he is dealing with, there is no well marked dividing line. Of course, when one signs a bond on being told it is a certificate that is an obvious case, it is not his bond. And on the other hand when a man gives a deed of land and everything is all right except a material covenant about which there is misrepresentation that is his deed and it may have to be set aside for the misrepresentation or attacked for fraud and special pleading is necessary.

But there are some instruments which have not well defined names. Agreements of sorts. And it may be difficult to place the misapprehension in one category or the other—cases midway. So in this case the defendant pleaded, as he may do under the Judicature Act, in both ways, as was done in the case of *Carlisle* v. *Bragg*, [1911] 1 K.B. 489. This is the defence:—

2. As to the balance of the plaintiff's claim the defendant says that he did not make the alleged contract.

3. As to the balance of the plaintiff's claim the defendant says in the alternative that he signed the said contract but that his signature thereto was fraudulently obtained by the agent of the plaintiff who represented to the defendant that the said contract required him to pay the said balance of $140 in monthly instalments of $10 each and fraudulently concealed from the defendant the fact that the said contract provided that if there should be any failure to pay any of the said instalment when the same became due that the full face of the amount of the said contract in writing and of said note should become due and payable.

In the case last mentioned, Buckley, L.J., said, p. 496:—

If, on the other hand, he is materially misled as to the contents of the document then his mind does not go with his pen. In that case it is not his deed. As to what amounts to materially misleading there is, of course, a question: *Howatson* v. *Webb*, [1908] 1 Ch. 1, was a case in which the erroneous or insufficient information was not enough for the purpose. In general the proposition is true that if a man acquainting himself with the contents of a deed by ear, and be-

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ing told by another what it contains receives a false information as to its contents in a material respect that is not his deed. As regards the plea of *non est factum*, that is this case, for the jury have found that the defendant was induced to sign this guarantee by Riggs' fraud not knowing that it was a guarantee, so that he was defrauded by the person who brought it to him and did not know what it was. It seems to me that, under those circumstances, it was not his contract.

Of course it is important to remember that the different paragraphs of a statement of defence are not like separate pleas under the former system each self-contained. A defendant relies upon the whole statement of defence: *Holmes* v. *Taylor*, 32 N.S.R. 191.

The plaintiff has attempted to attack the defence by taking each paragraph in detail. In respect to the second one he has moved upon affidavits to strike it out as false, frivolous and vexatious under a provision peculiar to this province. And in respect to the third paragraph, he has moved to strike that out under a rule which we have taken from the English rules, on the ground that it presents no reasonable ground of defence. And both have been struck out and there is an appeal.

Taking the statements in the affidavits of the defendant, I think it is quite probable that the defendant has a defence to the action and that it can be raised under one paragraph or the other.

The practice about setting aside a defence as false is pretty well settled. The falsity is the inquiry. The statements in the defendant's affidavits are alone to be regarded, and if there is any conflict the case must go to trial. Then if the facts alleged are true, but its sufficiency is open to question or is embarrassing or is bad in law and admits of argument the case must go to trial. It would not do to proceed in this summary way if there is anything to be tried, and it is only in that way that a defendant can get to the Court of Appeal: *Banks* v. *Batton*, 30 N.S.R. 386; *Holmes* v. *Taylor*, 32 N.S.R. 191; *Gittleson* v. *Sydney Household Co.*, 40 N.S.R. 381. In these the older cases are cited.

Now, taking the second paragraph, in view of the defendant's affidavit, it happens to be true. The defendant did not contract, as the plaintiff alleges, that on failure to pay an instalment then he would pay the whole amount at once. The parties' minds did not meet there. The memorandum of the contract may be over his signature. Whether that statement in the defence is sufficient in law to enable the defendant to raise that defence which he discloses in the affidavit is another question. That is a very arguable question and I think the judgment of Buckley, L.J., in *Carlisle* v. *Bragg*, [1911] 1 K.B. 489,

tends to shew that it is sufficient. It is not relevant in this application to contend that it is not sufficient because it does not give notice of the defence or is embarrassing, as it may mean that the defendant did not sign the instrument or that it was a different contract that he did sign. That has to be treated in another way. Or the defendant may find at the trial that although it is arguable it is really insufficient to enable him to prove the facts he relies on. Moreover, as to its not being sufficient notice the third paragraph really does give notice of what he means by the defence that he did not make the contract.

Then as to striking out the third paragraph as presenting no reasonable ground of defence, I think it is quite arguable that it is sufficient. Under this rule a pleading will not be struck out if it is merely demurrable. "It must be demurrable and something more." "Something more than demurrable": *Campbell* v. *McLeod*, 24 N.S.R. 66; *O'Connell* v. *Scallion*, 24 N.S.R. 345; *Power* v. *Pringle*, 31 N.S.R. 78. The appeal should be allowed with costs and the paragraphs of the defence restored.

MEAGHER, J.:—I have an opinion reaching substantially the same result. Meagher, J.

RUSSELL, J.:—The defendant was sued on an agreement to purchase a set of scales for $150, ten dollars cash and the balance in monthly instalments, the whole to become due on failure to pay an instalment. The defendant's case is that he was unaware of this provision making the whole amount come due on failure to pay any of the monthly instalments. He was born in Russia and although he has learned to write his name and can speak English he is unable to read the English language. He denies that he agreed to the provision as to the whole amount coming due on failure to pay the instalment. The agreement, as he swears to it, and his affidavit is not contradicted, was simply that he should pay for the scales at the rate of ten dollars per month. After the agreement was made the agent asked him to sign a paper and he asked the agent what it was, whereupon the agent told him it was a form of agreement which he understood to mean the agreement which had already been orally made. The agent did not explain to him that it contained any provision as to the whole amount coming due on failure to pay any of the instalments. Russell, J.

The defence was put on the record in the form of a paragraph numbered 2 that the defendant did not make the alleged contract, and a paragraph numbered 3 set up "in the alternative" the defence based on the misrepresentation of the nature of the document signed by the defendant and the fraudulent concealment of the provision as to the whole amount coming due

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on failure to pay the instalment. Both these paragraphs have been struck out on motion, par. 2 as being false, frivolous and vexatious, and par. 3 as disclosing no reasonable answer to the action.

I think that the appeal from this order must succeed. The defence contained in the third paragraph certainly calls for an answer from the plaintiff in view of the statements contained in the defendant's affidavit. It is quite possible that a cross-examination of the defendant would have shewn that his defence was untenable, but on the face of the statement as it stands it appears that there was an oral agreement for a purchase of the scales and a credit running over fourteen months, that the defendant understood this oral agreement to have been embodied in the writing, which he could not read, and that the agent failed to explain the writing and thus concealed the additional term which entirely altered its effect. Under these circumstances I do not think it was proper to strike out the defence, nor do I see how the defendant could substitute any better form of words to notify the plaintiff of the nature of the defence which he proposed to rely on at the trial.

The second paragraph raises a narrow question of pleading. I should have thought that it merely denied the fact of signing the agreement sued on. I must concede the difficulty presented by the language of Buckley, L.J., in *Carlisle, etc., Bank Co.* v. *Bragg*, [1911] 1 K.B. 489, but I think the case of *Howatson* v. *Webb*, [1908] 1 Ch. 1, draws the distinction by which the effect of this pleading must be governed. If this paragraph 2 stood alone I do not see how it could give the plaintiff any clue whatever to the grounds on which the claim was to be contested. And even if it stood alone I think it must be taken under our system of pleading either to deny only the actual signing of the document, or, at best, the signing of it under circumstances that made it wholly different in nature and not merely different in some of its material details from the agreement the defendant supposed he was signing. But the paragraph does not stand by itself. Read, as it must be, in connection with the third paragraph I do not see how it could possibly mean more to any reader than that the defendant was denying the execution of the document in question. So read the paragraph is untrue and a solicitor might, if it were not struck out, be obliged to bring witnesses at great expense to prove a fact that should never have been put in issue. I therefore think that paragraph 2 was properly struck out, but the appeal must succeed as to paragraph 3.

Ritchie, J.

RITCHIE, J.:—This is an appeal from an order made in Chambers striking out two paragraphs of the defence. The plaintiffs sold to the defendant a computing scale under a writ-

ten agreement, the effect of which is set out in the statement of claim. For a balance of $140, a promissory note was given by the defendant, payable in monthly instalments of $10 each. A clause in the agreement provided that

> if on presentation there should be any failure to pay said note in the instalments as therein provided and as hereinbefore recited or any of said instalments when the same become due that the full face amount of the said contract in writing and of said note should become due and payable.

The statement of claim sets out that three instalments were unpaid, and the action is brought for the full amount of the contract.

The defendant, who is a foreigner, swears that he cannot read English and that his verbal agreement, which he supposed from the representations of the plaintiff's agent was the same as the written agreement, did not have the term in regard to the full amount of the contract becoming due if an instalment was not paid when due. The second paragraph of the defence which is struck out is as follows:—

> The defendant says that he did not make the alleged contract.

Upon proof by affidavit that the defendant did in fact sign the agreement the learned Judge in Chambers struck out the paragraph which I have quoted.

Rule 20 of Order 19 provides as follows:—

> When a contract, promise or agreement, is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the same may be implied in law, and not as a denial of the legality or sufficiency in law of such contract, promise or agreement whether with reference to the Statute of Frauds or otherwise.

The object of the pleadings under the Judicature Act is to ascertain definitely what are the issues between the parties. Jessel, M.R., in *Thorp* v. *Holdsworth*, 3 Ch.D. 637, at 639, said:—

> The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order 19 was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact the whole meaning of the system is to narrow the parties to definite issues and therefore to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

In construing the rules in regard to a question such as the one under consideration it is, I think, clear that the object and meaning of the system referred to by the Master of the Rolls must constantly be kept in mind. If the defendant's contention is sound, then *non est factum* is the only ground of defence neces-

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sary to raise the question that the plaintiff's agent fraudulently concealed from the defendant that the agreement contained a term providing for all the instalments coming due upon the non-payment of one. A defendant by adopting this course could successfully go to trial with the real issue concealed and take the plaintiff by surprise. I thought the day for that sort of thing was past a long time ago. But it is said that we are bound by very high authority, namely, the case of *Carlisle* v. *Bragg*, [1911] 1 K.B. 489, to hold that under *non est factum* the defence set out in the defendant's affidavit could be raised. At the argument I was afraid that we were so bound. I say I was afraid because I think to so hold would do away with one of the most beneficial results of the Judicature Act. On further consideration of *Carlisle* v. *Bragg*, I think it is distinguishable from this case. In *Carlisle* v. *Bragg* the defendant signed a guarantee, having fraudulently been led to believe that it was an insurance application, a document of an entirely different character. He never made the contract sued on at all. The mind did not go with the act because no such contract had ever been suggested to him. But in this case he did make an agreement of the character sued on under which he now has the scale. He did make a contract to buy the scale and he knew he was making it though he did not know of the term to which I have referred. In *Howatson* v. *Webb*, [1907] 1 Ch. 537, and on appeal in [1908] 1 Ch. 1, I think the same principle is involved as in this case, namely, that if a man when he signs knows the character of the document that his property is being dealt with or that he is making a compact he cannot, under the plea of *non est factum*, shew a misrepresentation as to the contents of the document. But if, on the other hand, when a man signs he does not know that his property is being dealt with or that he is making a contract, but the document is of an entirely different character, as in the case of a guarantee being represented as an insurance application, then under *non est factum* the representation can be shewn because there never was any contract at all between the parties.

Warrington, J., in *Howatson* v. *Webb*, [1907] 1 Ch. 544, referring to *Foster* v. *MacKinnon*, L.R. 4 C.P. 704, quotes Byles, J., as follows:—

> It seems plain on principle and on authority that if a blind man or a man who cannot read or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least if there be no negligence, the signature so obtained is of no force and it is invalid not merely on the ground of fraud where fraud exists but on the ground that the mind of the

signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign the contract to which his name is appended.

Then Warrington, J., says:—

I pause then for a moment to remark that it seems to me to be essential to the proposition which is there stated that the contract which the signer means to execute should be of a nature entirely different from the contract in dispute. It will not be contended that if in reading over a contract to a blind or illiterate person, the reader merely omits or mis-states some material clause, the contract is altogether void. It may be voidable or it may be subject to rectification but it is not void.

In the Court of Appeal, Cozens-Hardy, Master of the Rolls, says that the law was stated with absolute accuracy by Warrington, J., and Lord Justice Farwell said:—

Warrington, J., has expressed my view of the law, thus, if a man knows that the deed is one purporting to deal with his property, and he executes it, it will not be sufficient for him, in order to support a plea of *non est factum* to shew that a misrepresentation was made to him as to the contents of the deed. The deed in the present case is not of a character so wholly different from that which it was represented to be as to come within the principle within which Lord Hatherley held that the case before him, *Hunter* v. *Walters*, did not fall.

The principle referred to by Lord Hatherly in *Hunter* v. *Walters*, L.R. 7 Ch. App. 75, at 81, was stated by him as follows:—

It is said that we ought to regard the whole of these instruments as void upon the principle of certain cases such as *Kennedy* v. *Green*, 3 My. & K. 699, where a representation had been made to a party to a deed that the instrument he was about to execute is an instrument of a totally different description from anything which it turns out to be. In such cases the person executing the instrument has not had his mind applied in any way to the words therein contained but to a different state of things; for instance when a person has signed a document believing it to be a certificate whilst it is in fact a bond.

This is a principle upon which *Carlisle* v. *Bragg*, [1911] 1 K.B. 489, was decided. I think it is not applicable to this case because Allen when he signed was not signing a totally different document. He was not giving a document of a wholly different character. He was signing the contract which he had made except that a term was inserted which he had not agreed to. It is the contract under which the defendant is now in possession of the scale. Holding, as I do, that the only issue raised in this case by *non est factum* is whether or not the defendant in fact signed the contract, it follows that the learned Judge in Chambers was right in striking out the paragraph in question because the fact of the execution of the contract is established by affidavit and not denied on affidavit. Therefore there is nothing to try so far as this issue is concerned.

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I think the third paragraph of the defence should not have been struck out. It is only when the Court sees and is satisfied that the pleading discloses a case which cannot succeed at the trial that a summary end is put to the litigation by striking out the pleading as disclosing no reasonable answer.

It was said by Mr. Justice Chitty that a pleading will not be struck out as disclosing no reasonable answer, "unless it is demurrable and something worse than demurrable." It is, I think, quite clear that, tried by this standard, par. 3 should stand, and I do not mean to say that a good enough plea of fraud is not disclosed.

I would dismiss the appeal as to par. 2 and allow it as to par. 3. The appeal, in my view, succeeding in part and failing in part there should be no costs.

Judgment accordingly.

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ELLIS v. ZILLIAX.

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

1. BUILDINGS (§ II—18)—BUILDING RESTRICTIONS—CONSENT TO REMOVE RESTRICTION—CONDITION INADVERTENTLY OMITTED.

Where by the terms of a contract for the sale of land the purchaser took subject to a certain restriction, but subsequently the vendor obtained from his grantor a consent that the restriction be removed subject to a certain condition, which consent was reduced to writing by the agent who brought about the sale, but the condition was inadvertently omitted, the purchaser has no right to have the part of the consent that was reduced to writing performed, unless the condition upon which it was obtained is carried out.

Statement

APPEAL by the plaintiff from the judgment of Middleton, J., of the 6th November, 1912, dismissing without costs a purchaser's action for specific performance of a contract for the sale and purchase of land or for damages for breach of the contract. The judgment required the defendant to return to the plaintiff the sum of $100 paid as a deposit.

The appeal was dismissed.

John King, K.C., for the plaintiff.
E. D. Armour, K.C., for the defendant.

Leitch, J.

The judgment of the Court was delivered by LEITCH, J.:—Action for specific performance. The plaintiff, on the 15th July, 1911, in writing, offered to purchase from the defendant lot No. 14, plan No. 382, on the south side of College street, in the city of Toronto, for the price of $2,600.

N. K. McKibbin, a real estate agent, was authorised by the defendant to sell the property. By the terms of his written offer, the plaintiff was to take the property, subject to any covenants that ran with the land.

The deed from Elizabeth Stewart to the defendant contained a covenant that the grantee and his assigns would not erect or maintain upon the land, during a period of ten years from the 8th June, 1908, any building or erection except one dwelling-house and the usual necessary outbuildings.

The plaintiff refused to take the property with this restriction. He wanted to build stores. The defendant objected to stores; and, after some negotiation, the agent, McKibbin, got the defendant to consent to the plaintiff building an apartment house if it was built out to the verandah line, instead of to the street. The agent reported to the defendant that the plaintiff had agreed to build to the verandah line.

The agent obtained from Mrs. Stewart a consent to the building of an apartment house instead of a single dwelling. The defendant then signed a document in writing consenting to the erection of an apartment house by the plaintiff. This document was signed by the defendant, on condition that the plaintiff was to build to the verandah line only instead of the street line.

The learned trial Judge found as a fact that the plaintiff had agreed to keep his building back to the verandah line, and that the agreement was signed by the defendant on this condition.

A perusal of the evidence satisfies us of the correctness of the view taken by the learned trial Judge. The reason for building to the verandah line, instead of to the street line, was, that this was a residential neighbourhood, and that to build out to the street line would injure other property in which the defendant and others were interested.

The agent, through neglect, omitted to include the condition as to building to the verandah line in the document containing the defendant's consent to the erection of an apartment house.

When the plaintiff learned from the agent that the defendant had signed a consent to the erection of an apartment house, he proceeded to stake out the lines of the excavation for the foundation to the street line, instead of to the verandah line.

The defendant prevented the plaintiff from proceeding with the work. The plaintiff is not willing to carry out the condition that he is to build to the verandah line.

The plaintiff has no right to have the part of the agreement that was reduced to writing performed, unless the condition upon which it was obtained is carried out. The learned Judge at the close of the trial so held; and, as the plaintiff was not prepared to carry out the verbal condition, the action was dismissed without costs. The laxity of the parties in connection with the transaction was, in the opinion of the learned Judge, a sufficient reason for withholding costs.

The appeal should be dismissed with costs.

Appeal dismissed.

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CLARK v. WILSON et al.

Manitoba King's Bench, Galt, J. February 5, 1913.

1. COSTS (§ I—19)—APPORTIONMENT—SUIT FOR PARTNERSHIP ACCOUNTING —ASCERTAINMENT OF ASSETS LIABLE.

In an action by a member of a partnership against other members of the firm asking for an accounting, the costs of the action from the commencement thereof are usually taxed against the partnership assets, that is, the assets remaining after payment of all the partnership debts including balances due to any of the partners.

[*Hamer* v. *Giles*, 11 Ch. D. 942, followed; *Ross* v. *White* (1894), 3 Ch. 326; *Chapman* v. *Newell*, 14 P.R. (Ont.) 208; *Mitchell* v. *Lister* (No. 2), 21 O.R. 318; Lindley on Partnership, 8th ed., 597, referred to.]

Statement

APPLICATION by the plaintiff for further directions.

O. H. Clark, K.C., for the plaintiff.

D. A. Stacpoole, for the defendants.

Galt, J.

GALT, J.:—The plaintiff and defendants were partners in a legal firm doing business at Dawson, in the Yukon, commencing on the 1st day of June, 1900. On July 2, 1910, the plaintiff brought this action alleging that the partnership was dissolved on the first day of May, 1906, and claiming an account of the partnership dealings, etc.

The defendants Wilson and Stacpoole each denied that the partnership continued until May 1, 1906. The defendant Stacpoole claimed special equitable relief against the plaintiff upon the ground that the plaintiff had for many months absented himself from Dawson, and thereby necessitated much additional work by the defendant, which should have been performed by the plaintiff. The plaintiff, in his reply, contested this equitable claim.

The action was tried on March 30, 1911, and the Court found in favour of the plaintiff that the partnership existed down to May 1, 1906. The Court found in favour of the defendants as regards the right to compensation for services, if any, rendered by them, and occasioned by the absence of the plaintiff from the business of the partnership between March 20th and May 1st, 1906, and that in taking the accounts, directed by the judgment, the defendants should be at liberty to submit any claims therefor as and by way of just allowances. The learned trial Judge reserved further directions and the question of the costs of the action until after the Master should have made his report.

The defendant Stacpoole appealed from the said judgment, but the appeal was dismissed with costs.

Under the report subsequently made by the Master on November 29, 1912, it was found, amongst other things, that the profits made by the firm of Clark, Wilson & Stacpoole between

March 20, and May 1, 1906, amounted to the sum of $1,628.08, and that it was proper to allow to the defendants out of this amount the sum of $1,176.50 in respect of the business having been exclusively conducted by them during that period; that the sum of $2,935.77 was due to the plaintiff from the defendants, and that the law library of the firm (which practically comprised all the outstanding assets) had been sold for the sum of $602.50, which had been paid into Court.

The Master also reported, at the request of the plaintiff, that he allowed no interest on the amount found in his favour although the defendants had had the money for an average period of six years, being of opinion that interest is not payable by law under the circumstances. The report has not been appealed from, or otherwise objected to on this motion.

The plaintiff now asks for: (1) payment out to him of the moneys in Court; (2) that each of the defendants be ordered to pay one-half of the balance due to the plaintiff after deducting the amount received from Court; (3) costs of this action up to the hearing; and (4) costs of the appeal by defendant Staepoole.

Item No. 4 is already provided for by the judgment of the Court of Appeal.

The defendants contend that no costs of the action should be allowed to anyone; but that the costs of all parties to the reference should be taxed and paid out of the moneys in Court.

Section 42 of the Partnership Act provides for the distribution of moneys after dissolution of the partnership, but contains no reference to costs. It reads as follows:—

> On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.

The rule as to costs in actions such as the present one is, that the costs of the action should be paid from the commencement out of the partnership assets, unless there is some good reason to the contrary; but partnership assets mean the assets remaining after payment of all the partnership debts including balances due to any of the partners: *Hamer* v. *Giles*, 11 Ch.D. 942.

In *Austin* v. *Jackson*, reported in the footnote to *Hamer* v. *Giles*, 11 Ch.D. 942, Jessel, M.R., said:—

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The rule in *Hamer* v. *Giles*, only applies where there are actual partnership assets. The balance due to the plaintiff (one of the partners) must be treated like a debt due to an outside creditor.

See also *Ross* v. *White*, [1894] 3 Ch. 326; *Chapman* v. *Newell*, 14 P.R. (Ont.) 208, and *Mitchell* v. *Lister* (No. 2), 21 O.R. 318.

Under the above authorities the plaintiff is clearly entitled to all of the moneys in Court.

As regards the costs of the action up to the hearing, the plaintiff relies upon a passage from Lindley on Partnership, 8th ed., 597, by way of an exception to the rule whereby the costs of all parties are paid out of the assets. The passage in question is:—

> But where the action is really instituted to try some disputed right the unsuccessful litigant will be ordered to pay the costs up to the trial of the action;

and contends that the defendants disputed his right to share in the profits of the firm down to May 1, 1906. I have examined the cases referred to in the footnote to that passage, but they fall short of establishing the words in the text. It seldom happens that actions are defended when there is no disputed right to try. This question is dealt with in the authorities above-mentioned, and the exception appears to be limited to cases of misconduct or negligence, neither of which is alleged or proved in this case. Moreover, at the trial the defendants succeeded in respect of a substantial equitable claim which had been denied by the plaintiff.

Under the judgment the defendants were entitled to equal shares, and the report shews that they drew out equal amounts from the partnership assets, so that each is liable to refund to the plaintiff one-half of the amount found due as aforesaid.

The amount of the moneys in Court will, therefore, be deducted from the total amount due to the plaintiff, and judgment will be entered against each defendant for one-half of the balance.

There being no partnership assets remaining after payment out to the plaintiff of the moneys in Court, there will be no order as to costs.

Judgment accordingly.

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Ontario Supreme Court. Trial before Falconbridge, C.J.K.B. February 5, 1913.

1. MUNICIPAL CORPORATIONS (§ II G 1—195)—LIABILITY FOR DAMAGES—HIGHWAY—GUARD-RAIL.

A township is liable for injuries sustained by a traveller along one of its roads by reason of its failure to supply a guard-rail or barrier at a place which is notoriously dangerous, where it appears that the failure to supply such guard-rail was the direct cause of the injury and that the attention of the township had been frequently called to the fact that a guard-rail was necessary at that point.

[*Kelly* v. *Township of Carrick* (1911), 2 O.W.N. 1429, referred to.]

Statement

ACTION by husband and wife against the Municipal Corporation of the Township of Ancaster for damages by reason of injuries sustained by the wife by being thrown out of a buggy while driving along the first concession line in the township of Ancaster, by reason, as the plaintiffs alleged, of the want of a guard-rail or other protection at a dangerous place.

Judgment was given for the plaintiff.

G. Lynch-Staunton, K.C., for the plaintiffs.

J. L. Counsell, for the defendants.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—The question as to the necessity of guard-rails or barriers at dangerous places along township roads has been the subject of many decisions both in the United States and in Ontario. The leading authorities up to 1906 are collected by Judge Denton in his valuable book on Municipal Negligence, pp. 113 to 120. On p. 119, he gives a summary of the tests to be applied in cases of this character. I refer further to my brother Teetzel's careful judgment in *Kelly* v. *Township of Carrick* (1911), 2 O.W.N. 1429.

Every case of this kind must depend on its own particular circumstances. The defendants here urge that it is not reasonable to ask them to supply guard-rails here or at like places in the township. Officials of the municipality admit that it is a rich and well-settled township, as well able, perhaps, as any township in Ontario to take care of its highways.

The photographs filed as exhibits shew that a guard-rail had been erected on one side of the road a long time before this accident, and had been allowed to fall into decay.

I am of opinion, therefore, that the defendants are liable, unless there is any defence on the ground of contributory negligence—which, by the way, is not specifically pleaded. I do not think that the doctrine res ipsa loquitur is applicable. The accident was caused by the whippletree of the buggy parting from the plate or cross-bar. The connecting link between these two objects was a bolt, and the accident was caused by the bolt

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giving way or coming out. The buggy was an old one, but it is sworn by both plaintiffs to have been in good condition. The horse ran off and left the female plaintiff in the buggy, which at once began to move backwards down the slope of the hill until it went over the bank. It was moving back so slowly that a trifling obstruction would have arrested its course. She was alone in the conveyance and had no means of stopping or checking its backward career. She made some effort to get out, but at her time of life she could not do so; and, if she had succeeded, she might have suffered severer injuries.

I find, therefore, that the direct cause of the injury was the want of a guard-rail at that point.

The road foreman swore that he called the reeve's attention to the necessity of a guard-rail at that point at every meeting of the council; he said, further, that this point and another, 150 yards further on, were the two worst places in the township, or at any rate on his beat.

I assess the damages to the male plaintiff at $100 and to the female plaintiff at $500, with costs of suit on the High Court scale.

Judgment for plaintiff.

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Feb. 7.

Re SNELL and DYMENT.

Ontario Supreme Court, Kelly, J. February 7, 1913.

1. ASSIGNMENTS FOR CREDITORS (§ III B 2—20)—ASSIGNEE—POWERS—PROPERTY OR TITLE TAKEN—IMPLIED AUTHORITY TO SELL REALTY, WHEN.

A trustee to whom an assignment has been made for the benefit of creditors of "all the assets and effects" of the assignor has implied authority to sell any real property of the assignor covered by the assignment if it appears that his duties cannot be carried out without such power.

[*Flux* v. *Best*, 31 L.T.N.S. 645, referred to.]

2. VENDOR AND PURCHASER (§ I C—10)—RIGHTS AND LIABILITIES OF PARTIES—DEFECTIVE TITLE—TRANSFER THROUGH ASSIGNEE FOR CREDITORS.

A purchaser of land, under an executory contract for the sale thereof is not entitled to reject the title on the ground that the creditors of one of the mesne grantors, who had made an assignment to a trustee for the benefit of his creditors, did not join with the grantor in the deed in which the trustee himself was the grantee, where it is not made to appear that the trustee in question, who also executed the deed of assignment, was a creditor or that any knowledge of the deed was communicated to the creditors or that they assented to it, and thereby made it irrevocable as regards the trust for creditors.

[*Andrew* v. *Stuart*, 6 A.R. 495; *Cooper* v. *Dixon*, 10 A.R. 50, referred to.]

Statement

AN application by Snell, the vendor, under the Vendors and Purchasers Act.

The objection raised by Dyment, the purchaser, was, that the creditors of William Hewitt were necessary parties to a conveyance made by him and William Thomson to one Wellstead on the 2nd November, 1880. Hewitt, on the 8th June, 1880, granted and assigned to Thomson all his assets and effects for the benefit of his creditors, so that they should "rank thereon for their respective claims ratably and proportionally and without preference or priority."

Statement

W. A. McMaster, for the vendor, contended that Thomson had power to make the conveyance of the 2nd November with the assent or concurrence of the creditors; that, from the nature of the assets assigned to him, and the purposes for which the assignment was made, a power of sale was implied.

Argument

A. C. Heighington, for the purchaser.

KELLY, J.:—The effect of the decision in *Flux* v. *Best*, 31 L.T.N.S. 645, is, that a power of sale will be implied wherever duties are imposed on the trustee which cannot be performed without it. That may well be considered the case here. But I do not find it necessary to rest my conclusions upon that ground, for there are other reasons from which I conclude that the objection to title is not well taken.

Kelly, J.

It has not been shewn that Thomson, who also executed the deed from Hewitt to him, was a creditor of Hewitt's; or that any knowledge of the deed was communicated to Hewitt's creditors, or that they assented to it. That being so, that deed was revocable: *Andrew* v. *Stuart*, 6 A.R. 495; *Cooper* v. *Dixon*, 10 A.R. 50, referred to in *Ball* v. *Tennant*, 25 O.R. 50, at p. 55.

Moreover, the purchaser is entitled to the protection given by sec. 48 of the Limitations Act, 10 Edw. VII. ch. 34.

I declare that the objection raised by the purchaser is not such as entitles her to reject the title; and, in so far as it is concerned, the vendor has shewn a good title.

There will be no costs to either party.

Judgment accordingly.

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K. B.

1913

Feb. 11.

SMITH v. SIMPSON et al.

Manitoba King's Bench, Prendergast, J. February 11, 1913.

1. JUDGMENT (§ II B—76)—DISMISSAL—JUDGMENT ON DEFENDANT'S ADMISSIONS, CONCLUSIVENESS OF.

An order for judgment made on application of plaintiff under rule 615 of the King's Bench Act (Man.), upon admissions made by defendant in his pleading, puts an end to the action, where the admissions constituted the entire defence raised; and the plaintiff is, therefore, precluded from subsequently applying for an order for examination on discovery of defendant, notwithstanding that when the order for a judgment was made, nothing was said by counsel on either side with reference to the plaintiff proceeding for any further relief, and the plaintiff did not ask to have such right reserved, and no suggestion was made by defendant's counsel at the time that the order for judgment would be in the nature of a final judgment, or prevent the plaintiff from proceeding for the balance of his original claim.

[*Kelly* v. *Kelly*, 18 Man. L.R. 362, distinguished; *United Telephone Co.* v. *Donohoe*, 31 Ch.D. 399, 55 L.J. Ch. 480; *Andrews* v. *Patriotic Assurance Co.*, 18 L.R. Ir. 115, applied.]

Statement

APPEAL by plaintiff from the following decision of the referee in Chambers refusing an application on behalf of the plaintiff to compel the defendant Corelli to attend for examination on discovery.

The plaintiff, on the 3rd of July, moved for an order for judgment, under rule 615 of the King's Bench Act, upon the admissions in the defendants' pleadings, and I made the order of that date accordingly. When this order was made nothing was said by counsel on either side with reference to the plaintiff proceeding for any further relief or attempting to go on and collect the full amount of the plaintiff's claim, and the plaintiff did not ask to have reserved any right to do so, whilst the defendants' counsel did not suggest that the order for judgment would be in the nature of a final judgment, or prevent the plaintiff from so proceeding further. Under these circumstances, I was under the impression at the time of making the order that the plaintiff could proceed to endeavour to collect the balance of his claim in this action, and I made the costs of the order costs to the plaintiff in the cause in any event.

I am now satisfied, however, on the authority of the cases cited by the defendant's counsel: *Demorest* v. *Midland*, 10 P.R. 640; *United Telephone Co.* v. *Donohoe*, 31 Ch. D. 399, and *Andrews* v. *Patriotic Assurance Co.*, 18 L.R. Ir. 115, that the plaintiff is precluded by the course taken and by the pleadings from proceeding further in the action, and that the defendant's contention that the action is at an end is one to which effect must be given, and I therefore refuse the order and dismiss the application with costs.

Plaintiff appealed.

H. A. Bergman, for plaintiff.

W. L. McLaws, for defendant.

Prendergast, J.

PRENDERGAST, J.:—This is an application by way of appeal from an order of the referee dismissing the plaintiff's application

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to compel one of the officers of the defendant company to attend on examination for discovery.

The facts are fully set out in the considered judgment of the learned referee, who gave effect to the objection raised that the action is at an end.

In *Kelly* v. *Kelly*, 18 Man. L.R. 362, the defence did not extend to all, but only to some of the lands of which partition was sought by the action; it was not then an entire defence, which distinguishes it from the present case.

I have my doubts whether the decision in *Demorest* v. *Midland R. Co.*, 10 P.R. 640, should apply here. But I think that the cases of *United Telephone Co.* v. *Donohoe*, 31 Ch. D. 399, 55 L.J. Ch. 480, and *Andrews* v. *Patriotic Assurance Co.*, 18 L.R. Ir. 115, on which the referee bases his decision, are well in point. This appeal should be dismissed with costs.

Appeal dismissed.

FITCHETT v. FITCHETT.

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Feb. 19.

Ontario Supreme Court, Trial before Britton, J. February 19, 1913.

1. DIVORCE AND SEPARATION (§ VII—79)—ALIMONY ACTION—CUSTODY OF CHILDREN—DECREE AS TO INTERVIEWS.

On the trial of an action by the wife for alimony and the custody of the children, the defendant husband against whom alimony is decreed, may be ordered not to visit or see the children at the plaintiff's house where such visits would interfere with plaintiff's business as a boarding-house keeper, but the court will direct that any periodical interviews to which it considers the father entitled with his children shall be held elsewhere.

Statement

ACTION for alimony.

Judgment was given for the plaintiff.

C. M. Garvey, for the plaintiff.

W. A. Henderson, for the defendant.

Britton, J.

BRITTON, J.:—At the close of the trial I gave my decision upon the questions of fact.

I held my formal judgment for further consideration, and to see what arrangement, if any, could be made in regard to the children of plaintiff and defendant, now in the custody of the plaintiff. The plaintiff, by reason of the assault committed upon her by the defendant on the 24th August, 1912, is entitled to judgment for alimony. After that assault the defendant decided to leave the plaintiff, and the plaintiff was willing that the defendant should go. The plaintiff was the lessee of the house; and, had not the defendant decided to go, the plaintiff would have been justified in refusing to live with him.

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The plaintiff is not, in the circumstances, disentitled to recover because she expressed her willingness that the defendant should leave her.

The plaintiff desires to keep their two children, and she is willing that the defendant should, as permanent alimony, pay only an amount that would be reasonably sufficient to enable her to maintain the children. The defendant is not in very good financial circumstances; $5 a week will be sufficient for him to pay, and sufficient for the purpose for which the plaintiff asks money. Owing to costs having been incurred, there may be loss and inconvenience by delay in the plaintiff's receiving any money.

The judgment will be for alimony, and the defendant must pay the costs, which I fix at $80. The plaintiff incurred some unnecessary costs in having witnesses who appeared to know nothing of facts material to the issues herein. These costs will be payable, $5 each week, to the plaintiff's solicitors, commencing on Saturday the 8th March, and on each Saturday thereafter until sixteen payments have been made of $5 each. Then the payment of alimony will commence—on Saturday the 28th June next, and continue weekly thereafter until otherwise ordered, so long as the plaintiff has the custody of and is maintaining the children, as above-mentioned.

The defendant will be released from further payment of interim alimony, even if payments are in arrear under the order made.

There will be an order in reference to the custody of the children. They are to remain in the possession and care of the plaintiff, to be maintained by her until further ordered, free from any interference or attempted control by the defendant. The defendant will be allowed to see the children, or either of them, on any afternoon, at a time to be named, between 2 and 5 o'clock in the afternoon; but not more frequently than once every two weeks, and the interview is not to exceed thirty minutes in duration. No attempt is to be made by the defendant at any interview to influence them, or either of them, against their mother or to make them, or either, discontented with their home. Notice of the time when the defendant wishes to see the children must be given twenty-four hours before the interview, and the plaintiff is to produce the children, for their father's visit, at Lippincott Barracks of the Salvation Army.

The defendant is not to visit or attempt to visit or see the children at the house where the plaintiff resides; nor is the defendant to visit that house to interfere in any way with the plaintiff, who is now keeping a boarding-house, and so engaged that any such visit would be hurtful to her business.

Judgment for plaintiff.

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GRAY v. EMPLOYER'S LIABILITY ASSURANCE CORPORATION.

MAN.

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March 10.

Manitoba King's Bench. Trial before Macdonald, J. March 10, 1913.

1. BONDS (§ II B—15)—FOR FIDELITY OF EMPLOYEES—GUARANTY POLICIES OF INSURANCE—CONDITIONS PRECEDENT.

Under a guaranty policy of insurance by which the insurers engaged to reimburse the insured for pecuniary loss sustained by him through the fraud or dishonesty of one of his employees, failure on the part of the insured to give notice of a material change in the position of the employee, which change reduced his salary, will avoid the policy, since the company is entitled to know the earning power of the employee to satisfy itself that no temptation is placed in his way by a changed pecuniary position.

2. BONDS (§ II B—15)—FOR FIDELITY OF EMPLOYEES—GUARANTY POLICIES OF INSURANCE—CONDITIONS PRECEDENT—NEGLIGENT SUPERVISION OF INSURED, EFFECT OF.

Failure by the employer to require weekly reports from time to time by the employee of the cash received by the latter and payment of same into the bank and to make a monthly audit, the bank books shewing such payment, all of which was required by the terms of a fidelity insurance bond issued to the employer in respect of such employee, constitutes such a breach of duty to the bonding company as will avoid liability to make good the employee's deficit in his accounts.

3. BONDS (§ II B—15)—FOR FIDELITY OF EMPLOYEES—GUARANTY POLICIES OF INSURANCE—CONDITIONS PRECEDENT.

In matters of guarantee insurance the employer, who is the beneficiary under a policy guaranteeing him against loss by embezzlement or theft of money by his employee, must comply strictly with all material conditions, stipulations and undertakings contained in the policy.

[See *Lachine* v. *London Guarantee and Accident Co.*, 3 D.L.R 335.]

Statement

ACTION upon a guaranty policy or fidelity insurance bond.

A nonsuit was granted.

A. E. Hoskin, K.C., and *W. S. Boyd*, for plaintiff.
S. E. Richards, and *A. G. Kemp*, for defendants.

Macdonald

MACDONALD, J.:—The plaintiff sues on a guarantee policy by which the defendants engaged, subject to certain conditions, to reimburse the plaintiff, for the period of twelve calendar months, from the 13th day of July, 1910, to the amount of $5,000 for pecuniary loss sustained by him by the fraud or dishonesty of Charles C. T. Mitchell, which amounts to embezzlement or larceny.

Mitchell entered into the employ of the plaintiff in 1910, and the plaintiff claims for moneys which he alleges were taken by Mitchell during his employment.

The withdrawals by Mitchell, which are charged as embezzlements, were in greater part prior to February, 1911, at which time a new agreement was made with him by which he ceased

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to be manager and acted as assistant and adviser of the plaintiff's new manager. It was then known to the plaintiff that Mitchell was carrying on a business for himself in addition to the management of the plaintiff's business, and it was also known by him from the beginning that he was engaged with the Lyall Mitchell Co. in some capacity and was in receipt of a salary from them.

His manner of conducting the plaintiff's business, and his handling of his moneys were known, or at least should have been known, to the plaintiff in February, 1911, at the time of his entering into the new agreement, and yet, with that knowledge the new engagement was entered into.

The plaintiff states that he had not knowledge of Mitchell's conduct of the business until May of 1911; but it is clear from the evidence that Mitchell's conduct of the business was known to the office staff, the employees of the plaintiff; everything that was done by him was done without any attempt at concealment, and, under the terms of the policy and the conditions under which the policy issued, the returns which should have been made under the terms of the policy would advise the plaintiff of how the business was being carried on.

In February, 1911, Mitchell's position with the company materially changed by reducing his salary and no notice of such change, as called for by the policy, was given. This in itself would, to my mind, avoid the policy, as the company would naturally require to know the earning power of the employee to see that no temptation was placed in his way by a changed pecuniary position. The policy—the proposal therefor being a part of it—provides for a weekly report by the employee of the cash received and payment of the same to the employer, and all moneys to be paid into the bank and the bank books were to be inspected and checked monthly, and it further provided that the employer should balance the cash account and check the receipts weekly. If these conditions were complied with, the employer must have known of the conditions that did exist, and if they were not complied with, then there was such a breach of duty to the company as to avoid liability upon them.

Furthermore, the conduct of the business was not such, from the evidence before me, as to constitute fraud or dishonesty which amounts to embezzlement or larceny. There was no concealment of his methods; he was drawing moneys out by cheque as required, and was occasionally paying money in that came from sources other than the plaintiff's business. He was in receipt of a salary from the start of $150 a month, in addition to which he was entitled to one-half the profits, and it

appears that they were doing a profitable business. He might reasonably set up a right to use the moneys on the strength of these profits, and, however improper this might have been, it would not amount to embezzlement.

In my opinion the plaintiff has failed in making out a case, and I must grant a nonsuit with costs.

Nonsuit granted.

BOOTH v. THE KING.

Exchequer Court of Canada, Cassels, J. February 13, 1913.

1. PUBLIC LANDS (§ I B—7)—LICENSE TO CUT STANDING TIMBER—RIGHT OF RENEWAL, HOW LIMITED.

Under the provisions of sec. 54, of ch. 43, R.S.C., 1886, and the later revision of R.S.C. 1906, ch. 81, sec. 73, giving authority to the Superintendent-General of Indian Affairs to grant licenses to cut timber on Indian lands, the licensee is not entitled at the expiration of his term of license to a renewal of the privilege as a matter of right, but his right to such renewal must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal, in view of the provisions of sec. 55 of ch. 43, R.S.C. 1886, to the effect that no license shall be granted for a longer period than twelve months.

[*Bulmer* v. *The Queen*, 23 Can. S.C.R. 488; *Lakefield Lumber Co.* v. *Shairp*, 19 Can. S.C.R. 657, followed; *Attorney-General* v. *Contois*, 25 Grant 346; *Muskoka Mill Co.* v. *McDermott*, 21 A.R. (Ont.) 129; *Smylie* v. *The Queen*, 27 A.R. (Ont.) 172; *W. C. Edwards Co.* v. *D'Halewyn*, 18 Que. K.B. 419, applied.]

2. STATUTES (§ II A—97)—CONSTRUCTION AND EFFECT—TO UPHOLD STATUTES AGAINST INCONSISTENT DEPARTMENTAL RULES—LICENSE TO CUT STANDING TIMBER.

Any regulation or contract whereby the Crown binds itself to grant a license to cut timber on Indian lands from year to year, practically in perpetuity, is *ultra vires*, as being contrary to the terms of the statute R.S.C. 1886, ch. 43, and the later revision R.S.C. 1906, ch. 81, since the lands in question are held by the Crown in trust for the Indians and the only right conferred by the statute is the granting of a license for one year.

Statement

PETITION of right to restrain the sale of certain timber and for a declaration that the petitioner is entitled to a renewal of a license to cut said timber issued to him and renewed for a large number of years.

The petition was refused.

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Shepley, K.C., and *A. C. Hill*, for suppliant.
Chrysler, K.C., and *Bethune*, for the Crown.

CASSELS, J.:—This was a petition of right on behalf of John Rudolphus Booth. The suppliant sets forth in his petition that on October 5, 1891, a license was issued to him by the Superintendent-General of Indian Affairs, to cut timber on Indian lands. The license was issued pursuant to the authority of ch. 43, of the Revised Statutes of Canada, and amendments thereto. The suppliant alleges that the said license, since the date thereof, had been renewed from year to year, the last renewal expiring on April 30, 1909. He then alleges that due application for a renewal of the said license for the year ending on April 30, 1910, had been applied for which application was refused by the Superintendent-General; and the suppliant further alleges that the said limits and the timber aforesaid had been advertised for sale by his authority.

The prayer of the petition is that the said sale may be restrained, and that the suppliant may be declared to be entitled to the renewal of the said license and to a renewal from year to year thereafter.

The Crown in its defence denies the right of the suppliant and alleges, among other grounds of defence, that the lands comprised in the timber limits affected were, in fact, required for purposes incompatible with the licenses in question. There are other defences set out, which, on reference to the statement of defence, will appear.

The license bearing date the 5th day of October, 1891, purports to be signed by Mr. VanKoughnet, the deputy of the Superintendent-General of Indian Affairs. It purports to be made pursuant to the provisions of ch. 43 of the Revised Statutes of Canada, and amendments thereto; and it gives to J. R. Booth of the city of Ottawa, his agents and workmen, full power and license to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump upon the location described upon the back hereof; and to hold and occupy the said location to the exclusion of all others except as hereinafter mentioned, from October 5, 1891, to April 30, 1892, and no longer.

The license provides among other things, that the dues to which the timber cut under its authority are liable shall be paid as follows: namely, as set forth in the regulations for the disposal of timber on Indian lands and reserves established by order of His Excellency the Governor-General-in-council, dated September 15, 1888.

The amount payable for ground rent is mentioned as the sum of $324—the renewal fees, $2—and it provides that the above-

named licentiate shall be bound before or when paying the ground rent and renewal fee, if the license is renewed, to declare on oath whether he is still the *bonâ fide* proprietor of the limit hereby licensed, or whether he has sold or transferred it or any part of it, or for whom he may hold it.

A series of renewals, so called, were granted down to January 4, 1909; and they are practically all to the same effect, namely, that the conditions of the within license having been complied with the same is hereby renewed. Subsequently, certain manufacturing conditions were imposed by order-in-council of April 19, 1901, and the renewals were made subject to the manufacturing conditions. There is no objection to this term subsequently imposed, in order to conform apparently to regulations which had been provided for by the Province of Ontario in regard to licenses granted by them of timber berths owned by the province.

No question arises in regard to the form of renewals. I will deal with this subject later on when discussing the various authorities bearing on the case. In point of fact "renewals" was the wrong term. There is no authority in ch. 43, R.S., referred to, or in any of the subsequent statutes which provided for renewals of licenses. Each so-called annual renewal was a new and independent license by itself.

The right of the suppliant to maintain his petition must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal.

The statute, ch. 43 of the Revised Statutes of Canada, 1886, provides in the interpretation clause, that the expression "Superintendent-General," means Superintendent-General of Indian Affairs; and the expression "Deputy Superintendent-General" means the Deputy Superintendent-General of Indian Affairs.

It is provided by sec. 4 of this statute that the Minister of the Interior or the head of any other Department appointed for that purpose by the Governor-in-council, shall be the Superintendent-General of Indian Affairs, and shall as such have the control and management of the lands and property of the Indians in Canada.

It is also provided that there shall be a department of the civil service of Canada, which shall be called the Department of Indian Affairs, over which the Superintendent-General shall preside.

It is provided by sec. 14 of the said statute that all reservations for Indians or for any band of Indians or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held before the passing of the Act and shall be subject to the provisions of this Act.

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Sec. 41 of the statute provides that all Indian lands which are reserves or portions of reserves, surrendered or to be surrendered to Her Majesty, shall be deemed to be held for the same purposes as before the passing of this Act, and shall be managed, leased and sold as the Governor-in-council directs, subject to the conditions of surrender and the provisions of this Act.

Chapter 81 of the Revised Statutes of Canada, 1906, is practically similar to ch. 43, Revised Statutes of Canada, 1886. Section 15 of said ch. 43, provides that the Superintendent-General may authorize surveys, plans, and reports to be made of any reservation for Indians, shewing and distinguishing the improved lands, the forest and lands fit for settlement, and such other information as is required, and may authorize the whole or any portion of a reserve to be sub-divided into lots.

Sec. 20 of ch. 81, of the Revised Statutes of Canada, 1906, is in similar terms.

By ch. 81, sec. 48, of R.S.C. 1906, it is provided that except as in this part otherwise provided no reserve or portion of a reserve shall be sold, alienated or leased, until it has been released or surrendered to the Crown for the purposes of this part.

By ch. 43, sec. 54, of the Revised Statutes of 1886, it is provided as follows:—

> The Superintendent-General or any officer or agent authorized by him to that effect may grant licenses to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as are from time to time established by the Governor-in-council, and such conditions, regulations and restrictions shall be adapted to the locality in which reserves or lands are situate.

Sec. 55 provides that no license shall be so granted for a longer period than 12 months from the date hereof.

Then follow subsequent provisions as to making returns, etc.

Sec. 73, ch. 81, R.S.C. 1906, and the following sections, are in similar terms to the earlier statute of 1886.

It is obvious that the Superintendent-General or other officer authorized by him to that effect had no power to grant a license for a longer period than twelve months from the date thereof.

It is equally obvious that the conditions, regulations and restrictions referred to in sec. 54, ch. 43, R.S.C. 1886, and of sec. 73, ch. 81, R.S.C. 1906, could only refer to such conditions, regulations and restrictions as are applicable to the yearly license, and would not include any such regulations which contemplated a further renewal of the license to a period beyond the year referred to.

In point of fact the license of the 5th October, 1891, referred merely to the payment of the dues. It reads:—

> That the dues to which the timber cut under its authority are liable, shall be paid as follows, namely: As set forth in the regulations for the disposal of timber on Indian lands and reserves established by order of His Excellency the Governor-General-in-council, dated the 15th September, 1888.

I am of opinion that, taking the license of October 5, 1891, by itself, and considering the authority conferred upon the Superintendent-General by sec. 54 of the earlier revision of the Revised Statutes, 1886, and sec. 73 of the later revision of 1906, there is no contract between the Crown and the suppliant which would entitle the suppliant to a judgment against the Crown as prayed for. The suppliant is, therefore, forced to rely upon the Indian land regulations and timber regulations adopted and established by orders of His Excellency the Governor-General-in-council on September 15, 1888, and to maintain his claim he must establish a contractual relation existing between the Crown and himself by reason of these regulations.

Sec. 2 of these regulations provides that the Superintendent-General of Indian Affairs, before granting any licenses for new timber berths in unsurveyed Indian reserves or lands, shall cause such berths to be surveyed; and the Superintendent-General of Indian Affairs may cause any reserve or other Indian lands to be sub-divided into as many timber berths as he may think proper. Then, there is a provision for sale by auction; and section 5 provides that license holders who shall have complied with all existing regulations shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian Affairs.

Sec. 11 provides that all timber licenses are to expire on the 30th April, next, after the date thereof, and all renewals are to be applied for before the first of July following the expiration of the last preceding license. In default thereof the berth or berths shall be treated as *de facto* forfeited.

Sec. 12 provides that no renewal of any license shall be granted unless the limit covered thereby has been properly worked during the preceding season, or sufficient reason be given under oath and the same to be satisfactory to the Superintendent-General of Indian Affairs for the non-working of the limit; and unless or until the ground rent and all costs of survey and all dues to the Crown on timber, saw-logs or other lumber cut under and by virtue of any license other than the last preceding shall have been first paid.

Mr. Shepley, in his very able and lucid argument before me, rested his case in the main upon these regulations. His argument is shortly that while, by the statute, the Superintendent-

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General can only grant a license for a year, nevertheless the Crown might, by valid contract, bind itself to grant a renewal or a new license from year to year, practically in perpetuity. I am unable to agree with this contention. The lands in question are held in trust for the Indians. There are provisions referred to above which contemplate sales of Indian reserves by the Crown for the benefit of the Indians. I don't think the Crown was bound for all time to keep lands set apart as timber berths if in its discretion it was considered advisable in the interest of its *cestui que trustent* to sell these lands. In the present case it appears that a surrender was made with the view to enable the Crown to sell the limits in question. They were put up for sale by auction. There is nothing imputing want of good faith on the part of those representing the Crown, and I must assume that the Crown is dealing with the lands in question in a manner best calculated to promote the interest of those whom it represents. Moreover, I have come to the conclusion that any regulation which would have the effect of tying up for practically all time the limits in question would, if they are so construed, be *ultra vires* as being contrary to the terms of the statute. The statute is that the Superintendent-General may grant licenses.

While I do not consider myself as bound to follow the various decisions which I shall refer to, with the exception of *Bulmer* v. *The Queen*, 23 Can. S.C.R. 488, they are the decisions of Judges of very great eminence; and even if I held a view contrary to their views, I would be loth to set up my personal judgment as against their opinions, but would prefer to leave it to a higher Court, to place a different construction upon the statutes. I may say, however, that I agree with their conclusions.

The first case which is important is the case of *Contois* v. *Bonfield*, 27 U.C.C.P. 84. This was an appeal from the judgment of the Court of Common Pleas. In this particular case a patent had been issued by mistake. It had been intended that the rights of the licensee to the timber should have been reserved to the patentee. The official of the Crown merely endorsed the reservation on the patent and it was held that this had no effect. An action was subsequently brought in the Chancery Division and tried by the late Chancellor Spragge, in the suit of the *Attorney-General* v. *Contois*, 25 Grant 346, and the patent was set aside. The importance of the *Contois* case in the Court of Appeal is the reference—the further renewal is made after the issue of the patent.

The case of *Attorney-General* v. *Contois*, 25 Grant 346, was decided under the Act respecting the sale and management of

timber on public lands, ch. 23, of the Consolidated Statutes of Canada, 1859. That Act provides as follows:—

> The Commissioner of Crown Lands or any officer or agent under him authorized to that effect may grant licenses to cut timber on the ungranted lands of the Crown at such rates, and subject to such conditions, regulations and restrictions as from time to time be established by the Governor-in-council, and of which notice shall be given in the Canada Gazette.

By sub-sec. 2 it was enacted that no licenses shall be so granted for a longer period than 12 months from the date thereof. And then follow provisions very similar in terms to the provisions of the statutes governing this case.

The late Chief Justice Thomas Moss, in his judgment is reported, as follows:—

> The patent on its face grants the land absolutely and unconditionally. It may, therefore, be said to grant more than the subject-matter of the treaty between the Crown and the patentees. This excess in the grant may be fairly taken to have been the result of an improvident act of the official whose duty it was to draw a proper patent, and we are not prepared to hold that in such a case the Crown cannot, in equity, obtain the relief which, under analogous circumstances would be awarded to a subject. But we rest our judgment upon the ground that, even if the memorandum endorsed had been embodied in the patent, the appellant would, for all that is alleged, have been without defence to this action. On that supposition the language of the patent would have been that it was subject to the rights, powers, and privileges of the defendant under the existing license.

Proceeding, the late Chief Justice Moss states:—

> It was suggested upon the argument that the difficulty arising from want of privity was met by the commissioner's renewal of the license for the period of a year, and that this should be treated as a *quasi* assignment by the Crown of any rights which could have been enforced against the plaintiff at its instance. The answer offered to this was that the powers of the commissioner are prescribed and regulated by statute; that an agreement for a renewal of a license is something which the law has not empowered him to make, and is, indeed, not within the contemplation of the statute; and that he can only give a right to cut timber upon ungranted lands, and even that for no longer period than twelve months.
>
> These positions are fully supported by the statute.

In the case of the *Muskoka Mill and Lumber Co.* v. *McDermott et al.*, 21 A.R. (Ont.) 129—also a case in the Court of Appeal for Ontario—the following is the language of the Court. Osler, J., states at page 132, as follows:—

> The Act respecting timber on public lands expressly enacts that no license to cut timber on the ungranted lands of the Crown shall be so granted for a longer period than twelve months.

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And he proceeds to point out the terms and the rights conferred upon the licensee. Then he states:—

> No language could more forcibly express the limitation of the right of the holder to the period of the license, as well as the limitation of the period for which it may be granted, and the license itself is expressed, as it ought to be, in accordance with the requirements of the Act. It is needless to say that no conditions, regulations or restrictions can be established by the Lieutenant-Governor-in-council which are opposed to these requirements. . . . The legal right of the licensee, except as excepted by the last clause of sec. 2 of the Act, ceased with the expiration of each license, and I am not aware of any equitable right to renewal capable of being enforced against the Crown. That is a matter which rests with the Crown, which no doubt will act justly in each particular case. But there is nothing so far as I know to prevent the Crown from withdrawing any lot from a timber limit, and declining to renew the license over such lot at the expiration of the license year.

Then he refers to the language of the late Chief Justice Moss, in the case of *Contois* v. *Bonfield*, 27 U.C.C.P. 84, which I have quoted. The late Chief Justice Hagarty concurred with the judgment of Mr. Justice Osler.

The next case of importance is the case of *Smylie* v. *The Queen*, 31 O.R. 202, decided by the late Mr. Justice Street. This decision was based upon the contract entered into between the parties. The contention in that case was that the subsequent orders-in-council which required the timber to be manufactured in Canada were not binding upon the licensee. The judgment of Mr. Justice Street proceeded upon the ground that by the original contract the rights of the licensee to a renewal were subject to such regulations as may from time to time be established. The licensee refused to accept a renewal of the license containing the regulations requiring him to comply with these subsequent regulations, and Mr. Justice Street dismissed the action, basing his judgment upon the ground that the licensee, if he took a renewal, was compelled to take it subject to these regulations, and having refused to do so he was out of Court.

I rather gather from the judgment of Mr. Justice Street that his own opinion would more than likely have been in favour of the right to a renewal. This case was taken to the Court of Appeal in Ontario, and while the reasons of the various Judges may have been *obiter dicta*, nevertheless their views are entitled to very great weight. The case is reported, *Smylie* v. *The Queen*, 27 A.R. (Ont.) 172, 176. Mr. Justice Osler refers to the regulations, and amongst others, is one that licensed holders who have duly complied with all existing regulations, shall be entitled to a renewal of their licenses on complying with certain conditions. He states at p. 177, as follows:—

In these regulations we find for the first time language which might imply an intention to take authority to sell the timber berths or limits themselves, instead of, as hitherto, selling the yearly license to cut timber thereon, and stress was laid on this by the appellant as if he had thereby acquired some larger title to the timber than the yearly license would confer upon him. We cannot, however, assume that the Lieutenant-Governor-in-council intended to do anything opposed to the statute, which only authorizes the Commissioner of Crown Lands to grant licenses to cut timber on the lands—licenses which by law must expire at the expiration of twelve months from their date. Such a license was, in my opinion, the only thing authorized and intended by these regulations to be sold, however large the sum paid at the sale, which can only be regarded as a premium or bonus for the license, as indeed the conditions of sale in each case expressly describe it. It may be, that, under the power to make "conditions, regulations, and restrictions," the Lieutenant-Governor-in-council had authority to provide, as these regulations purport to do, for renewing the license on proper terms. It is not necessary to decide that, although it does appear to be quite opposed to the clear words of the Act, which seem to contemplate that the Crown should be perfectly unfettered and free to deal with the timber at the expiration of each license year as it might think fit.

On page 181, he says:—

Considering, however, that every license is a new and independent license.

Mr. Justice Maclennan, at page 182, refers to the various statutes, and he points out that

Sec. 2 of the statute declares that no license shall be so granted for a longer period than twelve months from the date thereof.

And he says:—

Now, there is not, and there has never been, during fifty years, any enactment in any way qualifying or limiting that plain declaration of the Legislature, that no license shall be for a longer term than twelve months, and the law has been re-enacted during that period three different times. How absolute the intention of the Legislature was, and has been, in thus limiting the duration of licenses, appears from sec. 3, which defines the rights which the license was intended to confer.

He proceeds:—

I think the Legislature could hardly have used more clear, unambiguous, emphatic language to express its intention, that there should be no license for a longer period than twelve months, that at the end of that time they should expire. . . . They have always been for a term not exceeding twelve months, terminating on a day certain, which for many years has been the 30th of April, and no longer. Such is the language of the statute, and such is the title which has been granted to and accepted by the suppliants in pursuance thereof.

They contend, however, that the clear language of the Legislature and of the license issued in pursuance thereof, is to be qualified by the regulations, particularly regulation 5, and by the practice of the

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land department for many years of granting renewals annually to the previous licensee. Regulation 5 provides that license holders who have complied with all existing regulations shall be entitled to have their licenses renewed on application. . . .

The question is, whether these two regulations were intended or can be held to weaken or qualify the clear terms of the statute, and to confer a right not expressed in the license itself, and I think it impossible so to hold.

He then proceeds:—

I think, therefore, the intention of the regulations is to comply with, and not to qualify, the statute. But if the regulation is not in accordance with the statute, if it assumes to confer a right of renewal, it must give way to the statute, and can confer no right beyond what the statute authorized the land commissioner to grant, and that is a license for a term not exceeding twelve months. The regulations which the Lieutenant-Governor-in-council was authorized to establish were in respect of licenses which were not to exceed twelve months in duration. So far as they go beyond that they cannot bind the Crown. I think the regulations in question were ordained, merely for the guidance of the officials of the land department, and not for the purpose of conferring any contractual or other right of renewal upon licenses, which they could enforce against the Crown.

The learned Judge came to the conclusion, as follows:—

I am, therefore, of opinion that the suppliants have no contractual or other right, as licensees, to compel the Crown to renew their licenses.

The late Sir Charles Moss, at his death Chief Justice of the Court of Appeal, points out as follows:—

There powers are prescribed and regulated by the statute, and reference to it must be had in every case when it becomes necessary to ascertain what may and what may not be done in regard to the public timber. I fail to find in the statute any warrant for the suppliants' contention. On the contrary, I think it is made thereby very plain that the authority to give or grant a right to any one to cut timber upon the public lands of the province for the purpose of manufacturing it into logs, lumber, or square timber, is limited to the grant of a license for a period of twelve months from the date thereof.

These enactments indicate an intention to retain the entire right to and control over all timber not cut during the term of a license, and over the grant of licenses from year to year, and the power to withhold from the licensee of one year any claim whatever to the issue to him of a license for the next or any future year.

He further states:—

The term "renewal" seems to be applied to licenses issued after the first. But in reality this is not an accurate description. They are not in the nature of a restoration or revival of a right. Each is a new grant. It bears no necessary relation to the preceding license.

In regard to this latter point, reference may be had to the case of the *Lakefield Lumber and Manufacturing Co.* v. *Shairp*, 19 Can. S.C.R. 657. Mr. Justice Gwynne, in his judgment at page 671, states:—

As to the point that the license, which issued on the 3rd May, 1888, was the same license as that issued in all the years subsequent to and in the year 1883, when the first appears to have been granted and before the lot in question was sold, and that, therefore, the license of 1888 covered the lot in question equally as did that issued in 1883, and in prior years, it does not seem to me to be necessary to make any observations, further than that it cannot be entertained.

To the same effect in the Province of Quebec, in the case of *W. C. Edwards Co., Ltd.* v. *D'Halewyn*, 18 Que. K.B. 419.

The only other case that I have been referred to, and which has a bearing, is the case of *Bulmer* v. *The Queen*, 3 Can. Ex. R. 184. At page 212, the late Judge of the Exchequer Court, Mr. Justice Burbidge, seems to have yielded to Mr. McCarthy's argument and read the word "may" as meaning the word "shall," and came to the conclusion there was a contract to renew. In that particular case it appeared subsequently that the Dominion had no right or title to the limits, the subject-matter of the suit. The question therefore resolved itself into one of damages, the title not being in the Dominion, and the learned Judge proceeded to assess damages under the doctrine enunciated in *Bain* v. *Fothergill*, L.R. 7 H.L. 158, and allowed some $5,000 damages.

This case was taken to the Supreme Court, and the judgment of that Court was pronounced by the late Chief Justice Strong, and is reported, *Bulmer* v. *The Queen*, 23 Can. S.C.R., at 488. The Court differed entirely from the view taken by the Judge in the Court below. Apparently it declined to read the word "may" as "shall." And it is pointed out that, by the words of the statute, the right conferred is discretionary. No valid cross-appeal was taken so that the Supreme Court was unable to reduce the damages, and therefore dismissed the appeal. The case is important as shewing that no contract had been entered into merely by the orders-in-council not acted upon by the granting of the license. The learned Chief Justice points out that the right of the suppliant must, therefore, depend upon the terms of the lease or license itself, and no contract was evidenced by the terms of the license.

One or two other cases were cited before me, as, for instance, *Booth* v. *McIntyre*, 31 U.C.C.P. 183, and *Foran* v. *McIntyre*, 45 U.C.Q.B. 288, and *McArthur* v. *The Northern and Pacific Junction R. Co.*, 17 A.R. (Ont.) 86.

I have carefully read these various cases, but do not find that they assist in any way to a determination of this case.

I am of opinion for the reasons given that the suppliant has failed to prove a contract enforceable against the Crown.

The petition is dismissed with costs.

Petition dismissed.

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CORELLI v. SMITH.

Manitoba King's Bench. Trial before Curran, J. February 24, 1913.

1. ACCOUNTS (§ I—2)—OPENING; CORRECTING; REVIEW OF—SETTLEMENT AND RELEASE NOT AN ESTOPPEL, WHEN—FRAUD.

A principal is not estopped from demanding an accounting of his agent by reason of a prior settlement of their account, though a release was given by the principal to the agent, where it appears that the principal was over-reached and over-borne by the improper conduct of the agent who did not faithfully account at the time of the settlement.

2. ACCOUNTS (§ I—2)—OPENING; CORRECTING; REVIEW OF—REFUND OF PAYMENT UNDER SETTLEMENT NOT CONDITION PRECEDENT TO FRESH ACCOUNTING, WHEN.

In an action by the plaintiff against his agent and partner for an accounting, where a settlement between the parties is set aside because of the fraudulent concealment by the defendant of material items of his indebtedness, the accounting may be ordered without requiring the plaintiff as a condition precedent to pay back a certain sum paid to him by the defendant as due under the settlement on the grounds (*a*) that the defendant's payment *primâ facie* carried with it an admission that it was owing to the plaintiff, and (*b*) that the defendant's fraud disentitles him to such consideration.

Statement

AN agreement was arrived at between plaintiff and defendant whereby it was agreed that in consideration of the defendant advancing to the plaintiff sufficient money to maintain the plaintiff's business that defendant should receive one half of the net profits made in real estate speculations or from profits from the sale of lands which the plaintiff and defendant might agree to purchase. A number of real estate transactions were entered into, defendant advancing to plaintiff certain sums of money, and plaintiff expending other moneys and much time. Large profits were made, but in every instance the money from the sale of the lands was received by the defendant. Plaintiff demanded from the defendant from time to time an account of the moneys received by him and the distribution of same, but defendant refused to give any information.

In the month of September, 1908, plaintiff was interested in a large tract of land in Alberta of sixty-nine thousand acres and defendant advanced $32,000 upon the land. In February, 1911, plaintiff gave the defendant a general power of attorney to enable the defendant to dispose of the lands and to receive the purchase moneys. Acting under such power of attorney, defendant sold the lands for $135,349, which he distributed and paid without consulting the plaintiff and charged the plaintiff with large sums of money for interest and expenses in breach of the agreement between them. Plaintiff, therefore, brought this action for an account of all moneys received by defendant in relation to the dealings between them and for payment over of the amount due.

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Defendant denied that he had ever refused to give the plaintiff any information or account; further he claimed that the plaintiff had access to all books in which the defendant made any entries and had availed himself of such right of inspection and that defendant had accounted to plaintiff for all moneys due to plaintiff for his share in the Alberta land transaction, which moneys plaintiff had accepted in full satisfaction and discharge of any claim which he ever had against defendant in connection with such lands. This plaintiff denied.

Judgment was given directing a reference to take accounts between the parties, further directions and costs reserved.

G. A. Elliott, and *W. L. McLaws*, for the plaintiff.

A. B. Hudson, and *T. H. Johnson*, for the defendant.

Curran, J.

CURRAN, J.:—The only question for me to decide is as to the plaintiff's right to an accounting from the defendant of his dealings with certain lands in the Province of Alberta, referred to in paragraphs 5, 6, 7, 8, and 9 of the statement of claim. The defendant denies this right, alleges a proper account before action, payment to the plaintiff of all moneys due, and an acknowledgment in writing of the receipt of such moneys in full satisfaction and discharge of all claims against the defendant in respect of these lands, and he pleads such release by way of estoppel against the plaintiff. The plaintiff replies, denying such accounting, alleging non-disclosure by the defendant of the true state of the accounts and that the written acknowledgment referred to by the defendant was obtained by fraud, misrepresentation and duress on the part of the defendant, and is therefore void, and further alleges the discovery since the signing of the acknowledgment of many manifest and large errors in the accounts, and the existence still of a large indebtedness by the defendant to the plaintiff.

A sort of partnership arrangement was made between the plaintiff and defendant on the basis set forth in the letter, exhibit 5, and the plaintiff says that the Alberta land transaction was one which was entered into under, or was to be governed by the provisions of this letter.

It is not necessary to go into particulars of this transaction, further than to state that it resulted in a very large sum of money being made for the plaintiff, the defendant and one Denton, the gross amount of the share of these three reaching approximately $135,349. Denton, who became interested under exhibit 2, has been settled with in full, and has no interest in this litigation.

The defendant received a power of attorney from the plaintiff to act for him in closing out the transaction and to receive the share of purchase money belonging to the three parties be-

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fore mentioned. The defendant did receive this money and was certainly liable to account to the plaintiff for it and to pay over to the plaintiff whatever share he was entitled to on the basis of division provided for in exhibit 2.

It appears that there had been financial and other dealings between the plaintiff and defendant extending over a number of years, and beginning with the year 1907; but no adjustment or settlement of the accounts arising out of these dealings had ever been made by the parties.

The plaintiff says that in May, 1911, he was informed by the defendant that the money for the Alberta lands had been paid to him; that he waited for some days for an account and settlement from the defendant, and that, failing to receive this, he wrote the defendant the letter of which exhibit 8 is a copy. This letter is dated May 16, 1911. The defendant apparently responded by handing the plaintiff exhibit 9, which consists merely of a brief pencil memorandum of account on the back of an old envelope. It was unaccompanied by any vouchers, details or explanations, and certainly was not the kind of statement of account the plaintiff was entitled to receive at the hands of his agent, partner or co-owner, whichever the defendant was, in respect of a transaction of such magnitude.

The plaintiff cannot precisely fix the date when exhibit 9 was handed to him, but places it between the 16th and 20th of May, 1911. He says he objected strongly at the time to this statement, and swears that he never received any other statement from the defendant.

It will be noticed that by this statement the defendant charges himself with having received $87,505.08, in which, after deducting certain advances on capital account, the plaintiff was entitled to a one-half share. By some process of allowances, unexplained, a debit balance of $794.81 against the plaintiff, shewn in this document exhibit 9, is converted into an apparent credit balance of $2,555.68. This adjustment is not explained by the defendant, who has not seen fit to go into the box and give evidence on his own behalf. There are things in this particular statement exhibit 9, as well as in connection with the subsequent alleged settlement, payment of money and acquittance, which the defendant ought to have explained if susceptible of explanation. Why he has refrained from so doing I do not know, and can only guess.

After delivering exhibit 9 to the plaintiff, the defendant, on May 20, 1911, went to the plaintiff's office with the cheque exhibit 7 and the receipt exhibit 6 already prepared, and, speaking to the plaintiff, said in effect to him: "Sign this receipt and I will give you this cheque." The plaintiff says that he needed the money and so accepted the cheque and signed the receipt,

but not without a demur. He says: "I told him that if this was all the statement he was going to give me he was a crook." Plaintiff further says that he did not go over and check up the statement exhibit 9 with the defendant at any time, and it does not appear that there was any discussion or talk of compromise or settlement between the parties between the time of delivery of exhibit 9 to the plaintiff and the signing of exhibit 6. There is no evidence to shew that they ever saw one another during this interval. How, then, did the defendant arrive at $3,000 as the amount due the plaintiff? His statement exhibit 9 shewed the plaintiff to be entitled to $2,555.68. How did this amount grow to the even $3,000 in a few days? No explanation is offered by the defendant as to this, and the transaction seems to me a most extraordinary one and open to grave suspicion as to its honesty and fairness. It calls for a clear and satisfactory explanation from the defendant, but none is forthcoming. Why did the defendant have the cheque and acquittance prepared and ready beforehand? To my mind, it is very significant, and indicates a clear intention on the defendant's part, pre-arranged, to procure a settlement on terms of advantage to himself and of disadvantage to the plaintiff. He knew the plaintiff was entitled to an account at his hands, and that no such account as the plaintiff was entitled to expect had been rendered. As a business man the defendant knew it was his duty to produce vouchers, furnish such details and information, either written or verbal, as would put the plaintiff in a position to understand his accounts and intelligently check them up. He did not do this, and attempts to put the plaintiff off with the pencil memorandum exhibit 9 as a proper discharge of this duty. The defendant then occupied a fiduciary position and relation towards the plaintiff. He had received, as the plaintiff's agent, a very large sum of money, not merely $87,505, but over $135,000, as the plaintiff swears. The defendant was to settle with Denton, receive the principal and interest on the advances made under exhibit 2, and hold the balance to be accounted for to the plaintiff.

The defendant kept the books and possessed all the information relative to the transaction, while the plaintiff practically had none. The evidence discloses that the defendant actually received from Denton $1,131.18 on account of the plaintiff's expenses, which he wholly failed to account for. Nay more, he concealed from the plaintiff the fact that he had received this money, and I think he did so fraudulently. The plaintiff was in ignorance of this payment when the alleged settlement was made. The fact only came to light through subsequent litigation in which the defendant was involved. Why did the defendant conceal the receipt of this money when it was his duty to disclose it to the plaintiff?

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Again, the defendant knew that the plaintiff had a claim of some $12,000 for his expenses in connection with this Alberta land transaction, and which he knew the plaintiff claimed was to be a first charge on the fund before any division was made. That the defendant believed this claim to have some foundation is evident from his letter to the plaintiff exhibit 13. From another letter written by the defendant to Denton, exhibit 3, and from his answer to question 153 of his examination for discovery, which is in these words: "Believing that Mr. Corelli had legitimately spent $12,000 in the transaction, I was agreeable that we should divide up the expenses before any profits were divided." Yet this large item was wholly ignored in the alleged settlement to the plaintiff's detriment and to the defendant's advantage.

A perusal of exhibit 10 will shew that the defendant was careful to charge up his own expenses, amounting to over $650, not against the fund, which he might have had the right to do, but against the plaintiff personally. The plaintiff had no means of knowing this when the settlement was made.

Again, large sums for interest, between $1,600 and $1,700 were charged against the plaintiff personally, by the defendant, of which fact the plaintiff was unaware when the alleged settlement was made, and he now says that the defendant had no right to so charge him with this interest.

It will be noted that exhibit 10 is a statement compiled by the defendant since this action was begun, and purports to shew how two items of exhibit 9 "subsequent account $2,350.49," and "personal account $949.69" are made up. Had this belated information been put in the plaintiff's hands before the settlement, it is very probable that exhibit 6 would never have been signed.

In justice to the defendant, I refer to the only word of explanation before me as to the payment of the $3,000 to the plaintiff. *Vide* answer to question 108 of the defendant's examination for discovery:—

> I paid him a cheque for $3,000 at the time when I knew and he knew and everybody knew that I had overpaid him. I did it for peace with him. I found out what he was made of before that time and I got his receipt too, and he expressed himself very grateful for that cheque for $3,000. I paid it out of my own pocket and he wasn't entitled to a cent for I had overpaid him before.

The defendant would have the Court believe that he paid the plaintiff this large sum of money, $3,000, for the sake of peace with him, though he says he did not then owe him a cent. What was he afraid of, and why was he purchasing peace at so heavy a price? The plaintiff had only asked for what he was entitled to, a proper accounting from the defendant, a thing which, judging from the defendant's conduct, he was very unwilling

to render. There is no evidence that the plaintiff was making undue demands or that he had acted in any way improperly. Exhibit 8 indicates clearly all that the plaintiff was then asking of the defendant. It is merely an ordinary business letter, couched in moderate language, asking for a statement of account. And yet the defendant says he was purchasing peace yet did not owe the plaintiff anything. I do not believe this. I think the defendant was endeavoring to purchase immunity from an accounting which he had failed to make, and did not wish to make if he could avoid it. His conduct is not explainable on any other ground, and I think he took an unfair advantage of the plaintiff's financial necessities, his lack of knowledge and information of the state of the accounts to attain this end. In my judgment, he had no legal or moral right to do this, and I am satisfied the settlement was not a voluntary one, in the true sense of that term, on the plaintiff's part, or that it was acceded to by the plaintiff with a full knowledge of the real position and of the plaintiff's rights.

It was clearly the defendant's duty first to have fully accounted to the plaintiff before requiring an acquittance or discharge of his stewardship. I cannot acquit the defendant of over-reaching the plaintiff in this matter, and I hold that the plaintiff was over-reached, and induced to sign the release and accept the money in ignorance of the real state of the accounts, and in ignorance of the fact that the defendant had received that money from Denton. I find that the defendant was guilty of fraudulent concealment or non-disclosure of the payment made by Denton, which, of itself, under the circumstances, would, in my opinion, be a sufficient ground to avoid the settlement. I find that the defendant has not accounted to the plaintiff as he was legally bound to do for the moneys collected or received by him as the plaintiff's agent under power of attorney, in respect of these Alberta lands.

I hold that the plaintiff is not estopped by reason of his acceptance of the money and signing the release, from now requiring the defendant to so account. I find that the parties were not on equal terms when the settlement was obtained, that the plaintiff was at a disadvantage through breach of the defendant's duty and was over-reached and over-borne by the oppressive, wrongful and improper conduct of the defendant at a time when he owed a clear duty to the plaintiff to have faithfully accounted to him for the moneys received before requiring any such discharge. It would be against equity and good conscience to permit the defendant to protect himself against a discharge of this duty through a release obtained under such circumstances.

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Plaintiff's counsel asked that I should find that the plaintiff is entitled in any event to the sum of $12,000 for expenses. I cannot so find upon the evidence before me. The plaintiff will have to prove this item of credit before the local master on the reference which I intend to direct.

On the other hand, the defendant's counsel urged that if I refused to give effect to the settlement, the plaintiff should be required to pay back, or to pay into Court the money received by him, $3,000, as a condition precedent to this transaction being referred to the Master. I decline to accede to this, first, because I take it that the payment of the money by the defendant *prima facie* carries with it an admission that it was owing to the plaintiff; and second, because I think the defendant's conduct disentitles him to any such consideration. He has chosen to place himself in this position in preference to doing only that which the law required of him—the giving of an honest account of his stewardship.

There will be a reference to the local Master to take the accounts of this Alberta land transaction, as well as other transactions referred to in the statement of claim, and I therefore, refer all such matters to the local Master to take the accounts between the parties in the ordinary course and I reserve further directions and costs until after the Master shall have made his report.

Reference to take accounts.

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HA HA BAY R. CO. (defendant, appellant) v. LAROUCHE (plaintiff, respondent).

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. January 31, 1913.

1. EMINENT DOMAIN (§ I D 2—55)—RAILWAYS—CONDEMNING PROPERTIES FOR—FILING PLANS, WHEN CONDITION PRECEDENT TO ENTERING LANDS.

The sale, by deed, stipulating for immediate delivery and possession, to a railway company of all that portion of certain lots required by it for its right-of-way and other purposes necessary for construction, maintenance, or operation as the same appears on the plans already filed or to be filed in the land registry office of the county in which such lands are situate, does not give the company any right to the possession for the purpose of taking away sand and gravel therefrom, of lands outside of the lands designated upon the plan or plans filed under the Railway Act, R.S.C. 1906, ch. 37; if further lands are required, the new or amended plan must first be filed before the railway acquires any right of possession under such deed.

2. CONTRACTS (§ II—125)—CONSTRUCTION—AMBIGUITY—PRESUMPTION.

Upon the construction of contracts, doubts are solved in favour of him who has contracted the obligation and against the person claiming its benefit, especially where the latter drew the contract.

APPEAL from the judgment in favour of plaintiff, rendered by the Superior Court, Letellier, J., on April 13, 1912.

The appeal was dismissed.

Lapointe, and *Langlais*, for the appellant.

Belley, and *Gagné*, for the respondent.

GERVAIS, J.:—The Superior Court of the district of Chicoutimi, on April 11, 1912, sustained the respondent's claim in the nature of a possessory action in restoration and in damages to the amount of $5,000.

The respondent claims recovery of possession of lots Nos. 552, 553, 554, 555, 556, 557, and 558, according to the official record of the land registry office of the parish of St. Alphonse, upon which the appellant has, it is alleged, trespassed by taking therefrom sand and gravel for the construction of its railway, running from Ha Ha Bay through Bagotville to St. Alphonse; the respondent further demands that the railway company pay the damages in question for the taking away of this gravel and sand without leave. The Court of first instance sustained the claim for recovery of possession, but it adjudged the appellant to pay only $25 as damages.

The appellant now seeks the annulment of this judgment on the allegation of its defence as urged on the present appeal, that,

> by a deed duly sealed, dated September 10, 1909, signed in duplicate at St. Alphonse, the respondent sold to the appellant, stipulating for immediate delivery and possession all that part of the parcels of land above-mentioned, which the said company might require for its right-of-way, and for other purposes, necessary in the construction and carrying on of its railway between Chicoutimi and Ha Ha Bay, as the same appears on the plans already filed or to be filed by the company, in the land registry office of the county of Chicoutimi, according to law.

The respondent replied to these allegations of the appellant by alleging that the writing in question did not convey the right to use any sand or gravel deposits in the parcels of land above-mentioned prior to the deposit of the plans shewing the site and limits of the proposed right-of-way under the terms of the agreement giving the right to enter that portion of the lots necessary for the construction of its railway. Such is the issue in this case as it comes to this Court of Appeal. A number of witnesses, some twenty in all, were called to prove the value of the gravel and sand taken away by the appellant, without the consent of the respondent, from the lots in question.

The respondent does not cross-appeal against that part of the judgment which awards him damages in the sum of $25. We need not therefore further consider the evidence in that respect. The entire appeal resolves itself then into the question whether or not the judgment sustaining the possessory action, in favour

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of the respondent, is well founded on the first allegation that the appellant wrongfully took the sand and gravel in question, before the deposit of the plans as required in the written agreement of September 10, 1909; and, on the second allegation, that these native minerals do not comprise any part of the subject-matter of a sale of such lands as are required for the right-of-way of the appellant railway that they should not be imported into the instrument in question.

Did the appellant take possession of the native minerals in question, prior to the deposit of the construction plans of the railway, stipulated for in the written agreement and required as well by arts. 192, 193, and 194 of the Railway Act of Canada? It is necessary to answer this question in the affirmative, owing to the admission in its factum, p. 3, as follows:—

> The defendant began its construction without depositing a new plan, expecting to overcome all difficulties, and thus to avoid the necessity of correcting its plans a second time. The taking of possession by the company of the plaintiff's lands beyond that portion thereof designated in the plan originally filed, was gradual and commenced more than a year before this action was brought. When the construction works were ultimately stopped, the engineers of the defendant company were preparing an exact plan of the parcels of land, possession of which would be required. That plan was made during the summer of 1910, and filed in the department of railways for approval; the approval was received on January 4, 1911, and the plan so approved was filed in the land registry office for the county of Chicoutimi on January 14, of the same year. Between the preparation of that plan and the bringing of this action, the defendant fenced the land which it required, as shewn in said plan.

The real question is, should the appellant have filed a plan before going into possession of the respondent's lands? The appellant maintains not, for the reason, as he says, that the respondent, under the written agreement of September 10, 1909, sold the right-of-way in question with "immediate delivery and possession." But the respondent rejoins that this immediate possession could only follow the deposit of the plan of the appellant's railway under the provisions of the statute in that behalf, and that the provision for immediate delivery could have no other effect than to allow the delay for the payment of the indemnity. On this point, we consider that appellant acted wrongfully and in violation of the agreement of sale by infringing upon the possession of the respondent as to the lots in question. Were the sand and gravel made a part of the subject-matter of the sale in September, 1909? In the first place, there is no such mention of the same in the agreement to which we have referred. So far as concerns the respondent does that agreement import a sale of any gravel or sand which the company might need in constructing its right-of-way over the lots in question, and does it include the transfer of any sand and

gravel for filling up other portions of the right-of-way, for instance, within the forty-mile belt?

The expropriation of the land necessary for the construction of a railway, including stations, warehouses and sidings, is regulated by art. 191 *et seq.* The following steps, as we have said, were essential; filing of plans, service of notice for the naming of arbitrators and taking of testimony and making of an award.

The point in question is, on the other hand, the purchase of sand and gravel near the railway, and the company, building the same, could acquire possession of those native minerals by expropriation proceedings under arts. 180 *et seq.* of the Railway Act, as in the case of expropriation of land for the roadbed itself. Gravel and sand have a peculiar value distinct from the soil necessary for the railway roadbed so recognized under the practice and under the Railway Act itself. The agreement of September 10, 1909, does not import, in our opinion, a sale of a right to take sand and gravel as distinct from the land required for the roadbed of the railway across the respondent's land. Moreover such contracts are to be interpreted in favour of him who has contracted the obligation and against the creditor, it is so prescribed in art. 1019 C.C.

For these reasons, we are of the unanimous opinion that the appeal should be dismissed with costs, less those of the respondent's counsel.

Appeal dismissed.

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PINCHEBECK v. STRONG.

(Decision No. 2.)

Alberta Supreme Court. Trial before Walsh, J. February 5, 1913.

1. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION—ELECTION—REQUISITION—BASIS IN ESTIMATING NUMBER OF ELECTORS.

Under the provisions of sec. 124 of the Liquor License Ordinance, C.O. 1898 (N.W.T.), ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.), ch. 8, sec. 26, requiring a member of the Board of License Commissioners to order the taking of a poll under such local option provisions, to ascertain whether or not licenses for the sale of intoxicating liquors should be granted within a certain license district of the province on the presentation to him of a requisition signed by at least one-fifth of the total number of electors of the district, such number must necessarily be estimated by the commissioner; and although, under sub-sec. 2 of sec. 124, the estimate is based on the number of persons who voted in the last provincial election, it should be made by taking, merely as a starting point, the number of votes so polled, and then building up or cutting down from that as the case may be, according to the information available, and thus ascertaining as nearly as possible the number now entitled to vote, the votes so

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polled being merely the basis of the estimate, and not, of itself, determining the number of electors for the proposed poll, in other words, being the foundation upon which the superstructure is to be built, and not both foundation and superstructure; hence the estimate considers the enumerators' lists, the influx of population and other relevant factors, as well as the number of votes cast at the preceding provincial election.

2. INTOXICATING LIQUORS (§ I C—33)—PROHIBITION — LOCAL OPTION — ELECTION — PRESENTATION OF REQUISITION AS CONDITION PRECEDENT.

The presentation to a license commissioner of the requisition provided in sec. 124 of the Liquor License Ordinance, C.O. 1898 (N.W.T.), ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.) ch. 8, sec. 26, is a condition precedent to the right of such commissioner to order the taking of a poll to ascertain whether or not licenses for the sale of intoxicating liquors should be granted within his district, and such requisition must strictly comply with provisions of that section.

3. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION—ENUMERATOR'S LIST OF VOTERS, EFFECT OF.

A list of voters prepared by an enumerator, while not conclusive as to the right of the persons therein named to vote, is *primâ facie* evidence of that fact, in an action against a license commissioner for a declaration that he is not justified in holding a poll under the local option provisions of the Liquor License Ordinance, C.O. 1898 (N.W.T.), ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.) ch. 8, sec. 26, where the question as to the numerical sufficiency of the number of electors on the requisition for such poll arises.

4. ELECTIONS (§ I A—6)—VOTERS—QUALIFICATIONS—CHALLENGE, EFFECT OF.

Where a person's name appears on an enumerator's list of voters, he can cast his vote without hindrance, unless he is challenged at the polls, and if challenged he can cast it by taking the prescribed oath.

5. ELECTIONS (§ I B—12)—VOTERS—RIGHT TO VOTE—VOTERS' LISTS.

The fact that a person's name does not appear on the enumerator's list of voters does not disfranchise him, for the person may, by taking the prescribed oath, have his name added to the list and swear in his vote.

6. COURTS (§ I A—2)—INHERENT POWERS—INJUNCTION RESTRAINING LOCAL OPTION POLL.

The Alberta Supreme Court has jurisdiction to grant an injunction restraining a license commissioner from acting on a requisition presented to him for a poll to determine whether licenses should be granted for the sale of liquor in his district under sec. 124 of the Liquor License Ordinance, C.O. 1898 (N.W.T.), ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.) ch. 8, sec. 26, where it appears that the commissioner had no jurisdiction, because the requisition did not comply with the statute, notwithstanding sub-sec. 11 of sec. 124.

7. PARTIES (§ I A 4—45)—PLAINTIFFS—ON MATTERS OF PUBLIC RIGHTS—ABSENCE OF SPECIAL DAMAGE—LOCAL OPTION.

A mere inhabitant of a license district has no status to maintain an action against a license commissioner, asking for an injunction restraining the commissioner from acting on a requisition presented to him for a poll to determine whether licenses should be granted for the sale of liquor, under sec. 124 of the Liquor License Ordinance, C.O. 1898 (N.W.T.), ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.) ch. 8, sec. 26, there being no allegation in the statement of claim that any special damage might accrue to the plaintiff from the submission of the question to a vote of the electors.

8. COSTS (§ II—50)—OF UNNECESSARY PROCEEDINGS—DEFECT OF PARTIES—UNNECESSARY DELAY OF SUCCESSFUL PARTY.

In an action by an inhabitant of a license district against a license commissioner praying for an injunction restraining the latter from acting on a requisition presented to him for a poll to determine whether licenses should be granted for the sale of liquor within his district, under sec. 124 of the Liquor License Ordinance, C.O. 1898 (N.W.T.), ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.) ch. 8, sec. 26, where it appears that the action, as originally brought, should have been dismissed, because the plaintiff had no status to maintain the action, but the action was saved by the adding of another person who was entitled to maintain the action, the new plaintiff, although successful, is not entitled to costs, since the defendant could have had the action dismissed before the new plaintiff was brought in, and the defendant is entitled to tax as costs, only such items as he could have taxed as the result of the motion to dismiss which he failed to make.

9. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION—PROCEDURE: ELECTION—REQUISITION TO COMMISSIONER, WHEN JURISDICTIONAL.

Under the local option provisions of the Liquor License Ordinance, C.O. 1898 (N.W.T.), ch. 89, as amended by 2 and 3 Geo. V. (Alta.) ch. 8 (comprised in sec. 124), the presentation of the requisition for the proposed poll is the foundation of the jurisdiction of the license commissioner, and where it is proved that the license commissioner proposed to command the taking of the poll on a requisition signed only by one-fifth of the number of electors who voted at the last provincial election, this establishes an attempt, on the commissioner's part to act without jurisdiction and shifts upon him the onus of shewing numerical sufficiency strictly.

GROSS v. STRONG.

Statement

ACTION brought against the defendant, a member of the Board of License Commissioners for the Province of Alberta, for a declaration that he is not justified in holding a poll under the local option provisions of the Liquor License Ordinance in license district No. 3, and for an injunction restraining him from acting on a requisition presented to him for a poll under sec. 124 of the Liquor License Ordinance, C.O. 1898 (N.W.T.), ch. 89, as amended by statutes 2 and 3 Geo. V. (Alta.) ch. 8, sec. 26. Judgment on the return of a motion for an interim injunction is reported: *Gross* v. *Strong* (No. 1), 6 D.L.R. 843. On the trial after argument the Court allowed an amendment adding one Stephen Wilson as a party plaintiff.

Judgment was given refusing the plaintiff Gross the injunction asked for, but granting the injunction to the added plaintiff Wilson.

Frank Ford, K.C., and *O. M. Biggar*, for the plaintiffs.
A. G. McKay, K.C., and *C. A. Grant*, for the defendant.

Walsh, J.

WALSH, J.:—As this action was originally constituted it was brought by the plaintiff Gross against the defendant Strong, who is and was at all material times a member of the Board of License Commissioners for the Province of Alberta, for a declaration that the defendant is not justified in holding any poll under

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the local option provisions of the Liquor License Ordinance in the license district No. 3, for the province, and for an injunction restraining him from acting upon the requisition therefor in the statement of claim set out. This statement of claim alleges that the plaintiff Gross resides at the town of Red Deer, in the Province of Alberta, and is a duly qualified elector in the electoral district of Red Deer, in the said province. The statement of defence denied that the plaintiff Gross is a duly qualified elector as alleged, but is silent with respect to the allegation as to his residence, which, therefore, under our practice, is taken to be admitted. No evidence was given at the trial or otherwise by the plaintiff or respecting him, and his name was not even mentioned during the course of the trial. The case stood, therefore, at the close of the trial, in so far as he is concerned, simply upon the admissions as to his residence as alleged in the statement of claim. On the argument it was contended for the defendant that the plaintiff, on the evidence before me, had no status to maintain this action. Some days after the close of the trial application was made by the plaintiff to add one Stephen Wilson as a plaintiff, and after argument I allowed the amendment upon certain terms as to costs which it is not necessary to refer to here. The statement of claim has been amended accordingly by adding as a plaintiff Stephen Wilson, suing on behalf of himself and all other, the inhabitants of and holders of licenses for sale of intoxicating liquors in license district No. 3. The amended statement of claim alleges that Wilson is resident in and is the holder of a hotel license under the Ordinance for the sale of liquors by retail in license district No. 3. It is admitted by the defendant that the plaintiff Wilson was at the commencement of this action and still is a resident of license district No. 3, and that he was and still is the holder of a license for the sale of intoxicating liquors by retail in such license district.

In the month of September, 1911, a requisition was presented to the defendant praying that a vote should be taken for the purpose of determining whether or not any license to sell intoxicating liquors should be issued in this license district. The facts in connection with this requisition I will refer to in detail as well as the irregularities which the plaintiffs allege with respect to them. The defendant before the commencement of this action was notified by the plaintiff's solicitor that he had been instructed to begin an action against him for the purpose of restraining him from proceedings to take a poll under this requisition, this letter setting out with some detail the irregularities complained of. The defendant in reply wrote the plaintiff's solicitors that he had taken steps to appoint returning officers for the taking of the poll and that the date on which it would be held would be announced later. This action was thereupon commenced for the

purpose already mentioned. A mass of evidence was given on behalf of the plaintiff to shew the irregularities of and the inaccuracies in this requisition other than those which appear from the documents themselves. In answer to a question from me it was stated that it was not the intention of counsel for the plaintiff to endeavour by this means to cut down the number of requisitionists below the statutory percentage, but simply to shew that the methods adopted for obtaining and verifying signatures were so loose and unreliable as to justify the conclusion that carelessness permeated the whole transaction to such an extent that no dependence could be placed upon the requisition as being what it purports to be, namely, one signed by duly qualified electors whose signatures are verified by the oaths of the witnesses to the same. That great looseness of method prevailed in these respects is not open to question. In saying this I do not intend to reflect in the slightest degree upon those who had this work in hand. As I said during the argument I am convinced upon the whole of the entire honesty of purpose of those who undertook the arduous task of getting this requisition signed. I am satisfied that they went about it in a spirit of splendid fairness and that the majority of the errors that were made and of the irregularities that occurred were the result of honest mistake due to insufficient information and instructions. In some cases there was carelessness as to the contents of what were supposed to be statements under oath, but I am satisfied that there was nothing wilfully wrong in this. I am also convinced that the defendant was actuated by a strong desire to do his duty as he saw it, and that in any respect in which he has failed his failure is to be attributed either to the difficulties of the situation or an incorrect appreciation of the requirements of the Ordinance. Sixty-four witnesses in all were called, the evidence of nearly all of whom was directed to the class of irregularities and inaccuracies with which I am now dealing. It is impossible for me to do more than summarize my findings of fact in this connection which I will endeavour to do in such a way that an appellate Court will have as little difficulty as possible in understanding exactly what has been proved in these respects. Fourteen men who signed the requisitions and were called as witnesses were not duly qualified electors applying to them the test as of the dates of their signing, and there is some doubt as to the qualifications of a few more. Three men signed two different requisitions, so that their own signatures are duplicated. Three of the men who circulated the requisitions and procured and witnessed and purported to verify the signatures either had no information or incorrect instructions as to the qualifications of an elector, and they seem to have acted according to these incorrect views in getting signers. William Hastie had no instructions except to see that the peti-

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tioners had been three months in the district, and he says that that is all that he concerned himself about, as he thought that was the only thing requisite to qualification. He circulated petition No. 77 of exhibit 1, on which there are 29 signatures. C. H. Swanson witnessed the signing of petition No. 31 of exhibit 1. He says that his instructions were to get it signed by British subjects who had been in the district three or six months. There are 96 signatures on his petition. M. M. Wiggins had charge of petition which is No. 2 of exhibit 1, on which there are 39 signatures. He was not aware that a year's residence in Alberta was an essential in the qualification of an elector. Each of these men made a statutory declaration, which is attached to their respective requisitions, containing a paragraph in which he says that every signature in it is that of a man possessing all of the qualifications of an elector which are set out in it in detail. Hastie says this was not read to him and that it is not true. Swanson swears that there are men whose signatures are on his requisition that he does not know, and that his information respecting the right to vote of those whom he did not know was gained by simply asking them if they had a right to vote. It is shewn by their own evidence that two of the signers of Wiggins's requisition, namely, W. W. Ford and W. G. Braine, were not duly qualified electors, and he stated himself that he is doubtful as to whether or not six others had been living for a year in Alberta when they signed. There are many other objections of a minor character along the same lines. Two petitioners swore that they did not know or understand what they were signing. All of these petitioners who, I have found, were not entitled to vote are sworn to by the witnesses as possessing all of the qualifications. A number of the witnesses were under the impression that a residence of three months in the license district, rather than in the electoral district, was necessary, and they acted upon this idea in procuring signatures. Nine of the witnesses to the signatures were not sworn by the officers before whom their affidavits purport to have been taken. The signatures on these requisitions run into the hundreds, but I have not taken time to count them. There are several other witnesses with respect to whom I am in doubt upon this point. In a great many cases it is quite plain that those who witnessed the signatures were not in a position to swear positively that every signer was a duly qualified elector. Many of them frankly admitted the impossibility of this. They were forced to rely upon the statements of the signers themselves or upon information given to them by others. The instances of this are very numerous if, indeed, every man who witnessed signatures and gave his evidence at the trial is not in some degree included in this class. This was of necessity the case because of the absence of any system of

voters' lists in this province, except the enumerators' lists prepared before an election. But no matter what the reason for it the evidence as to the right to vote of hundreds of the requisitionists is upon the evidence before me not disproved, but open to very serious doubt. These instances which I have given illustrate the general nature of the evidence offered to shew the irregularities and inaccuracies complained of. I have not attempted to cover them with any more detail, for that would be a work of too great magnitude. My object simply is to shew, in a general way, the nature and extent of this class of objections urged by the plaintiff and established by the evidence. The local option provisions of the Liquor License Ordinance, as they existed at the date of the presentation of this requisition are contained in sec. 124. The portion of that section with which we are now concerned is a part of sub-sec. 2, which reads as follows:—

> When a requisition is presented, accompanied by the sum of $100 to defray the expenses of the poll hereinafter specified, to any member of the board from a number of the electors of any district (estimated as near as may be at at least one-fifth of the total number of electors of the district, the basis of such estimate being the number of electors who voted at the last election of a member of the Legislative Assembly), requiring a vote to be taken as to whether or not such license shall issue or be granted therein, it shall be the duty of such member upon the receipt of such requisition and the said sum of $100 to scrutinize the names of the electors attached to such requisition, and being satisfied that the names so attached are those of duly qualified electors within the district, and after the person or persons who have witnessed the signatures to the said requisition shall have sworn before a justice or notary public
>
> (*a*) That he, the said witness, or they, the said witnesses, were present and saw the said electors sign the said requisition;
>
> (*b*) That the said electors signed the said requisition within thirty days of the date of such affidavit; and
>
> (*c*) That the signers constitute one-fifth of the electors of said district (estimated as above)
>
> to command the taking of a poll of the said electors to ascertain whether or not such license shall be granted.

It is contended for the plaintiff that before the defendant could command a poll to be taken all the requirements of this sub-section must have been complied with as they are conditions precedent to his right to so command. The plaintiffs further contend that there has been such an entire lack of compliance with all of these requirements that the defendant is absolutely without authority to order the taking of the vote and that he should be restrained by the order of this Court from so doing.

I will first set out the objections which the plaintiffs urge and where necessary the facts as I find them with reference thereto:—

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(1) The sub-section requires that the requisition shall be "accompanied by the sum of $100 to defray the expenses of the poll" and says what the defendant shall do "upon the receipt of such requisition and the said sum of $100.

The plaintiffs say that this means that the requisition and the deposit must come together to a member of the board. The fact is that the deposit did not come to the defendant with the requisition or at all. It was sent or handed to the Provincial Secretary, by whom, or how, or when does not appear.

(2) The sub-section provides for a requisition "from a number of the electors of any district (estimated as near as may be at at least one-fifth of the total number of electors of the district, the basis of such estimate being the number of electors who voted at the last election of a member of the Legislative Assembly."

The defendant has estimated the number of electors in this license district as 12,320, and upon that has taken 2,464 as being the number of requisitionists necessary to justify him in having a poll taken. The plaintiffs insist that he has adopted an entirely wrong system for arriving at the number of electors in the district. The evidence as to the system which he adopted is given by himself. He procured from the Provincial Secretary's department a memorandum shewing the total number of votes cast in the general election of March, 1909, in each of the 16 electoral districts which lie either wholly or in part within the boundaries of license district No. 3, in which there was a contest. In six of these electoral districts which lie wholly within this license district there were contests at such general election, and in them he took the total vote polled. In neither Lacombe nor Sedgewick was there a contest and so there were no records by which he could go with respect to them, he added together the total number of votes polled in the six constituencies to which I have referred and dividing this aggregate by six got the average for each of these six districts. He estimated that the vote in Lacombe would just about equal this average, and that the vote in that portion of Sedgewick which is in this license district would be about two-thirds of this average and he allotted to each of these constituencies a total vote upon this basis. . The eight remaining electoral districts lie partly within and partly without the limits of this license district. In four of them he made a geographical distribution of the total votes polled, giving to this license district the proportion of the same which the number of townships in it bears to the number of townships lying outside of it. In the remaining four he had no figures whatever to guide him. In Cochrane, Rocky Mountains and Stony Plain he had absolutely nothing to shew the votes polled, and in Lac St. Anne there was no contest. He simply guessed, therefore, at the figures for these electoral districts. The plaintiff's argument is

that he erred in this in two respects. The section gives the total number of votes polled as the basis of this estimate which the defendant is required to make of the total number of electors, but he has taken the number of votes polled as being the total number of electors in the district, or, in other words, as counsel for the plaintiff put it, the section gives the number of votes polled as the foundation upon which the superstructure of the total number of electors is to be built, but the defendant has taken it as being both foundation and superstructure. The defendant stated in his examination for discovery that there had been a large increase in population in this district since the election of 1909, which he did not take into account. No attempt was made by him to get the returns from the Dominion census of 1911, but there is nothing to shew that they were then available to him. In short, the total vote polled, as arrived at in the manner which I have described and nothing more, is what he based his decision upon that a requisition from 2,464 electors was sufficient to justify the taking of a poll. A memorandum prepared and verified by the clerk of the executive council shewing the number of names on the enumerators' lists for 1909 elections in each of the electoral districts wholly within this license district and in those portions of the other electoral districts except Vermilion, which lie within this license district, was put in. The Vermilion figures are for the bye-election of June 29th, 1910. For the convenience and to allow the accuracy of my figures to be more easily tested, I will put in tabular form the number of names thus shewn on the enumerators' lists within these districts and parts of districts and the number of votes polled or estimated by the defendant in each of same.

	Names on enumerators' lists	*Defendant's estimate of votes polled*
Didsbury	2,081	1,357
Olds	1,708	1,176
Innisfail	1,351	971
Red Deer	1,282	1,281
Lacombe	1,400	1,112
Ponoka	951	695
Wetaskiwin	1,423	1,192
Stettler	2,129	875
Camrose	1,901	1,648
Vermilion	556	276
Alexandra	1,271	596
Cochrane and Rocky Mountains	182	200
Lac St. Anne and Stony Plain		201
Sedgewick	1,886	740
	18,121	12,320

The statement shews that there were eight polls in all in the above list for which no returns of enumerators' lists were received

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and in addition five from the whole of Sedgewick. It is instructive to note that the number of names on the enumerators' lists for the portions of Sedgewick within this license district increased from 1886 in March, 1909, to 3,409 in May, 1912, the date of the last polling in that constituency, as shewn by this same memorandum and that the number of votes actually polled within the same in 1912 was 2,089 as compared with the defendant's estimate, for 1909 of 740. These large increases are, no doubt, due to the increase in population in the territory in these three years, an increase for which the defendant has made no allowance. The argument, of course, is that the fact that so many more names appear in the numerators' lists, as persons entitled to vote, than appear in the poll books as having actually voted shews the impropriety of adopting the latter number as representing the total number of electors in the district. Then it is said that the methods adopted with reference to the electoral districts in which there were no contests and to those which lie partly within and partly without this license district are not warranted by the section which fixes "the number of electors who voted at the last election of a member of the Legislative Assembly" as the basis for the estimate.

(3) The section makes it the duty of the defendant "upon the receipt of such requisition and the said sum of $100 to scrutinize the names of the electors attached to such requisition."

It is contended that the defendant did not do this, but I cannot find any evidence at all upon this point. The defendant's examination for discovery describes many things which he did, but is silent upon the question of this scrutiny, and I cannot say merely from the fact that it is not referred to that he did not do it.

(4) The section imposes upon the defendant the duty of commanding the taking of a poll "being satisfied, that the names so attached are those of duly qualified electors within the district," and after the person or persons who have witnessed the signatures to the said requisition shall have sworn before a justice or a notary public: (*a*) that he, the said witness, or they, the said witnesses, were present and saw the said electors sign the said requisition; (*b*) that the said electors signed the said requisition within thirty days of the date of such affidavit; and (*c*) that the signers constitute one-fifth of the electors of the said district (estimated as above).

The plaintiffs contend that upon the facts established the defendant should not and could not have been satisfied that the names attached to the requisitions are those duly qualified electors. He further contends that the provisions of the section relating to the verification of the requisition have not been complied with in many respects. The facts are as follows: The requisition was made up of a large number of separate and distinct documents, consisting in some instances of one sheet and in

others of more than one fastened together. It was handed to the defendant by Mr. G. W. Smith, of Red Deer, the president for license district No. 3 of the Temperance and Moral Reform League, early in September, 1911. Attached to or endorsed upon each document constituting the requisition was an affidavit which, speaking generally, was in the following form, or to the like effect:—

(1) That I was present and did see the electors named in the within requisition sign the said requisition.

(2) That the said electors signed the said requisition within thirty days of the date of this affidavit.

At the same time Mr. Smith left with the defendant his own affidavit as follows:—

(1) That I have examined the requisition now shewn to me and marked exhibits one to twelve, both inclusive.

(2) That the signers of the said exhibits constitute at least one-fifth of the electors of the local option district number three who voted at the last election for members of the Legislative Assembly.

Mr. Smith was himself a witness to the signatures upon but one of these documents. None of the documents constituting the requisitions are marked as exhibits to this affidavit and there is nothing upon any of them to indicate that they are such exhibits. He says that he does not know how many signatures there were upon the requisition, but is under the impression that there were over 8,000. He also says that he only knew of the number of electors in the district from returns made to him by the head office of the league, that in electoral districts in which there was no contest in 1909 he took returns for the election of 1905, making no allowance for the fact that in the meantime the boundaries of every such district had been altered, and that he did not know whether or not any allowance had been made in respect of the districts which were partly within and partly without the license district. This affidavit purports to have been taken before a commissioner, but I think it is reasonably clear that Mr. Smith was not sworn. The defendant placed his initials upon each document so delivered to him and then tried to find out the total vote cast at the last provincial elections. He got from the Provincial Secretary's department the memorandum to which I have already referred which, while giving the total vote polled in each district in which there was a contest, does not distinguish in any manner the vote polled respectively within and without the license district in the constituencies which were only partly within the license district and those in which there was no contest. From this statement he worked out the total vote in each district in the manner which I have already described. He then got the poll books that were used in the last election for the electoral district of Wetaskiwin and attempted to check the names

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on the requisitions against the names in it, but he found it impossible to do so and abandoned that idea. He says in effect that he found it impossible by this system of checking to satisfy himself that the requisitionists were electors and he sent the papers back for further evidence. They were all returned to him shortly after the 11th of October, and upon their return there was attached to each document constituting the requisition a statutory declaration made by the witness to the signatures on that particular document in the following form:—

(1) That I was the witness to the signature of the electors whose names are in the requisition hereunto annexed and was present and did see the said electors sign the said requisition.

(2) That each and all of those whose names are signed to the said requisition are British male subjects of the full age of twenty-one years and have resided in the Province of Alberta for at least twelve months and in the electoral district where they now reside for at least three months immediately preceding the date of their so signing and that they are not unenfranchised Indians.

This was supplemented by an affidavit from Mr. G. W. Smith under date of October 4, 1911, as follows:—

(1) That the signers to the petitions included in the three parcels marked as exhibits one (1), two (2) and three (3), constitute at least twenty per centum (20%) of the number of duly qualified electors who voted at the last provincial elections in the territory included in local option district No. 3 (number three).

A further affidavit of Mr. Smith under date of the 11th of October, 1911, was also furnished as follows:—

That the signers to the petitions in the parcels marked exhibits one (1), two (2), and three (3), constitute a number of duly qualified electors equal to at least twenty per cent. (20%) of the number of duly qualified electors who voted at the last provincial elections in the territory included in license district No. 3 (number three) in the Province of Alberta.

The only reason suggested for this second affidavit, which is in substance identical with the first, is that in the former the district is referred to as local option district No. 3, instead of license district. None of the documents constituting the requisition are marked as exhibits to either of these affidavits or in any way identified as being the petitions mentioned in them, and Mr. Smith confessed his inability to now pick out the petitions so referred to. Mr. Smith stated in his evidence before me that he based his statement in these affidavits that the signers were duly qualified electors upon the statements contained in the affidavit of the witnesses and upon them alone. I do not think that he was sworn upon either of these occasions. The defendant upon the return of these documents to him checked up again the calculations which he had made in the first instance, the result of which he summarized on page 2 of a memorandum prepared by him and which is exhibit 12, on this trial as follows:—

Total vote	12,320
The one-fifth necessary	2,464
Local option petition	3,156

This is all that has been done in compliance or attempted compliance with the requirements of that portion of sub-section 2, of section 124, with which I am now dealing, and it is urged, for reasons which I will refer to later, that this falls very short of satisfying these requirements. Many of the affidavits of the witnesses were made before a commissioner for taking affidavits instead of before a notary public or justice of the peace, the officers named for that purpose in the section. It was admitted upon the argument that if those documents forming part of the requisitions the signatures to which are verified by affidavits made before commissioners must be excluded from consideration, there are not sufficient signatures upon the remaining document to make up the required percentage even upon the basis adopted by the defendant for his estimate. For this reason it is unnecessary for me to go into any figures under this head.

(5) The sub-section refers throughout to "the electors of the district" and the "duly qualified electors of the district." Under section 2 of the Ordinance the word "electors" means those who are entitled to vote at an election for a member of the Legislative Assembly of the Territories, the last word, of course, now reading "Province." Under sec. 104 of the Alberta Election Act, which is the section then and now governing the qualifications of an elector, residence in Alberta for one year and in the electoral district in which he seeks to vote for three months immediately preceding the date of the issue of the *writ of election* is an essential to a man's right to vote at such an election. The argument is made that inasmuch as an elector's residential qualifications are fixed by reference to the date of the issue of the writ of election, which is the date fixed by the Act for the application of the residential test, and inasmuch as there is no such thing known to the Liquor License Ordinance as a writ of election, there was not at the time of the signing of this requisition any man who was an elector or any body of men who constituted the electorate of the district.

(6) It is argued that the requisition though consisting of many parts is but one document, and that the Ordinance only makes provision for a requisition and that being but one document, if any part of it fails the whole document must fall to the ground.

(7) The sub-section enacts that "such poll shall be held in the month of October or November next ensuing," which, of course, would be in this case October or November of 1911. It is argued that the time thus fixed having passed without the taking of a poll, the defendant was, when in October, 1912, he proposed doing so, and now is, without jurisdiction to order it to be held.

By sub-sec. 2, of sec. 26, of ch. 8, of the Statutes of Alberta, 2 & 3 Geo. V., sub-sec. 17 is added to sec. 124, which enacts as follows:—

(17) Notwithstanding anything herein contained the member of the board to whom the requisition for such poll has been presented, or in

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case of his death or resignation the member of the board appointed in his place or stead may without the presentation of any further or other requisition appoint such day as he may deem proper for the taking of the postponed poll in the license districts numbers 2 and 3, and the validity, invalidity or other status of such requisition or of any other proceedings heretofore had or taken in regard to the taking of such poll shall be in nowise affected by the passing of this Act, but shall in all respects be governed by the provisions of the Liquor License Ordinance as in force at the time of the presentation of such requisition and all further proceedings hereafter to be had or taken in regard to the taking of such poll shall in all respects be governed by the provisions of the said Ordinance as amended by this Act:

Provided that if the decision of three-fifths of the persons voting thereon in either of such license districts is in favour of the prohibition of the sale of intoxicating liquors in their district and against the granting of licenses therefor, such decision shall come into effect on the first day of July, 1913.

It is contended that this new enactment does not help the defendant, for it refers to the postponed poll in this district and there is no evidence to shew that the date was ever fixed for the taking of the poll on this requisition, or that any postponement of it was ever ordered and that there may, for anything disclosed to the contrary on the trial of this action, have been a requisition for a poll in this district other than that in question here.

It is plain beyond controversy that the requisition upon which a license commissioner must act and the only one upon which he can act is one that is signed by a number of electors estimated as near as may be at at least one-fifth of the total number of electors of the district. These are the words of the section and that is what the witness or witnesses must swear that the signers of the requisition constitute. This percentage of the electorate is to be estimated, but that is so of necessity, for there was not at the time of the passing of this legislation, and there never has been since, and there is not now, any system of voters' lists in this country save the enumerators' lists, which since 1909 are prepared at election time and, therefore, there never has been and there is not now any fixed and ascertained body of men who at any given time, save at the date of a writ of election and at the date of the election itself, could be said to constitute such electorate. It would, therefore, be impossible to do more than estimate the number of electors for the purposes of this section or do more than estimate whether or not the signers of the requisition equal one-fifth of such number, but it is one-fifth, as nearly as can be ascertained, of the total electorate, and not simply of those who actually voted at the last election, whose signatures must be found upon the requisition. It is equally plain that those who were responsible for this requisition, as well as the defendant, erred in the view which they took of the requirements

of the section in this respect. They both took the view that so long as the requisition was signed by a number of electors equal at least to one-fifth of the total number of those who voted at the last election it was sufficiently signed. This view of the promoters of the requisition is clearly manifested in the language of Mr. Smith's affidavits which constitute the only evidence furnished the defendant upon the point, and in all of which he asserts that the signers constitute one-fifth or twenty per cent. of the electors who voted at the last election for the Legislative Assembly. That the defendant himself took this view is plain from his own evidence. They and he were misled by the words of the section which make the number of electors who voted at the last election simply the basis of the estimate thereby directed, and being so misled they have fallen into the error of treating as a sufficiently signed requisition one which measured up to the standard thus mistakenly set. What the section means may, in my view of it, be paraphrased as follows: "You will take as your starting point in making your estimate the number of votes polled at the last election in the district and build up or cut down from that as the case may be, according to the information available until you have ascertained as nearly as possible the number of people in the district now entitled to vote, and if the requisition is signed by one-fifth of that number it is sufficiently signed; otherwise it is not." The defendant was, in my judgment, quite wrong in assuming to act upon his erroneous view of the meaning of this provision.

The presentation to a license commissioner of the requisition mentioned in the section is the foundation of his jurisdiction to command the taking of a poll. Without it he is powerless to do so. To be effective it must be such a requisition as is defined by the section. If it falls short of the statutory requirements it is not the requisition prescribed by law and, therefore, is not a valid requisition. The section says, "when a requisition is presented" from the number of electors specified it shall be the duty of the commissioner to act. The presentation of the prescribed requisition is a condition precedent to this exercise of his power under this section.

When the plaintiffs proved, as they undoubtedly did, that the defendant proposed to command the taking of a poll upon a requisition which was proved to be signed only by one-fifth of the number of electors who last voted, they established that he purposed doing something that he had no right to do.

I think that this was all that the plaintiffs were called upon to establish and that thereupon the onus shifted to the defendant of shewing that the requisition was in fact signed by a sufficient number of electors to give it validity. He was certainly entitled to shew that notwithstanding his erroneous read-

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ing of the section the requisition was as a matter of fact upon a proper construction of the section sufficiently signed. That, however, was his duty and not that of the plaintiffs and this he made no attempt to do. If, therefore, the plaintiff's case upon the question of the numerical sufficiency of the signers had rested simply upon the proof of the defendant's error, to which I have referred, I would say that in the absence of evidence on the part of the defendant to shew the sufficiency of the requisition upon a proper construction of the section, they had proved their case. Not content, however, with that, the plaintiffs have adduced evidence which satisfies me from whatever point of view it may be considered that it is far from being established that the requisition is signed by the requisite percentage of the electors. Instead of resting as they might have done upon the defendant's failure to prove the affirmative of this question they have undertaken, perhaps not to prove the negative of it, but at any rate to cast so much doubt upon it as to justify the conclusion that the requisition is not one upon which the defendant would be justified in acting.

There is no proof before me of the actual number of signatures upon all of the documents intended to form parts of the requisition which came to the defendant. Four bundles of papers were filed as exhibits at the trial. The only explanation given of them is in the defendant's examination for discovery (he not having been examined as a witness at the trial), and that is very vague. He simply says that those which have his initials on came in at one time (Q. 23), and that the result of his calculations as to the number of signatures on the petitions as presented is set out in the paper marked as exhibit 17 of his examination, which is exhibit 12 on the trial and that there were some more that came in that did not count (Q. 258 and 259). I understood that the bundles marked as exhibits 1 and 2 at the trial were petitions received and counted and upon which the defendant proposed to act, this division being made to separate those sworn before commissioners from those sworn before justices of the peace or notaries public. There is no evidence as to what the papers comprising exhibits 3 and 4 are, and I have been unable to get any satisfactory explanation of them. I have a note that the papers in exhibit 3 are not initialled by the defendant, and that those in No. 4 are questioned. However this may be it is evident that the signatures counted and accepted, and intended to be acted upon by the defendant, number only 3,156. Upon reference to my judgment on the motion for an interim injunction (*Gross* v. *Strong*, 6 D.L.R. 843), I find it there stated that counsel for the plaintiff on that argument represented that there were 4,089 signatures in all, and I assume in the absence of any evidence on the

point and without actually counting them that this is the maximum number in the bundles produced, counting those which the defendant does not appear to have checked or examined at all as well as those which he accepted. Now, while the number which he counted, 3,156, is quite sufficient on the basis adopted by him, it falls very far below the required percentage of the total number of electors in the district. I think that upon the evidence it may fairly be said that even the maximum number of 4,089 is not enough. The names on the enumerators' lists for this district in March, 1909, except for Vermilion, and in that constituency in June, 1910, were 18,121, one-fifth of which is 3,624. It may be said that these enumerators' lists should not be considered because the entry of a man's name upon them is not conclusive of his right to vote. It is true that it is not conclusive, but I think that it affords just as reliable proof of the right to vote of those who are named in it as does the evidence that we have here of the status of these requisitionists as electors. An enumerator prepares his list under the sanctity of an oath which binds him to act faithfully in that capacity without partiality, fear, favour or affection. I think that for such a purpose as this, at any rate, the appearance of a man's name on this list is *primâ facie* evidence of his right to vote. Unless his vote is challenged at the polls he can cast it without let or hindrance, and if challenged he can cast it upon taking the prescribed oath. In any event, I think that these lists might, with very great propriety, be resorted to for the purpose of the estimate of the voting strength of the district required by the section. In several instances witnesses who were examined at the trial got their information as to the electors in their district from these lists. We have it, therefore, that two years and a half before this requisition was presented there were in all of this district, except Vermilion, 17,565 names on these lists, and in Vermilion there were a year and three months before the requisition was presented 556 names on the list, making 18,121 in all, and even then there were a number of polls from which no lists were received, as I have shewn. Now, while the placing of a man's name on the enumerator's list is, as I have said, not conclusive of his right to vote, the fact that his name is not on it does not disfranchise him, for he may go to the polling booth on the day of election and by taking the prescribed oath have his name added to the list. Although this system has only been in force in Alberta since 1909 it has been in vogue in Dominion elections in this country for many years, and I think it is almost common knowledge that the enumerators' lists are always materially added to in this way. A good illustration of this is afforded by the figures for Red Deer in the foregoing tabular statement. There were 1,282 names on the enumerator's list and 1,281 votes

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were actually polled. This can only be accounted for by the fact that many names must have been added to the enumerators' lists on election day, for I am sure that never in the history of elections, not even in the famous Londonderry contest of last week, was such a proportion of votes polled as 1,281 out of 1,282. A reasonable addition should, therefore, be made on this account to the names on the enumerators' lists.

Then allowance should be made for the large increase in the voting strength of the district between the preparation of these enumerators' lists and the presentation of the requisition. The defendant on his examination admitted a very large increase in the population. I, of course, cannot say whether or not the increased voting strength in Sedgewick, to which I have drawn attention is illustrative of the growth of the entire district. It will be remembered that from March, 1909, to May, 1912, the names on the enumerator's list in that constituency increased from 1,886 to 3,408. This growth is at least instructive and shews that some regard should be had to this element throughout the district. If there were, as has been proved, 18,121 names on the enumerators' lists at the dates mentioned I am satisfied that from the two causes to which I have referred a reasonable estimate of the voting strength of the entire district in October, 1911, would be at least 25,000, a figure which, of course, would require the signatures to the requisition of at least 5,000 electors before the defendant could act upon it.

In the entire absence of any proof to the defendant that the requisition is signed by one-fifth of the total number of electors of the district and of proof by the defendant at the trial that it is so signed, I would not have hesitated to hold that in assuming to command the taking of a poll he was acting entirely without jurisdiction. In the face of the evidence offered by the plaintiff, I have no hesitation in holding that it is not sufficiently signed, and this without taking into account at all the doubts as to the right of many of the requisitionists to qualify as voters which are created by the evidence before me. This conclusion makes it unnecessary for me to consider any of the remaining objections to the validity of the requisition pressed upon me by counsel for the plaintiffs, and for this reason I have not done so. These objections are many, and from the casual consideration which I have been able to give them, some of them at least appear to be formidable. When, however, the objection which I have dealt with, at perhaps an inordinate length, is, in my opinion, fatal to the validity of the requisition no good purpose would be served by discussing the others, which, of course, upon appeal will still be open for argument. I do not think that sub-section 11, of section 124, applies to any such act or proceeding as that which I have been considering. I do not see anything

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in it to deprive the Court of its inherent jurisdiction to stop the defendant from usurping a power which he does not possess. The board would, doubtless, have the right under this sub-section to enquire into and dispose of objections based upon irregularities occurring in the exercise by one of its members of a power which he lawfully exercised, but that is not this case. Neither is sub-sec. 12 applicable here.

What I am dealing with is not a "mere want or defect of form or any irregularity in the drawing up or execution of the same." That might apply to some of the objections urged by the plaintiff, but it does not to the ground upon which I am placing my judgment, namely, the entire lack of jurisdiction in the defendant to do what he proposes doing. I think that the new sub-sec. 17 added by the amendment of last session applies to this requisition. There is, of course, no verbal evidence to connect the two. I gave effect to the objection of the plaintiff's counsel when an attempt was made by the defendant through the evidence of the Deputy Attorney-General to shew the connection, for I think it clear that the section must receive its construction from its wording. In the absence of any evidence shewing that any other requisition was presented I think that I am justified in assuming that the new sub-section refers to the requisition over which this litigation has arisen. The expression "postponed poll," as applied to the events in question here, is not a happy one, for in strictness there is no postponed poll in this district. In view, however, of the fact that the poll upon this requisition which was presented in October, 1911, should have been taken, if at all, either in that or the following month, and was not so taken, it might fairly be said that such poll was postponed, though no precise date for it had ever been set. I do not see, however, how this amendment can be made helpful to the defendant. His counsel argued that because it says that he "may without the presentation of any further or other requisition appoint such time as he may deem proper for the taking of the postponed poll" he is invested with statutory authority to do so regardless of every consideration. This might be so but for the fact that it goes on to say that "the validity, invalidity or other status of such requisition or of any other proceedings heretofore had or taken in regard to the taking of such poll shall be in no wise affected by the passing of this Act, but shall in all respects be governed by the provisions of the Liquor License Ordinance as in force at the time of the presentation of such requisition." Some effect surely must be given to these words, but if the defendants' contention is entitled to prevail they must be read out of the section. In my opinion this amendment accomplishes nothing more than the extension of the time for voting upon the requisition from November, 1911, to a day to be fixed

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by the defendant and subject to that the requisition is good or bad now, according to its validity or invalidity when presented.

It was objected that injunction is not the proper remedy, but what the proper remedy is, was not suggested. I must confess my inability to see how the defendant could be stopped from doing an unauthorized act except by the order and injunction of a competent Court, and I entertain no doubt whatever but that this Court has the jurisdiction which the plaintiffs here invoke. I am of the opinion that the plaintiff Gross has no status to maintain this action, he being a mere inhabitant of the license district to whom it is not even alleged that any special damage might accrue from the submission of the question to a vote of the electors. I think, however, that the plaintiff Wilson is entitled to maintain it. He as a person engaged in the liquor business in the district has reason to apprehend that he will suffer damage in that business if the requisition is acted upon, for the vote upon it might put an end to his right to apply for and receive a renewal of his license to carry on such business after the 30th of June next. In my view of the authorities, which I do not take time to cite or to quote from here, they are ample to sustain both of these propositions. But for the addition of Wilson as a plaintiff I would have dismissed this action, and with costs, because of my opinion that the plaintiff Gross has no status to maintain it. I do not now dismiss it because I hold that the plaintiff Wilson can maintain it, and he is, in my opinion, entitled to the judgment asked for. The defendant did not raise this objection until the close of the case. He might, and I think he should, have moved to dismiss the action as soon as he had entered his appearance on the ground that the statement of claim disclosed no cause of action in the plaintiff. If my view of it is right that motion would have ended the action. On the argument before me of the motion for the interim injunction this objection was not even suggested. I think that the plaintiffs are not entitled to any costs, for as the action stood at the close of the trial it should have been dismissed, and it is only the subsequent adding of Wilson that has saved it. The defendant is entitled to some costs, but only such as he could have taxed as the result of the motion to dismiss which, as I have said, he should have made. I think it would be improper to allow him to profit so tremendously through his failure to take prompt advantage of this objection, as he would if allowed all of his costs to the date of the amendment. He will have his costs against the plaintiffs on the above basis. These are the terms upon which I allowed the amendment if I should find as I have found, that the plaintiff Gross was not entitled to judgment. I fix these costs at $50. The taxable costs exclusive of the argument would be about $25. There would have been but one argument of the

Chamber motion to dismiss this action and the Pinchbeck action, for which $50 would be a fair fee, and this divided between the two cases would be $25 in each, making $50 in each case a fair amount at which to fix the costs. The plaintiff Wilson will have the judgment for the relief prayed for without costs, and the defendant is entitled to his costs, fixed at $50.

Judgment for plaintiff Wilson.

PINCHEBECK v. STRONG.

Statement

ACTION brought against the defendant, a member of the Board of License Commissioners for the Province of Alberta, to restrain him from taking a poll of the electors of license district No. 2, pursuant to a requisition presented to him for a poll under sec. 124 of the Liquor Ordinance C.O. (N.W.T.) 1898, ch. 89, as amended by statute 2 and 3 Geo. V. (Alta.) ch. 8, sec. 26. The judgment on the return of a motion for an interim injunction in this action is reported: *Pinchebeck* v. *Strong* (No. 1), 6 D.L.R. 847. On the trial the Court allowed an amendment adding one William Telford as a party plaintiff.

Judgment was given declaring the plaintiff Pinchebeck not entitled to the injunction, but granting the injunction sought to the plaintiff Telford.

Frank Ford, K.C., and *O. M. Biggar*, for the plaintiffs.

A. G. McKay, K.C., and *C. A. Grant*, for the defendants.

Walsh, J.

WALSH, J.:—This action is brought against the same defendant as in *Gross* v. *Strong*, 6 D.L.R. 843; *Gross* v. *Strong* (No. 2), 10 D.L.R. 391 to restrain him from acting upon a requisition under section 124 of the Liquor License Ordinance with respect to license district No. 2. The original plaintiff is in exactly the same plight as the original plaintiff in the *Gross* case. I allowed the addition of William Telford as a plaintiff at the same time and under the same circumstances and upon the same terms as in the *Gross* case. It is admitted that he was, at the commencement of the action and still is, a resident in and the holder of a wholesale license for the sale of intoxicating liquors by wholesale in this license district. He sues on behalf of himself and all others the inhabitants of and holders of licenses for the sale of intoxicating liquors in the district. In their general outline the facts of this case and the grounds urged in support of the plaintiff's right to succeed are identical with those in the *Gross* case, differing simply in the details, of which I will give a synopsis. I find that nine of the requisitionists, including two women, were not entitled to vote at the time that they signed the requisition. Four signatures ap-

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pear, those of Joseph Flook, Bert Woods, Yan Ulan and G. Levinsky, which seem to have been unauthorized unless there are people of the same name living in the same district other than the four witnesses who were called, and each of them stated that there was not to his knowledge. One man who circulated a petition, David Ganton, had no instructions as to the qualifications of an elector and made no enquiries, but simply assumed that those who signed were qualified. He signed the affidavit and declaration simply because they signed the requisition. His document is No. 27 of exhibit 1, on which there are only nine signatures, including his own. Five of the witnesses whose names appear upon affidavits verifying the signatures upon their documents were not sworn by or before the officer before whom the same purports to have been taken; namely, J. S. McCallum, David Ganton, W. A. Clark, F. B. Richardson and W. I. Sanford. Of these, only two, Sanford on No. 12 of exhibit 1, and Ganton on No. 27 of exhibit 1, purport to have been sworn before a notary public or a justice of the peace. There are nine signatures on Ganton's petition and 119 on Sanford's. I doubt very much if either H. T. Edgedal, or Paul Reimer was sworn. Their affidavits purport to have been sworn before justices of the peace. Eight requisitionists were induced to sign upon false representations made to them as to the nature and purpose of the requisition. These men are Ruthenians and signed at the request of a fellow-countryman named Gonsky, who represented that the object of the petition was to close the hotels and establish liquor stores, in which, as he told one of them, liquor would be cheaper. Gonsky was not called as a witness so that their evidence is uncontradicted. This is the only evidence of bad faith on the part of those interested in procuring signatures to the requisition disclosed by the evidence except that bearing upon the unauthorized signatures of the four men above referred to, which is by no means conclusive.

The requisition in this case came to the defendant from Mr. H. N. Stephens of Vermilion, the president of the Temperance and Moral Reform League for this license district, at the same time that the requisition in the *Gross* case first reached him. The affidavits of the witnesses to it were in the same form as the affidavits in the *Gross* case. A number of them as in the *Gross* case were sworn or purport to have been sworn before a commissioner.

I asked counsel to check the number of names which appear upon petitions, the signatures upon which purport to be verified by the affidavits of witnesses sworn before notaries public or justices of the peace. Mr. Grant has handed to me a memorandum shewing the result of his count as follows:—

Names on petitions constituting exhibit 1 after deducting 20 names from one list upon which the verifying affidavit is insufficient as it does not mention the names of the signers....	892
Names on petitions constituting exhibit 3.....	10
Names on petitions constituting exhibit 15.....	154
Total	1,056

Mr. Ford's count gives one more name on exhibit 1 than Mr. Grant's does, but in other respects their counts agree. Mr. Ford contends, however, that 48 additional names should be removed from exhibit 1 for the following reasons. No. 1 of this exhibit contains 203 names, all of which are witnessed by F. G. Miller, who on the 7th of August, 1911, made 11 separate and distinct affidavits proving the same, one being attached to each of the 11 sheets constituting this document. These affidavits were all made before F. G. Barber. The words, "A comr., etc., for the province of Alberta" were typed at the foot of each jurat. In 9 of them the words, "A comr., etc.," are struck out and the letters "J. P." are substituted. In one of the others attached to a sheet containing 20 signatures these words are not struck out, nor do the letters "J.P." appear, so that upon its face it purports to be sworn before a commissioner. In the remaining affidavit attached to a sheet containing 20 names the words "A comr., etc.," are struck out but nothing is substituted for them, so that there is nothing on the face of this affidavit descriptive of the office held by the man who took it. The signature of Barber on each of these affidavits is unquestionably that of the same man who in the other nine affidavits forming parts of this document is described as a "J. P."; and as the affidavits are all made by the same deponent on the same day, I think I am justified in holding that these two affidavits were sworn before a justice of the peace. The remaining eight names objected to are on No. 17 of exhibit 1. This is signed by 12 people. The signatures of 4 of them are proved by the affidavit. There is an additional affidavit which reads, "that I was present and did see the following electors named in the within requisition, sign the said requisition." The names of the electors whose signatures are thus proved nowhere appear in the affidavit and therefore, only 4 out of the 12 signatures can be counted. While Mr. Ford's count of the names on exhibit 15 tallies with Mr. Grant's count, he says that these should not be counted at all as they were not acted upon by the defendant. He points out that the statutory declaration attached to one list containing 122 names is not made. It is quite true that these were not accepted or acted upon by the defendant. I will summarize the situation with respect to these documents as follows:—

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Names on exhibit 1, after deducting the 20 allowed by Mr. Grant, and the additional 8 objected to by Mr. Ford	884
Names on exhibit 3	10
Additional names on exhibit 15, if same are to be counted	154
Total	1,048

There was no proof of anything supplied to the defendant originally in this case, except these affidavits. The defendant went through the same process as I have described in the *Gross* case. The memorandum which he procured from the provincial secretary's department, gave simply the number of votes polled in the electoral districts and parts of electoral districts comprised in this license district in the 1909 elections in which there were contests, except Vermilion, the figures for which are of the 1910 election and the defendant worked out from it his estimate of the number of votes polled in it in much the same way as he did in the *Gross* case. In Victoria, there was no contest. He gave it the same vote as he gave Lacombe in the *Gross* case, namely, 1,112, being the average of the six constituencies mentioned in my judgment in that case. In Vegreville, where there was a contest, he took the total vote polled. Vermilion, Alexandra and Camrose, which lie partly in this license district and partly in No. 3, he divided on a geographical basis, giving to this district the balance of each of them remaining after his allotment to No. 3; namely, to Vermilion four-fifths, to Alexandra one-half and to Camrose one-tenth of the total vote. In Pakan there was no contest and he took the vote in Ponoka in the other district as a guide or basis and gave Pakan two-thirds of the number of votes polled in Ponoka. The memorandum prepared by the clerk of the executive council filed in the *Gross* case, gives as well the same information as to the names on the enumerator's list in these districts and parts of districts in the 1909 elections in all but Vermilion and in the 1910 contest in that district, and I tabulate here the figures as I did in the other case.

Electoral district.	Names on enumerators lists.	Defendants estimate of votes polled.
Victoria	1,168	1,112
Vegreville	2,477	1,719
Vermilion	2,263	1,105
Alexandra	1,506	597
Pakan	553	465
Camrose	258	183
	8,225	5,181

The defendant's estimate of the number of signatures needed in this district is 1,036, being one-fifth of 5,181, his estimate of the total vote, and his count of the signatures on the requisition is

1,687. The defendant after his ineffectual attempt to check the requisition, by the poll books in the manner described in the other judgment sent it back for further proof and it was returned to him with statutory declarations of the witnesses in the same form as in the *Gross* case and with an affidavit of Mr. Stephens in the following form:—

> That the signers to the petitions included in the exhibit containing sixty-nine (69) several petitions, constitute a number of duly qualified electors equal to at least twenty per cent. (20%) of the number of duly qualified electors who voted at the last provincial elections in the territory included in license district No. 2 (number two) in the province of Alberta.

This affidavit purports to have been sworn before a Commissioner, but I have no doubt upon Mr. Stephen's own evidence that he was not sworn at all. He says that he got the figures shewing the total vote polled from Mr. Fortune, secretary of the league, who got them from Mr. McLeod, then clerk of the executive council. He further said that he had no means of knowing that the petitioners were duly qualified electors except by the attached affidavits of the witnesses. The petitions which are referred to in his affidavit are not marked or identified in any way.

In every respect save as hereby varied my remarks in the *Gross* case are to be taken as applying to this. For the reasons which I have give in the *Gross* case, I think that the defendant has no jurisdiction to command that a poll be taken upon this requisition. The only difference between the cases lies in the figures. Upon the basis of 8,225 names appearing on the enumerator's lists at the times mentioned, I think 11,000 a fair estimate of the number of persons entitled to vote in October, 1911, and a valid requisition should upon this basis be signed by 2,200 electors. There will be judgment declaring that the plaintiff Pinchebeck is not entitled to maintain this action, but that the plaintiff Telford is and granting him the declaration and injunction prayed for, but without costs. The plaintiffs will pay to the defendant his costs, fixed upon the same basis as in the *Gross* case, at $50.

Judgment for plaintiff Telford.

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GUNNS Limited v. DUGAY.

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White and McKeown, JJ. September 20, 1912.

1. JUDGMENT (§ I C 2—19)—ENTRY IN CAPIAS PROCEEDINGS—SPECIAL BAIL.

A court has no authority to enter a default judgment against a defendant who was arrested in a civil action under a writ of *capias* and who gave bail to the sheriff, but did not put in special bail as conditioned by his bond to the sheriff, since a defendant so arrested is not in court until after he puts in and perfects special bail.

[*McRory* v. *McAlpine*, 20 N.B.R. 557, referred to.]

2. ARREST (§ II—22)—CAPIAS—ACTION FOR LIQUIDATED DEMAND—ENDORSEMENT OF WRIT.

In an action for a debt or liquidated demand commenced by a writ of *capias* under N.B. Order 69, rule 1, against the defendant, the writ should be endorsed under Order 3, rule 7, of the N.B. Judicature Act, 9 Edw. VII. ch. 5, in like manner to a writ of summons, with a statement of the amount of debt and costs respectively upon payment of which within six days further proceedings will be stayed; but the court has power to allow an amendment where the endorsement does not comply with that rule.

3. ARREST (§ II—21)—CIVIL ACTION—SETTING ASIDE WRIT OF CAPIAS.

An application to set aside an arrest under a writ of capias and to have the bail bond discharged is not "a step in the cause" within the meaning of Order 70, rule 2, of the Judicature Act, to the effect that no application to set aside any proceeding for an irregularity shall be allowed, if the party applying has taken any fresh step after knowing of the irregularity.

4. BAIL AND RECOGNIZANCE (§ I—6)—CAPIAS—BOND TO SHERIFF—IRREGULARITY OF CAPIAS—DELAY.

A delay on the part of defendant in not applying to set aside a writ of *capias* and a bail bond given to the sheriff thereunder until two months after judgment by default had been entered against him and a *fi. fa.* issued thereon, constitutes such an unreasonable delay as would justify a court under N.B. Order 70, rule 2, of the Judicature Act, 1909, in refusing an application founded on the irregularity in failing to properly endorse the writ under N.B. Order 3, rule 7.

Statement

APPEAL from order of Barry, J., refusing to set aside a writ of *fieri facias* and judgment in this cause against defendant, and the arrest of the defendant and the writ of *capias* under which arrest was made, and refusing to discharge the bail herein.

The appeal was allowed with costs.

J. D. Phinney, K.C., for the defendant (appellant).

R. B. Hanson, for the plaintiff (respondent).

Barker, C.J.
Landry, J.

BARKER, C.J., and LANDRY, J., agreed with judgment of MCLEOD, J.

McLeod, J.

MCLEOD, J. (oral):—I agree with the judgment delivered by Mr. Justice McKeown, and only wish to say a few words with reference to the first ground that was stated in the appeal before Mr. Justice Barry, viz.:—

that the plaintiff's claim being for a debt or liquidated demand only, the writ should have been endorsed according to Order 3, rule 7, and it was not.

On that ground the facts are that the writ was issued on November 30, 1911, the defendant arrested on December 1, 1911, and he gave bail to the sheriff. On December 11, he made an application to Mr. Justice Barry to set aside the arrest under the writ of *capias*, and to have the bail discharged and an *exonereter* entered as against the bail on various grounds, but not on the ground that the writ was not properly endorsed. The learned Judge refused this application. The plaintiff went on with the suit, to judgment. The defendant did nothing further in the matter until February 15, 1912, when this present application was made to set aside the writ and judgment, one of the grounds being the one I have stated, that is, that the writ was not endorsed as it should have been. There is no doubt the writ should have been endorsed according to Order 3, rule 7. On this application Mr. Justice Barry refused to set aside the judgment on that ground, as well as the others; but on that ground he stated as his reason that the application made before, that is, the one made on December 11, to set aside the arrest and have the bail discharged, was a step in the cause. In my view that would not be a step in the cause. Order 70, rule 2, is as follows:—

> No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowing of the irregularity.

I think the application to set aside the arrest and have the bail discharged was not a step in the cause. What may be called a step in the cause in the case of a defendant is something that looks to the prosecuting of the defence, such as the filing or serving of any of the pleadings; but simply moving to set aside the arrest is not a step in the cause. I think, however, the learned Judge was right in refusing the application, because there was an unreasonable delay in making the application. The learned Judge himself says as to that, that if he were driven to it he should be disposed to think the application was not made within a reasonable time; and with that I agree. From December the 1st until the 15th of February, over two months, was an unreasonable delay, and on that ground the learned Judge was quite right in refusing to set aside the writ and in allowing the amendment that he did allow. Not only under Order 70, rule 2, could the amendment be made; but I think it would also be covered by Order 69, rule 27, which gives a Judge authority to amend in matters such as this.

This is my view in regard to that point.

WHITE, J., concurred.

White, J.

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GUNNS LIMITED v. DUGAY.

McKeown, J.

McKEOWN, J.:—On January 27, 1912, the plaintiff in this cause signed judgment against defendant as by default, and three days later caused a writ of *fi. fa.* to be issued upon said judgment for $593.76. Application was subsequently made to Mr. Justice Barry to set aside the writ and judgment, and, generally, all the proceedings in the suit upon which plaintiff's judgment was based; and four separate grounds were urged in support thereof, all of which were disallowed, and the application refused. From the order of the learned Judge dismissing such application this appeal is taken, and I think it should be allowed on the second of such grounds, namely:—

> That there was no authority to sign judgment against the defendant, as he had never been summoned to appear in this cause in Court.

The question involved in the argument has to do with the validity of a judgment signed against a defendant who, upon his arrest, gives bail to the sheriff, but does not put in special bail, and takes no further notice of the proceedings in the suit.

In this case, the plaintiff caused a writ of *capias* to be issued out of this Court against the defendant on November 30, 1911. On the following day defendant was arrested upon the process, and he thereupon gave bail to the sheriff, and obtained his liberty by virtue of the obligation into which he and his sureties thereby entered. He did not put in special bail, as conditioned by his bond to the sheriff, but took no further concern in the matter. On January 27, 1912, judgment in the suit was signed against the defendant, and, as above stated, an execution was issued thereon on the 30th day of the same month.

I think that the whole theory of arrest and bail to the sheriff, and special bail, rests upon the fact that a defendant so arrested is not in Court until after he puts in special bail. Upon his arrest he is in the custody of the sheriff, and if he satisfy that official, by a sufficient bond, that he will enter into special bail, his liberty is restored and the sheriff takes that risk, against which he is protected by his bond. But defendant's only obligation or duty to appear and answer plaintiff's claim rests upon the bond which he has so given. The writ of *capias*, a copy of which he receives upon arrest, is not directed to him. It does not command his appearance; it is simply a command to the sheriff to take the defendant and keep him safely until he gives bail in an action at the suit of a plaintiff named in the writ, or until otherwise lawfully discharged and to make immediate return of the writ. Rule 5 of Order 69 of the Judicature Act, 1909, provides that

> upon each copy of a writ of *capias* there shall be subscribed a notice to the defendant according to the Form No. 7, in Appendix A, Part 1,

and this notice consists of three sections, each of which provides for a different condition; the 1st, if the defendant be arrested

and go to prison for want of bail; the 2nd, if the defendant give bail to the sheriff and omit to put in special bail; and the 3rd, if the defendant be only served with the writ and not arrested thereon. As neither the 1st nor the 3rd applies to the defendant in the present case, the 2nd section is the only one requiring present consideration. It reads thus:

> 2. Take notice, that if a defendant, having given bail to the sheriff on the arrest, shall omit to put in special bail within ten days thereafter, inclusive of the day of such arrest, the plaintiff may proceed against the sheriff or on the bail bond.

The procedure indicated by the above notice is, I think, the only course open to the plaintiff where special bail is not put in. By Order 69, rule 12, of the Judicature Act, it is provided as follows:—

> 12. Special bail may be put in within ten days after the arrest, inclusive of such day, and such bail may be put in and perfected according to the practice hereinafter provided, and after special bail has been so put in the plaintiff may proceed in like manner as if the action had been commenced by writ of summons and the defendant had appeared thereto.

But there seems to be no authority for proceeding against the defendant, unless special bail is so put in. Rules 6 and 8 of the same order provide that a writ of *capias* need not necessarily be executed as such, but may, in certain cases, be served upon defendant without arrest, and thereupon it shall operate as a summons to appear in the suit, and (O. 69, r. 8) "such service shall be of the same force and effect as the service of a writ of summons." But otherwise the writ of *capias* is no summons at all. It is by putting in special bail, in accordance with the obligation entered into with the sheriff, that defendant comes before the Court, and rule 12, above quoted, specially provides that when such bail has been so put in plaintiff may proceed against him. The bail to the sheriff is simply an obligation entered into by the party arrested, in favour of the sheriff, by which he and his sureties bind themselves to the sheriff to pay a certain sum of money; and the condition of the obligation is that if the party arrested do enter into special bail in an action brought against him by the person at whose instance he is arrested according to the practice of the Court, etc., then the obligation is to be void, otherwise to be in force. The statutes by which sheriffs were first authorised and eventually compelled to accept good and sufficient bail for a person under arrest were not passed with a view of regulating or affecting the procedure in an action, but their object was to secure for a party defendant, on certain conditions, his liberty while the suit was being proceeded with, and he accomplishes this by giving his bond in the prescribed form, with sufficient sureties, to the sheriff whose duty it is to accept it and to liberate the defendant. In describ-

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ing the procedure of giving bail, Mr. Tidd, in chapter 11 of his work upon Practice, says (9th ed., p. 221):—

> Bail in personal actions came in with the *capias*, and it is either to the sheriff, for the appearance of the defendant at the return of the writ, or to abide the event of the suit. The former is called bail to the sheriff or bail below; the latter, bail to the action, or when special, bail above. Before the statute 23 Hen. VI. ch. 9, the sheriff was not obliged to bail a defendant arrested upon mesne process unless he sued out a writ of *main-prize;* though he might have taken bail of his own accord. . . . This statute hath two branches, first, as to the persons to be let to bail; and secondly, as to the form of the security. . . . The second branch of the statute requires a security by bond or obligation. . . . Respecting the form of the bond, there are three things to be observed; first, that it be made to the sheriff himself; secondly, that it be made to him by his name of office; and thirdly, that it be conditioned for the defendant's appearance at the return of the writ and for that only.

It is to be noted from this that it was the defendant's appearance at the return of the writ that the sheriff was indemnified against by his bond, and if no appearance was made by him, the sheriff was liable to the plaintiff for escape, against which liability he held the bond above referred to. That putting in bail to the sheriff was no appearance in the suit and gave no authority to proceed against him is clearly stated in Bacon's abridgment under the head of Bail in Civil Causes. The author says (7th ed., vol. 1, p. 441):—

> The putting in bail in personal actions seems to be in limitation of the civil law . . . for formerly in these actions if the defendant did not appear on the summons, the process was an attachment, and the sheriff might attach him either by his goods or by pledges,

and if he attached him by his goods, by his non-appearance his goods were forfeited; and if by pledges and the party did not appear, they were amerced.

By an early rule of this Court, made in Hilary Term, 1786, it was ordered:—

> That in all process where an affidavit is made and filed of the cause of action, the sheriffs of the different counties, at the time of taking the bail bond, shall serve the sureties therein with a copy of such process, subscribed with the following notice:—
>
> "A.B. Take notice that unless special bail is put in above by the defendant in this cause within twenty days after the return of this process, the condition of the bail bond you have entered into will be forfeited."

This is in effect the provision of paragraph 2 of the notice now necessary to be endorsed on a writ of *capias* issuing out of this Court, which notice, however, is now to the defendant, not to his sureties: see Order 69, rule 5.

The provisions of section 30, ch. 37, Consolidated Statutes of 1876, and of sec. 69, ch. 111, Consolidated Statutes, 1903, are identical in enacting that:—

In actions in the Supreme Court special bail may be put in and perfected according to the established practice; and after special bail has been so put in, the plaintiff may proceed in like manner as if the action had been commenced by writ of summons, and the defendant had appeared thereto;

and this is substantially rule 12 of Order 69 of the Judicature Act, while rule 13 of the same Order seems to have for its object the removal of any possible doubt that might be entertained as to the effect of entering special bail and giving notice thereof, by providing that:—

Entering special bail and giving notice thereof to the plaintiff or his solicitor shall be equivalent to the entering of an appearance.

In discussing the question of relief of bail in actions brought in the County Courts, Allen, C.J., in the case of *McRory* v. *McAlpine*, 20 N.B.R. 557, at 562, says:—

Whatever power there is to relieve bail in actions in the County Courts, must be derived from the 30th section of ch. 51, of the Consol. Statutes, as, I think, the provision in the latter part of sec. 5, ch. 38, is not applicable to the County Courts. In construing that provision it will be necessary to consider what the practice was in relieving bail to the sheriff in actions on bonds. It was, that they should put in and perfect bail, so that the plaintiff might proceed with his action against the principal; or, that they should put in bail, and render the defendant; and even this indulgence was not granted, if the plaintiff had lost a trial.

In order that plaintiff may be in a position to "proceed with his action against the principal" special bail must, it seems from the above reference, be put in and perfected, and that not having been done in the case before us I think plaintiff is not entitled to hold his judgment. See also *Betts* v. *Smith*, 2 Q.B. 113.

With reference to the other grounds of appeal, I agree with the views expressed by my brother McLeod in his judgment.

I think the appeal should be allowed with costs and the plaintiff's judgment and all proceedings based thereon be set aside.

Appeal allowed.

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Feb. 4.

Re ROSENBERG and BOCHLER.

Ontario Supreme Court, Lennox, J. February 4, 1913.

1. VENDOR AND PURCHASER (§ I C—10)—DEFECTIVE TITLE—REGISTRY OF AUTHORITY TO AGENT TO SELL—CLOUD ON TITLE.

Where an instrument executed by the owner of a parcel of land giving an agent authority to sell the same is on record (whether properly or not) at the time an executory contract for the sale of land is made, it constitutes for a year at least (sec. 75 of the Ontario Registry Act, 10 Edw. VII. ch. 60) a cloud upon the vendor's title, and a release or discharge thereof must be procured and registered by and at the expense of the vendor before he can compel the purchaser to take title.

[*Ontario Industrial Loan and Investment Co.* v. *Lindsey*, 3 O.R. 66, 4 O.R. 473; *Baker* v. *Trusts and Guarantee Co.*, 29 O.R. 456, applied.]

Statement

APPLICATION by the vendor, Rosenberg, under sec. 4 of the Vendors and Purchasers Act, for an order declaring that a certain registered agreement was not a cloud upon the applicant's title to land which he had agreed to sell to Bochler.

L. M. Singer, for the vendor.
R. S. Robertson, for the purchaser.
C. E. Newman, for the Queen City Realty Company.

Lennox, J.

LENNOX, J.:—The vendor asks to have it declared that a certain agreement, dated the 5th November, 1912, made between the vendor and the Queen City Realty Company, registered as No. 118685, is not a cloud upon and does not constitute a valid objection to the title to land agreed to be sold by Rosenberg to Bochler.

I cannot so declare. On the contrary, I am clearly of opinion that, whatever may be the questions to be settled between the vendor and the realty company, the registered instrument referred to is a cloud upon and constitutes a valid objection to the title of the property in question. The wording of the instrument itself, and sub-secs. (d) and (e) of sec. 2, and secs. 33, 35, 50, 70, 71, 72, 74, and 75 of the Registry Act, 10 Edw. VII. ch. 60, completely answer the argument of counsel for the vendor that this is not an instrument capable of being registered. And *Ontario Industrial Loan and Investment Co.* v. *Lindsey*, 3 O.R. 66, 4 O.R. 473, cited in support of this, is clearly against the vendor, as it shews that an instrument improperly registered must be removed from the registry. This case is more like *Baker* v. *Trusts and Guarantee Co.*, 29 O.R. 456, but clearer in the *Baker* case. Even if the instrument in question is only a bare authority to sell upon commission, it is expressly provided for by sec. 75, and is effective for a year at all events; and, in any case, take it that it was improperly regis-

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tered, still it is registered, and the company is asserting a claim, and the purchaser has actual notice of it. I have hesitated on account of the pending action for specific performance. As, however, this results from the vendor's improper threat of rescission, as the present motion is made by the vendor after action, and as the disposal of this question may prevent further litigation, I have decided to deal with the matters submitted upon this application.

I find and declare that the instrument above referred to is a cloud and incumbrance upon and objection to the title of the lands in question; and a release or discharge thereof must be procured and registered by and at the expense of the vendor.

The costs of all parties shall be paid by the vendor.

There are questions between the realty company and the vendor which the parties should have an opportunity of having inquired into before final adjustments of the account as between them. If these parties do not otherwise arrange before the order is issued, the order will provide that upon payment of the $125 commission—undisputed—and upon payment of $200 into Court, the Queen City Realty Company will execute and deliver a release, capable of being registered, of all their claims upon the land in question.

Judgment accordingly.

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Feb. 14.

Alberta Supreme Court, Walsh, J. February 14, 1913.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II D—20)—SUFFICIENCY OF ALLEGATIONS—DUPLICITY—"COMMON PROSTITUTE OR NIGHT WALKER."

A conviction and warrant of commitment issued by a police magistrate charging a woman with vagrancy in that she is "a common prostitute or night walker" without stating to which of these two classes she belongs, is not void for duplicity, since at most this is a mere defect in form within the meaning of the curative provisions of sec. 724 of the Criminal Code (1906), especially where the offence is described in the words of sec. 238 (*i*) of the Code.

[*Regina* v. *Hazen*, 20 A.R. (Ont.) 633, referred to; *Rex* v. *Leconte*, 11 Can. Cr. Cas. 41; *Smith* v. *Moody*, [1903] 1 K.B. 56, referred to.]

2. SUMMARY CONVICTIONS (§ VI—60)—RECORD OF CONVICTION AND PROCEEDINGS—STATING THE OFFENCE—SUFFICIENCY.

Though a woman cannot be convicted as a vagrant under sec. 238 (*i*) of the Criminal Code unless she has failed to give a proper account of herself on being asked to do so, when found wandering at night in the public streets, the absence from the conviction of the allegation that she was asked to do so is not fatal to its validity, where the offence is charged in the language of sec. 723 (3) of the Criminal Code, 1906.

[*Regina* v. *Levecque*, 30 U.C.Q.B. 509; *Regina* v. *Arscott*, 9 O.R. 541; *Rex* v. *Harris*, 13 Can. Cr. Cas. 393; *Rex* v. *Pepper*, 15 Can. Cr. Cas. 314, dissented from; *Cotterill* v. *Lempriere*, 24 Q.B.D. 634; *Smith* v. *Moody*, [1903] 1 K.B. 56, applied.]

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3. CRIMINAL LAW (§ II C—51)—WARRANT OF COMMITMENT—POLICE MAGISTRATE SIGNING AS "P. M."

It is not a valid objection to a warrant of commitment that the committing magistrate in signing and sealing the warrant wrote after his name merely the letters "P. M." instead of spelling out his official designation of "police magistrate," where his official capacity was recited in full in the body of the warrant.

4. INDICTMENT, INFORMATION AND COMPLAINT (§ II G—60)—SUFFICIENCY —LATITUDE AS TO PARTICULARITY.

While fair information and reasonable particularity as to the nature of the offence under the summary conviction sections of the Criminal Code, 1906, must be given in informations and convictions, this merely means that such particulars as to the time, place and subject matter of the charge must be given as, with the statutory description of the offence, will shew upon the face of the conviction exactly what it is for; especially since such sections are administered generally by a body of men without special legal training or experience.

[Cr. Code, sec. 723, referred to.]

5. SUMMARY CONVICTIONS (§ VI—60)—RECORD OF PROCEEDINGS—SERVICE OF MINUTE OF ORDER—CONVICTION NOT AN "ORDER."

The "minute of conviction" made by a justice of the peace for an offence under the Vagrancy Clauses, Cr. Code 1906, secs. 238 and 239, upon directing imprisonment for the offence is not a minute of an "order" of a justice so as to require service of a copy thereof under Cr. Code sec. 731 before issuing a warrant of commitment.

[Sec. 731, Cr. Code 1906, applies only to "orders" as distinguished from "summary convictions" made by justices although the procedure as to both is regulated by Part XV. of the Code; see *R.* v. *Sanderson*, 12 O.R. 178; *R.* v. *O'Leary*, 16 N.B.R. 264; *R.* v. *Conrod*, 5 Can. Cr. Cas. 414, 425.]

Statement

APPLICATION for *habeas corpus* and *certiorari* in aid or for an order quashing the conviction under sec. 238 of the Criminal Code (1906) of a common prostitute.

The application was dismissed.

J. McK. Cameron, for the applicant.

F. S. Selwood, for the Attorney-General.

Walsh, J.

WALSH, J.:—This is an application for a *habeas corpus* and a *certiorari* in aid or for an order quashing the conviction of the applicant without the actual issue of the writ of *certiorari*, and for her discharge from the custody in which she is now held in the guard-room of the Royal North-West Mounted Police at Calgary, without the actual issue of the writ of *habeas corpus*. She is so in custody under a warrant of commitment issued by the police magistrate at Calgary following her conviction by him,

> for that she, the said Effie Brady, of Calgary, on the 28th of January A.D. 1913, at Calgary, aforesaid, being a common prostitute or night walker wandered in the public streets and did not give a satisfactory account of herself and is thereby a loose, idle and disorderly person and a vagrant, contrary to sec. 238 of the Criminal Code.

For this offence she was sentenced to imprisonment for three months with hard labour. No less than seventeen grounds

for this application are set out in the notice of motion but happily they were not all pressed. I, of course, will only deal with those which were argued before me.

Objection is taken to the reference to the applicant as "being a common prostitute or night walker." It is argued that if these two expressions are descriptive of different classes of people the conviction and the warrant should state to which of them the applicant belongs and that they are bad for duplicity in that they do not do so. It is said on the other hand that if a night walker is the same thing as a common prostitute the conviction is bad because there was no evidence before the magistrate upon which the applicant could be said to be a prostitute. I do not think that these two expressions are synonymous. Without attempting a definition of the word night walker, I do not hesitate to say that the evidence given on this charge, which is before me, brands the applicant as one. She was wandering around the streets of the city after dark in the company of a woman who had been convicted of being an inmate of a house of ill-fame and both she and her companion accosted and spoke to nine or ten different men in a period of twenty minutes during which they were under observation by policemen. Whatever else may be involved in this expression I am satisfied that it is broad enough to cover a woman who thus conducts herself. It may perhaps be that in strictness she should, in the conviction, have been called merely a night walker but I think that if any duplicity arises from her description as a common prostitute or a night walker it is but a defect of form within the meaning of sec. 724 of the Code and that the curative provisions of that section apply so as to render this objection futile. Much more serious defects of substance have been held to be cured under this section, and the corresponding English section in *Onley* v. *Gee*, 9 W.R. 662; *Rodgers* v. *Richards*, [1892] 1 Q.B. 555; *Bartholomew* v. *Wiseman*, 8 Times L.R. 147; *Regina* v. *Hazen*, 20 A.R. (Ont.) 633.

Then it is urged that the conviction and the warrant are bad because, while they allege that she did not give a satisfactory account of herself they do not set out the fact that she was first asked to do so. Her prosecution was under sub-sec. 238 (*i*) of the Code which defines as a vagrant one who "being a common prostitute or night walker wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people and does not give a satisfactory account of herself." I quite agree with what is said in many of the decided cases under this clause that the failure to give a satisfactory account of herself is of the essence of this offence. A woman of one of these classes may wander as long as she likes and in such public places as she chooses without simply by reason

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thereof bringing herself within this enactment. It is only when in the course of her wanderings she fails to give a satisfactory account of herself that she converts herself into a vagrant. I also agree that it is only when she so fails to account after being asked to do so that she can be said to be a vagrant. She is under no compulsion to volunteer information explanatory of her wanderings to every one whom she meets. She is obliged to satisfactorily account for her wanderings when and only when she is asked to do so and it is her failure then to comply with this demand that stamps her as a vagrant. This is a necessary implication from the language of the section, for it would be monstrous to suppose that even a woman of the under-world could be sent to gaol for six months for not giving a satisfactory account of herself when no one had ever asked her to do so.

I have not been able to convince myself, however, that the absence from the conviction of the allegation that the applicant was asked to give an account of herself is fatal to its validity. I have read with care the cases to which I was referred by Mr. Cameron in support of his contention on this point, namely: *Regina* v. *Levecque*, 30 U.C.Q.B. 509; *Regina* v. *Arscott*, 9 O.R. 541; *Rex* v. *Harris*, 13 Can. Cr. Cas. 393, and *Rex* v. *Pepper*, 15 Can. Cr. Cas. 314. These are the decisions of able Judges which, if binding upon me, would be conclusive of this matter for three of them decide this exact point in favour of Mr. Cameron's contention, and the fourth of them similarly decides the same point under another clause of this section. None of them, however, is binding upon me, and though I may be charged with effrontery in venturing to dissent from them, I deem it my duty to do so if I cannot agree with them.

It will be observed that the offence is charged in the exact words of the section except that it is limited as to place to the public streets which form one of the classes of public places described in it. All of the words of the conviction which follow the statement of the date and locality of the offence constitute the description of it. Sub-sec. 3 of sec. 723 of the Code provides that "the description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence or any similar words shall be sufficient in law." We have, therefore, a description of the offence in the conviction in the words of the Act and this by the section last above quoted is sufficient in law.

This sub-section, so far as appears from a necessarily hurried examination of the statutes, first found a place in the Code in the year 1900, so that *Regina* v. *Levecque*, 30 U.C.Q.B. 509, and *Regina* v. *Arscott*, 9 O.R. 541, were decided before its enactment, and the other two cases above cited were decided

largely upon their authority. What change, if any, such a provision as we now have would have made in the opinions of the Judges who decided the *Levecque* and *Arscott* cases it is, of course, impossible to say, but the fact to which I am now referring is, if I am not mistaken in saying that it was first enacted in 1900, worthy at least of some attention in the consideration of these cases.

There are no words in the clause of the vagrancy section under consideration which describe the offence as consisting of a failure to account after being asked to do so. Why then should it be necessary to read into the warrant as descriptive of the offence words which are not found in the Act which creates and describes it. I think that it is just as fair to assume from the use in the conviction of the words that she "did not give a satisfactory account of herself," that she was first asked to do so as to conclude from the use of the same words in the statute that she must be asked to account before she can be deemed a vagrant for not accounting. The statute says that the woman is a vagrant if she does not give a satisfactory account of herself and the Courts say that this means if she so fails, having first been asked to account. The conviction says that she did not give a satisfactory account of herself and why should not the same meaning be given to these words in the conviction as in the statute?

I do not think that the case of *Cotterill* v. *Lempriere*, 24 Q.B.D. 634, is an authority against the view which I am expressing. The conviction in that case did not follow the words of the by-law for breach of which it was made. Neither do I think that what was actually decided in *Smith* v. *Moody*, [1903] 1 K.B. 56, makes it an authority for this contention of the applicant. The conviction there complained of stated that the appellant "did injure the property" of the respondent without specifying the property, and this was held insufficient for lack of that information. I think it clear even from this case that the offence itself need only be described in the words of the statute and that is what I think this conviction does.

The case of *Rex* v. *Leconte*, 11 Can. Cr. Cas. 41, in which *Smith* v. *Moody*, [1903] 1 K.B. 56, was cited is an authority in favour of the validity of this conviction both upon the question of duplicity and of the offence being sufficiently described in the words of the statute. In that case it was held that a conviction of a woman, under what is now clause (*j*) of this same section 238 of being "the keeper of a disorderly house, bawdy house or house of ill-fame, or house for the resort of prostitutes" was not void for duplicity and that the conviction in that form was valid under what is now section 723 (3) of the Code because it described the offence in the words of the statute creat-

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ing it. This was the unanimous judgment of the Common Pleas Division of the High Court of Justice of Ontario, delivered by Chief Justice Meredith, and affirmed by the unanimous judgment of the Ontario Court of Appeal, the reasons for which were given by Chief Justice Moss.

The summary convictions sections of the Code are administered by a body of men, the great majority of whom are without legal training or experience of any kind. It is probably for this reason that sec. 723 (3) of the Code was enacted so that a justice of the peace might not worry over the phraseology to be used by him in describing an offence, but might use the ready-made description of it contained in the section creating it. That being so I think that he should be allowed to do so. Not being a Judge or a lawyer, he is not used to picking hidden meanings out of the plain language of statutes nor should he be asked to do so. It surely must be mystifying to a justice of the peace after being told by the Code that he will be all right if he describes an offence in the language of the section enacting it to be told by a Judge that he was all wrong in so describing it and that his conviction which follows implicitly the directions of the statute in its description of the offence is no good because he did not put into that description some words which do not appear in the statute. Of course, as Lord Alverstone says, in *Smith* v. *Moody*, "fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions." This, I take it, means that such particulars as to the time, place and subject-matter of the charge must be given as with the statutory description of the offence will shew upon the face of the conviction exactly what it is for.

I think that the minute of the conviction described in the affidavit of the magistrate is a sufficient minute; I do not think that sec. 731 of the Code applies to such a case as this so as to make service upon the applicant of a minute of the order necessary. The objection that the warrant does not upon its face shew jurisdiction in the committing magistrate because he simply wrote after his name the letters P.M. instead of spelling out his official designation in full is over-ruled. He is described in the body of the warrant as "one of His Majesty's police magistrates in the Province of Alberta, having jurisdiction in and for the City of Calgary" and that is enough. I think the place of her imprisonment is sufficiently described in the words "in the Police Barracks in the said City of Calgary." The barracks of the R.N.W.M.P. are by statute common gaols in this Province, and I think that such barracks are sufficiently designated by the words here used. Something was said in argument in support of the 15th ground of this application, namely,

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that the stenographer who took the evidence upon the trial of the applicant was not sworn in that case, but as there is nothing in the applicant's material shewing this to be so I have not considered it.

This disposes of all of the grounds argued before me. I dismiss the motion.

Application dismissed.

MACDONALD v. DOMESTIC UTILITIES MFG. CO.

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Feb. 12.

Manitoba King's Bench, Prendergast, J. February 12, 1913.

1. DEPOSITIONS (§ I—2)—RIGHT TO TAKE—PRELIMINARIES—EXAMINATION OF OFFICER OF COMPANY.

Service of an appointment and subpœna under K.B. rule 389 (Man.), on an officer of a defendant company for examination for discovery, is not the proper procedure, but an order is necessary under rule 425.

[*Connolly* v. *Doird*, 18 P.R. (Ont.) 38, applied.]

2. DISCOVERY AND INSPECTION (§ IV—31)—FAILURE OF COMPANY'S OFFICER TO ATTEND EXAMINATION—IRREGULARITY IN PROCESS.

A defendant company cannot be penalised under K.B. rule 398 (Man.) on the ground that one of their officers had failed to attend an examination for discovery, when the officer was not properly subpœnaed.

3. DISCOVERY AND INSPECTION (§ IV—31)—OFFICER OF CORPORATION—DISCRETION AS TO ORDERING EXAMINATION.

The granting of an order under K.B. rule 425 (Man.) for the examination for discovery of a defendant company through one of its officers is discretionary with the Court.

[*Cox* v. *Prior*, 18 P.R. (Ont.) 492, referred to.]

Statement

THIS suit was instituted by the plaintiff, who claimed certain commission as an agent for the sale of washing machines. The defence set up was that the agreement between the parties was voided by the default on the part of the plaintiff before the commissions were payable and that the commissions are not payable by the terms of his own contract.

The plaintiff wished to examine one Crooker, the vice-president of the defendant company, who was, at the time of the service temporarily resident in the city of Winnipeg. Service was made by subpœna here calling on him to attend and he was paid the usual conduct money of $1.25. His solicitor advised him not to attend as he had not been properly subpœnæd and was not subject to examination, not being a resident of this province. The plaintiff moved before the referee to strike out the defence and counterclaim filed by the company for non-attendance of one of the officers. The referee dismissed the motion with costs and plaintiff appealed.

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Prendergast, J.

J. Galloway, for plaintiff.
H. V. Hudson, for defendants.

PRENDERGAST, J.:—It seems plain, under the decision in *Connolly* v. *Dowd*, 18 P.R. (Ont.) 38, that service on Crooker of an appointment and subpœna under rule 389 was not the proper procedure. What was required was an order under rule 425 as amended. Then, Crooker having failed to appear, the plaintiff moved before the referee to have the defence struck out under rule 398, which the referee refused. The plaintiff now appeals from that decision. But it is clear that the referee could not penalize the defendant company on the ground that one of their officers had failed to attend for examination, when the latter was never properly required to do so. In my opinion this disposes of the whole appeal.

On the hearing, however, the plaintiff made the alternative application, not mentioned in the notice of motion, that I make an order under rule 425 to secure Crooker's attendance. Of course, if the matter were brought up in the proper way, such an order could be made; and if the latter were not complied with, then the defence could be struck out under the said rule. But the granting of such an order is a matter of discretion, and in *Cox* v. *Prior*, 18 P.R. (Ont.) 492, the order was evidently made having in regard the fact that the party to be examined was then, and would be for quite a while, in Ontario, where he was attending to certain duties. But here, the evidence is that Crooker is and has been for months in California where his permanent residence is, and there is surely not a shred of material at hand which would justify me in taking the extreme course of ordering him to attend at Winnipeg, even if rule 425 were broad enough to allow such an order. But I would rather take the position that this last application is not before me, not being stated in the notice of motion. The appeal will be dismissed with costs.

Appeal dismissed.

BINDON v. GORMAN.

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Feb. 17.

Ontario Supreme Court. Trial before Lennox, J. February 17, 1913.

1. CONTRACTS (§ I E 4—83)—CONTRACTS AS TO REALTY—PARTNERSHIP, WHAT CONSTITUTES—VERBAL AGREEMENT—STATUTE OF FRAUDS.

A verbal agreement to divide profits of transactions in land is valid, at all events where no specific lands are referred to, since such agreement does not deal with an interest in land.

[*Gray* v. *Smith* (1889), 43 Ch.D. 208; *Re De Nicols, De Nicols* v. *Curlier*, [1900] 2 Ch. 410, R.S.O. 1897, ch. 338, referred to; see also *Galbraith* v. *McDougall*, 6 D.L.R. 232.]

2. PARTNERSHIP (§ IV—15) — TRANSACTIONS IN LAND—AGREEMENT TO "DIVIDE PROFITS," CONSTRUED.

An agreement to "divide profits" of transactions in land does not necessarily mean an equal division. (Dictum *per* Lennox, J.)

Statement

ACTION to establish a partnership and for an account and payment of a share of the profits to the plaintiff.

Judgment was given for the plaintiff.

G. E. Kidd, K.C., for the plaintiff.
J. J. O'Meara, for the defendant Gorman.
M. J. O'Connor, K.C., for the defendant Murray.

Lennox, J.

LENNOX, J.:—I am asked to pronounce upon the rights, if any, of both the plaintiff and the defendant Murray against the defendant Gorman; and, if there is judgment against Gorman, to apportion the money between Bindon and Murray. I do not think that R.S.O. 1897 ch. 338 and the various cases referred to have any bearing upon this case. It is not a question of an interest in land; it is simply as to certain services and a division of profits; and a verbal agreement to divide profits of transactions in land is valid, at all events where no specific lands are referred to: *Gray* v. *Smith* (1889), 43 Ch.D. 208; *Re De Nicols, De Nicols* v. *Curlier*, [1900] 2 Ch. 410, and cases there referred to.

If the evidence of the plaintiff and his witnesses is true, the defendant Gorman should pay over a portion of the profits he received in certain transactions to the plaintiff and Murray; and he is keeping the whole of it. The only evidence is that called by the plaintiff and what is furnished from the exhibits; for, so far as Gorman is concerned, unfortunately, he has practically no memory at all. It is a good deal worse than idle, for it is improper, to have a witness swear to the details of a conversation, and whether or not he sent a certain telegram in the summer of 1905, when it is known that as a matter of independent memory he cannot tell what route he took, either outward or homeward, on an extensive trip he took during that same sum-

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mer, anything as to the time of his departure or return, who accompanied him, or even whether his wife accompanied him or not; who has no ideas as to the amount of profits he made out of either of the transactions in question in this action; and who, although he had received more than $5,000 profit on the sale of the Brandon property, and had written and sent telegrams in connection with it, could not recall, even after the action was brought, that the property had been sold, the money divided, and the account closed, as shewn by exhibit 22.

On the other hand, there are discrepancies in the evidence of the plaintiff and Murray; they contradict each other in some particulars; and I believe they are both mistaken as to the date at which the telegram instructing Murray to invest was sent, if it was sent. But these differences do not at all go to the root of the matter. I was particularly impressed by the manner in which Murray gave his evidence, and I believe the evidence of this witness and the plaintiff was substantially accurate. I believe that the defendant Gorman sent a telegram to Murray authorising him to invest $10,000, and speaking of a division of profits between the parties to this suit. I am satisfied from the references to Gorman in the correspondence, from Gorman's own telegram and letter from Kansas City, from Currie's evidence as to Murray's determination to have Gorman in the syndicate, and upon the testimony of the plaintiff and Murray, that, before Murray went out west, the defendant Gorman agreed to furnish as much as $10,000 for profitable speculation, and agreed to divide the profits among himself and the plaintiff and Murray. The west was the main outlook, but the moving cause was profits, and the money was to be available for any proposition of which Gorman, when it was submitted, approved.

I am not sure that it was stated that the profits would be divided equally; and, after some hesitation, I have come to the conclusion that division of profits simply does not necessarily mean an equal division. I have no doubt at all that, at the time these transactions were going through, Gorman fully expected to have to share up with the plaintiff and Murray. It is very probable, too, that later on he told the plaintiff that there were no profits; and, in the condition in which he is, he might say this quite honestly. I will take no account of interest down to the date of the action—it would increase the liability of the defendant Gorman if I did.

I am of the opinion that the defendant Gorman should pay to the plaintiff and Murray one-third of the profit of the Brandon transaction, say $1,700—of which $1,200 will belong to the plaintiff—and he should pay $500 to each of these parties in

respect of the Montreal Park realty stock transaction, and interest from the date of suit.

There will be judgment for the plaintiff against the defendant Gorman for $1,700, with interest from the 12th August, 1911, and costs; and for the defendant Murray against the defendant Gorman for $1,000, with interest from the 12th August aforesaid, and Murray's costs of defence.

Judgment for plaintiff.

O'NEIL v. HARPER.

Ontario Supreme Court. Trial before Britton, J. February 18, 1913.

1. PARTIES (§ I A 4—45)—ON MATTERS OF PUBLIC RIGHT—ATTORNEY-GENERAL—MUNICIPALITY—DAMAGE PECULIAR TO PRIVATE PLAINTIFF, EFFECT OF.

A plaintiff is not entitled to maintain an action to have a travelled road which is situated on defendant's land declared a public highway, and to compel the defendant to remove obstructions therefrom, without making either the Attorney-General or the township in which the road is situated, parties to the action, unless he can shew that he has suffered damage peculiar to himself beyond that suffered by the rest of the public who would also be entitled to use the road in question if it were declared to be a public highway.

[*Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, 25 A.R. 251, 256, followed; *Fritz* v. *Hobson*, 14 Ch.D. 542, distinguished.]

2. HIGHWAYS (§ I A—7)—DEDICATION—AS AGAINST GRANTEES OF CROWN—EFFECT OF 30 YEARS' PUBLIC USER.

Public user of a road for thirty years without objection or interference furnishes conclusive evidence of dedication as against grantees of the Crown and those holding under them, but, in an action improperly launched for a declaratory judgment the principle cannot be given effect.

[*Mytton* v. *Duck*, 26 U.C.R. 61, specially referred to.]

3. HIGHWAYS (§ I A—7)—DEDICATION—AS AGAINST CROWN—MERE USER, EFFECT OF.

Dedication by mere user cannot be presumed against the Crown. (Dictum *per* Britton, J.)

Statement

ACTION for a declaration that a road crossing the south half of lot 7 in the 2nd concession of the Gore of Chatham was a public highway; (2) for an order compelling the defendant to remove all obstructions placed by him upon that highway; (3) an injunction restraining the defendant from further obstructing that highway; and (4) for damages for an alleged assault committed by the defendant upon the plaintiff in attempting to prevent the plaintiff from travelling upon that highway.

The action was dismissed.

J. S. Fraser, K.C., for the plaintiff.
M. Wilson, K.C., for the defendant.

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BRITTON, J.:—The plaintiff owns that part of lot 8 in the 2nd concession of the Gore of Chatham lying north of Running creek. The defendant owns the south half of lot 7 in the same concession. The plaintiff alleges that Running creek commences in the 3rd concession of the Gore of Chatham, flows southerly and easterly through the said Gore of Chatham, and along the north side of the town of Wallaceburg, to the river Sydenham.

The evidence establishes, and I find as a fact, that from the early settlement of the township of Chatham down to a comparatively recent date, a travelled road ran from Nelson street in Wallaceburg—or a point near Nelson street—westerly and along the southern bank of Running creek, crossing lots 11, 10, and a part of 9 in the 2nd concession of the Gore of Chatham; then the road crossed the said creek to the north side thereof, and proceeded westerly and southerly across the remainder of lot 9, and diagonally across lots 8 and 7, to the line between the 1st and 2nd concessions, and on to the river St. Clair.

It was well established that for many years this road was the only direct and travelled road—and called a highway—between Wallaceburg and Baby's Point and Port Lambton.

The part of lot 7 now owned by the defendant was crossed by this road. The obstructions placed by the defendant are on the line of this road.

There is no evidence of any word of the owner of any part of the land where this road passes to shew an intention to dedicate the road to the public.

As to dedication, this case is governed by *Mytton* v. *Duck*, 26 U.C.R. 61. In that case Draper, C.J., decided that, as against the grantee of the Crown and those claiming under him, the public user for thirty years, without objection or interference on their part, would furnish conclusive evidence of dedication.

This road was used as a public highway long before the grant by the Crown to the Canada Company of lands over which the road was travelled.

Dedication cannot by mere user be presumed against the Crown, but the Crown granted these, with other lands, to the Canada Company, in 1846.

This road was openly used as a public road at least down to 1896, and thus, according to the case cited, dedication has been conclusively established.

The evidence did not establish that statute labour had been continuously done upon this road; or that any public money had been expended upon it.

It is a fact that the Corporation of the Town of Chatham assumed, by by-law, to close a portion of it; and the Corporation of the Town of Wallaceburg, by by-law, assumed to close a short part at the eastern end. It is difficult to connect the

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Wallaceburg by-law with this road, as the by-law described it as "the original allowance for road." However, of the intention of the municipality to close a part of the road in question, there is no doubt. These by-laws do not either assist the plaintiff or prejudice him in his contention.

As to the part of the road in which the plaintiff is particularly interested, no action has been taken in any way by the township corporation; and, so far as appears, no person, other than the defendant, has interfered with the plaintiff or those desiring to use the road.

The case of *Dunlop* v. *Township of York*, 16 Gr. 216 (1869), does not conflict with *Mytton* v. *Duck*, 26 U.C.R. 61.

It must be accepted as sound reasoning, as stated in *Dunlop* v. *Township of York*, 16 Gr. 216, that in a new part of the country, or over an area of low land where persons would naturally look for the high places over which to travel, user of a road is not to be too readily accepted as evidence of an intention on the part of an owner to dedicate.

In this case, the great length of the time of the user and the comparatively slight deviations strengthen very much the argument in favour of the highway contended for here.

Frank v. *Township of Harwich*, 18 O.R. 344, is in favour of the plaintiff's contention.

Intention to dedicate may be presumed: see Lord Halsbury's Laws of England, vol. 16, p. 33.

The Canada Company, grantors of the lands of the defendant, had other lands in the vicinity. The inference is warranted that they knew of this road, and of its user by the public, if not before, very soon after, the grant to them.

If the plaintiff is entitled to maintain this action at all, he is entitled to a declaration that the travelled road across lot 7 is a public highway. The defendant pleads that the plaintiff cannot maintain this action without either the Attorney-General or the Municipal Corporation of the Township of Chatham and North Gore being a party thereto. The plaintiff simply joins issue upon this statement.

The question is, upon the evidence in this case, as laid down in *Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, 25 A.R. 251, at p. 256, "Can the plaintiff be said to have suffered damage peculiar to himself beyond that suffered by the rest of the public who were also entitled to use the road for any purpose?" I am met at once with the absence of evidence that the plaintiff has suffered damage peculiar to himself beyond that suffered by the rest of the public who were entitled to use the road. The plaintiff's evidence was almost wholly directed to the question of highway or no highway, and he omitted to prove, if he could prove,

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either the particular damage to himself by the defendant's obstruction, or to prove an assault.

The defendant in his pleading denies the assault, and in his evidence does not admit it. He admits preventing the plaintiff, on a Sunday, from going through a gateway upon the alleged road. The defendant said that the plaintiff crossed this part of the alleged highway only twice in eighteen months. The plaintiff was not called to deny or explain this evidence of the defendant.

Even if the defendant, in erecting the gate on the highway, has created a public nuisance, I am unable to find that the plaintiff suffered particular injury, so as to bring the case within *Fritz* v. *Hobson*, 14 Ch.D. 542.

The objections that the municipality was not a party to the action, and that no particular private injury to the plaintiff had been proved, were made upon the argument. The plaintiff did not ask for any postponement to endeavour to get the municipality to intervene, or to supplement the evidence as to assault or private injury.

As the great mass of evidence was given upon the point on which the plaintiff was right, I think justice will be done if the action is dismissed without costs.

The judgment should be without prejudice to any other action by the plaintiff.

Action dismissed.

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Feb. 27.

GALLAGHER v. FREEDMAN.

Manitoba King's Bench. Trial before Galt, J. February 27, 1913.

1. PLEADING (§ I M—95)—ADMISSIONS—NOT STRICTLY CONSTRUED BUT MOULDED UNDER THE EVIDENCE—MODERN PRACTICE (MAN.).

In an action by plaintiffs for the price of goods supplied to defendant, where the defendant sets up an agreement of agency between the plaintiffs and himself and counterclaims to have an account taken of what moneys were still due in respect to that agency, and plaintiffs reply to the counterclaim that the contract of agency was entered into, but was subsequently annulled by the parties, and that thereafter the defendant purchased the goods in question, and ask in the alternative for a reference to ascertain what is due them from the defendant if the contract of agency was made and still exists, such admission by the plaintiffs under the modern practice in Manitoba will not be taken strictly against them, but will be moulded in accordance with the evidence adduced at the trial, especially where such evidence shews that there was only a proposition of agency between the parties which was never consummated because the parties failed to agree on the terms.

2. SALE (§ I—1)—WHAT CONSTITUTES—DELIVERY WITH INVOICES FOR "GOODS SOLD," EFFECT OF—ABORTIVE NEGOTIATIONS FOR AGENCY CONTRACT.

Where plaintiffs proposed that defendant act as their agent in running a store and the plaintiffs supplied the defendant with goods, but

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subsequently the parties failed to reach an agreement in regard to the terms of a written contract of agency which had been drawn up, but the plaintiffs still kept supplying goods to the defendant sending him weekly invoices indicating that they were for goods "sold" to the defendant with the charge carried out, and which invoices were signed by the defendant, the course of the dealing between the parties is that of seller and buyer rather than that of principal and agent.

[*Ex parte White*, L.R. 6 Ch. 397, and *Re Watson*, [1904] 2 K.B. 753, referred to.]

Statement

IN this case, the plaintiffs claimed the sum of $1,780.10 for meats supplied by them to the defendant. The defendant set up an agreement of agency whereby he was employed to conduct the business as agent for the plaintiffs on certain terms, and he counterclaimed to have an account taken of what moneys were still due him in respect of that agency.

Judgment for plaintiff and counterclaim dismissed.

H. Phillipps and *W. D. Lawrence*, for plaintiffs.

E. R. Levinson, for defendant.

GALT, J.

GALT, J.:—In the defence to the counterclaim, the plaintiffs admit the contract set up by the defendant, but state that it was cancelled and annulled by the parties thereto on or about the 10th day of October, 1909, and that subsequent to that date the defendant purchased the meats and incurred the indebtedness alleged in the plaintiffs' statement of claim. In the alternative, the plaintiffs say that if the contract alleged in the defendant's counterclaim was made and still exists, then they ask for a reference to ascertain what is due them from the defendant.

On the question of pleadings, at one time, no doubt, such a plain admission as the plaintiffs make here in the defence to the counterclaim might have been used very strenuously against them; but under the modern practice, pleadings are often drawn so loosely that it is necessary to mould them in accordance with the evidence which may have been adduced at the trial. There is another reason in this case for not holding the plaintiffs too strictly to that particular admission. The original transaction was undoubtedly a proposition of agency. Mr. Gallagher admits this as well as the defendant. The plaintiffs were anxious to commence doing business in the north end and get a footing in that locality and for that purpose instructions were given by both parties to draw up the agreement. The agreement was drawn up, but meanwhile, I gather from the evidence, the parties went on on the assumption that they would come to a definite agreement of agency and meats were supplied on that footing; but when the draft agreement came to be submitted to the plaintiffs, and they came to consider the position they would be in, in dealing with a man they knew little of and under

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peculiar terms, they naturally desired to have control of the business, as they would have a right to do under a contract of principal and agent. For this reason, Mr. Gallagher states, the plaintiffs would not agree to the agency agreement as drawn up by the solicitor and as signed by the defendant only. Mr. Gallagher stipulated before approving of that agreement that the defendant would have to agree to allow the plaintiffs to put in a cash register and a cashier and bookkeeper of their own to supervise the accounts, and this the defendant would not agree to. It is manifest, therefore, that the plaintiffs never accepted the agreement relied upon by the defendant. So far as the testimony of the parties goes, I think both Mr. Gallagher and Mr. Fink gave their evidence in a perfectly satisfactory manner and I see no reason for discrediting what either of them says about the business, allowing, of course, for any exaggerated feelings that they may have.

The defendant, on the other hand, I find to be a very unsatisfactory witness, after making all due allowance for the fact that he is a foreigner. Though he cannot speak English fluently, he appears to be an intelligent man, and yet he tells stories entirely at variance from time to time with one another which makes me hesitate very much to accept his testimony where it conflicts with the plaintiffs' witnesses. It appears to me that this case depends more upon the course of dealing between the parties than anything else. From the commencement, invoices were sent by the plaintiffs to the defendant every week, of the goods supplied, and those invoices were on the heading of the plaintiffs and expressed to be for such and such an amount of meat "sold" to the defendant with the charge carried out, and they are signed by Freedman. The plaintiffs kept an accurate account of these sales, but the defendant, if he kept any books at all, kept books that do not help us at all. I say books, because the one book produced contains entries which apparently refer to another book which is not produced and we have no idea what it contains.

If he supposed he was acting as agent, surely the defendant would be obliged to keep track of his doings in such a way as not merely to account to his principal, but to secure his own rights by getting a proper allowance of whatever he would be entitled to. As a very glaring instance of his contradictions, he states in his evidence in one place that he appropriated the moneys he received from the sale of the meats partly in payment of his own expenses and the amount he was to receive under the agreement for his horse and waggon and for the man he employed, and only paid over the difference to his employers; and yet subsequently he puts in a claim for these very items of expense as

though he had never paid them at all. The efforts of counsel failed to elucidate his final story as to this. It is impossible to suppose for a moment that the plaintiffs thought they were dealing with the defendant as an agent after they definitely refused to sign the agreement of agency above referred to; or to suppose that they would be sending meats down to him from time to time and not take pains to ascertain whether or not a correct account was being kept of them by the defendant or insisting upon accounts being rendered from time to time by the defendant. On the other hand, if the arrangement was an out and out sale by the plaintiffs to the defendant, that is entirely consistent with all the evidence before the Court at present, with the single exception of the argument by Mr. Levinson that the agreement of agency had never been actually revoked or cancelled. The answer to this is that the particular agreement relied upon was never agreed to by the plaintiffs.

The importance of the dealings between parties as a test of their true relationship is shewn in *Ex parte White*, L.R. 6 Ch. 397, where it was held that the course of dealing shewed that although both parties might look upon the dealings as an agency, N. did not in fact sell the goods as agent of T. & Co., but on his own account upon the terms of his paying T. & Co., for them at a fixed rate if he sold them and the moneys he received from them were, therefore, moneys which T. & Co. had no right to follow. This case is referred to with approval in *Re Watson*, [1904] 2 K.B. 753.

I find, therefore, in this case, that the course of dealing between these parties, certainly after the plaintiffs declined to agree to the draft agency agreement, was that of vendor and purchaser and not that of principal and agent. For this reason the plaintiffs are entitled to judgment with costs. It appears that the sum of $1,780.10 remains after all items which were not meats under the statements rendered had already been paid off by payments made by the defendant. Consequently, the defendant is liable for $1,780.10 and costs. The defendant's counterclaim will be dismissed with costs, and the plaintiffs are entitled to a fiat for the cost of the examination for discovery.

Judgment for plaintiff and counterclaim dismissed.

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Feb. 28.

GOOD v. BESCOBY.

Manitoba King's Bench. Trial before Curran, J. February 28, 1913.

1. CONTRACTS (§ V C 3—402)—RESCISSION — FRAUD — VENDOR AND PURCHASER—CONCEALMENT OF IDENTITY OF PURCHASER—MATERIALITY OF PERSONALITY.

A vendor of land is not justified in repudiating the sale on the ground that he had been deceived as to the identity of the purchaser, where it appears that the personality of the purchaser was a matter of no concern to the vendor and there is no proof of any prejudice or injury to him because of this alleged deception, that the sale was for cash and the vendor would get all he bargained for and that the purchaser was not guilty of any improper conduct, but that if there was a deception it was not intentional.

[*Fellowes* v. *Lord Gwydyr*, 1 Sim. 63, 1 Russ. & M. 83; *Nash* v. *Dix*, 78 L.T. 445; *Smith* v. *Wheatcroft*, 9 Ch.D. 223, applied.]

2. PRINCIPAL AND AGENT (§ II—8)—AGENT'S AUTHORITY—VENDOR AND PURCHASER—SALE OF LAND.

Where a prospective purchaser of land comes to one who has been acting generally as the solicitor for the owner of the land, the purchaser erroneously believing that he was also the agent for the sale of the land, and the solicitor calls up the owner who states the price and terms upon which he is willing to sell and the sale is brought about through the solicitor and payment on account of the purchase price accepted by the owner, the solicitor has become the owner's agent for the sale of the land so as to bind the owner by the solicitor's contract of sale in terms made as agent for the owner.

Statement

ACTION for specific performance of an agreement for the sale of land.

Judgment was given for the plaintiff.

A. B. Hudson, and *A. E. Dilts*, for plaintiff.

J. B. Coyne, and *J. Galloway*, for defendants.

Curran, J.

CURRAN, J.:—The plaintiff sues for specific performance of an agreement for the sale of land contained in the following document (exhibit 1):—

Stonewall, Manitoba, 24th February, 1912.

$100.

Received from W. Robert Good, Esq., the sum of one hundred dollars ($100) in cash being the cash payment on account of the purchase from Felix H. Bescoby of the south half of the south-east quarter of section thirteen (13), township fourteen (14), range one (1), east, in Manitoba. The purchase to be completed as follows: The balance of the purchase money, being the sum of twenty-three hundred dollars ($2,300), to be paid on the 1st day of April, A.D. 1912.

(Sgd.) H. A. ARUNDEL,
Agent for Felix H. Bescoby, owner of above-mentioned land.

The defendant is the owner of the land referred to in this document, and is in a position to give title to the plaintiff.

The $100 mentioned in exhibit 1 was duly transmitted by the agent Arundel to the defendant, and subsequently, on the 1st

day of April, 1912, the plaintiff tendered to the defendant in cash $2,300, the balance of the purchase price of the lands, and also tendered for execution by the defendant a transfer of the land under the Real Property Act, from the defendant to himself. The defendant refused to accept the money or to execute the transfer, and the plaintiff brings suit.

The defendant repudiates the sale, denies the alleged agreement, pleads the Statute of Frauds, and further sets up that if there was any such agreement it was obtained by fraud and deception of the plaintiff as to who the real purchaser was.

I think the agreement in question constitutes a sufficient memorandum to satisfy the Statute of Frauds if the agency of Arundel is established.

The following are the facts: The defendant, in the fall of 1911, offered to sell the land in question to the plaintiff for $3,000, which offer the plaintiff declined, as he considered the price asked was too high. The defendant heard nothing further from the plaintiff in connection with the land until the transaction in question arose. In February, 1912, the plaintiff employed one Robert Nelson, a notary public, of Stonewall, to try and purchase this land for him at $2,000, telling Nelson that he thought one Stratton had the land for sale. Nelson accordingly, on the 23rd of February, 1912, went to see Arundel, named in exhibit 1, about buying the land. Why he went to Arundel and not to Stratton does not appear. Arundel was a solicitor practising at Stonewall, and had generally acted in that capacity for the defendant; but the land in question was not listed with him for sale, nor was he then in any sense the defendant's agent.

Arundel, at Nelson's request, called up the defendant on the telephone and got from him the information that the land was for sale, and his lowest price and terms—namely, $2,400 cash. This information was communicated to Nelson who was sitting in the office while the conversation over the telephone was going on, and Nelson thereupon wrote the plaintiff the letter (exhibit 4), and ceased to further appear in the matter.

As the result of receiving this letter the plaintiff, on the 24th February, 1912, went in person to Arundel and offered him $2,000 for the land. This was refused by Arundel, who told the plaintiff that $2,400 cash was the lowest price at which the land could be bought, at the same time telling him that he could not then sell him the land as it was practically sold to someone else, meaning Nelson. The plaintiff then asked Arundel if it was to Nelson, and was told that it was. Plaintiff then said he had sent Nelson, and upon Arundel being convinced that Nelson really represented the plaintiff, he accepted $100 deposit, and issued to him the receipt (exhibit 1).

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Before advising the defendant of the sale and payment of the money, Arundel decided to wait until he could get confirmation from Nelson of the statement made by the plaintiff that Nelson was representing him in negotiating for the land. This confirmation Arundel got from Nelson by telephone some time that afternoon and at about 6.30 o'clock in the same afternoon telephoned to the defendant advising him of the sale, the receipt of the deposit, that the balance of the $2,400 would be paid on April 1st, following. The defendant agreed to this without asking the name of the purchaser. About five or ten minutes later defendant called up Arundel on the telephone to ask the name of the purchaser, to which Arundel replied "Bob Good," meaning the plaintiff.

There is a contradiction in the evidence at this point, and I will refer to it later.

I will now proceed to deal more in detail with the evidence of Arundel's agency. Arundel says in his evidence in chief:—

> When Nelson came in he got me to 'phone to Bescoby and get the lowest price. He told me to practically say that he could have until Monday night to decide—a sort of option.

On cross-examination he said:—

> I asked Bescoby what was the lowest price that he would take for the property, and I think he told me $3,000 on time and $2,600 or $2,800 if it was all cash. I could not remember those figures given, that is on time. I pointed out to him, Nelson said, that was too high a figure, and I pointed out to Bescoby, "You will have no commission to pay."
>
> Q. Did he ask you who was purchasing? A. Yes, he asked me when he stated that price, then he said, "Who is it that is purchasing?"
>
> Q. What did you tell him? A. I said, "Wait a minute, I will find out," and I turned to Nelson and I said, "Who is buying?" Nelson said, "I am going to Winnipeg to-morrow and I will be back from Winnipeg on Saturday or Monday, and I will let you know," and I said to Bescoby, "It is a Winnipeg man," and he, Nelson, never said yes or no, and I turned to the 'phone and I said, "It is a Winnipeg man." Nelson didn't say it was a Winnipeg man who was purchasing; I took it from what he said that it was a Winnipeg man.

None of the foregoing is contradicted, and it constitutes practically all the evidence there is upon the question of agency.

I will now consider more fully what transpired when the plaintiff himself entered upon the negotiations with Arundel. Arundel says:—

> I called up Bescoby then and told him that the deal was closed; I'd got $100, but I hadn't got the rest of the cash then, but the understanding was that it was to be all cash.
>
> HIS LORDSHIP:—When was that? A. It would be about half past six; about two hours and a half after I got the $100.
>
> Q. That is on the 24th? A. Yes.

HIS LORDSHIP:—You 'phoned Bescoby and told him that you had made the sale and received $100? A. Yes, and received $100, and the balance of the $2,400 was to be paid within a month.

Q. Did you tell him to whom you had sold it? A. I don't think it was mentioned; I think he was to come out from town. It wasn't mentioned then, but it was the week afterwards, because he rung me up afterwards.

Q. There was a slight difference; instead of being cash there was to be the five weeks? A. Yes. It would take that time to clear the title anyway, and it would amount to cash in that way.

HIS LORDSHIP:—Did Bescoby agree to the terms? A. Yes. He agreed to the terms.

Q. Did he ask you anything about the purchaser then? A. No. Hung up the receiver and he rang me up five or ten minutes afterwards and asked me, "By the way, you never told me who the purchaser was," and I told him "Bob Good."

Q. What did he say? A. Well, now, he didn't make any remark, but said "Oh!" in a rather peculiar way, as if he was surprised; that is the only remark he made; nothing further was said at that time.

On cross-examination the witness was asked by Mr. Coyne:—

Q. Are you sure that Mr. Bescoby didn't say anything else besides that? A. No, he didn't; he made the surprised exclamation, and I held the receiver to see if he had anything more to say; and I thought that he was surprised to find that it was (sold) to so close a neighbour.

Q. Mr. Bescoby called you up again? A. This was Saturday night. He called me up again when I was at breakfast on Monday morning about half-past seven o'clock.

Q. Monday the 26th, at half-past seven in the morning, Bescoby called you up? A. Yes.

Q. That is the time he told you to return the $100 to Good? A. Yes. He repudiated the sale altogether, and told me he would not sell to a Stonewall man.

The defendant contradicts this part of Arundel's evidence and says that the repudiation of the sale took place at the second conversation over the telephone on the Saturday evening, and that all he, the defendant, said on the Monday morning to Arundel was to tell him "to be sure and send Good his money back."

It appears that on the intervening Sunday other parties had been out to see the land with a view to purchasing, and it is suggested by the plaintiff that this was the real reason for the defendant's repudiation the next day. The defendant denies this, claiming that the repudiation had already taken place on the Saturday previous.

It further appears that the defendant at this time had the land in question, along with all his other lands in the locality, listed for sale, and that he had fully made up his mind to sell this land.

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Upon this state of facts the defendant contends that Arundel was not his agent at all, or, at most, if he was his agent, he was only authorized to sell to a Winnipeg man. He contends that Nelson, the plaintiff's agent, was guilty of deception in withholding from Arundel the knowledge that he was representing Good; that Good knew that the defendant would not sell to him, and that the sale having been brought about by deception, should not be given effect to.

I cannot find, upon the evidence that the plaintiff knew that the defendant would not sell him the land, or indeed that the defendant would not, at this time, or at any time, have been willing to do so if he could obtain his price. I cannot find that there was any personal reason why the plaintiff was objectionable to the defendant as a purchaser, or that there ever had existed any reason why the defendant would not have sold to the plaintiff, except their previous disagreement as to price. On the contrary, the defendant himself, during the previous fall, and also in the spring of the same year, offered to sell the land to the plaintiff, and it was only a difference as to price that prevented a sale being then consummated.

I cannot find that the plaintiff has been guilty of any fraud or deception inducing the contract, or that the defendant would not have entered into the contract had he been aware that the plaintiff was the purchaser.

Nor can I find that the plaintiff has done anything improper whereby the terms of the contract were rendered more beneficial to him or less beneficial to the defendant. The defendant says he would have been quite willing to complete the sale had the purchaser been a Winnipeg man. He does not suggest that the price was reduced because the intending purchaser was supposed by him to be a Winnipeg man, and the only suggestion of injury he does make in his evidence is that selling this 80-acre parcel by itself would "affect down the value of the other." Or, as he expressed it again, the rest of his land would be more valuable if he owned this 80 acres.

How is this evidence to affect the sale to the plaintiff? The defendant's reasons or objections to the sale to the plaintiff would equally apply to a sale to a Winnipeg man. The defendant does not suggest in his evidence that a sale to a Winnipeg man would be more beneficial to him or that a sale to the plaintiff would entail any more injurious consequences to him than a sale to a Winnipeg man.

To my mind the evidence wholly fails to prove the grounds of defence set up in the 8th paragraph of the statement of defence, except that Nelson withheld the name of the plaintiff as the intending purchaser when asked by Arundel, and *may have* knowingly permitted, without contradiction, Arundel to

tell the defendant over the telephone that it was a Winnipeg man who wanted to buy. Nelson is not produced as a witness, and there is no evidence that he understood Arundel's half of the telephone conversation, and he certainly could have had no knowledge as to what the defendant was saying from his end of the instrument. I would hesitate under such circumstances and upon the evidence here to find that Nelson was guilty of any fraudulent conduct, concealment or deception. I think Arundel acted honestly in making the sale, and it must be borne in mind that the actual sale was not made to Nelson, the agent, but to the plaintiff in person, and that Arundel knew that the plaintiff was not a Winnipeg man. He advised the defendant on the Saturday night that the plaintiff was the purchaser, and the defendant did not then dissent or object in any way. Upon this point I accept the evidence of Arundel in preference to that of the defendant, and I find that the defendant did not repudiate the sale until the Monday morning.

None of the reasons given by the defendant for repudiating the sale indicate that a consideration of the person to whom he was willing to sell entered as an element into the contract. The proposed sale being for cash, none of the usual matters which give rise to a question of the person entering as an element into a contract are here present.

Now, as to the question of Arundel's agency, I confess I have had much difficulty in reaching a satisfactory conclusion. Arundel, without doubt, was the plaintiff's agent up to a certain point, and not the agent of the defendant. At what point in the negotiations then did he, if at all, become the defendant's agent? I think he became the defendant's agent when the defendant informed him the land was for sale and stated to him the price and terms upon which he was willing to sell. I think this information was given for the purpose of enabling Arundel to make a sale and constituted a sufficient authority to him to sell the land, at all events to a Winnipeg man. If not, for what purpose or object was it given? I hold that the defendant authorized Arundel to sell the land in question to a Winnipeg man for $2,400, payable $100 cash and the balance on the 1st of April, 1912, being the equivalent under the circumstances of this case of a cash sale. Authority to sell to a Winnipeg man afforded a very wide range of selection of a purchaser, and precludes, to my mind, the existence in the mind of the defendant of any consideration of the personality of the purchaser entering as an element into the contract of sale the defendant was willing to make. If then to a Winnipeg man, why not to the plaintiff, unless the plaintiff was excluded upon the principles of law which would justify a refusal to perform because

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the plaintiff was not the person the defendant thought he was dealing with?

I adopt and apply to this case the principles of law laid down in *Fellowes* v. *Lord Gwydyr*, 1 Sim. 63, and 1 Russ. & M. 83; *Nash* v. *Dix*, 78 L.T. 445; and *Smith* v. *Wheatcroft*, 9 Ch.D. 223.

In *Fellowes* v. *Lord Gwydyr*, 1 Russ. & M. 83, at p. 89, the Lord Chancellor (Lyndhurst) says:—

> Mr. Page (one of the defendants), I am satisfied, had every reason to believe that he was contracting with Lord Gwydyr; but the only question here is, what loss or inconvenience has he sustained in consequence of acting under that mistake? There is nothing in the cause which can lead me to suppose that he would not have contracted with the plaintiff, or that he would have declined to offer the sum of 1,500 guineas had he been aware of the party who was really the owner of the property. . . . Mr. Fellowes (the plaintiff) says that the name of Lord Gwydyr was not used for any improper purpose; but even if it were otherwise, that circumstance alone would furnish no reason why Mr. Page should be released from his contract, without shewing that the deception had in some way operated to his prejudice.

And again, in the same case, at the hearing, the Vice-Chancellor (Sir William Grant) says:—

> If the plaintiff had been aware that the defendant Page would not have treated with any other person than Lord Gwydyr, and for that reason had concealed his own interest in the transaction, the cases cited would have applied and would have come to be considered.

He goes on to say:—

> But there is no reason to suppose that the plaintiff had any knowledge that such was the feeling of the defendant. . . . But if the plaintiff, by the use of Lord Gwydyr's name, really desired to conceal the speculative bargain which he had made with Lord Gwydyr, it would afford no principle upon which the defendant could escape from the contract without special circumstances; and none are proved here. This concealment could work no injustice to the defendant Page.

Again, in *Smith* v. *Wheatcroft*, 9 Ch. D. 223, the learned Judge said:—

> I ask myself here whether the defendant has shewn that any personal consideration entered into this contract? Has he shewn me that he would have been unwilling to enter into a contract in the same terms with anybody else? I say distinctly that he has failed to produce any such effect on my mind, and that being so, I think the second head of defence must fail as well as the first.

I would also refer to Pothier's Traité des Obligation, at paragraph 19, where the law is stated by the learned author in the following language:—

> Whenever the question of the person with whom I am willing to

contract enters as an element into the contract which I am willing to make concealment in respect to the person destroys my consent and consequently annuls the contract. On the contrary, when the consideration of the person with whom I thought I was contracting does not enter into the contract, and I would have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.

I think the defendant's willingness to sell to the plaintiff as to a Winnipeg man may fairly be inferred from his not objecting when apprised that the plaintiff was the purchaser. It seems to me clear from the principles enunciated in these authorities that the mere abstract question of deception, unaccompanied by a consideration of the personal element referred to by Pothier, or by loss or injury to the party deceived, or working him no injustice of prejudice and not in reality material to the contract, will not of itself furnish sufficient ground to relieve a party from his contract.

I hold that the deception, if any, was not material to the contract, because the sale was for cash and the defendant would get all he intended to bargain for, namely, the cash price for his land. There is no proof of any prejudice or injury to the defendant resulting from the deception practised if it could be called deception. I cannot hold upon the evidence that any deception was intentionally practised. I can see nothing improper in the plaintiff employing a business man like Nelson to try and buy this land for him on better terms than apparently he himself had been able to obtain. There was no attempted concealment or non-disclosure on the part of the plaintiff himself and Nelson was not then buying, as the price quoted to him went beyond his instructions. Nelson was merely obtaining a quotation of price and terms for a prospective buyer. Was there any obligation then upon Nelson to disclose the name of the person he represented? I think not. He was not bound to disclose; but if he did disclose, he must do so truthfully.

If anyone was at fault it was Arundel for jumping to the conclusion that Nelson was representing a Winnipeg man. I do not think that the intention to restrict a sale to a Winnipeg man only was in the minds of any of the parties. My view is that the defendant's question, "Who is the buyer?" and the reply given, "A Winnipeg man," were mere incidents in the conversation, the crux of which was the price and terms to be obtained, and did not form, and were not intended to form, a part of the agent's authority restricting him to sell to a Winnipeg man only. There is no reason suggested by the defendant in his evidence why such a construction should be placed upon it, and, in my opinion, the objection raised was an after-thought which may or may not have been actuated by the contingency

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of a better sale to those other parties. If this limitation was present to the defendant's mind when authorizing Arundel to sell, and was really deemed by him important or material to be observed by Arundel, I think the defendant would, in some way, have emphasized that fact to the agent. He did not do so then and did not urge it when informed that the plaintiff was the purchaser. One would naturally look for it to be urged the moment he was apprised that the purchaser was not a Winnipeg man. That he did not do so further strengthens the view I take that this being a cash sale or one equivalent to cash, the personality of the purchaser was a matter of no concern to the defendant.

I do not wish to be understood as saying that in no case of a cash sale could the personal element arise, for it is conceivable that it might, and often does arise in connection with land sales; but I merely hold that it does not arise in this case.

Upon the best consideration of the case that I have been able to give, and not, perhaps, entirely without some doubt, I am of opinion that the plaintiff is entitled to succeed.

There will be judgment for the plaintiff for specific performance of the agreement for sale in question, with costs of suit, but no damages.

Judgment for plaintiff.

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April 14.

TOWNS v. TOWNS.

Manitoba King's Bench. Trial before Prendergast, J. April 14, 1913.

1. HUSBAND AND WIFE (§ II E—84 a)—CONTRACTS AND LIABILITIES INTER SE —MANAGING WIFE'S PROPERTY.

A husband living with his wife on a farm of which she has the beneficial interest and working the farm to earn a living for them both, is presumed to do so by virtue of the relationship and duties resulting from their marriage and is not entitled to claim wages from his wife in respect of such services on her subsequently leaving the farm and living separate from him.

Statement

THE parties, who are husband and wife, separated after living seven years in common, and the former brought this action about one and a half years later, claiming $500 a year for seven years as compensation for his time and labour in managing and working the farm on which they lived together; $400 as value of goods and chattels converted by the defendant to her use; the return of a team of horses and waggon detained by her, or $500 as the value thereof, and $197 advanced for the purchase of farm stock. The statement of claim also alleges a partnership

and prays for an accounting, but this was abandoned at the close of the trial as being unsupported by the evidence.

The action was dismissed with costs.

H. E. Henderson, K.C., for the plaintiff.

J. F. Kilgour, for the defendant.

PRENDERGAST, J.:—The defendant was first married to one John Stirling, and on the death of the latter, leaving her and three children under age, she was appointed administratrix of the estate consisting of 700 acres of farm lands, forming practically one area; of certain farm stock and products, and a certain sum of money. After John Stirling's death, the farm was first worked by the defendant's brothers; and when she was married to the plaintiff in November, 1903, they went to live on the farm and worked it themselves.

The defendant then had with her on the farm: horses worth $700, grain $400, 1 cow and pigs, $100, waggon and sleighs $60, farming implements $40, etc., amounting in all to, say, $1,300, and about $1,300 in cash (not taking into account a certain sum which was paid later for the balance of the purchase price on the land). The plaintiff brought with him: 1 team of horses and harness, one lumber waggon, 2 cows and 2 calves, and some seed grain, worth altogether about $600. He says he also had $197 in money.

After having lived together on the farm and worked it for seven years—*i.e.*, in the fall of 1910—the defendant took it from her husband's hands and rented it to others. The reasons she gives for taking that step are: that the plaintiff was so much away and so neglected the work generally that they were running behind from year to year, until $1,950 of debts had accumulated; that financial conditions had got so, that he was urging her to mortgage part of the farm; that his behaviour as a husband towards her was not proper, and that her bondsman as administratrix was insisting that she should take such a step to protect herself as well as the estate. There was also an incident with respect to a note to which she says he put her name without authority, which seems to have finally precipitated the determination which she took.

The defendant, after giving possession to the new tenant, went to live at the near-by town of Ninga; while the plaintiff sought work in other parts of the province, and they have lived apart ever since.

The general presumption is, it is safe to say, that a husband living with his wife on a farm of which she has the beneficial interest, and exerting himself by working the same to earn the common livelihood, does so by virtue of the relationship and duties resulting from their marriage, and is not therefore en-

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titled to wages. The plaintiff admits, moreover, that there was no express agreement about wages or compensation of any kind.

First of all, as already stated, the claim based on partnership was abandoned at the trial, as it was admittedly unsupported by the evidence. Then he says, on cross-examination:—

When she suggested to me at the start that we work on shares, I said it would not look very nice between husband and wife. . . . That was abandoned, yes . . . There was no mention of wages, no. . . . She was the wife and I was the husband and I went to work. . . .

He, however, claims compensation under a contract which he says will be implied from the circumstances, having, more particularly, reference to the extent and nature of his services, and the results which he has attained by his work.

I have collected the following, taken here and there from the plaintiff's evidence:—

She was the manager and I was the foreman. . . . I never bought anything without consulting her. . . . I employed hands. . . . I marketed the crop. . . . I did the buying and paying out. . . . I was allowed to run the farm; I was really in charge, subject to consulting her. . . . The fall we married, 1903, she gave me $1,300, which I spent; I cannot say exactly what it was spent for without looking at my book. . . . This book was made after, in 1910; seven years after. . . . I sold the crop and I sold the cattle. . . . I borrowed also. . . . I put the money to my own bank account. . . . I didn't consult my wife about making cheques; I took what I chose. . . . When I wanted to go away I went away; I didn't always consult her, no. . . . By saying she was the manager she didn't tell me to plow this and summer-fallow that; but I would tell her that I was thinking of doing this and summer-fallowing that. . . . I have kept no account of the farming operations, no. . . . I don't know what I realized from the wheat every year, no. . . . From the other crops, no. Nor what I got from the cattle I sold. . . . As for swearing I didn't sell for $2,000 of cattle, I won't swear that, no. . . No account was ever taken of the moneys received during the occupation of the farm. . . . In 1910, I borrowed from my brother $900 which went into the estate, and that has not been repaid. . . . There were no debts when I went on the farm. . . . When I left there were debts unpaid for over $1,800, besides the $900 due my brother. . . . I took for myself during the seven years only $500 which I used for clothes. . . .

The defendant says:—

We went on the farm after we were married. We had 700 acres, of which 400 acres was for crop and 300 acres for pasture. . . . I had some things, and I gave him that fall about $1,600, out of which, after buying pigs and paying a balance on the land, there was about $1,300 left. . . . He also had some things which his father gave him and that he brought. . . . He took charge; hired the help; bought the machinery and worked himself. . . . As to consulting, sometimes he would say he was going to have this and do that, and I never refused. . . . He never suggested that he should be paid wages or that there was a partnership existing. . . . I am in debt over $1,900 now. . . . So far as I know, he never kept any account of the proceeds of the farm. . . .

I do not see that there is anything in the foregoing that is not altogether in keeping with the relationship of husband and wife, while there appears to be a great deal that is incompatible with the notion of the plaintiff having occupied a subservient position, such as the freedom with which he made sales, deposited the proceeds to his own account, disposed of the same, and never accounted for either receipts or expenditure.

The plaintiff, however, lays special stress on the fact that during the seven years he was there, the old buildings were enlarged and new ones put up, considerable fencing was done, wells were dug, more machinery bought and the number of horses and cattle increased—which, altogether, as he alleges, represent a value of $10,000. I would place the same at a figure not much short of $9,000—with the qualification, however, that this includes the $1,300 of cattle and farm stuff which the defendant already had on the farm. There are also to be taken into account: the $1,300 in cash which she entrusted to him when they were married and the $1,900 which she now owes. This forms $4,500, or say, $4,000 (allowing $500 for depreciation of her chattels) which must be deducted from the apparent increase of $9,000, reducing the same to $5,000. But it is shewn, on the other hand, that he sold at least for $3,500 of cattle and pigs and I am satisfied that he sold more. He also sold all the grain grown during the seven years, which represents a very large amount indeed, and of which he kept no account whatsoever. In fact, the farm being a very large one, of which 400 acres is good wheat land and it being all paid for, several competent witnesses who live near by and know the conditions, have shewn by their own experience that the results for which the plaintiff claims credit fall very far short indeed of being a brilliant achievement.

The defendant herself, and all her witnesses give the plaintiff credit for being a very good worker "when he keeps at it," and for having toiled well and assiduously the first two years. But they are also unanimous in saying that after that he did not "keep at it," that he contracted habits of idleness and spent much of his time with the boys of Ninga, where he spent money for amusement, if not lavishly, at all events, altogether too freely. One witness said that during the last four years young Stirling (the defendant's eldest son), and the hired man seemed to bear the brunt of it all and that they would have done quite as well without the plaintiff; and another witness said that as a manager during those years, he would not have had him one moment.

Neither, then, in his manner of dealing, in the amount of work which he did, nor in the results attained, can I see anything to rebut the presumption arising from his marital relation to the defendant.

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With respect to the $400 of his chattels which he says the defendant converted to her own use, the fact is that he disposed of the same, and that if he did not use the proceeds for himself, they went to the general fund with the other receipts for which he cannot account.

With respect to the horses and waggon which he claims the defendant is detaining, his own evidence shews that he was told that he could take them away and that they are still at his disposal, except one horse which had to be shot on account of old age.

As to the $197 which he said he had when he was married, his evidence is that he kept that amount hidden in the cellar for five years, then deposited it in the bank, where it remained two years, and finally spent it on the farm the last year he was there—all of which is perhaps not impossible, but seems highly improbable, and is at all events, subject to the same remarks that I have made above concerning the two other items.

Apart from the question of their actual merits, the plaintiff's different items of claim cannot be countenanced except as part of, and included in, an accounting, and this he is unable to give on his own shewing.

The action will be dismissed with costs.

Action dismissed.

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March 29.

UNITED STATES v. WRENN.

Halifax County Court, Nova Scotia, Judge Wallace sitting as an Extradition Judge. March 5, 1913.

The Nova Scotia Supreme Court en banc. March 29, 1913.

1. EXTRADITION (§ I—4)—WARRANT ON PRIMA FACIE CASE.

If the proofs tendered on an extradition hearing shew a *primâ facie* case against the accused, a committal for extradition is justified.

2. EVIDENCE (§ VIII—674)—INCRIMINATING STATEMENTS MADE TO DETECTIVE—PRISONER NOT CAUTIONED.

Incriminating statements made by a prisoner to a detective who did not caution the prisoner, will not be admitted in evidence on the hearing of an extradition charge without evidence to shew that they were made voluntarily. (*Per* Judge Wallace.)

3. JAILS (§ I—3)—PERMITTING INTERVIEWS WITH PRISONER—DETECTIVE'S INTERROGATION OF ACCUSED.

Unless a prisoner asks for an interview with the detective, or there are exceptional circumstances, the jailor should not permit interviews between a government detective and the prisoner, at which others are not present. (*Per* Judge Wallace.)

Statement

THE prisoner, "Jack" Wrenn, was arrested at the instance of the United States Government, under a provisional warrant

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based upon a complaint of John A. Rudland, chief of police for the city of Halifax, charging the fugitive with the crime of murder in New Hampshire. At the hearing before the commissioner, the demanding Government submitted several depositions taken in New Hampshire, and called several witnesses, including Detective Hanrahan of Halifax. The depositions offered shewed on their faces that some were taken before a Mr. Charles A. Madden, and the remainder before a Mr. Orville E. Cain. The former swore out the warrant in New Hampshire, charging Wrenn with murder, and the latter issued it, and also was the "county solicitor" or district attorney in charge of the prosecution against Wrenn. It was attempted on the part of the United States to give evidence of certain incriminating statements made by Wrenn to Hanrahan in the Halifax county jail. Hanrahan admitted on cross-examination that he had not cautioned or warned Wrenn before receiving the statement or at any time, but there was evidence that Wrenn knew Hanrahan in his official capacity.

Argument

A. Cluney, K.C., for the prisoner:—The depositions are inadmissible, having been taken before persons disqualified by interest. Further, they are inadmissible, as having been taken subsequent to the issue of the warrant in New Hampshire: see *Re Ockerman*, 2 Can. Cr. Cas. 262. The statement to Hanrahan is inadmissible: see *R.* v. *Kay*, 9 Can. Cr. Cas. 403. The depositions are subscribed by Cain and Madden as "notaries," and do not shew themselves as coming in the functionaries within the meaning of sec. 17*a* of the Extradition Act.

W. J. O'Hearn, for the United States Government:—"Interest" or "bias" affects only judicial proceedings. Cain and Madden were acting only in a ministerial capacity; secs. 16, 17 and 18 of the Extradition Act and treaty are complied with. The conditions under which the evidence is to be given and the class of functionaries to administer the oaths are left to the "demanding Government" to prescribe and designate. "Notaries" were accepted as proper functionaries in *Re Lewis*, 9 Can. Cr. Cas. 233: *Re Ockerman*, 2 Can. Cr. Cas. 262, does not apply here, as in that case the provisional warrant was obtained on the exhibition of a verified "foreign warrant." In this case the complaint was on "Information and belief" shewing grounds: see sec. 10 of the Extradition Act. There is sufficient oral testimony after rejecting the depositions to justify committal.

Judge Wallace.

JUDGE WALLACE:—Dealing first with the objections to the evidence it will be conceded that statements in depositions of this kind, taken in a foreign country, must be received with caution. In a few of the depositions there is some matter which would not be legal evidence in Canada, but, on the other hand,

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the depositions contain considerable legal evidence of much weight.

An objection is taken to the evidence of the Halifax detective as to admissions made to him by the prisoner in a private interview in the county jail. The alleged admissions were not prefaced by any caution from the detective, and, as the evidence is not pressed by the demanding Government, I reject all this testimony. The practice of detectives interrogating a prisoner when in jail, and when no one else is present at the interview, should be discouraged. If a prisoner wishes to make a statement to a detective, or to any other person, ample opportunity should be given, but unless the prisoner asks for the interview, or there are exceptional circumstances, the jailor should not permit private interviews between a Crown detective and a prisoner. I do not mean that there was any impropriety in the manner of obtaining this interview, but subsequent testimony as to the conversation might unintentionally result in a miscarriage of justice, as the prisoner might, by fear, have been influenced to say what was not true. The detective, in this instance, being alone with the prisoner, first tells him that there is a "pretty strong" case against him, and then presses him with questions. When a person is under arrest and in jail in a strange country, charged with a most serious crime, he is apt to be affected by any influence that might inspire fear, and he might be in such a state of mental disturbance that any statements made by him in answer to questions from a Crown detective should not be regarded as voluntary or trustworthy.

Prisoners in such a trying situation, under the pressure of persistent interrogatories, might say anything that they think would be to their advantage. The detective may be anxious to elicit the truth, but such a method is more likely to elicit falsehood. The situation is such as to invite a false statement, and, therefore, the conversation is not entitled to credit. A detective, pressing a prisoner with questions, might wring from him answers that would, if admissible in evidence, involve grave injustice to a prisoner.

It is not necessary for me to comment upon the other evidence received in this case. The facts proved by legal and competent evidence would be sufficiently strong in themselves to justify his committal for trial if the crime had been committed in Canada. According to Canadian rules of evidence, *prima facie* proof of the guilt of the accused has been given before me. A warrant for the committal of the accused will, therefore, be granted.

Extradition ordered.

N.B.—A writ of *habeas corpus* was subsequently granted returnable before the Court *en banc*, and on its return on March

29, 1913, Sir Charles Townshend, Chief Justice, and Justices Russell, Drysdale and Ritchie being present, the grounds as to the validity of the depositions as stated above were urged.

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SIR CHARLES TOWNSHEND, C.J., orally delivered the judgment of the Court, expressing no opinion as to the validity of the depositions, but stating that in the opinion of the Court there was some oral evidence upon which the commissioner could have acted. The prisoner was accordingly remanded to custody.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Simmons and Walsh, JJ. March 31, 1913.

1. WITNESSES (§ III—58)—CORROBORATION—CRIMINAL TRIAL—CR. CODE 1906, SEC. 1002.

The evidence of witnesses called for the defence may be looked at for the purpose of finding the corroboration required by statute (Cr. Code 1906, sec. 1002) for conviction of certain offences.

[*R.* v. *Girvin*, 45 Can. S.C.R. 167, and *R.* v. *Fraser*, 7 Cr. App. R. 99, followed.]

2. APPEAL (§ VII M 3—542)—CRIMINAL CASE—STATUTORY CORROBORATION —ERROR IN RULING AT CLOSE OF PROSECUTOR'S CASE.

If the presiding judge on the trial of a criminal case erroneously rules at the close of the Crown's case that the prosecution has made out the corroboration required by statute for the particular offence and refuses the defendant's motion to take the case from the jury for lack of corroboration, the defence may either rest its case or adduce evidence in defence, but if it elects the latter course and sufficient corroboration is made out from the defendant's witnesses the defendant cannot, upon an appeal by case reserved, take advantage of the absence of corroborative evidence at the close of the Crown's case.

[*R.* v. *Girvin*, 45 Can. S.C.R. 167, and *R.* v. *Fraser*, 7 Cr. App. R. 99, followed.]

Statement

HEARING of a reserved case after conviction of accused on a charge of having had illicit intercourse with a girl of previously chaste character and between the ages of 14 and 16 years.

The conviction was affirmed.

F. E. Eaton, for the accused.
L. F. Clarry, and *G. P. O. Fenwick*, for the Crown.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is a case reserved by Mr. Justice Simmons for the opinion of this Court.

The accused was tried by Mr. Justice Simmons and a jury on 23rd October, 1912, on a charge of having had illicit intercourse with one Elsie Dickerson, a girl of previously chaste character

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and between the ages of 14 and 16 years. The jury convicted the accused.

The first question reserved is as follows: Was there any evidence adduced by the prosecution corroborating the evidence of the complainant implicating the accused as to the alleged seduction or illicit connection? At the hearing the Court was of opinion and decided that this question should be answered in the affirmative. I think it advisable to say, however, that we treated the question as if it were a question whether there was any evidence anywhere in the case of that corroborative nature required by the statute, and that we found it in the evidence of the witness Melville called for the defence. With regard to the corroborative evidence which was before the Court at the close of the Crown's case, it is not necessary for us to say anything. At that stage there may or may not have been evidence of the nature required by the Code, but in view of the course which the trial took that question became immaterial. The trial Judge rightly or wrongly decided that the Crown had adduced corroborative evidence and called upon the accused for his defence. It was open to him then to rest his case upon the evidence already given and to question the trial Judge's decision before the Court of Appeal or to enter into his defence. He chose the latter course and called the witness Melville. Following our decision in *Rex* v. *Girvin*, 18 W.L.R. 482, which was confirmed by the Supreme Court of Canada, 45 Can. S.C.R. 167, and also the decision of the Court of Criminal Appeal in England in *Rex* v. *Fraser*, 7 Cr. App. R. 99, we were of opinion that if corroborative evidence sufficient to satisfy the provisions of the Code appeared in the evidence adduced for the defence, the accused could not upon a reserved case any longer take advantage of the absence of corroborative evidence at the close of the prosecution.

The witness Melville gave evidence as to an interview between the accused and the complainant at which he was present. This evidence was as follows:—

A. Wakelyn first knocked at the door and Elsie Dickerson appeared and he said, "You want to see me," and she said, "Yes," and we were both invited in. She asked what he intended to do and said he was the father of the child. He denied it.

Q. What did he say? A. He said he was not; that there was some other men he had heard had been there too.

Q. Did he mention any names? A. Yes, some names were mentioned; Hollis for one and Mundy for another.

Q. What was said about that? A. Elsie Dickerson said if they had been there that had nothing to do with this.

SIMMONS, J.:—Q. What was that? A. If they had been there that had nothing to do with this one.

Eaton:—Q. Can you remember anything else? A. She said some-

thing that if he would not claim to be the father of the child the case would go to Court.

Q. He said that? A. No, she said that.

Q. Did he make any reply to that? A. All she said was that her mother had quite a bit of money and that she would see this money spent in making him pay and suffer.

Q. Did you say anything? A. I said I was sorry to see it going to Court, and that is all I can remember.

Q. That is all you said? A. Yes, as far as I can remember that is all I said.

Q. Was this the conclusion of the conversation as far as you can remember? A. Yes.

Q. Did you or Wakelyn mention the names of Hollis and Mundy? A. Well, I could not mention Hollis, but I mentioned Mundy.

SIMMONS, J.:—Q. What did he say about Mundy?

Eaton:—He said he did not mention Hollis, but only Mundy. A. Yes, Mundy was the one I mentioned.

Q. And Wakelyn mentioned Hollis? A. Yes.

Q. As having had connection with her? A. Yes.

Q. And you mentioned Mundy? A. Yes.

It is this evidence which I think was clearly corroborative evidence implicating the accused. Taking it altogether it was clearly open to the jury to infer if they saw fit at that interview the accused was suggesting to the complainant that other men had had intercourse with her as well as he, that all he denied was that he was the actual father of the child and that his words amounted to an admission of illicit intercourse between himself and the complainant.

The second question reserved for our opinion is this: Was the complainant a girl of previously chaste character within the meaning of sec. 211 of the Criminal Code, having regard to the complainant's own testimony and in the absence of evidence of reform and self-rehabilitation?

With regard to this question the first thing to be observed is that it does not, at least on the face of it, bring before the Court a pure question of law at all, whether the woman in respect to whom the offence defined in sec. 211 of the Code was, at the time of the alleged commission of the offence, a woman of previously chaste character or not, is a question of fact for the jury to decide upon a proper direction by the Judge as to the meaning of those words, that is, the question is one of mixed law and fact. No exception was taken either at the trial or before us to the trial Judge's charge and under the question submitted to us it seems to me in any case impossible to raise any such question. During the argument it was suggested that the question might be treated as equivalent to the question whether there was any evidence before the jury from which they could reasonably infer that the complainant was at the time of the offence a girl of previously chaste character, and this suggestion, made, I think,

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by myself, was, if I remember correctly, assented to by counsel for the Crown and for the accused. On consideration, however, it is evident that the suggestion was based upon a misapprehension, that is, upon the mistaken idea that the burden of proving previously chaste character was upon the Crown. But sec. 210 of the Code provides that the burden of proving unchastity on the trial of a charge under sec. 211 shall be upon the accused. It is clear therefore that it is impossible to consider the question submitted to us in the way suggested.

This being so, it is a grave question in my mind whether the proper way to deal with the question submitted is not to say that such a question, being one of mixed law and fact, does not come within the provisions of sec. 1014, which provides only for the reservation of a question of pure law and, the first question having been answered adversely to the accused, therefore to affirm the conviction. I confess to some difficulty in formulating any pure question of law even if it be thought proper in the circumstances to travel beyond the exact form of the question submitted. The only possible form in which the real question involved could be put seems to me to be this: Assuming in the complainant's favour all the facts that the jury could upon the evidence reasonably find in her favour, that is, assuming that the accused, in undertaking the burden of proving unchastity, which sec. 210 cast upon him, proved against the complainant the least that the jury upon the evidence could reasonably find against her, were those facts such as to constitute the complainant a girl of previously unchaste character? That, I think, would be a question of law, because the definition of what constitutes previously chaste character is clearly a question of law; as it is the duty of the Judge at the trial to define the essential ingredients of the crime which is charged.

Even here, however, it is, as it seems to me, extremely difficult to draw the exact line between law and fact, because, after all, the exact condition or nature of the complainant's motives and feelings and of her moral tendencies, is really a question of fact quite as well as her outward acts and conduct.

It is somewhat difficult indeed to see just in what other form than that I have just suggested such a question can be reserved where the trial has been by jury. So far as I can find, the question has been raised only twice in the Canadian Courts and in each case the trial was by a Judge alone who was therefore able to inform the Court as to what the facts were as found by him. But where there is a jury, as in the present case, we have no means of knowing what state of facts they did find to have existed. The real solution of the difficulty is probably this, that inasmuch as it is the Judge's duty at the trial to direct the jury on the question of what constitutes unchastity and to tell them

hypothetically that if they find such and such facts to have existed, then unchastity is shewn, or if they find such and such facts only to have existed, then unchastity is not shewn, it is for the accused to complain of the nature of his charge and to say either that he has not directed them at all upon the point or has misdirected them, and to ask for a reserved case thereupon. In the present instance, however, as I have pointed out, no question has been raised as to the propriety of the charge to the jury, and this is in itself another grave reason against considering question number two at all. Even taking the form in which I have suggested that the matter ought to be treated in this case, it seems to me we should be travelling too far from the question reserved and it would involve an enquiry into each specific fact suggested in evidence and into the question in each case what the jury could reasonably find to have been the true fact. Finally, if we treat the question as one of pure fact and as equivalent to the question whether any reasonable jury could refuse to find on the evidence that the complainant was of unchaste character, we come practically to the position of claiming the right to tell a jury that they ought to have considered the evidence sufficient to establish unchastity. That seems to me to be usurping their function and I hesitate to adopt that attitude. In the result I do not think the case has been presented to us in a form in which we can properly deal with it, and I think the conviction should be affirmed.

Conviction affirmed.

ROBERTS v. BELL TELEPHONE CO. and WESTERN COUNTIES ELECTRIC CO.

Ontario Supreme Court. Trial before Middleton, J. April 14, 1913.

1. ELECTRICITY (§ III—19)—INJURY BY WIRES IN STREETS—DANGEROUS AGENCY DOCTRINE—EFFECT OF—STATUTORY AUTHORITY.

The effect of conferring statutory authority upon an electric power company to erect poles and power wires on a highway is that, apart from negligence, the company is absolved from the rule that any one who, for his own purposes, collects or keeps anything likely to do mischief if it escapes, is *primâ facie* answerable for all the damages which are the natural consequence of its escape.

[*Fletcher* v. *Rylands*, L.R. 1 Ex. 265, and *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, considered; *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186, and *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A.C. 381, referred to.]

2. ELECTRICITY (§ III A—27)—TESTS AND INSPECTION—POWER LINE ON STREET.

An electric power company stringing its wires by statutory authority upon the public streets at a time when no other wires were there, is under no duty to inspect the wires periodically for the purpose of seeing that no other wires had subsequently been placed in too close

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proximity to their own wires and so avoiding injuries which might result to persons handling the dead wires of another company should the latter become charged by close contact with the power wires.

3. PROXIMATE CAUSE (§ II C—25)—INJURY BY ELECTRICITY—CONTACT OF TELEPHONE WIRE WITH POWER WIRE.

A telephone company empowered to erect its poles and wires on a street upon which the poles and wires of an electric power line are already strung is under a duty to string the telephone wires at a safe distance from the power wires, and where a telephone lineman is killed by the telephone wires with which he was working becoming charged by contact with an electric wire which had sagged low by the settlement or bending of the electric company's poles not resulting from any negligence on the part of the electric company, the proximate cause of the injury is the negligence of the telephone company and not of the electric company, although the latter had taken no precautions by guy wires or otherwise to obviate the effect of such sagging.

[*Engelhart* v. *Farrant*, [1897] 1 Q.B. 240; *McDowell* v. *Great Western R. Co.*, [1902] 1 K.B. 618; *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640, and *Lothian* v. *Richards*, 12 C.L.R. 165, referred to.]

Statement

ACTION by the widow of Herbert Roberts, on behalf of herself and infant children, to recover damages for his death on the 16th September, 1912.

The action was dismissed.

G. S. Kerr, K.C., and *G. C. Thomson*, for the plaintiff.

M. J. O'Reilly, K.C., for the defendant the Western Counties Electric Company.

Middleton, J.

MIDDLETON, J.:—The action was settled between the plaintiff and the Bell Telephone Company. That company paid $1,200 damages; this sum being accepted by the plaintiff in full of that company's liability; and, the electric company consenting, without prejudice to her claim against the latter company.

At the time of the happening of the accident, Roberts was engaged as an employee of the Bell Telephone Company, in the stringing of a wire called "a messenger wire," along Dufferin street, Brantford. A messenger wire is a naked steel wire, from which a telephone cable is suspended. This particular messenger wire, at the intersection of Dufferin street and St. Paul street, passed over another messenger wire, which carried a cable running along St. Paul street. In the course of his work, Roberts came in contact with the latter wire, and received from it an electric shock which caused his death. It was afterwards found that, a block away from this point, the messenger wire on St. Paul street was in contact with a primary electric wire of the electric company, carrying 2,200 volts.

This electric wire was strung along Blake street, which runs parallel with Dufferin street; and, when near the intersection of Blake and St. Paul streets, the wire was strung diagonally across St. Paul street, above the Bell messenger wire, to the opposite side of the street, where it joined the main electric

line passing up and down St. Paul street. The poles carrying this particular span were 29 feet high, and the span was 113 feet. At the time of the accident, it was found that the messenger wire was 4 feet 6 inches below a straight line between the electric light insulators.

The electric wire was put up in August, 1911, or earlier. The telephone messenger wire was not placed in position until some time in 1912. The evidence as to the relative positions of the two wires at the latter date is exceedingly meagre and unsatisfactory. The electric wire, when placed in position, had, it is said, a sag of two feet. This would bring the wire within 2 feet 6 inches of one another, assuming that no further sagging took place between the time of the stringing of the electric light wire and the time of the placing of the messenger wire.

It was shewn that the stretching of the copper wire on a span of this kind would be infinitesimal. The increase in the sag between the time of stringing and the time of contact was occasioned by the settlement or bending of the electric light poles, which were not sufficiently guyed to prevent the sagging. Experts stated that, as a matter of calculation as well as of experiment, if the tops of the poles each moved two inches inwardly, this would bring the wire down from the 2 feet to the 4 feet 6 inches. It is altogether probable that most of this settlement took place when the poles were newly erected; so that I am satisfied that there was not anything like a clearance of 2 feet 6 inches when the messenger wire was placed in position.

All parties agree that to insure safe construction wires should not be placed closer than 3 feet, as some sagging is inevitable, and there is always danger of extra sagging being caused by sleet and ice.

I find as a fact that the electric company, in the erection of its poles, did not take adequate precautions, by guying or otherwise, to prevent the increase of the sag in their wire, and that they did not inspect the wire, or they would have discovered the contact, which existed from early in the summer until the time of the accident.

It was shewn in evidence that throughout the summer this wire, when swung by the breeze or otherwise, emitted sparks when it came in contact with the messenger wire; and some children were called to testify that their summer evening amusement was the making of fireworks by swinging on the guy wire so as to cause the wires to separate and come in contact, and to emit flames.

It is contended on behalf of these defendants that, however short of perfection their construction may have been, and however negligent their inspection may have been, they had no duty to the telephone company or its employees to protect the wire

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improperly placed by the telephone company in a dangerous position; and that, the accident being in truth caused by the negligence of the telephone company, in placing its wires in undue proximity to the electric wires, neither the telephone company nor its employee is entitled to recover.

With some regret, I find myself compelled to give effect to this contention; for two reasons.

In the first place, I do not think that the construction which permitted the wires to sag to the extent they did amounts to negligence. Negligence must be founded upon a breach of duty; and, when these wires were placed upon poles 29 feet above the highway, no wires being then under them, I do not think that there was any duty owing to the telephone company or its employees calling for such stability of construction as to prevent what was, after all, a very slight increase in the sag of the wire. The same reasoning leads me to think that there was no duty to inspect the wires periodically for the purpose of seeing that other wires had not been improperly placed in undue proximity.

During the course of the argument it was suggested that there would be liability apart from negligence, because the electric current was a dangerous substance within the principle of *Fletcher* v *Rylands*, L.R. 1 Exch. 265 (affirmed *sub nom. Rylands* v. *Fletcher*, L.R. 3 H.L. 330).

This argument ignores the fact that the erection of poles on the highway is authorized by the Legislature, thus giving an authority which relieves from liability unless negligence is shewn: *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A.C. 381.

In the next place, the injury sustained by the plaintiff was, I think, the direct and proximate result of the negligence of the telephone company, and there was no reason why the electric company should anticipate and guard against that negligence. The question of the liability of the defendant for its negligence where the wrongful act of a third party intervenes has been the subject of much discussion recently. In *Engelhart* v. *Farrant*, [1897] 1 Q.B. 240, it is laid down by the Court of Appeal that the question whether the original negligence was an effective cause of the damage is to be determined in each case as a question of fact. In *McDowell* v. *Great Western R. Co.*, [1902] 1 K.B. 618, the railway company was held liable where some boys loosed the brakes of a car which had negligently been left near an incline, so that it ran down the incline; because the railway company knew or ought to have known of the danger of this interference, and negligently omitted to take reasonable precautions to prevent the consequences of that interference. But, upon appeal, this decision was reversed, the Court taking

the view that, upon the principle of *Engelhart* v. *Farrant*, [1897] 1 Q.B. 240, the negligence of the defendants could not be regarded as the effective cause of the accident.

The question is also discussed in *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640, and the cases are well collected and reviewed in *Lothian* v. *Richards*, 12 C.L.R. 165.

This principle appears to me to be fatal to the plaintiff's case here. The action will, therefore, be dismissed as to the electric company, without costs.

Action dismissed.

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BOUTON v. CANADIAN PACIFIC R. CO

Quebec Court of Review, Archibald, McDougall, and Chauvin, JJ. April 16, 1913.

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1. CONTRACTS (§ I D 3—55)—NATURE AND REQUISITES—DEFINITENESS.

Where an employer arranges with a restaurant keeper to supply an indefinite number of midnight meals from time to time to his employees producing the employer's meal tickets, redeemable by the latter at a fixed rate per meal, there is no implied stipulation that the employer shall send all or any of his employees to get their meals exclusively at that restaurant; and an action for damages does not lie against the employer at the instance of the restaurant keeper for issuing tickets good as well at other restaurants as at that of the plaintiff for their employees' meals.

[*The Queen* v. *Demers*, [1900] A.C. 103, applied.]

APPEAL by plaintiff from the dismissal of his action at the trial brought for damages for alleged non-performance of an agreement. Statement

The appeal was dismissed.

A. Valleé, for plaintiff, appellant.

W. J. Shaughnessy, for defendant, respondent.

ARCHIBALD, J.:—Plaintiff was a keeper of a restaurant on the wharf front of Montreal during the years 1909 and 1910. On April 4, 1910, the defendant company wrote to the plaintiff the following letter:— Archibald, J.

Montreal, April 4, 1910.

Mr. O. Bouton,
58 and 60 Place d'Youville, City.

Dear Sir,—Please let me know at your earliest convenience if you will be ready to supply our men with midnight suppers during the coming season on the same conditions as last summer, namely, 20 cents per meal.

Yours truly,
J. T. WALSH,
Supt. Atl. SS. Lines.

To this letter the plaintiff answered in the affirmative; and then the defendant issued the following circular:—

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Montreal, April 26, 1910.

To whom it may concern:

This is to certify that Mr. O. Bouton has made arrangements with this company to supply midnight suppers to our 'longshoremen during the coming summer season, 1910.

(Signed) J. T. WALSH,
Supt. Atl. SS. Lines.

That appears to be the whole contract, whatever it may amount to. The defendant, thereupon, commenced issuing tickets good for a midnight supper at Bouton's place, and these tickets were used up to somewhere about the 10th of July of that summer. Defendant's men began to complain of the bad quality of these suppers and they had other grievances. At any rate, the board of conciliation, which existed as a permanent affair in the city, was applied to to hear the grievances of the men. Among other grievances, the poor quality of the midnight suppers furnished to the men was brought in question by the defendant's employees especially. The board of conciliation decided that it was unfair to the men to make their tickets for midnight suppers good only at a single restaurant, for, by that means, the men were apparently obliged to buy their suppers themselves, thus losing the benefit of the 20 cents, which the company offered for that purpose. Thereupon the company defendant changed the form of its tickets, making them good generally for a supper for 20 cents.

The plaintiff contends that he was not guilty of any fault with regard to the quality of the suppers; that the persons complaining were drunkards, who desired to have liquor in place of food, and he did not serve liquor to the men. The plaintiff arrived at the amount of his damage in this way: He takes the number of suppers which he had furnished to the men of the company defendant the previous year under a similar arrangement, and the number of suppers which he had furnished those men during the balance of the year, from July up to the close of the season; and he estimates that, on a twenty-cent lunch he would make a profit of ten cents, and finds his damages that way to be $674.80. It might be thought that, if the plaintiff's claim as to his profits upon his lunches is well founded, he must have furnished very cheap food. However, that is not the main question. There is no suggestion in the correspondence of the parties that the defendant had undertaken for its men that they would go and take their lunches at the plaintiff's restaurant. If the plaintiff had supposed that there was an undertaking of that kind, he probably would have attempted to find out the number of men employed by the defendant and charged them during the whole season for his profit upon the suppers which those men ought to have taken, if they did not do so. But he seems to admit that the men were free to go to his place or not, as they liked.

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We are not without authority upon this subject, which is decisive. In a case decided in the Privy Council, *The Queen* v. *Demers*, [1900] A.C. 103, Demers set up a contract to give him the official printing of the Province of Quebec during a period of eight years; and then he alleged breach of his contract by the Government, and damages in the sum of $85,000. In this case there was an actual signed contract. Lord Macnaghten, in giving the judgment of the Privy Council in the matter (I may say that the Courts of this province maintained the plaintiff's action), said:—

In August, 1897, the respondent, Demers, carrying on business in the city of Quebec as a printer, under the name of J. L. Demers et Frère, sued Her Majesty the Queen by petition of right, claiming $85,000 as damages for breach of a contract in respect of the printing and binding of certain public documents.

It seems that on January 27, 1897, the Lieutenant-Governor of Quebec had approved a report of the committee of council stating the Provincial Secretary recommended that the work in question should be entrusted to the respondent's firm for a term of eight years, to run from January 1, 1897, at the prices which that firm had received for the same work since 1892, and that he should be authorized to sign a contract to that end, subject as to its details to the approval of the Lieutenant-Governor-in-council.

On March 18, 1897, a contract was signed purporting to be made between Her Majesty, represented by the Provincial Secretary, authorized in that behalf by the order-in-council of January 27, 1897, of the first part, and the respondent Demers, of the second part. The contract declared that the respondent covenanted to execute for Her Majesty the Queen, during the term of eight years beginning from January 1, 1897, the printing and binding of the public documents specified in the body of the instrument, and that the contract was made for the prices and considerations expressed in the schedules and tables annexed thereto.

(It is seen that in this case also the promising is all done by one party, the other party not undertaking, not expressly at any rate, any obligation on its part.)

The judgment in the Privy Council proceeds as follows:—

The judgment of Larue, J., and the judgments of the learned Judges of the Court of Queen's Bench, deal at some length with several questions of constitutional interest which were raised in the pleadings. Their Lordships do not propose to deal with these questions or with the question whether the alleged contract was of any validity without the confirmatory order-in-council contemplated by the order of January 27, 1897. It appears to their Lordships that, assuming the contract to be a good and valid contract, the respondent has not shewn that there was any breach on the part of the Government.

The contract purports to be made between Her Majesty, represented by the Provincial Secretary, and the respondent Demers. It does not purport to contain any covenant or obligation of any sort on the part of the Crown. The respondent undertakes to print certain public documents at certain specified rates. For all work given to him on the footing of the contract the Government was undoubtedly bound to pay according to the agreed tariff. But the contract imposes no obligation on the Crown to

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pay the respondent for work not given to him for execution. There is nothing in the contract binding the Government to give to the respondent all or any of the printing referred to in the contract, nor is there anything to prevent the Government from giving the whole of the work, or such part of it as they think fit, to any other printer.

So the judgment of the Courts below was reversed, and the plaintiff's action was dismissed, with costs of all the Courts. That action is on all fours with the present one, only perhaps there was more to be said in that case in favour of the plaintiff than there is in this. I think the action was rightly dismissed by the Court below. I am to confirm it.

Plaintiff's appeal dismissed.

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McKENZIE v. ELLIOTT.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. April 22, 1913.

1. APPEAL (§ VII L 4—510)—FINDINGS BY REFEREE—RECONSIDERATION ON APPEAL AS TO INFERENCES FROM SURROUNDING FACTS.

While a referee hearing the witnesses has the better opportunity for forming a right judgment upon the credibility of witnesses as affected by their demeanour in giving evidence and his finding where based upon credibility will not ordinarily by disturbed by an appellate court, the rule does not apply to the consideration of the weight to be given the evidence as affected by the surrounding circumstances and attendant facts; an appellate court should draw its own conclusions in regard to the probabilities and inferences to be drawn from such facts and circumstances.

2. EVIDENCE (§ II K 1—311)—ONUS OF PROOF—VARIANCE FROM WRITTEN BUILDING CONTRACT—SUBSEQUENT ORAL VARIATION.

In an action upon a building contract where the construction actually proceeded with differed from that contemplated by the written contract between the parties as to size of building and class of materials, the party who claims that the written contract was altogether abrogated and not merely varied in such respects by the verbal arrangement between the parties by which the change was assented to after the contract was made, has the onus cast upon him to prove such claim.

[*McKenzie* v. *Elliott*, 2 D.L.R. 899, affirmed on appeal.]

Statement

APPEAL by the plaintiff from the order of a Divisional Court, *McKenzie* v. *Elliott*, 2 D.L.R. 899, 3 O.W.N. 1083, affirming the order of Boyd, C., 2 O.W.N. 1364, setting aside the report of the Master in Ordinary.

Judgment below was varied.

I. F. Hellmuth, K.C., and *W. Mulock*, for the plaintiff.

A. W. Anglin, K.C., and *J. Shilton*, for the defendant.

Meredith, J.A.

MEREDITH, J.A.:—There is, of course, no law against an appeal in a case which has been determined upon the credibility of witnesses; an appeal lies in such a case just as much as in any

other, and it is not only the right but the duty of an appellate Judge to hear and duly consider such an appeal; the exception to the general provisions giving a right of appeal in cases not tried by a jury, is, generally speaking, only of matters in the discretion of the trial Judge or judicial officer; as to them it is generally provided that there shall be no appeal except by leave.

But it is quite obvious that where the findings depend altogether upon the credibility of the witnesses, and there is nothing to indicate that the parties have not had a full and fair trial, an appeal would be hopeless, because those who hear and see the witnesses have so much better opportunity for forming a right judgment upon such a question.

Cases of that kind, however, are few and far between. Circumstantial evidence enters very largely into almost all cases; and in regard to the probabilities arising from such circumstances a court of appeal sometimes has advantages which a trial Judge had not.

This case is very plainly not one depending altogether, or anything like altogether, upon the credibility of the witnesses; the learned Master did not so treat it; and, if he had, would have erred; his view was that he must look at the "surrounding circumstances and attendant facts to arrive at the truth;" but I cannot think that, after all, he really did; or, if he did, that he gave them sufficient consideration.

We start with an agreement in writing duly signed by both parties; an agreement not to be got rid of merely because some of its provisions were not filled out or were inapplicable; it was a general form, not one drawn for the purposes of this contract. In making light of this signal writing; in treating it very much as if it were not more than waste paper, the Master, I think, got off at a false start in his inquiry. His observation that, if it were in force as to the price, it must be in force for all purposes, or, in other words, if not in force for all purposes, cannot be as regulating the price, was a mistake, and one which, I am inclined to think, dominated to a considerable extent his conclusions against the defendant.

He has given at length his reasons for not giving weight to the testimony of the witnesses Coleman and the defendant's wife —reasons which do not seem to me to be of anything like the most convincing character. He was also apparently very considerably impressed by the fact that the defendant's sons were not called as witnesses, expressing the firm belief that there must have been conversations between father and sons as to the nature of the contract; but apparently forgetting that such conversations could not be given in evidence by the defendant.

No object, however, would be gained by going over the many other circumstances, not depending on the credibility of wit-

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nesses, which weigh against the Master's finding upon the question of an agreed-upon general price or no agreement as to cost; the case has been so fully and so carefully investigated and considered by the Chancellor, with the assistance of the Master's reasons for his findings, and again in the Divisional Court, with the assistance of all that had previously been said upon the subject, that further discussion would be merely putting in my own words those things which have been plainly and well said. I quite agree in that which was said in each Court as to the Master's finding upon this important initial question.

But I cannot think that the case is a proper one for sending the parties back to the morass of another reference; the costs of which might amount to more than the real amount in difference. I agree with the Divisional Court in the view there expressed, that the evidence already taken suffices to do justice between the parties as to the amount due to the plaintiff, based upon the price named in the agreement, and making all proper allowances for variations in all respects.

On the 15th December, 1910, the plaintiff wrote to the defendant that he had decided to accept the amount the defendant had offered him, $3,315, in settlement, provided that he should have also some posts and shingles described in the latter; that sum, with the amount already paid on account of the contract, amounting to $8,315.

A very careful examination of the whole evidence satisfies me that in the making and accepting of the offer of this amount each of the parties knew pretty accurately the true amount which was really due from the one to the other; that in truth the sum so due is the amount mentioned in that letter; and that any number of references, and the waste of any amount of additional costs, could not rightly lead to any better conclusion.

For the order made in the Divisional Court I would substitute one directing judgment for the plaintiff for $3,315, with interest from the date mentioned; with costs to be paid as already adjudged; but without costs of this appeal: when parties to an action have left the subject-matter of their litigation so tangled or uncertain that the interposition of the Court is needed to make plain that which they should have themselves made plain, neither party, whether winner or loser, or partly each, can well complain if part of the costs falls on him.

GARROW and MAGEE, JJ.A., and LENNOX, J., concurred.

Maclaren, J.A.

MACLAREN, J.A.:—The judgment will be varied (the parties consenting that this Court dispose of the whole case without application to the Court below for further directions); the plaintiff to recover the sum of $3,315, with interest from the 15th December, 1910; no costs in this Court or in the action up to

the judgment of reference; costs of the reference to the defendant; other costs disposed of by paragraph 7 of the judgment of the Chancellor and by the Divisional Court to stand.

Judgment accordingly.

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Re THE WINNIPEG NORTH-EASTERN R. CO.

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Manitoba Public Utility Commission, Mr. Justice Robson, Commissioner. April 9, 1913.

1. EMINENT DOMAIN (§ I B—8)—RIGHT TO TAKE PROPERTY—RAILWAY COMPANY—PLANS FILED SET ASIDE—DELAY IN COMMENCING PROCEEDINGS TO ACQUIRE.

Where the plan of the line of a proposed railway has been approved by the Railway Commissioner of Manitoba, and filed in the land titles office of the district, but nothing has been done towards actually establishing the railway, except the obtaining of a charter which incorporated the provisions of the Manitoba Railway Act, and the payment in of a specified deposit in respect of such charter, the railway company should with reasonable dispatch exercise its right to acquire the land through which its proposed line runs by eminent domain proceedings, and an owner through whose property the proposed line runs may, on the company's default in proceeding within a reasonable time, apply pursuant to the provisions of the Manitoba Railway Act, 3 Geo. V. (Man.), to have the plans set aside.

APPLICATION by Ernest Kern, to remove from the land titles office, district of Winnipeg, the plan and profile, filed by the Winnipeg North-Eastern R. Co., on November 9, A.D. 1912, at 10.44 o'clock in the forenoon, on the ground, on the lands referred to in the judgment: That by section 13 of the statutes of Manitoba, 2 Geo. V. (Man.) ch. 150, it is provided that the Public Utilities Act is to apply to said railway company, and that the plan filed does not comply with the provisions of the Manitoba Railway Act, and the amendments thereto, inasmuch as same was never approved of by the commission, as substituted by the Public Utilities Act, for the Railway Commissioner, and that the company is not in a legal position to do business, and file the said plan and profile, as it has never been legally organized, and that the company has not within a reasonable time accurately defined and acquired the land required for the railway.

The plan was set aside.

W. F. Hull, for Kern.

H. P. Blackwood (*W. R. Mulock*, K.C., and *O. H. Clark*, K.C., with him) for railway.

JUDGE ROBSON, COMMISSIONER:—The Winnipeg North-Eastern Railway was incorporated by statute of the Province of Manitoba, ch. 116 of 1 Geo. V. (1911). Judge Robson.

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RE THE WINNIPEG NORTH-EASTERN R. CO.

Judge Robson.

By section 2 of the Act as amended the provisions of the Manitoba Railway Act are incorporated with and to be deemed to be a part of the Act and to apply to the company, and to the railway to be constructed by it, except as varied or excepted by the special Act.

The company is declared to have full power and authority to construct a railway from a point in or near Winnipeg northerly and easterly along the east shore of Lake Winnipeg to the northern boundary of the Province of Manitoba. The Act recites that the construction of the railway will be of general benefit to the province.

The acting Railway Commissioner of Manitoba, on the second day of November, 1912, at the request of the company, approved a plan of a proposed line of railway extending from a point in Winnipeg to a point several miles easterly thereof and running through the land of the applicant hereinafter referred to. The plan was filed with the district registrar of the appropriate land titles district.

The applicant, Ernest Kern, owns legal sub-divisions one (1), and eight (8), section six (6), township eleven (11), range four (4), East Manitoba. He now applies under the clause added to sec. 15 of the Railway Act, at the recent session (3 Geo. V.) of the Legislature, for the removal of this plan on the grounds, among others, that the company has not, within a reasonable time, acquired the land required for the railway.

The fact is, for anything that appears on the present application, that nothing has as yet been done towards establishing this railway except the obtaining of the charter and the formal subscription for stock and payment in of $5,000 as required by the amended sec. 8. As far as the charter goes the company is at liberty to take its time in proceeding with the work.

The filing of the approved plan is general notice to all parties of the lands required, and is the basis of proceedings whereby lands may be arbitrarily taken from an owner, subject to compensation to be adjudged by others. The date of deposit of the plan is the date with reference to which compensation or damages for lands taken or injuriously affected is to be ascertained.

The interference with private property is permitted in the public interest in order that railways may be constructed. This public policy does not require or justify the setting aside of private property indefinitely at the behest of a railway company, without actual taking and payment of compensation.

The plan in this case indicates the severance longitudinally about the centre of these legal sub-divisions one (1) and eight (8). It is easy to understand that, situated as it is, the land is valuable, and that the presence of the plan and possibility of

the railway prevents the owner from exercising free action towards its use or disposition. The affect is not in all cases alike.

The fixing of the date of filing of the plan as the date at which compensation shall be estimated, operates against an owner because other factors than the probability of the railway may increase the value of the land, but the owner is nevertheless deprived of that increment in the valuation proceedings. To avoid injustice to an owner a company should, after obstructing his title with its plan, proceed with reasonable despatch to complete the taking. What would be reasonable despatch may be a question of degree differing with various cases.

In the present instance the plan was filed in the land titles office on November 9, 1912. Assuming the company's procedure to be correct it was at liberty, after the expiration of ten days from the deposit of the plan, and after newspaper notice, to take steps towards expropriation. Nothing was done, and on February 28 last this application came up. It has been discussed on different occasions, lastly on April 5 instant. The company's answer to this portion of the application was merely that the $5,000 had been paid in, and assurances were made that the undertaking would proceed as soon as certain financial arrangements now under way are concluded, and they ask that a period of at least three months further be allowed them to proceed. There is nothing to lead any one to think that matters will be any further advanced by that time. The situation may then be the same as now. That the company is not ready to proceed at once is not the owner's fault, and he should not suffer by it. A reasonable time has elapsed, and the restriction upon the exercise of the owner's right should not be further continued. When the company is in a position to proceed they may apply for the consideration of a plan as they may be advised, and they must accept the situation as they then find it.

The amendment to the Railway Act of 3 George V. (last session) provides that if a company having filed a plan does not, within a reasonable time, acquire the land, the Public Utilities Commissioner, may, after a hearing, order the removal of the plan, or make such other order as to him may seem proper. This application is made in respect of the single parcel of land mentioned. It is not necessary to go beyond that. The order that seems to me to be proper is that the plan be set aside as to the legal sub-divisions described. I am not dealing with the other grounds raised by the applicant.

Plan set aside.

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MacKISSOCK v. BROWN.

Manitoba King's Bench. Trial before Prendergast, J. January 22, 1913, and March 31, 1913.

1. EVIDENCE (§ VI M—587)—PAROL EVIDENCE AS TO CREATION OF PARTNERSHIP.

A partnership agreement may be established by parol evidence, even though the partnership is to deal in lands.

[*Caddick* v. *Skidmore*, 2 DeG. & J. 52, doubted; *Forster* v. *Hale*, 5 Ves. 308; *Dale* v. *Hamilton*, 5 Hare 369, 2 Ph. 266; *Gray* v. *Smith*, 32 Ch.D. 208, and *De Nichols* v. *Curlier*, [1900] 2 Ch. 410, followed.]

2. PARTNERSHIP (§ I—3)—WHAT CONSTITUTES—FAILURE TO CARRY OUT VERBAL UNDERTAKING.

A verbal undertaking given by a prospector who had made a discovery of a coal deposit, that he would stake out two mining claims in addition to one for himself and a verbal agreement that, after the staking of these three claims, they should be amalgamated and worked on a partnership basis, does not create a partnership between the prospector and the two parties with whom the verbal agreement was made, in respect of the single claim which the prospector staked for himself, where he failed to stake claims for the others; all that was created was an agreement for a future partnership on certain conditions which were never complied with.

3. COSTS (§ I—2)—HIGHER SCALE—DECEIT OF DEFENDANT.

Flagrant deceit on the part of the defendant in the dealings complained of is a good ground for allowing the plaintiff costs on the higher scale, although the amount recovered is within the lower scale tariff.

Statement

TRIAL of an action in which the plaintiffs alleged that they verbally entered with the defendant into a partnership agreement for the purpose of locating and exploiting coal deposits on Lake Winnipeg, in pursuance of which they, from time to time, advanced him large sums of money, and sued for a declaration of partnership with respect to certain coal deposits located by the defendant and mining rights secured by him in his own name from the Dominion Government, for discovery of the said locations, delivery of all licenses and other documents relating to the said mining rights, and that he be restrained from dealing with the same.

B. L. Deacon, and *D. N. Wemyss*, for plaintiffs.

H. M. Hannesson, for defendants.

Prendergast, J.

PRENDERGAST, J.:—The defendant denies any agreement. He admits having received from time to time from the plaintiffs several small sums not exceeding $50 in all, but says they were advanced to him by way of friendly loans and that no part of them was used by him in the locating or promoting of any coal deposit. He also relies on the Statute of Frauds, on the ground that, if there was an agreement, it was not in writing.

I will dispose at once of the last ground of defence, by stating that although the decision in *Caddick* v. *Skidmore*, 2 DeG. & J.

52, is generally looked upon by text-book authorities as a sounder interpretation of the statute, still, the law on the point must be taken to have been correctly stated in *Forster* v. *Hale*, 5 Ves. 308, and *Dale* v. *Hamilton*, 5 Hare 369, *S.C.*, on appeal 2 Ph. 266, which have been treated as binding in the recent cases of *Gray* v. *Smith*, 43 Ch.D. 208, and *De Nichols* v. *Curlier*, [1900] 2 Ch. 410. In *Forster* v. *Hale*, *supra*, the Lord Chancellor said:—

> The question of partnership must be tried as a fact and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery in which land was necessary to carry on the trade, the lease goes as an incident.

The plaintiffs are not precluded then from establishing by oral evidence the agreement which they allege.

Now, the facts appear to be substantially as follows: The defendant had discovered a coal deposit in a secluded spot on the shores of Lake Winnipeg. He felt, however, that he required assistance, as he had no technical knowledge about coal or coal-mining, and would, moreover, require, at intervals, small sums of money to carry on his explorations further. So, in October, 1910, he went to Peter MacKissock, whom he knew to have studied mining in Scotland, and to be able to assist him financially. The defendant says he went to Peter MacKissock just to ask him in a friendly way what he thought of a sample of coal that he had brought down from the deposit and that his receiving $10 from him at the same interview was for private purposes, and had nothing to do with coal. But this is untrue. I find that the defendant, on this occasion, after saying he had found coal on Lake Winnipeg, and shewing them the location on a sketch, made to Peter MacKissock and his son, William Black MacKissock, who was with him, the following proposition: He (the defendant) was to go back at once to the location, stake one claim for himself and one for each of the plaintiffs, bring back samples, have the samples analyzed, and if satisfactory register the claims and put the papers in the plaintiffs' hands. They were then to enter into a partnership "to develop the mine," the defendant and William Black MacKissock attending to the work at the mine itself, and Peter MacKissock financing the enterprise, making arrangements with the railway companies, and generally attending to the city end of the concern—profits to be divided equally between the three. On this occasion Peter MacKissock gave the defendant $10 to pay expenses of going to the lake. The defendant consequently went to the location shortly afterwards, and came back bringing samples and saying he had staked the three claims, which was untrue, as he only staked one for himself. Peter MacKissock had the samples analyzed, for which he paid $6, and the test shewed the coal to

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be valuable. He then gave $7.50 to the defendant to register the three claims, which he had said he had staked; and the defendant, some time later reported that he had effected this registration—which was only true, of course, of his own claim, and could not be true of the two others which he had never staked. The plaintiffs then began, and for six months continued insisting, 1st, that the claim certificates be delivered to them as agreed; 2nd, that partnership papers be drawn, and 3rd, that they be taken to the location. During that time, the defendant continued asking money from Peter MacKissock, from whom he admits he received in the aggregate about $65.

The defendant uniformly met all of the plaintiffs' requests with evasions and untruths. The appointments that he made with them over and over again to take them to the lake were each time broken, and made the occasion for baseless excuses and explanations. In fact, the correspondence produced, and the testimony of the plaintiffs' solicitor and of another witness, shew that the defendant's course throughout was marked by deceit of the most flagrant nature. At the same time, I cannot make out from the above facts that there was an actual partnership.

I find two things: first, an undertaking by the defendant to stake two claims for the plaintiffs as well as one for himself; and secondly, an agreement that the three claims should be put together and worked on a partnership basis. I cannot find any evidence that each claim was to be jointly owned by the three parties. That the defendant failed in his undertaking to stake two claims for the plaintiffs does not make the one that he staked for himself the joint property of the three. I find an agreement to form a partnership on certain conditions; but not an actual partnership. Even if it was defendant's fault that the conditions did not materialize, I do not see that I can extend any other relief than allow the plaintiffs to recover the money they have paid.

The plaintiffs may have judgment for $65, or take out an order of reference to first ascertain the amount advanced by them—with leave reserved to sue for damages or otherwise if so advised.

As to costs, I feel that the defendant's duplicity has been such that the plaintiffs should have their costs on the scale of this Court, without statutory set-off.

Judgment for plaintiff.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Simmons and Walsh, JJ. March 31, 1913.

1. EVIDENCE (§ VIII—674)—CRIMINAL TRIAL—CONFESSIONS—SUBORDINATE FACT.

An acknowledgment of a subordinate fact not directly involving guilt and not essential to the crime charged is not a "confession" within the rules by which evidence of a statement by way of confession made to a person in authority may be received only where shewn to have been made freely and voluntarily.

[1 Wigmore on Evidence, sec. 821, approved.]

2. TRIAL (§ I D—21)—CONDUCT OF CRIMINAL TRIAL—STATEMENTS OF COUNSEL—MATTERS NOT IN EVIDENCE—CROSS-EXAMINATION OF ACCUSED.

Where questions are put to the accused by the Crown counsel in cross-examination when the accused becomes a witness on his own behalf and such questions overstep the bounds allowable in cross-examination as making suggestions not warranted by the evidence and from which the jury might draw inferences prejudicial to the accused, the validity of the conviction will not be affected thereby if the trial judge has instructed the jury to disregard those questions and any inferences suggested by them.

[*R.* v. *Long*, 5 Can. Cr. Cas. 493; *R.* v. *Rose*, 18 Cox C.C. 717; *R.* v. *Bridgewater*, [1905] 1 K.B. 131; and *R.* v. *Hudson*, [1912] 2 K.B. 464, 7 Cr. App. R. 256, referred to.]

Statement

HEARING of a reserved case after conviction of the accused on a charge of theft.

The conviction was affirmed.

F. E. Eaton, for the accused.

L. F. Clarry, and *G. P. O. Fenwick*, for the Crown.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The accused was convicted before my brother Stuart with a jury of theft of money from a passenger in a sleeping car between Medicine Hat and Calgary on February 6, 1913.

The money amounted to $287 of which $220 was in new $10 bills, $40 in two $20 Imperial Bank bills, and the remainder in bills of smaller denominations. Detectives took the names and addresses of the passengers of the car, including the accused and the twenty-two $10 bills were discovered by the sleeping car porter under a pillow in a berth where accused had been. The detectives subsequently proceeded to the house of accused to make further inquiries and there ascertained that he had two $20 Imperial Bank bills. He was requested to go to the police station and make an explanation to the chief of police. The chief asked him where he got the $20 bills and it is sworn that he said he got one from a man named Morley of Medicine Hat, but gave no information about the other. Morley of Medicine Hat was afterwards called and stated that he had given accused

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$20, but that it was in two $10 bills. Accused was arrested after making the statements to the chief of police.

The accused was examined as a witness on his own behalf and corroborated Morley's evidence, but said that what he told the chief of police was that he got $20 from Morley, not that he got one of the $20 bills.

No evidence was given by the Crown to prove the commission of the thefts by the questions. Objection was made by counsel for accused to the evidence of statements made by accused to the chief of police, but no objection was taken to the foregoing questions and answers. The trial Judge, however, directed the jury to disregard absolutely the suggestions contained in the questions of the Crown counsel.

The questions reserved by the trial Judge for the opinion of the Court are:—

1. Were the answers given by the accused to the questions addressed to him at his boarding-house and at the police station admissible in evidence against him under the circumstances shewn in the evidence, a copy of which is attached and made part of the case?

2. Were the questions addressed to the accused on his cross-examination by counsel for the Crown inadmissible as inferentially stating facts to the jury which the Crown made no attempt to prove and as tending to make suggestions prejudicial to the accused?

Dealing with the first question it is objected that the statements were not free and voluntary, that they were obtained by questions without any warning being given when the accused was practically if not indeed legally under arrest. It is to be noted however, that the statements do not contain any confession or even suggestion of guilt, but rather contain or at any rate suggest a denial of guilt.

Section 685 of the Code provides that:

Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession or other statement, made at any time by the person accused or charged, which by law would be admissible against him.

Confessions may be given in evidence only when they have been freely and voluntarily made. Wigmore in his comprehensive work on evidence points out (vol. 1, par. 817), that in the Tudor and Stuart period there was no restriction on the admission of confessions, but that from the middle of the 18th century a principle of exclusion gradually developed to the extent of making exclusion the rule and admission the exception, but that a reaction has now set in. The rule of rejection, however, applies only to confessions of guilt.

At par. 821, Wigmore says:—

A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged, or of some

essential part of it. It is to this class of statements only that the present principle of exclusion applies.

and again on the following page,

Exculpatory statements denying guilt cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed.

He further points out in the same paragraph that

An acknowledgment of a subordinate fact not directly involving guilt or in other words not essential to the crime charged, is not a confession.

And quotes Eyre, L.C.J., in a charge to the jury in *Crossfield's Trial*, 26 How. St. Tr. 215, as saying:—

Gentlemen, these declarations have been as it seems to me improperly called "confessions." They are not properly "confessions" which import a particular charge first made and an acknowledgment of that charge. According to the rules of evidence what a prisoner has said respecting a particular fact is admissible evidence not in the nature of a confession, but as evidence of the particular fact.

It appears clear, therefore, that there is no reason for applying the rule as to the exclusion of confessions to the evidence in question and it is not, therefore, necessary to consider whether if it were a confession it would be inadmissible under the circumstances disclosed. It is suggested that a Judge cannot tell whether the answer to a question as to a statement made by a prisoner will be evidence of a confession or not, until it is given and for that very reason it is to be expected that the prisoner's counsel will object because he does not know what the answer will be. However, that difficulty appears to be more theoretical than practical, for the Crown counsel usually knows what the answer will likely be and in this very case the Crown counsel stated that the evidence was not that of a confession and it was received by the trial Judge on that ground.

But even if there were a difficulty in the trial Judge reaching a proper decision as to the admission, the evidence is now before us and all we are asked to say is whether it was admissible or not. For the reasons I have given, I think it was not inadmissible as a confession and I know of no other ground, nor is any suggested, for its exclusion and I would therefore answer the first question in the affirmative.

Regarding the second question reserved, I leave aside for the present the consideration of whether a question asked by counsel can under any circumstances be inadmissible and how its admission other than by repetition can be prevented.

I also find it unnecessary to determine whether on any consideration the questions were inadmissible because it appears to me that under the circumstances of the case, their admission would be no ground for interference with the conviction now. It has already been stated that the learned trial Judge directed

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the jury to disregard these questions and answers and any inferences suggested by them and it is admitted by counsel for accused that this was done in the amplest manner.

In Phipson on Evidence, 4th ed., 638, it is stated:—

> Where the jury, although allowed in the first instance to consider the inadmissible evidence have been directed by the Judge before verdict to disregard it, the conviction will not be disturbed.

In *The King* v. *William Long* (1902), 5 Can. Cr. Cas. 493, the same rule is laid down by the Court of King's Bench of Quebec.

In *Rex* v. *Gibson* (1887), 18 Q.B.D. 537, hearsay evidence was given to which no objection was taken until after the jury's attention had been directed to it by the presiding Judge, who on application refused to withdraw it from the jury's consideration. The conviction was set aside. Mathew, J., said, at 543:—

> It is the duty of the Judge to warn the jury not to act upon evidence which is not legal evidence against the prisoner.

and Wills, J., said:—

> I am of the same opinion. I think no reasonable fault can be found with the prisoner's counsel for assuming that the chairman would give a proper direction to the jury.

In *Rex* v. *Bridgewater*, [1905] 1 K.B. 131, the prisoner was asked on cross-examination if he had ever been convicted, to which he answered "Yes."

The English Criminal Evidence Act, 1898, prohibits such a question, though no such provision exists here and it was held by the Ontario Court of Appeal in *Rex* v. *D'Aoust* (1902), 5 Can. Cr. Cas. 407, that a prisoner who gives evidence on his own behalf may be cross-examined as to whether he has been previously convicted of an offence, though no evidence of good character has been given. The evidence in the *Bridgewater* case was allowed to go to the jury against the objection of prisoner's counsel, though the answer was given without objection. Lord Alverstone, C.J., in delivering the judgment of the Court consisting of five Judges at 135 says:—

> It must not be thought that because counsel for a prisoner allows a question as to a previous conviction to be put without objection he can afterwards set aside the conviction on the ground of the inadmissibility of such a question. He cannot stand aside and allow an improper question to be put and afterwards rely upon that question as a ground for quashing the conviction. In this case and under the circumstances, if the learned recorder had told the jury that they were to disregard the prisoner's answer as to his having been previously convicted, this Court would not, I think, have been inclined to interfere.

It is true that statement is *obiter*, but it is the considered opinion of the Lord Chief Justice concurred in by four Judges and is entitled to the great weight that such an opinion merits,

and especially in view of the fact that the portion respecting the absence of objection was expressly concurred in in *Rex* v. *Hudson,* [1912] 2 K.B. 464, 7 Cr. App. R. 256, by Lord Alverstone and four other Judges not the same as in the former case.

If the authorities quoted are to be taken as enunciating a principle of application to all cases it would be sufficient always for the Judge to correct an improper admission of evidence by his direction to the jury, but in *Rex* v. *Rose* (1898), 18 Cox 717, in which an involuntary confession had been received which did go to the jury by reason of which the conviction was set aside Lord Russell, C.J., in delivering the judgment of the Court at 718, said:—

> A question of some delicacy then arises as to the course which the magistrates ought to have adopted. It is clear that the evidence ought not to be admitted, but ought the Court to tell the jury to disregard it, or ought the Court to discharge the jury and try the case again?

The question is only raised, but not answered.

In my own experience at *nisi prius* the same question has occurred to me and I have on more than one occasion adopted what I considered the safe course of offering to discharge the jury, but usually with the result of the prisoner's counsel waiving that right and accepting in lieu a proper direction to the jury on the point. There are cases when such a course would not, I think, fully protect the prisoner, e.g., where as in the last case cited a confession of guilt has been received, for a jury of laymen might find difficulty in fully accepting the refinements which have resulted in the exclusion of confessions under some circumstances and might find it hard to persuade themselves that a man who had confessed his guilt under conditions which it would appear to them would justify them in thinking he was telling the truth, was in fact not guilty, but in the present case no such difficulty arises, for the questions do not amount to anything more than suggestions from which inferences might be drawn prejudicial to the prisoner. I feel, no doubt, that full justice would be done the accused by a proper direction as to the effect of such questions, and I think it was the trial Judge's duty to give such direction independently of whether such questions were properly asked or not as to which I prefer to offer no opinion except as to the last, which I think was undoubtedly an overstepping of the bounds allowable in cross-examination. For the reasons stated, I think it unnecessary to answer the second question as its answer would not affect the correctness of the conviction which it appears to me is not open to question on the points reserved.

Conviction affirmed.

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April 4.

McMEANS v. KIDDER.

Manitoba King's Bench. Trial before Curran, J. April 4, 1913.

1. FRAUD AND DECEIT (§ IV—16)—INTENT—INNOCENT MISREPRESENTATION.

It is unnecessary that a representation made by the vendor that his land fronting upon a river had a sandy beach, should have been intentionally false to entitle the purchaser to repudiate the contract where the vendor, in the negotiations shewed to the purchaser land with a sandy beach as being the land for sale, whereas it was in fact part of a neighbouring tract; the party deceived by the misrepresentation, although innocently made, is entitled in equity to have his contract set aside.

Statement

PLAINTIFF brought this action to recover the balance due upon the sale of property to defendant. Defendant alleged fraud and misrepresentation on the making of the contract and asked by way of counterclaim for cancellation of the agreement of sale, and for repayment by plaintiff to him of all moneys paid by the defendant under the agreement.

The action was dismissed and judgment given for the defendant on the counterclaim.

E. D'H. McMeans, for plaintiff.

P. C. Locke, for defendant.

Curran, J.

CURRAN, J.:—The agreement of sale is admitted, also the balance of purchase money due under it. The plaintiff will be entitled to judgment unless effect can be given to the defence of fraud and misrepresentation inducing the contract set up by the defendant.

The plaintiff was familiar with the locality and the position and description of the lands mentioned in the agreement for sale, whereas the defendant was not, and in fact had no knowledge of the locality whatever. The parties were not, therefore, on equal terms in point of knowledge of the subject-matter of the agreement. The facts sworn to by the defendant are that he went out to Minaki in the early part of July, 1911, with the intention of buying some property fronting on the Winnipeg river near Holst Point, if such a property could be got, having a sandy beach on the river front. This adjunct seems to have been the predominating idea in his mind. He says:—

> I went to Minaki to get property with a sandy beach, if possible; met plaintiff, who said he had some property which would fill what I was after.

Whereupon the plaintiff took the defendant in his launch to see the property which the plaintiff said he had in the locality for sale. They landed below the plaintiff's property owing to low water and walked back some distance till they came to a river frontage having a strip of sand or sandy beach, as the plaintiff says, 30 or 40 feet wide by about 15 feet across, and running to the water's edge. While there, some movements

were gone through by the plaintiff, apparently with a view to indicating to the defendant some of the boundaries of his property. The defendant says the plaintiff stood on the shore line and directed him to walk inward where he would find a stake. This stake the defendant failed to find, when the plaintiff came over to where he was and shewed him the stake, stood him at it and then returned to the shore line, saying to defendant, "The line of the property ran between me and him; that leaves between 30 and 40 feet on his (plaintiff's) property." The defendant then rejoined the plaintiff, who took a pole and waded out into the water using it to shew the defendant the firm quality of the sand. The two then went eastward to the adjoining location, walking across a narrow peninsula to reach it, and came to another beach which was of muddy formation. The defendant swears the plaintiff did this to shew him by way of contrast the advantages of the plaintiff's land and beach over that of the adjoining land.

None of these statements of the defendant is denied by the plaintiff in any material point. The defendant was satisfied with the property the plaintiff shewed him, and that same day took an option of purchase at $600 (exhibit 3), on what he supposed was the land the plaintiff had first shewn him, and having the sandy beach upon it. This land was described by the plaintiff in the option as lots 6 and 7, S. 1025, Winnipeg river. Defendant returned to Winnipeg and the agreement of sale (exhibit 1), was prepared and executed by both parties, and the defendant paid over the cash payment of $150. The lots are more formally described in this document (exhibit 1), but they are admitted to be the same lots as are described in the option (exhibit 3).

Before the second payment became due, the defendant says he heard that the beach he had seen was not on the plaintiff's property, and he went to the plaintiff and told him what he had heard. He says the plaintiff assured him the beach was as represented, and the defendant, on the strength of this assurance, paid the second instalment of purchase money and interest, amounting to $154.50. The plaintiff subsequently passed a sight draft upon the defendant for the third payment and interest, which the defendant refused, because, as he says, he kept hearing reports that the beach was not on the property he had agreed to buy. No further payments were made, and the defendant, in July, 1912, employed a surveyor, one Albert Meekin, to go out and locate the land described in the agreement of sale (exhibit 1). This was done and the result is detailed in the examination of this surveyor taken *de bene esse* (exhibit 7), and used by consent at the trial. A sketch or plan was made by the surveyor (exhibit 8). It is clear from the surveyor's evidence,

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that there is no sand beach whatever on the property mentioned in the agreement of sale (exhibit 1), and that there is considerable sandy beach on the adjoining property to the west, known as location S. 803.

From the defendant's account of their movements on the day of sale and looking at exhibit 10, made by the plaintiff himself, it would seem almost beyond question that the beach the defendant saw was on location S. 803, and that when they walked eastward, as the defendant says they did, across the narrow peninsula to the muddy beach of the adjoining location, they actually came to location S. 1025, which immediately adjoins S. 803 on the east, and also fronts on the river.

It is possible that the plaintiff himself was mistaken and honestly thought he had shewn the defendant the property he did in fact own, and that the beach in question was on it. It is unnecessary that the representation made in this respect should be intentionally false to entitle the defendant to relief if in fact the defendant was misled and deceived by it.

The defendant does not say the plaintiff made any statement or representation as to the exact amount of beach on this property exhibited, except that the indicated boundaries before referred to would leave between 30 and 40 feet on the plaintiff's property. This was what the defendant saw and was satisfied with, and is, I find, a material representation on the faith of which the defendant agreed to buy. The plaintiff does not deny any material part of the defendant's evidence. It is true, he says he told the defendant that, "no one down there owned the beach, but that it belonged to the Government," and that he did not suggest to the defendant that there were 30 or 40 feet of beach, because there was not that quantity; but he does not deny the plaintiff's story as to what took place when the boundary line was indicated by the plaintiff as before stated.

The defendant further says, that he understood the property ran right down to the water's edge. The plaintiff, however, says that he told the defendant that this was not the case, as there was a road along the river front. The Crown patent (exhibit 9), reserves an allowance of one chain in perpendicular width for a road along the shore of the Winnipeg river, which renders it impossible for the plaintiff to give title to the land to the water's edge. Nothing turns upon this, as the statement of defence does not set it up as a ground of defence. If the road in question took up the entire beach, which the defendant thought he was getting this would not necessarily interfere with the defendant's enjoyment of the beach, if it was situated where the defendant thought it was.

The plaintiff called a witness to prove that the Winnipeg river in 1911 was about 22 inches lower than in 1912. The pur-

chase was made in 1911, and the surveyor's examination of the property was not made until 1912, and it is suggested by the plaintiff that the higher water in 1912 might easily cover up the part of the beach which was visible in 1911 as the land was flat and easily covered with water. The plaintiff, however, admits, in his evidence, that there was no sand beach on location S. 1025, because the sand did not run that far back and the evidence clearly shews that there was considerable sandy beach on location S. 803. I do not think the evidence as to the water being higher in 1912 than it was in 1911, when the property was bought, sufficiently explains the entire absence of any sandy beach being visible to the surveyor in the summer of 1912, and apparently, in view of the plaintiff's statement that there was no sand beach at all upon location S. 1025, I do not see that the question of the water being higher or lower makes any difference.

I think I can fairly hold, upon the evidence, and do hold, that the defendant was misled by the plaintiff's statements, conduct and actions on the day in question, when the property was sold to him, into supposing that he was actually buying the property fronting on the Winnipeg river, where the sandy beach in question was, and that he purchased the property mentioned in exhibit 1, on the faith of the plaintiff's statements and actions in the premises. I hold, upon the evidence, that the plaintiff's statements and representations as to the beach were material to the contract, induced it, and were untrue.

Whether such statements and representations were innocently or falsely made, I think is immaterial. The defendant was deceived by them to his detriment and the contract brought about by such methods cannot, in equity, be allowed to stand. The transaction is still an executory one and is subject to these equitable principles. I do not find that any fraud was made use of to induce the defendant to buy the land and to execute the agreement of sale. The plaintiff's representations, nevertheless, were false, though, perhaps, innocently made, and that is sufficient to give the deceived party the right, in equity, to have the transaction set aside: *Wolfe* v. *McArthur*, 18 Man. L.R. 30.

The evidence disclosed that sandy beaches were scarce at Minaki, and any frontage possessing such an advantage was correspondingly more desirable and valuable. Whether the plaintiff designedly deceived the defendant or was honestly mistaken himself, the result to the defendant is the same and the plaintiff ought not to succeed in his action. I dismiss the plaintiff's action with costs and there will be judgment for the defendant upon the counterclaim for cancellation of the agreement of sale and for repayment by the plaintiff to the defend-

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ant of all moneys paid by the defendant under such agreement, with interest at the legal rate. If the parties cannot agree upon this amount, I will, upon application, fix it. The defendant is entitled to the costs of his defence of the action and of the counterclaim, and I allow the costs of the examination *de bene esse* of the witness Meekin.

Action dismissed and judgment for defendant on counterclaim.

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March 31.

IMPERIAL ROOFING COMPANY v. DICK.

Alberta Supreme Court, Scott, Stuart, Simmons, and Walsh, JJ. March 31, 1913.

1. CONTRACTS (§ I E 2—70)—FORMAL REQUISITES—STATUTE OF FRAUDS—COLLATERAL CONTRACTS—DEBTS OF OTHERS—DUAL LIABILITY.

Dual liability is the prime test as to whether a verbal agreement is collateral and within sec. 4 of the Statute of Frauds as a promise to answer for the debt of another; and where the defendant gives a contract to construct a building to a third party who sub-contracts the roof to the plaintiff; and where (before anything is done under the sub-contract) the contractor dies and the sub-contractor, looking upon the death as putting an end to the sub-contract, makes a verbal agreement with the defendant to do for him the identical roof work on the identical terms covered by the original sub-contract under which the defendant promises "to pay for it," such verbal agreement, since it imports no dual liability is not within the statute, although the original contract was not in any way formally rescinded.

[*Guild* v. *Conrad*, [1894] 2 Q.B. 885, applied; *Bond* v. *Treahey*, 37 U.C.Q.B. 360, disapproved.]

2. NEW TRIAL (§ II—9)—INSUFFICIENCY OF ISSUES SUBMITTED—PLAINTIFFS' INADVERTENCE IN INTRODUCING DISSERVING DEPOSITIONS.

Where the plaintiffs' case is dismissed at the trial on the defendant's motion at the close of the plaintiffs' case, and where, on appeal from such dismissal, it appears that the motion was given effect simply because the plaintiffs inadvertently and disservingly introduced the entire examination on discovery of the defendant, containing categorical denials, and that but for the introduction of such denials the defence must have met the plaintiffs' case, and it further appears to the appellate court that the matters in issue should properly be placed before the trial court in a more satisfactory form than that adopted by the plaintiffs, a new trial may be granted to them upon terms.

3. COSTS (§ II—50)—OF UNNECESSARY PROCEEDINGS—INSUFFICIENCY OF ISSUES SUBMITTED THROUGH PLAINTIFFS' INADVERTENCE—COSTS ON GRANTING NEW TRIAL.

Where the plaintiffs on appeal seek a new trial and it appears that through their own inadvertence there was an insufficiency of issues submitted on the trial, the case may be sent back for re-trial, but upon exemplary terms as to costs penalizing the plaintiffs for the unnecessary proceedings through their default.

Statement

APPEAL by the plaintiffs from judgment at trial dismissing action brought to recover the price of roofing work on a building belonging to defendant.

A new trial was ordered upon terms.

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Walsh, J.

H. W. McLean, for the plaintiff [illegible]ellants.
D. S. Moffatt, for the defendant, [illegible]pondent.

The judgment of the Court was delivered by

WALSH, J.:—I was of the opinion upon the argument of this appeal that the trial of this action from the judgment at which this appeal is taken was unsatisfactory and that the plaintiffs should be given an opportunity to re-try it upon fair terms. This, as I understood it, was the view of the other members of the Court as well, and judgment was reserved only for the purpose of enabling us to consider the argument of Mr. Moffatt that the plaintiffs could not succeed even upon their own evidence. The agreement sued upon is a verbal one and Mr. Moffatt contends that upon the plaintiffs' own shewing it is one to answer for the debt default or miscarriage of another which cannot be enforced against the defendant for lack of a writing. As of course no good purpose could be served by a new trial if this argument is well founded, we thought it better to reserve this question for consideration.

One Garson contracted with the defendant to erect for him the building in question and the plaintiffs agreed with Garson to put the roof on the same for an agreed price. The story of the plaintiffs is that, before anything was done by them under their contract with Garson and before any of the materials for the roof had been either ordered or delivered, Garson died. They say that a verbal agreement was thereupon made between them and the defendant whereby they went on and did this work for him on the strength of his promise to pay for it, and having done it they seek to hold the defendant to his promise. Although from some portions of their evidence the impression might, perhaps, be gathered that this agreement was in the nature of a guarantee by the defendant of the payment of the amount to which the plaintiffs under their original contract with Garson would be entitled, I think the fair and proper conclusion from their evidence as a whole is that they were dealing with the defendant as their primary debtor under a new contract with him, from which Garson and his estate and the contract made with him were eliminated. The word "guarantee" appears more than once in their evidence, but as Mathew, J., said in *Guild & Co.* v. *Conrad*, [1894] 2 Q.B. 885, at 888, "I am not in the least disturbed by the use of that phrase." The Garson contract was not formally put an end to in any way. As a matter of fact no communication of any kind seems to have taken place with reference to it between the plaintiffs and any one representing the Garson estate. The position of the plaintiffs was that having done nothing and having incurred no liability, and having been put to no expense, and having been paid

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nothing under it, they did not purpose to proceed with this work under the Garson contract at all, and being under the impression that his death terminated it they intended to treat it as at an end. And then they regard what happened between them and the defendant as an entirely new contract, under which Garson and his estate entirely disappeared from the transaction, and they agreed to do for the defendant and upon his sole liability the work covered by the Garson contract at the same price as was provided for in it.

Mr. Moffatt's argument is that even upon the plaintiffs' own evidence Garson, the original contractor, or his estate, remained liable to the plaintiffs for payment of the agreed price under the original contract, and that being so the contract with the defendant is one of guarantee simply, the test as to this being whether or not the original debtor remained liable to the plaintiffs.

But for the case of *Bond* v. *Treahey*, 37 U.C.Q.B. 360, I would not have had the slightest doubt but that the liability imposed upon the defendant upon the plaintiffs' version of the transaction was a primary and not a secondary one. That case is in its facts so like this that if the judgment was that of a Court by whose judgments this Court is bound I do not see how we could escape giving effect to Mr. Moffatt's argument. Practically the only difference between the two cases is in the language said to have been used by the respective defendants in assuming liability, it being said in the *Bond* case that the defendant had said, "I will see you paid," while here the plaintiff Purvis swears that the defendant said "for me to go at once and go ahead with the work and he would pay me for it." The judgment in the *Bond* case did not proceed, however, upon the ground that the defendant's promise was in the words which I have quoted. On the contrary, the Court, speaking of the expression, "I will see you paid," said:—

> It is, without more, such an expression as would afford evidence under particular circumstances of an original promise on the authority of *Mountstephen* v. *Lakeman*, L.R. 7 Q.B. 196, as affirmed by the House of Lords in L.R. 7 H.L. 17.

It is therefore impossible to distinguish this case from that upon this ground, and it does not seem to be otherwise distinguishable. It is with the very greatest diffidence that I venture to express an opinion which differs from that of a Court as strong as that which rendered the judgment in *Bond* v. *Treahey*, 37 U.C.Q.B. 360, the reasons for which were given by no less eminent a jurist than the late Chief Justice Harrison, but I feel bound to do so.

Upon the plaintiffs' version of the transaction there was not involved in it any idea whatever of a continued liability either

of or to the plaintiffs under the Garson contract. The plaintiff Purvis says that he told the defendant's architects that, "I couldn't go on with it under the old agreement. I couldn't go under the Garson estate, as I considered my contract died with Mr. Garson." And throughout his version of his negotiations with the defendant runs the idea of an entirely new contract based upon the Garson contract so far as the work to be done and the price to be paid are concerned, but independent of it with respect to the liability of the contracting parties. Now, however mistaken the plaintiffs may have been in their view of the legal result upon this contract, by the death of Garson, it surely was competent for them and the defendant to agree, as they say was agreed, that the defendant was the man on whose sole liability this work was to be done. If, notwithstanding the fact that Garson was under contract with the defendant for the whole of the work involved in the erection of the entire building, and that the plaintiffs were under a sub-contract with Garson to put on the roof, the plaintiffs and defendant had behind Garson's back come together in his lifetime and verbally agreed that the Garson contract should be put to one side, and that the plaintiffs, under a direct contract with the defendant, should put the roof on and the plaintiffs, under this new contract, did put the roof on, could it be argued for a moment that the defendant could not be held liable for lack of a writing, because his agreement was simply one of guarantee? Legal difficulties might, of course, have been interposed to prevent the carrying out of such an agreement, but I am assuming, for the purpose of this argument, that none were interposed and that this new agreement was, in fact, executed by the plaintiffs. Surely such an agreement would be in no sense collateral to the Garson contract. It would be one imputing primary, and not secondary, liability on the defendant. And that is precisely the position of the matter upon the plaintiffs' presentation of the facts. There was no intention or thought of any continued liability on the part of Garson or of the defendant's liability arising simply upon the failure of Garson to pay. It was not a contract to pay if the Garson estate did not, because there was no thought that the Garson estate would be liable to pay. In my opinion, therefore, the plaintiffs, if otherwise entitled to succeed, cannot fail upon the facts sworn to by them simply because the contract alleged is not in writing.

Upon the trial, counsel for the plaintiffs put in the entire examination of the defendant for discovery, which contradicts entirely the story of the plaintiffs. Counsel for the defendant moved, at the close of the plaintiffs' case, to have the action dismissed, and the learned Chief Justice gave effect to this motion. In doing so he said:—

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I think if the evidence were limited to the two witnesses that have been called, I could do nothing but call on the defence. But the whole of Mr. Dick's examination has been put in containing his denials as well as anything he may have admitted and it is before me.

He then proceeded to deal with the facts disclosed by the evidence of the plaintiffs and the examination of the defendant and ended by dismissing the action. Counsel for the plaintiffs in the argument of this appeal contended most strenuously that he had only put in certain portions of the defendant's examination, but the evidence against him is too strong to admit of any doubt whatever on the question. The above-quoted statement of the Chief Justice and the entry in his book absolutely settle the question in my mind apart entirely from the other evidences of Mr. McLean's mistaken view which were presented to us.

I am inclined to think that it was entirely through inadvertence that Mr. McLean put in this entire examination. That is the only hypothesis upon which his action in so doing can be accounted for, as surely no counsel of any experience whatever would deliberately place in evidence against himself the testimony of the opposing litigant containing nothing but denials of the story upon which his own case rests. While the learned Chief Justice very properly treated the defendant's examination as evidence offered by the plaintiffs, and, after an analysis of it, and of the other evidence, arrived at the conclusion which he did, I think it would be more satisfactory if the matters in issue could be disposed of after a trial in which the contentions of the parties were placed before the Court in another form. The defendant's examination for discovery is not a satisfactory form in which to have his narrative presented to the Court, particularly when presented under the circumstances here related. I should think that his architects, who were not called before, could give material evidence for one side or the other. And so, taken all in all, it is my opinion that the ends of justice will be better served by a new trial of the action.

The fault of the former unsatisfactory trial must be laid at the door of the plaintiffs, who should therefore only have a new trial upon proper terms. The defendant will have his costs of this appeal in any event. Upon payment of them within ten days after taxation the plaintiffs may, within ten days after such payment, by notice filed and served upon the defendant's solicitor elect to take a new trial of the action, to which they shall thereupon become entitled. In that case the costs of the former trial will be costs to the defendant in any event. If the costs of appeal are not paid and the election for a new trial is not made within the periods above respectively limited, the appeal will stand dismissed with costs.

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The plaintiffs will, doubtless, consider carefully the advisability of taking a new trial upon these terms. As the case now stands they are under no liability for any costs except those of this appeal, the judgment appealed from having been without costs. A new trial will make them liable for the costs of the former trial and a judgment against them as the result of another trial may perhaps saddle them with all of the costs of the action.

New trial ordered upon terms.

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April 3.

NORTHERN ELECTRIC AND MANUFACTURING CO. v. CITY OF WINNIPEG.

Manitoba King's Bench, Macdonald, J. April 3, 1913.

1. ACTION (§ I B—5)—PREMATURE ACTIONS—PRELIMINARY ARBITRATION.

A stipulation in a contract for the supply and installation of machinery to the effect that any dispute arising "during the continuance of the contract" shall be referred to arbitration will not bar an action at law for the price based upon a claim that the work had been completed and accepted.

Statement

APPEAL from an order of the Referee refusing a motion to stay proceedings under sec. 6 of the Arbitration Act, Stat. Man., 1911.

C. S. Tupper, for plaintiffs.

J. Preudhomme, for defendants.

Macdonald, J.

MACDONALD, J.:—The plaintiffs entered into a contract in writing with the defendants to supply and install one turbine pump and one three-phase 60-cycle induction motor, together with shafting, etc., for which the defendants were to pay the sum of eleven thousand dollars. This contract provides that, should any question arise respecting the true construction or meaning of the specifications or should any dispute arise from any cause whatever during the continuance of this contract, the same shall be referred to the award, order and determination of the city engineer, whose award shall be final and conclusive.

Certain other provisions are made in schedule "H" annexed to and forming part of the contract, constituting the city engineer sole judge and arbitrator, but not affecting the matter to be determined here.

The plaintiffs bring this action, alleging completion of the works and acceptance thereof, and claiming payment due and payable under the contract, and also claiming for certain other services not covered or provided for by the contract. The defendants upon service upon them of the statement of claim make a motion before the Referee for a stay of proceedings of the

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action, taking the stand that the arbitration clause in the contract provides the tribunal before which all matters in dispute are to be adjusted.

Section 6 of the Arbitration Act, 1911, 1 Geo. V. (Man.) ch. 1, provides for applying for a stay of proceedings and that the Court or a Judge thereof may make such an order. Under rule 27 of the King's Bench Act the Referee in Chambers is empowered to do all such things, etc., as are *now* done by a Judge sitting in Chambers, with certain specified exceptions, of which this is not one. This application being subsequent to the passing of this latter rule, the Referee would not have jurisdiction were it not for rule 29 of the King's Bench Act, which amplifies the powers under rule 27, and makes it applicable to future as well as to past actions and matters in Court. Counsel engaged in the case before the Referee, however, it appears, relied solely on section 6 of the Arbitration Act, and confined their argument to that section. The notice of motion was for an order under section 6 of the Arbitration Act, 1911, and under this the learned Referee declined to exercise jurisdiction. The intention of counsel for the defendant no doubt was to secure a stay of proceedings and the appeal from the Referee is based on the rules of the King's Bench Act referred to, which rules were not urged before the Referee.

From a perusal of the statement of claim and the contract, I am clearly of the opinion that the subject matter of the action is not within the arbitration clause of the contract, and I will therefore make an order dismissing the application. Costs in the cause.

Appeal dismissed.

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April 10.

Re JAMIESON caveat.

Re GRAND TRUNK PACIFIC DEVELOPMENT CO., Ltd.

(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Brown, JJ. April 10, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEAT AS TO BUILDING RESTRICTION NOT MENTIONED IN TRANSFER.

Where a contract of sale of lands provided that the vendee would use the property only for a specified purpose (*ex. gr.*, for the erection of a church) and further provided that upon complete payment of the purchase money and surrender of the contract a transfer would be made to the vendee subject to the original reservations by the Crown and to a reservation of minerals, without further mention being made in the contract as to the building restriction, and a transfer was thereupon made without mention therein of the building restriction, the vendor cannot afterwards enforce the stipulation of the contract as to the use to be made of the property by filing and continuing a caveat claiming an interest therein on behalf of the vendor against his vendee

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as registered owner to prevent the use of the property for other purposes as an easement attaching to the land; the court will discharge the vendor's caveat under such circumstances.

[*Re Grand Trunk Pacific Development Co.* (No. 1), 7 D.L.R. 611, affirmed on different grounds; Sask. Land Titles Act, R.S.S. 1909, ch. 41, secs. 71, 72 and 73, referred to; see also Annotation on Building Restrictions in contracts, 7 D.L.R. 614.]

Statement

APPEAL by the Grand Trunk Pacific Development Company, Limited, from an order dismissing an application to continue caveat filed by it claiming an interest in certain lots, transferred to the trustees of the Presbyterian Church at Nokomis by the company, subject to certain restrictions: *Re Grand Trunk Pacific Development Co., Ltd.* (No. 1), 7 D.L.R. 611.

The appeal was dismissed.

G. D. Brown, for appellants.

F. W. Turnbull, for respondents.

The following opinions were handed down:—

Newlands, J.

NEWLANDS, J.:—In this matter the Grand Trunk Pacific Development Co., Ltd., seek to continue on the certificate of title of the trustees of the Presbyterian Church at Nokomis, a caveat which is to the effect that they claim an interest in lots 23, 24 and 25, block 4, Nokomis, for the purpose of preventing the purchaser or purchasers from using the property or any building thereon, for any other purpose than that of a church. In the agreement of sale in which the company contracted to sell these lots to the trustees of the church, it was provided:—

That he will use the property for the erection of a church and buildings in connection therewith and for no other purpose.

It further provided that the purchaser, upon payment of the purchase money

and the surrender of this contract, shall be entitled to a deed or transfer conveying the said premises in fee simple freed and discharged from all encumbrances, but subject to the reservations, limitations, provisoes, and conditions expressed in the original grant from the Crown, and subject to the reservation of mines, minerals, coal or valuable stone in or under the said land.

In the affidavit of George V. Ryley, the land commissioner of the said company, he states

that on the 6th day of January, 1910, the said Grand Trunk Pacific Town and Development Co., Ltd. (of which company the Grand Trunk Pacific Development Co., Ltd., is the successor) did execute a transfer of said land to the said trustees, conveying said land to said trustees in fee simple, subject to the reservations, limitations, provisoes, and conditions expressed in the original grant of said lands from the Crown, and subject to the reservation of mines, minerals, coal or valuable stones in or under the said land, and subject to the said caveat.

This last statement, that the transfer was made subject to the caveat, is evidently a mistake, as the caveat in question

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Newlands, J.

was not made until February 7, 1910, a month after the execution of the transfer. The transfer itself was not put in evidence, so I presume it was as sworn to by Mr. Ryley, subject to the reservations contained in the grant from the Crown, and of mines and minerals, but not to a caveat that was not then made, this being in accordance with the term of the agreement which I have quoted.

That being the case, the Land Titles Act, which in sec. 72 says:—

> every instrument transferring land shall operate as an absolute transfer of all such right and title as the transferor has therein at the time of its execution unless a contrary intention is expressed in the transfer,

vested in the trustees all the company's interest in these lots, excepting in the mines and minerals, and they had, therefore, no other interest which they could protect by way of caveat.

Mr. G. D. Brown argued that the covenant in question created a right in the company, they being the owners of adjoining lands, in the nature of an easement, for although it was affirmative in form, it had the effect of a negative covenant on the part of the trustees that they would not use the land for any other than church purposes. If this argument is correct, and such a covenant should be construed as creating easement, then, in order to be effective under the Land Titles Act, it should have been created and registered as provided by sections 71 and 73 of that Act.

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

Brown, J.

BROWN, J.:—In this case the Grand Trunk Pacific Development Co., Ltd., sold certain lots under an agreement of sale to the trustees of the Presbyterian Church at Nokomis, for church purposes. The agreement contains, among others, the following provisions:—

> That he will use the property for the erection of a church and buildings in connection therewith and for no other purpose.
>
> If the purchaser or his legal representatives or assigns shall pay the several sums of money aforesaid punctually at the several times above fixed and shall in like manner strictly and literally perform all and singular the aforesaid conditions, then he, his heirs or assigns approved as hereinafter provided, upon request at the office of the land commissioner of the company, at the city of Winnipeg, *and the surrender of this contract*, shall be entitled to a deed or transfer conveying the said premises in fee simple freed and discharged from all encumbrances, but subject to the reservations, limitations, provisoes, and conditions expressed in the original grant from the Crown, and subject to the reservation of mines, minerals, coal or valuable stones in or under the said land.

A transfer was duly issued to the trustees, subject only to the reservations specified in the aforesaid provisions. It is stated in Ryley's affidavit that the transfer issued subject to

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a caveat which the company filed against the property in question, but this is clearly wrong, for the simple reason that no caveat was in existence at the time the transfer was issued. It is contended on behalf of the company that the first of the provisions above given creates rights in them which exist notwithstanding the issue of the transfer to the trustees. In my opinion, the provisions of the agreement itself, which are above given, are an absolute answer to any such contention. One of the conditions upon which the trustees become entitled to the issue of the transfer to themselves is the surrender of the contract. Upon surrender of the contract, they become entitled to the issue of a transfer such as they apparently got and subject only to the reservations as contained therein. To give effect to the company's contention would be to hold that the trustees must surrender their contract before they can get the transfer, but that notwithstanding such surrender, and notwithstanding the issue of such transfer, the company still have rights under the agreement. It seems to me preposterous to contend that such a result could ever have been contemplated.

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

Appeal dismissed.

Re THOMPSON LOCAL OPTION BY-LAW.

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April 3.

Manitoba King's Bench, Macdonald, J. April 3, 1913.

1. ELECTIONS (§ II A—17)—NOTICE—STATUTORY PRELIMINARIES—BY-LAW REPEALING LOCAL OPTION BY-LAW.

Where there has been a failure by the municipal council to comply with the statutory preliminaries required by the Manitoba Municipal Act, R.S.M. 1902, ch. 116, sec. 376, in not posting the notice of the proposed voting on a local option by-law in four or more of the most conspicuous places in the municipality, and not publishing in the notice the places of voting, such departures from the requirement of the Act are fatal and the by-law will be quashed, notwithstanding the saving provisions of section 200 of the Act.

[*Little* v. *McCartney*, 18 Man. L.R. 323; *Hatch* v. *Oakland*, 19 Man. L.R. 692, and *Shaw* v. *Portage la Prairie*, 20 Man. L.R. 469, referred to.]

Statement

APPLICATION to quash by-law No. 36 of the above municipality, being a by-law repealing a local option by-law.

The application was granted.

J. B. Coyne, and *H. Beattie*, for applicants.

F. M. Burbidge, for municipality.

Macdonald, J.

MACDONALD, J.:—Several objections are raised, but the argument is confined to a few of them. The first is that copies of the voters' list were not published as required by sec. 9 of the Municipal Electors Act.

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RE THOMPSON LOCAL OPTION BY-LAW.

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This Act provides for the preparation by the clerk of any municipality of an alphabetical list of voters, and sec. 9 requires that, immediately after the clerk has made the said alphabetical list, and within forty-five days after the final revision and correction of the assessment roll, the clerk shall forthwith cause a copy of said list to be posted up and to be kept posted up in a conspicuous place in his own office, and deliver or transmit copies to certain designated parties, among which are each school teacher and postmaster in the municipality, who shall post up the same in the school or post-office as the case may be.

Copies of the list of electors as required by this section were not transmitted to each school teacher in the municipality.

Section 376 of the Municipal Act provides for certain proceedings for ascertaining the assent of the electors before the final passing of a by-law; the by-law itself shall fix the day and hour for taking the vote of the electors and such places in the municipality as the council shall deem best for the purpose and the council shall publish in some public newspaper published in the municipality in at least one number of such paper each week for three successive weeks and post up in four or more of the most public places in the municipality a notice signed by the clerk of the council setting forth concisely the objects of the by-law and naming the hour, day and place or places fixed for taking the votes of the electors for or against the by-law.

I find from the material before me that the requirement as to posting up in four or more of the most public places in the municipality of the notice provided for was not complied with, nor was there any posting up anywhere within the municipality of any intimation of the taking of a vote on such by-law.

The notice of holding the election, which was published was also defective in not fixing the places of voting.

These matters of non-compliance with the preliminaries leading up to the election, it is urged by counsel, should not be held fatal to the by-law, as section 200 of the Municipal Act, R.S.M. (1902), ch. 116, provides that,

> No election shall be declared invalid by reason of a non-compliance with the rules contained in this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appear to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the Act, and that such non-compliance or mistake or irregularity did not affect the result of the election.

The Court has a discretion in determining whether there has been a sufficient compliance and whether effect should be given to objections in an application such as this; but the Court cannot, in my opinion, exercise such a discretion where there

has been such a departure from the spirit of the Act as is manifest here. The omitted preliminaries seem to me to be more mandatory than directory and to conclude that such omission could not affect the result is impossible.

By-laws have been quashed in a number of cases because of failure to comply with preliminaries such as obtain here: *Little* v. *McCartney*, 18 Man. L.R. 323, and cases there cited; *Hall* v. *South Norfolk*, 8 Man. L.R. 430; *Hatch* v. *Oakland*, 19 Man. L.R. 692; *Shaw* v. *Portage la Prairie*, 20 Man. L.R. 469. These and other cases seem to me clearly to establish the law applicable.

The application must be granted, and the by-law quashed, with costs.

Application granted.

REID v. THE ALBERTAN PUBLISHING COMPANY, Ltd.

Alberta Supreme Court, Stuart, J. February 8, 1913.

1. LIBEL AND SLANDER (§ III C—113)—DEFENCES—JUSTIFICATION—BASIS FOR PLEA OF TRUTH, WHEN INSUFFICIENT AS TO SPECIFIC FACTS.

In an action for libel, a justification must be specially pleaded and with sufficient particularity to enable the plaintiff to know precisely what is the charge he will have to meet, and, although where the words complained of are precise and convey a specific charge in full detail it is sufficient to plead that they are true in substance and in fact and no particulars are necessary, yet an allegation in plaintiff's statement of claim, that the defendant newspaper published an article charging, that an effort was made "to stampede the members of the city council into appointing a member of the police force," and that the first move to secure a certain appointment to the police force was made by the plaintiff "of the notorious cafeteria and later the pioneer of the still more notorious South Coulee," does not allege such specific facts in full detail as would entitle the defendant to plead truth in justification without stating particulars shewing the specific facts which he means to prove in order to establish the truth of the alleged libel.

[Odgers on Libel and Slander, 5th ed., 190, specially referred to; *Zierenberg* v. *Labouchere*, [1893] 2 Q.B. 183; *Walker & Son, Ltd.* v. *Hodgson*, [1909] 1 K.B. 239, followed.]

2. DISCOVERY AND INSPECTION (§ IV—32)—EXAMINATION IN LIBEL CASES—VAGUE CHARGE—JUSTIFICATION—RIGHT TO INTERROGATE PLAINTIFF.

On an examination for discovery of plaintiff before trial, in an action for libel, the plaintiff is not bound to answer questions which are directed to questions of fact as to which there was no specific allegation of fact in the alleged libel, if the alleged libellous words constituted merely a vague charge to which the defendant pleaded truth in justification without giving particulars.

[*Zierenberg* v. *Labouchere*, [1893] 2 Q.B. 183; *Walker & Son, Lt.* v. *Hodgson*, [1909] 1 K.B. 239; *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington*, [1895] 2 Q.B. 148, followed.]

Statement

APPLICATION by the defendants to compel the plaintiff to attend for further examination for discovery and to answer certain questions which he refused on advice of his counsel to answer on his examination for discovery.

The order was granted.

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REID
v.
THE ALBERTAN PUBLISHING CO., LTD.

Stuart, J.

Frank Eaton, for the plaintiff.
G. W. Ross, for the defendant company.

STUART, J.:—The action is for libel. The libel alleged is contained in an article published in the *Albertan*, a newspaper published by the defendant company wherein after some reference to the expected appointment of a chief of police for Calgary and to an alleged effort "to stampede the members of the city council into appointing a member of the police force" to that position it is further said,

> there is no disguising the fact that the effort to stampede the members of the council is not above suspicion. The first move to secure Sergt. Nutt's appointment to the police force was made by Johnny Reid (the plaintiff) of the notorious cafeteria and later the pioneer of the still more notorious South Coulee.

The innuendo alleged by the plaintiff is shortly stated to the effect that these words mean that the plaintiff was endeavouring unduly to influence members of the council to obtain Nutt's appointment and that the plaintiff was the founder and was financially interested in a district inhabited by prostitutes.

The defendants deny that the words mean what is alleged. They say that, in so far as the statements complained of consist of allegations of fact they are true in substance and in fact and in so far as they are expressions of opinion they are fair comment upon said facts which are matters of public interest and were made in good faith and without malice.

In Odgers, on Libel and Slander, 5th ed., p. 190, it is said:—

> A justification must be specially pleaded and with sufficient particularity to enable the plaintiff to know precisely what is the charge he will have to meet. Where the words complained of are precise and convey a specific charge *in full detail* it is sufficient to plead that they are true in substance and in fact and no particulars are necessary. But where a vague general charge is made as for instance that the plaintiff is a swindler it is not sufficient to plead that he is a swindler; the defendant must set forth the specific facts which he means to prove in order to shew that the plaintiff is a swindler.

Unless specific facts are alleged a plea that the statements made are true is, as Kay, L.J., said in *Zierenberg* v. *Labouchere*, [1893] 2 Q.B. 183, quoting *J'Anson* v. *Stuart*, 1 T.R. 748, simply respecting the libel.

In the present case the libel alleged does not, in my opinion, state any specific facts. The words, "of the notorious cafeteria" do not allege specific facts. Nor do the words "pioneer of the still more notorious South Coulee."

There is no specific allegation of fact there at all. The Court cannot gather any specific meaning from these words taken in

themselves and is not supposed to have any knowledge whatever as to what may be hidden behind those words.

In *Peter Walker & Son, Ltd.* v. *Hodgson*, [1909] 1 K.B. 239, cited by the defendant such a plea as is here made is treated merely as a plea of fair comment and not a plea of justification at all.

The plain rule deducible from *Zierenberg* v. *Labouchere*, [1893] 2 Q.B. 183; *Walker & Son, Ltd.* v. *Hodgson*, [1909] 1 K.B. 239, and *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington*, [1895] 2 Q.B. 148, is that the defendant can only interrogate as to specific facts alleged by him. It is of no advantage to the defendants to say that the innuendo alleged contains certain statements of facts as to which therefore discovery may be sought because the defendants deny the innuendo. They cannot blow hot and cold. For myself, I not only do not see what defendant can examine upon, but I really do not see what they will be able to claim the right to prove at the trial. The libel itself is only insinuation and the plaintiff has a right to know by particulars what is insinuated as a matter of fact before evidence can be given.

In my opinion, therefore, while the plaintiff should have answered the first question objected to, viz., whether he had taken any part in endeavouring to secure Nutt's appointment because it is specifically alleged in the alleged libel itself that he had endeavoured to secure that appointment yet he was not bound to answer any of the other questions which he refused to answer because they were all directed to questions of fact as to which there was no specific allegation of fact contained in the alleged libel at all.

The defendants, therefore, may have an order that the plaintiff do attend and answer the first question above referred to, but as that question referred to an entirely innocent proceeding and had very little, if anything, to do with the libel complained of he should have his witness fees paid. And the defendants should pay the costs of this application in any event on final taxation.

Motion granted.

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March 31.

GEORGE v. HOWARD.

(Decision No. 2.)

Alberta Supreme Court, Scott, Stuart, Simmons, and Walsh, JJ. March 31, 1913.

1. BROKERS (§ II B—12)—REAL ESTATE BROKERS—COMPENSATION.

Where the authority given to the real estate broker contained in a writing specifying the vendor's price, is followed by a stipulation in a separate sentence or paragraph that the vendor will pay the broker "five per cent. commission on purchase price," the promise to pay commission is not thereby limited to a sale at the specified price but is to be construed, in the event of a lower price being accepted, as an absolute promise to pay the agreed rate of commission upon such lower price paid by a purchaser whom the broker had introduced.

[*Toulmin* v. *Millar*, 58 I.T. 96, approved; see also Annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531.]

Statement

APPEAL by defendant from judgment of Beck, J., *George* v. *Howard*, 4 D.L.R. 257.

The appeal was dismissed.

J. L. Jennison, for appellant.

James Muir, K.C., for respondent.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—My brother Beck, on evidence which, in my judgment, fully justified him in so doing, has found in the plaintiff's favour all of the facts essential to his right to succeed in this action. That being so, the only question remaining for consideration is that raised as to the sufficiency of the writing which evidences the agreement of the defendant to pay the commission sued for. This writing, which is made necessary by ch. 27 of the Statutes of Alberta for 1906, is in the following form:—

May 20/10.

T. B. George, Esq.,
Blairmore, Alta.

Dear Sir,—I will sell my hotel complete except personal effects and stock for the sum of forty thousand dollars ($40,000), covering lots 1 and 2, block 4, and lot 19, block 4, in Blairmore. I will pay you five per cent. commission on purchase price.

HENRY HOWARD.

The plaintiff found a purchaser for this property at $34,000 to whom the defendant sold at that price.

By the judgment under appeal the plaintiff is awarded $1,700, being a commission of five per cent. on this purchase price. The defendant contends that this writing only binds him to the payment of a commission on a sale at $40,000 and that as a sale at that price was not made, the plaintiff can recover nothing. The plaintiff's submission is that the defendant's pro-

mise to pay five per cent. commission on the purchase price is not limited by the earlier words of the writing in which the defendant's willingness to sell at $40,000 is expressed, but is an absolute promise to pay the agreed commission upon such price as might be paid by a purchaser found by the plaintiff and accepted by the defendant.

The construction contended for by the plaintiff is, in my opinion, the proper one. It gives to the words, "I will pay you five per cent. commission on purchase price" their grammatical and ordinary sense. There is no connection upon the face of the writing between these words and the sum of $40,000 mentioned in the earlier part of it by which the defendant's liability can be limited as he suggests that it should be. The writing was drawn by him and the promise is made by him, and if there is any ambiguity in the expression it must therefore be taken most strongly against him. He could, by placing the word "said" before the words "purchase price" have made it plain beyond question that it was only upon a $40,000 purchase price that payment of the commission could be exacted from him, but he did not do so. The agreement between the parties of which this writing is the evidence was, I think, that the plaintiff should be paid a commission in the event which has happened, and under the construction which I am placing upon the writing, it evidences the true agreement so arrived at.

I think that the plaintiff, under the arrangement made between him and the defendant and the evidence of that arrangement contained in the writing set out above, is within the words of Lord Watson, in the House of Lords case of *Toulmin* v. *Millar*, 58 L.T. 96, when he says:—

> When a proprietor with the view of selling his estate goes to an agent and requests him to find a purchaser, naming, at the same time, the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent the latter will be entitled to his commission although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of those negotiations.

The appeal should be dismissed with costs.

Appeal dismissed.

MAN.

C. A.

1913

April 14.

TREMBLAY v. DUSSAULT.

(Decision No. 2.)

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

1. CONTRACTS (§ I E 5 C—108)—SUFFICIENCY OF WRITING—SIGNATURE "PER" ONE OF SEVERAL JOINT OWNERS—STATUTE OF FRAUDS.

A receipt for the deposit on a sale of land expressed to be "subject to owners' approval" and containing a statement of the price and terms of sale will not satisfy the Statute of Frauds where it is signed "per" one of several joint owners and was repudiated by the co-owners, who declined the deposit and had it returned to the proposed purchaser.

[*Tremblay* v. *Dussault* (No. 1), 8 D.L.R. 348, affirmed.]

Statement

APPEAL from decision of Curran, J., *Tremblay* v. *Dussault* (No. 1), 8 D.L.R. 348.

The appeal was dismissed.

H. P. Blackwood, and *A. Bernier*, for the plaintiffs.

A. Dubuc, and *J. Mondor*, for the defendant.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—This is an action by the plaintiffs, owners of certain property in St. Boniface, to remove a caveat filed by the defendant, who counterclaimed for specific performance.

The action was tried before Mr. Justice Curran, who gave judgment in favour of the plaintiffs, vacating the caveat and dismissing the counterclaim.

The memorandum on which the caveat was based is in the form of a receipt, which is set forth by the learned trial Judge, and which was given by Deniset, one of the owners, who signed simply "per F. Deniset" and was expressed to be "subject to the owner's approval." The trial Judge finds that Tremblay & Co. and Gevaert, two of the owners, refused to assent to the sale and rejected the defendant's offer as soon as it came to their knowledge. This finding establishes as a fact that there was no concluded contract between the parties, and the defendant, therefore, must fail. This puts an end to the matter and there is no need of discussing the other questions brought forward on the argument of this appeal.

The defendant's appeal must be dismissed with costs.

Appeal dismissed.

KENNERLEY v. HEXTALL.

(Decision No. 2.)

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April 15.

Alberta Supreme Court, Walsh, J. April 15, 1913.

1. PLEADING (§ III A—303)—PLEAS AND ANSWERS—DENIALS IN DEFENCE.

Under a rule of pleading which requires each party to deal specifically with each allegation of fact of which he does not admit the truth (Alberta rule 118), denials of the allegations in each of several paragraphs of the statement of claim may be pleaded by separate paragraphs of the statement of defence alleging as to each separately that the defendant "denies each and every of the allegations and facts set forth and contained" in the particular paragraph.

[*Adkins* v. *North Metropolitan Tramway Co.*, 63 L.J.Q.B. 361, 10 Times L.R. 173, applied; and see Annotation to this case.]

2. PLEADING (§ I Q—135)—SURPLUSAGE—REPETITION.

A paragraph of a statement of defence which merely repeats, in effect, what is more formally pleaded in other parts of the defence, may be struck out as unnecessary under Alberta rule 127.

3. ASSIGNMENT (§ II—20)—EQUITABLE ASSIGNMENT—TRANSFER OF HALF INTEREST IN DEBT.

When an action is brought for the whole of a debt in the name of the original creditor, although the defendant debtor has been given notice of an assignment of a half interest therein by the original creditor to a third party, the defendant may properly plead such assignment and notice in reduction of the plaintiff's claim, and to protect himself from the claim of such assignee, whether or not the latter's claim to a half interest could be sued in the name of the assignee or the transfer operated only by way of equitable assignment.

[See *Fraser* v. *Imperial Bank*, 10 D.L.R. 232, and Annotation thereto as to equitable assignments.]

Statement

MOTION by plaintiff to strike out certain paragraphs of the defendant's statement of defence.

The motion was allowed in part and dismissed as to part.

J. C. Brokovski, for the plaintiff.

C. T. Jones, for the defendant.

Walsh, J.

WALSH, J.:—To each of six paragraphs of the statement of claim the defendant pleads that he "denies each and every of the allegations and facts therein set forth and stated." Each of these paragraphs contains several material allegations. The plaintiff moves to strike out the paragraphs of the statement of defence which thus plead to these paragraphs on the ground that they infringe the provisions of rule 118, which requires amongst other things that—

> each party must deal specifically with each allegation of fact of which he does not admit the truth except damages.

The form of pleading here adopted by the defendant met with the approval of the Court in *Adkins* v. *The North Metropolitan Tramways Co.*, 63 L.J.Q.B. 361, in which the entire statement of defence consisted of denials in this form of the allegations contained in each paragraph of the statement of claim, English rule 17 of Order 19 being exactly the same as

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our rule 118. Upon principle, I can see no objection to it, for surely every allegation of each paragraph is thus as effectively denied as if it was set out verbatim in the defence and then denied, and it is done in a form which, whilst avoiding prolixity, does not place the plaintiff at any disadvantage. The motion to strike out these paragraphs fails.

By paragraph 7, the defendant pleads,

> in further answer to said paragraph 5, he is not indebted to the plaintiff in any sum whatever;

and by paragraph 25 he pleads "defendant is not indebted to plaintiff in any sum whatever." The plaintiff moves to strike out these paragraphs. These paragraphs but summarize the defence, the particulars of which are contained in the other paragraphs of the pleading which mean nothing more than that the defendant is not indebted to the plaintiff. In this sense, they are unnecessary and therefore offend against rule 127. I cannot understand why the plaintiff should have objected to them, for they certainly do not embarrass him, but having objected, I think they must go. They will be struck out.

By paragraph 26, the defendant pleads that

> the plaintiff by an absolute assignment in writing assigned a half interest in the said agreement of April 21, 1911, and in the debt (if any) sued herein to one William P. Taylor of Calgary and notice in writing of the said assignment was given the defendant before action.

The plaintiff moves to strike out this paragraph upon the ground that it is in effect a plea in abatement which is prohibited under rule 20 of Order 21 of the English practice. It seems to me, however, that this paragraph is pleaded not for the purpose of putting an end to or preventing the trial of the plaintiff's action, but by bringing to the attention of the Court the fact that a third party claims that the plaintiff has divested himself of and that he has acquired a half interest in the debt sued for, making sure that the plaintiff recovers no more of the total of the amount claimed than he is entitled to. The only effect that it can have is to reduce the amount of the plaintiff's recovery if he succeeds in the action and it seems to me that for this purpose it is properly pleaded. I am not considering now whether or not an assignment of a half interest in a debt is an assignment of a chose in action under the statute for which the assignee could sue in his own name. The doubt suggested by Chitty, L.J., in *Durham Brothers* v. *Robertson*, [1898] 1 K.B. 765, 770, as to whether or not an assignment of part of an entire debt is within the corresponding English statute, does not appear to have been solved as yet. If it is not, the assignment in question may perhaps be given effect to as an equitable assignment. These are questions beyond the

scope of this motion and I am not assuming to deal with them. But it does appear to me that when a man is sued for an entire debt by the original creditor, it is quite proper for him by his pleading to draw to the attention of the Court the fact that another claims a part of it, if for no other reason than to protect himself against a recovery by the plaintiff of a judgment for more than the plaintiff is entitled to. I dismiss the motion to strike out this paragraph.

The costs of this application will be in the cause.

Motion allowed in part and dismissed in part.

Annotation—Pleading (§ III A—303)—Statement of defence — Specific denials and traverses.

Annotation

Pleadings—Specific denials and traverses

In provinces in which the English Judicature Act system of pleading has been adopted, a provision will usually be found requiring that the statement of defence shall deal specifically with each allegation of fact contained in the statement of claim, in default of which the allegation which has not been specifically denied, allegations of damage being usually excepted, is to be taken as admitted. The Alberta rule (No. 118), upon which the case above reported is founded, is identical with the English rule (order 19, rule 17, marginal number 213). The British Columbia Supreme Court Rules 1906 (B.C., order 19, rule 17), the Saskatchewan Supreme Court Rules 1911 (Sask. rule 157), and New Brunswick Judicature Rules 1909 (order 19, rule 17, marginal number 173), each contain a similar provision to the English rule, which followed, in this respect, the common law system of pleading. In Ontario, a different system was adopted, with the Judicature Acts of 1881 and its revisions, as is shewn by rule 272 (Con. Rules, Ont. 1897). The latter practice rule in force in Ontario introduces the equity practice as to admissions in pleadings and declares that, "save as otherwise provided, the silence of a pleading as to any allegation contained in the previous pleading of the opposite party shall not be construed as an admission of the truth of such allegation."

In consequence of this rule, it is held in Ontario, that, where a material fact is alleged in a pleading, and the pleading of the opposite party is silent in respect thereto, the fact must be considered in issue: *Waterloo Mutual Co.* v. *Robinson*, 4 O.R. 295; *King* v. *Bailey*, 31 Can. S.C.R. 342. Each party is, however, to admit "such allegations in the pleadings of the opposite party as are true"; Ont. C.R. 1897, 269; but the only penalty for failure to make the admission is that the defaulting party may, afterwards have to pay the extra costs which the Court finds to have been occasioned by the failure to make admissions in the pleadings. The result is that, ordinarily, only such facts alleged in the plaintiff's pleading are admitted in the defence as the defendant himself desires to set up, and the defendant attempts to reserve, by reason of his failure to admit, an opportunity to find the plaintiff unprepared at the trial to satisfy the onus, which the law places upon him, of proving a point in his case which is not the real issue or which could not be successfully controverted. While the same result might occur if the defendant took the trouble to

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Annotation

Pleadings—Specific denials and traverses

Annotation (*continued*)—Pleading (§ III A—303)—Statement of defence—Specific denials and traverses.

plead specific denials in conformity with the English rule in jurisdictions where it has been adopted, a defendant would hesitate to categorically deny in one part of his pleading what he himself intended to set up at the trial, or by specific denial to allege in his plea what would possibly be inconsistent with other portions of his own pleading.

Under the Manitoba King's Bench Rules, R.S.M. 1906, a statement of defence shall contain a "statement in plain and ordinary language of the matters of defence upon which the defendant intends to rely" (K.B. rule 287); shall admit such of the allegations of the statement of claim as the defendant knows or can readily ascertain to be true and in his denials of allegations of fact, shall "*deny specifically* wherever possible" (K.B. rule 290); and all allegations in a statement of claim shall be held to be admitted "unless the party defendant has denied the same" (K.B. rule 290).

To an action charging negligence on the part of the defendants in leaving open and unguarded a trap-door in their premises through which the plaintiff, while lawfully there, fell and was injured, it is proper for defendants to plead under rule 290 of the King's Bench Act as re-enacted by 7 and 8 Edw. VII. ch. 11, sec. 4, denying in separate paragraphs the leaving of the trap-door open or unguarded, and that it was by reason of its being open or unguarded that the plaintiff fell into it, if (which was not admitted) he did in fact fall into it, and setting up in other paragraphs that, if the trap-door was open (which was denied) it was sufficiently guarded by a rail and was not dangerous, that there was no negligence on the part of the defendants, and that the plaintiff did not exercise ordinary care or caution in the matter: *Smith* v. *Canada Cycle and Motor Company*, 20 Man. L.R. 134.

Rule 306 of the King's Bench Act, R.S.M. 1906, ch. 40, requires that "pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved," and as amended by rule 326, 7 and 8 Edw. VII. ch. 12, sec. 6, authorizes the striking out of unnecessary or scandalous matter in a pleading; yet, if pleadings are merely prolix by reason of containing passages setting out facts which are immaterial and unnecessary and passages which are merely recitals of the evidence proposed to be adduced, such passages should not be struck out under rule 326 as they are neither embarrassing nor tending to prejudice or delay the fair trial of the action: *MacLean* v. *Kingdon Printing Co.*, 18 Man. L.R. 274.

Action for the price of goods alleged to have been sold and delivered to the defendant, and, in the alternative, damages for non-acceptance of the goods and non-payment for same. By the third paragraph of the statement of defence, the defendant denied that she had purchased or received the goods, and then proceeded as follows: "And the defendant is informed that the alleged claim of the plaintiffs for the said brushes (part of the goods), if any, arose prior to the time when the defendant started in business, and if the same exists at all, which the defendant does not admit, it is against the estate of the defendant's late husband and not against the defendant":—Held, that the part of the paragraph quoted was embarrassing, and should be struck out because it was not stated positively

Annotation (*continued*)—**Pleading** (§ III A—303)—**Statement of defence—Specific denials and traverses.**

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Annotation

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but only on information, and was thus in violation of rule 306 of the King's Bench Act, and also because it sought to raise an immaterial issue. Paragraph 5 was in part as follows: "The defendant says that she never agreed to purchase mufflers from the plaintiffs for the price and sum of £129 15s. 1d., as alleged by the plaintiffs." The Court held that this was an evasive or ambiguous denial containing a "negative pregnant," and was not in compliance with rule 290, which requires a specific denial, if any is made, as the statement would be true even if the fact was that the defendant had purchased the goods for £129 15s., and that this paragraph must be amended or in default struck out. Paragraph 7 alleged that some of the goods referred to in the statement of claim, if ordered at all, which was not admitted, were ordered under a contract set out in another paragraph setting up a counterclaim, a contract which was in no way identified with that sued upon and alleged a breach of such other contract and went on to set up two quite different defences. It was held that this paragraph also was embarrassing and should be amended, or in default struck out as conflicting with Man. K.B. rule 309: *Schweiger* v. *Vineberg*, 15 Man. L.R. 536 (Perdue, J.).

Questions of substantial difficulty or importance raised by the statement of defence should not be disposed of on motion in chambers to strike out paragraphs of the statement of defence as embarrassing, but should be left to be dealt with at the trial of the action: *Long* v. *Barnes*, 14 Man. L.R. 427 (Killam, C.J., Dubuc, and Bain, JJ.).

In the statement of defence in an action for malicious prosecution a simple traverse of the plaintiff's allegation of the want of reasonable and probable cause is sufficient. In such an action, when the defendant in separate paragraphs of his statement of defence alleges certain facts tending to shew reasonable ground for his belief in the plaintiff's guilt, but leaves it open for himself to prove other and distinct facts for the purposes of this defence at the trial, so that the plaintiff might be misled into assuming the allegations on the record to be all he has to meet, such paragraphs should be struck out as embarrassing. In such a defence it is not sufficient to allege that the defendant received certain information without shewing the source or that it was reliable, or to allege possession by the plaintiff of the animals which he had been accused of stealing without shewing that it was recent possession, or that all the information received had been laid before the magistrate before whom the charge had been laid and before counsel who advised the prosecution complained of, without shewing what facts had been laid before them; and paragraphs of the defence setting up such matters without shewing absolutely reasonable and probable cause should be struck out: *Rogers* v. *Clark*, 13 Man. L.R. 189 (Killam, C.J.).

The exact terms of the English rule 213 (order 19, rule 17), are as follows:—

"17. It shall not be sufficient for a defendant, in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

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Annotation

Pleadings—Specific denials and traverses

Annotation (*continued*)—Pleading (§ III A—303)—Statement of defence—Specific denials and traverses.

Before the Judicature Act, the defendant was allowed to plead what was called "the general issue," *i.e.*, "that he is not guilty," or "that he never was indebted as alleged"—both of which were conclusions of mixed law and fact. Now, a defendant may no longer deny generally the facts alleged in the statement of claim. He must take each matter which is alleged against him separately, and either admit it, or deny it, or say that he does not admit it. "It is not merely denial which is meant; the rule covers non-admission" as well. Whether the defendant says, "I deny" or "I do not admit," he is equally bound to deal specifically with each allegation of fact of which he does not admit the truth (*per* Jessel, M.R., in *Thorp* v. *Holdsworth*, 3 Ch.D. 640). This is the general principle which now governs every traverse. And in order to make this general principle quite clear, special instances are given in subsequent rules:—

"In actions for a debt or liquidated demand in money, comprised in O. 3, r. 6, a mere denial of the debt shall be inadmissible" (O. 21, r. 1).

"In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, *e.g.*, the drawing, making, endorsing, accepting, presenting, or notice of dishonour of the bill or note" (O. 21, r. 2).

"In actions comprised in O. 3, r. 6, classes (A) and (B), a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed" (O. 21, r. 3; and see *Copley* v. *Jackson*, W.N. (1884), 39).

"In actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff" (O. 21, r. 3).

What is meant by "dealing specifically" with an allegation of fact? It means that the party pleading must make it perfectly clear how much of it he admits and how much of it he denies. If he does this, the Court will not quarrel with the phrase which he uses. He must not deny *en bloc* everything alleged against him: Annual Prac. 297. A defendant may not now plead that "he denies specifically every allegation contained in the statement of claim." Still, in order to deny specifically, it is not necessary to write out every sentence in the statement of claim and traverse it in detail. It is sufficient, when dealing with matters of inducement or any other allegations which do not go to the gist of the action, to plead that "the defendant denies each of the allegations contained in paragraph 8." This will have the same effect as copying out the whole paragraph and constantly inserting "not." But when the pleader comes to those allegations which are of the gist of the action, he must be more precise. He must plead: "The defendant never agreed as alleged," or "never spoke or published any of the said words," or "never made any such representation as is alleged in paragraph 2 of the statement of claim." (This is, at all events, the practice in the King's Bench Division; it is in accordance with the latest decision on the point: *Adkins* v. *North Metropolitan Tramway Co.*, 63 L.J.Q.B. 361; and not inconsistent with the earlier cases, such as *Harris* v. *Gamble*, 7 Ch.D. 877; *Smith* v. *Gamlen*, W.N. (1881), 110;

Annotation (*continued*)—**Pleading** (§ III A—303)—**Statement of defence—Specific denials and traverses.**

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Rutter v. *Tregent*, 12 Ch.D. 758; *British and Colonial Land Association* v. *Foster*, 4 Times Rep. 574; and *Burdett* v. *Humphage*, 92 L.T. Jo. 294).

Sometimes, in order to obey the rule and to deal specifically with every allegation of fact of which he does not admit the truth, it is necessary for the defendant to place on the record two or more distinct traverses to one and the same allegation. Thus, if he pleads: "The defendant never broke or entered the plaintiff's close," he thereby admits that the close in question belongs to the plaintiff. If he intends at the trial to deny that the plaintiff owned or possessed that close, he must say so distinctly and in a separate plea. If he wishes to raise both defences—*i.e.*, to deny the act complained of, and also the plaintiff's title to the land—he must put on the record two separate paragraphs, *e.g.*: 1. "The defendant never broke or entered the said close"; 2. "The said close is not the close of the plaintiff." Merely to deny an allegation in terms will often be ambiguous, and therefore evasive. The pleader must always answer "the point of substance" alleged against him, otherwise his pleading will be deemed evasive (r. 19). And, if an allegation be made against him, with details of time and place, etc., he must deny the substance of the allegation, and not confine himself to denying it along with those inessential details: see r. 19.

Only allegations of fact should be denied; matter of law should not be traversed. And the defendant should never traverse matter not alleged against him; he should be content to answer what is laid against him in the statement of claim, and not trouble about any other matters which the plaintiff might have, but has not raised: *Rassam* v. *Budge*, [1893] 1 Q.B. 571. Moreover, it is no part of his duty, when drafting his defence, to anticipate what the plaintiff may hereafter allege in his reply.

Odgers, on Pleading, 7th ed., 160, says: "If your opponent's allegation be in the conjunctive, you must plead to it in the disjunctive; otherwise your traverse may be too large; for it is seldom, if ever, necessary for your opponent to prove at the trial the whole of his allegation precisely as he has pleaded it. In other words, when traversing, remember always to turn "and" into "or," and "all" into "any." How far should the pleader confine himself to merely traversing? Should he not, after denying his opponent's story, go on to add his own version of the matter? This is sometimes a difficult question. The pleader must use his own discretion. It is sometimes most desirable to do so, in order to shew clearly what is the real point in dispute: (see the judgment of Jessel, M.R., in *Thorp* v. *Holdsworth*, 3 Ch.D. 367, 45 L.J.Ch. 406). If, for instance, a plaintiff, in his statement of claim, sets out or refers to certain clauses of a written contract on which he relies, the defendant should certainly set out or refer to other clauses, if any, which tell in his favour. Again, if the plaintiff gives his version of the effect of a written document, it will certainly tend to clear the matter up if the defendant, instead of merely denying the plaintiff's version, states also his own construction of the document. And, in many cases, it may be desirable for a defendant thus to state definitely what his exact contention is. But, by so doing, he necessarily somewhat limits his case at the trial. He has no longer the same free hand. And there is this further danger, that if the defendant, instead of merely denying, sets up an affirmative case as well, both Judge and jury will expect him to prove his affirmative case, and are apt to find against him if

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Annotation (*continued*)—Pleading (§ III A—303)—Statement of defence—Specific denials and traverses.

he does not. The onus of proof is not really shifted by such a method of pleading: *Kilgour* v. *Alexander*, 14 Moore 177. But if, when accused of a tort, the defendant pleads, "It was A. who did it, not I," the jury will be inclined to treat this as an admission that either A. or the defendant did it, and to conclude that, if the defendant cannot prove his assertion that A. did it, he must have done it himself: Odgers, on Pleading, 7th ed., 162.

The case of *Adkins* v. *North Metropolitan Tramway Co.*, 63 L.J.Q.B. 361, which is applied in the principal case has not met with universal approval. It would seem that the proposition for which it is quoted should in fact be limited to matters of inducement set up in a pleading: *Lougheed* v. *Hamilton*, 1 A.L.R. 16. Mr. Justice Wetmore, in *Daniel* v. *Canadian Pacific R. Co.* (1907), 6 W.L.R. 538, refused to follow it.

Stuart, J., in *Lougheed* v. *Hamilton*, 1 A.L.R. 16, said: "It has always been my opinion that *Adkins* v. *Metropolitan Tramways Co.*, 63 L.J.Q.B. 361, 10 Times L.R. 173, was wrongly decided."

In *Smith* v. *Canadian Pacific R. Co.*, 7 Terr. L.R. 56, it was held that a general denial of "each and every material allegation" in a statement of claim is a bad plea.

The question arose upon an application to join other pleas with a plea of "not guilty by statute" in a negligence action; Wetmore, J., said he would allow the defendants to plead denials of material facts set out in the statement of claim, but they must satisfy the Court by affidavit that they have, or have reason to believe that they have, good grounds for the denial.

He drew attention, in the last-mentioned case, to the fact that in *Adkins* v. *North Metropolitan Tramways Co.*, 63 L.J.Q.B. 361, there were two denials and each denial was limited to the allegations in a specified paragraph of the statement of claim.

Where parts of a defendant's pleading sufficiently disclose a reasonable ground of defence against the plaintiff or a reasonable cause of counterclaim, it will not be struck out as embarrassing or as tending to prejudice the plaintiff under rule 167 of the Saskatchewan Rules of Practice, 1911: *Douglas* v. *Young*, 8 D.L.R. 788, 22 W.L.R. 733.

Under the mode of pleading introduced by the Ontario Judicature Act the statement of claim must allege the material facts on which the plaintiff relies in support of his case, and the defendant in his statement of defence may either (1) deny or refuse to admit the facts stated; (2) confess or admit them and avoid their effect by the assertion of other facts constituting an answer thereto, or (3) admit the facts and question their effect as a matter of law. Where, therefore, to the plaintiff's statement of claim for work done and materials provided for a company, for which the defendant had agreed to become responsible, and setting out the items upon which their claim was based, the defendants by one of the paragraphs of the statement of defence, set up that no account of the said moneys so claimed to be due, except as to one item, which was disputed, had been rendered to the defendants, nor payment asked for or demanded before action brought; and by another paragraph, that prior to the commencement of the action the defendants offered to the plaintiffs a specified sum (which was less than the amount claimed) and that plaintiffs had not demanded, nor made any claim for any amount in excess thereof; it was

Annotation (*continued*)—Pleading (§ III A—303)—Statement of defence—Specific denials and traverses.

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held, that no issue, or one immaterial to the maintenance of the action, had been tendered, and that the paragraphs were embarrassing, and must be struck out: *Webb* v. *Hamilton Cataract Power Company, Limited*, 7 O.L.R. 670 (MacMahon, J.).

Questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing: *Centre Star* v. *Rossland Miners' Union*, 9 B.C.R. 531.

A paragraph in a statement of defence which asserts a conclusion of law without alleging the facts upon which such conclusion is based is bad and will be struck out. Alternative defences must not repeat prior inconsistent defences, and will be struck out if they do: *Strathdee* v. *Manufacturers Life Insurance Company*, 2 A.L.R. 141.

Untrue allegations in a statement of defence will be struck out only when an abuse of the process of the Court has been clearly and unmistakeably established: *Owen* v. *Tinning* (No. 1), 3 Terr. L.R. 403.

Plaintiff's statement of claim alleged that on or about a certain date he was the owner of certain goods and chattels described, and that, on or about the date mentioned, defendant converted to his own use the goods and chattels described. It was held, that pleas which denied that plaintiff was the owner of the goods and chattels described, without adding the words "or any of them," and which confined the denial of plaintiff's ownership of the goods and chattels, and defendant's conversion of them, to the dates mentioned in the statement of claim, were bad and must be set aside: *McDonald* v. *Lowe*, 34 N.S.R. 531.

A statement of defence traversed allegations in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without shewing the defendants' title in the defence, and further set up laches as an alternative defence. It was held that the defendants were bound to set forth their title in their statement of defence: *Esquimault and Nanaimo Railway Co.* v. *New Vancouver Coal Co.*, 9 B.C.R. 162, reversing *S.C.*, 6 B.C.R. 306.

Under the Quebec practice, where the defendant in his plea begins by denying generally all the allegations of the plaintiff's declaration, he is excluded, under art. 202 C.C.P., from proceeding to special allegations upon the case: *Chapleau* v. *St. Louis*, 20 Que. S.C. 238 (Davidson, J.).

When a defendant pleads a general denial in the first two allegations, and then pleads specially in the remaining paragraphs, he will be permitted to make option within four days, and if he fails to do so, the special allegations will be struck out: *Rutherford* v. *Macy*, 4 Que. P.R. 326 (Davidson, J.).

Under the Code of Civil Procedure (Que.), art. 202, each party must reply specifically and categorically to the allegations of the opposite party, either by admitting or denying them, or by declaring that he is ignorant of them. The party may, nevertheless, deny generally the said allegations, but a general denial excludes any other defence, answer or reply upon the facts of the case: *McLeod* v. *Montreal Street Railway Co.*, 20 Que. S.C. 8.

But the special denial of each of the allegations in a declaration does not constitute a general denial in the sense of art. 202 C.C.P., and does

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Annotation (*continued*)—Pleading (§ III A—303)—Statement of defence—Specific denials and traverses.

not exclude any other special defence: *Beaulac* v. *Lupien*, 21 Que. S.C. 216 (Sup. Ct.).

Allegations which contradict preceding allegations in a defendant's plea containing admissions will be struck out on motion by the plaintiff with no right of election by the defendant: *Destroumaisons* v. *Dominion Ice Co.*, 4 Que. P.R. 368 (Sup. Ct.).

The special denial of each allegation in the declaration does not constitute a general denial within the meaning of art. 202 C.P.Q., the defendant may set up certain facts which can only be added to the denial by a special paragraph: *Endrukaitis* v. *Alexandrovitch*, 10 Que. P.R. 207, but compare *Jaboli* v. *Lawande*, 9 Que. P.R. 292.

In an action in a County Court (in N.B.) the fact that the special matters set out in a notice of defence could be given in evidence under the general issue is not necessarily a good ground for an application to strike the notice out: *Bennett* v. *Cody*, 35 N.B.R. 277.

Under the modern practice in Nova Scotia, separate paragraphs of a statement of defence are not to be regarded as separate pleas, as was the former practice, but the defendant may rely upon the whole statement of defence: *Stimpson Computing Scales Co.* v. *Allen*, 10 D.L.R. 349; *Holmes* v. *Taylor*, 32 N.S.R. 191.

A misrepresentation as to an instrument which causes a total misapprehension of its nature by the person who signed it, will entitle him to plead *non est factum* in an action on the instrument, but not where the person signing knew the nature of the instrument, but laboured at the time under a misapprehension of the effect or contents of the instrument: *Carlisle* v. *Bragg*, [1911] 1 K.B. 489, and *Howatson* v. *Webb*, [1908] 1 Ch. 1; *Stimpson Computing Scales Co.* v. *Allen*, 10 D.L.R. 349.

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April 7.

STRONG v. LONDON MACHINE TOOL CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Hodgins, JJ.A., and Latchford, J. April 7, 1913.

1. BROKERS (§ III B—35)—BUSINESS AND GENERAL BROKERS—COMPENSATION—SUFFICIENCY OF SERVICES—INTERMEDIATE ABORTIVE NEGOTIATIONS ON STIPULATED COMMISSION—QUANTUM MERUIT.

Where an agent is employed to bring together his employers (as vendors) and a prospective purchaser, and where subsequently (after negotiations and a tentative agreement of sale) his employers, believing a bargain within reach enter into an agreement with the agent fixing his commission on the basis of the presumed selling price and making the payment of same contingent on the deal going through, the agent is still entitled to remuneration if the bargain at the presumed price is not carried out, but a sale is effected by the principal at a lower price; under such circumstances the agent is entitled to recover as upon a *quantum meruit*.

[See as to right to commission generally, *Singer* v. *Russell*, 1 D.L.R. 646, and Annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531.]

Statement

APPEAL by the defendants from the judgment of Middleton, J., 4 O.W.N. 593.

The appeal was dismissed.

M. K. Cowan, K.C., and *T. Hobson*, K.C., for the defendants.
J. W. Bain, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—If, as contended by counsel for the appellants, the proper conclusion of fact is, that the measure of the respondent's rights is to be found in the agreement of the 14th July, 1911, the action fails, because in that case the right to payment for his services was contingent on an agreement, in the terms of the writing of the 29th July, 1911, being concluded between the appellant and the Canada Machinery Corporation Limited; and such an agreement was not made.

In my view, the agreement of the 29th July, 1911, is not the measure of the respondent's rights.

Before the making of that agreement, the respondent, who was a land agent or broker, had been retained by the appellants to endeavour to bring about a sale to the Canada Machinery Corporation Limited of the business and property of the appellants, or, as it was called, a merger between that company and the appellants; and the proper conclusion upon the evidence is, I think, that the respondent was instrumental in bringing the two companies together after a suggestion rather than negotiations for the sale had been, if not abandoned, at least suspended.

The evidence satisfies me, and the learned Judge must have thought, that it was not part of the arrangement between the parties that commission should be paid only in the event of the sale resulting in a surplus to the appellants. The evidence of the respondent on this point is clear, and that of Mr. Yeates, the managing director of the appellant company, is not satisfactory. When examined in chief as to the arrangement, he says nothing about any such limitation; and it was not until his cross-examination that he stated that the commission was not to be paid unless there was a surplus.

When the agreement of the 14th July, 1911, was entered into, it was supposed that an agreement for sale in the terms of the writing of the 29th July, 1911, had been reached; and the purpose of the former agreement was to settle the remuneration which the respondent was to receive for his services, the amount of it not having been previously arranged.

It turned out, however, that the writing of the 29th July, 1911, though purporting to be executed by the Canada Machinery Corporation, was not binding on it, and the company refused to purchase on the terms mentioned in it.

Notwithstanding its refusal to purchase on those terms, negotiations were carried on with a view to arranging terms, and these negotiations resulted in a sale being effected, but upon terms much less beneficial than those which it was supposed had been come to.

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To adopt the view contended for by the appellants would give to the agreement of the 14th July, 1911, a meaning different from that which, in my opinion, the parties to it intended that it should bear, and different from that which the language used in its imports.

Its object was plainly, as I think, merely to fix the commission which the respondent was to receive if the sale that it was supposed had been arranged for was made; and its effect is to leave open for arrangement between the parties the amount of the commission if a sale should be made on different terms.

It is not as if the respondent had been employed to bring about a sale on the terms of the writing of the 29th July, 1911. Had that been the character of his employment, the cases cited by the learned counsel for the appellants might and probably would have applied, and the respondent would not be entitled to recover; but that was not its character. His employment was, I have said, to endeavour to bring about a sale, not a sale upon the terms of the writing or upon any terms except those which are to be implied from the nature of the transaction—that the person to whom the appellants desired to sell should be willing to purchase on terms to which the appellants would be willing to agree.

The case is, in my opinion, to be dealt with on the footing of the employment being that the respondent should bring the suggested purchaser and the appellants together; and, he having done that, and a sale having been eventually made to the suggested purchaser, the respondent is, in my opinion, and as the trial Judge held, entitled to recover as upon a quantum meruit; and I see no reason for differing from the conclusion of my learned brother as to the amount to which the respondent is entitled.

I would dismiss the appeal with costs.

Appeal dismissed.

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CASES REPORTED, VOL. X., PART 4.

CANADA FOUNDRY CO. (Appellants) v. BUCYRUS CO. (Respondents).

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Feb. 18.

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Brodeur, JJ. February 18, 1913.

1. TRADEMARK (§ II—9a)—DESCRIPTIVE WORD—VARIATION.

Where a particular name (*ex. gr.* Bucyrus) has been applied to a specific line of goods manufactured by a company for so long a time that the designation so given by the company, although originally a mere geographical name, had acquired a secondary meaning as identifying such goods although not registered as a trademark, a registration in opposition thereto of such name with the prefix of the word "Canadian" (*ex. gr.* Canadian Bucyrus) is not permissible under the Trade Marks Act, R.S.C. 1906, ch. 71, and will be cancelled upon petition.

[*Bucyrus Co.* v. *Canada Foundry Co.*, 8 D.L.R. 920, 14 Can. Ex. C.R. 35, affirmed.]

2. TRADEMARK (§ II—8)—GEOGRAPHICAL NAME—SECONDARY MEANING.

Where a geographical name has become identified with manufactured goods of a certain class manufactured by a particular manufacturer and has in that respect acquired a secondary meaning, it may be registered as a specific trademark to such goods under the Trade Marks Act, R.S.C. 1906, ch. 71.

[*National Starch Application*, [1908] 2 Ch. 698, referred to; *Bucyrus Co.* v. *Canada Foundry Co.*, 8 D.L.R. 920, 14 Can. Ex. C.R. 35, affirmed.]

Statement

APPEAL from a judgment of the Exchequer Court of Canada in *Bucyrus Co.* v. *Canada Foundry Company*, 8 D.L.R. 920, 14 Can. Ex. C.R. 35, in favour of the present respondents, the Bucyrus Company.

The appeal was dismissed.

Two questions arose on this appeal. First, whether or not the respondents were entitled to register as a trade-mark the geographical term "Bucyrus," which for many years had been applied to the goods they manufactured and under which name said goods had become widely known in the United States and Canada; secondly, whether or not the appellants, manufacturing similar goods in Canada, could register the words "Canadian Bucyrus" as their trade-mark. By the judgment of the Exchequer Court the first question was answered in the affirmative and the second in the negative.

Argument

J. K. Kerr, K.C., and *J. A. Paterson*, K.C., for the appellants:—We are entitled to use a trade name similar to that of the respondents so long as we take effective steps to prevent the public from being deceived as we have done. See *Grand Hotel Co. of Caledonia Springs* v. *Wilson*, 2 Ont. L.R. 322; 5 Ont. L.R. 141; [1904] A.C. 103; *Orr Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376; *Pabst Brewing Co.* v. *Ekers*, Q.R. 21 S.C. 545. The word "Bucyrus" is a geographical as well as an historical term and cannot be registered as a trademark. *Re Salt & Co.*, 63 L.J.

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Ch. 756; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U.S.R. 665.

D. L. McCarthy, K.C., for the respondents, referred to *Partlo* v. *Todd*, 17 Can. S.C.R. 196, at p. 199; *Richards* v. *Butcher*, 8 Cut. P.C. 249, [1891] 2 Ch. 522, at p. 543; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 35 L.J. Ch. 53, at p. 64; *Re Rivière & Co.'s Trade Mark*, 53 L.J. Ch. 578.

SIR CHARLES FITZPATRICK, C.J.:—This is an appeal from a judgment rendered on an application made by the respondents to the Judge of the Exchequer Court, to expunge from the register the words "Canadian Bucyrus," registered by the appellants as their trade-mark. That application was made necessary by reason of the refusal to register the word "Bucyrus" as the trade-mark of the respondents and the validity or propriety of that refusal falls also to be considered on this appeal.

Two questions therefore arise: (*a*) Should the appellants' trade-mark be removed from the register? (*b*) Is the word "Bucyrus" registrable as a trade-mark under the circumstances? The facts as to which there is practically no dispute, stated in their chronological order, lead irresistibly, in my opinion, to the conclusion that the first question must be answered affirmatively. There may be some doubt as to whether the word "Bucyrus" can be registered as a valid trade-mark; but on that question also I agree with the learned Judge of the Exchequer Court.

The petitioners, now respondents, are an American corporation engaged, since 1879, in the manufacture and sale in the United States and Canada, and other parts of the world, of particular types of wrecking cranes, pile drivers, shovels and other railway appliances, and during the greater part of that period they adopted the name "Bucyrus" to distinguish their manufactured products.

Those railway appliances speedily became known under the name of "Bucyrus" and the business of the company grew rapidly, their machinery obtaining a wide celebrity. It was sold invariably and solely under the name of "Bucyrus." All the machinery so sold had been prominently marked with the word "Bucyrus," printed on a name-plate. The respondents began to sell their machinery in Canada, and on the first of October, 1904, they entered into an agreement with the appellants by which the latter were appointed sole and exclusive agents to make, manufacture and sell in Canada, the railway appliances described in the agreement as "Bucyrus" specialties. It was expressly stipulated that all such specialties manufactured under that contract should be

characterised and distinguished under the name "Bucyrus" that this name shall appear prominently on the complete machines, and that the *method and system of marking adopted by the Bucyrus Company* on its own apparatus in the United States shall be followed as closely as practicable.

This contract remained in force until 1909 when, in the month of November of that year, it was cancelled by the appellants, who continued thereafter, as they had done before, to sell steam shovels, cranes, etc., with the name "Bucyrus" upon them. As the appellants say in their factum, by judicious advertising and adopting energetic business methods they established a large and prosperous business for the sale of products manufactured under that agreement. And in these circumstances they, in the month of February, 1911, obtained permission to register as their trade-mark the words "Canadian Bucyrus," to be applied to steam shovels, wrecking cranes and other railway appliances of their own manufacture. On or about the 7th July, 1911, the respondents also applied to register the word "Bucyrus" as their trade-mark, to be applied to their specialties, which are the same as those manufactured by the appellants and that application was refused because of the prior registration obtained by the appellants. Hence this application to expunge from the register the trade-mark "Canadian Bucyrus" and to register the word "Bucyrus" as the trade-mark of the respondents.

The respondents claimed and proved that in Canada, as elsewhere, the word "Bucyrus" had become (and was at the date of their agreement with the appellants) specially and exclusively distinctive of the railway specialties manufactured by them, and that it had always distinguished such specialties from those of all other makers whatsoever and that the use of the word "Bucyrus" conveyed to the minds both of the trade and the public in Canada and elsewhere, that the specialties to which it was applied had been manufactured by the respondents, or by the appellants under their license and by no other company, firm or person. On the evidence it appears to me conclusively established that the word "Bucyrus" has a particular signification and indicates the origin or manufacture of the thing to which it is attached. From the very first the word has been used to distinguish the machinery manufactured by the respondents from the machinery of other persons; it has been on the name-plate attached to the machinery sold by them under the designation of "Bucyrus" railway specialties. I am consequently of opinion that the word "Bucyrus" is a good trade-mark (section 5) and registrable as such.

To the objection that a geographical name is not a good trade-mark I reply by referring to: *Rey* v. *Lecouturier*, 27 Cut. P.C. 268; *The Karlsbad Case*, 29 Cut. P.C. 162.

That the respondents' goods had been upon the market for

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many years and were known under the name of "Bucyrus" specialties is not an objection (see *National Starch Co. Application*, [1908] 2 Ch. 698.

To refuse to expunge from the register the trade-mark "Canadian Bucyrus" would be to encourage unfair dealing. The object of a trade-mark is not to distinguish particular goods, but to distinguish the goods of a particular trader. It is reasonably clear by the terms of the contract between the parties that the "Bucyrus" specialties meant to the ordinary public, machinery used in the construction of railways, made by a particular firm or company and that the respondents guarded themselves carefully against the contingency which has arisen. The appellants argue here that in their advertisements they are careful to say that the goods they sell are manufactured by them in Canada, but this is not a case of passing off. The question here is: Have the appellants the right to register as their trade-mark the word "Bucyrus" either alone or in combination with the word "Canadian"? The principle which, in my opinion, ought to govern in the case of an application of this kind is to prevent the use by two companies of names so nearly resembling one another as to be calculated to deceive. In my opinion, the use of the word "Canadian Bucyrus" is calculated to cause confusion. This is evident from the mere comparison of the two names. There is also abundant evidence that confusion would result from the use of both names. The word "Bucyrus," as I have already said, had long before this application been adopted by the respondents to distinguish the goods of their manufacture and by that name they were identified and known to the public. The appellants contend that they have under license from the respondents contributed to make a market for these goods in Canada. In that argument I find a complete answer to their case because it involves the admission that the word "Bucyrus" was to the public at the time of their application, a distinctive word and meant the goods of a particular maker of whose good name and reputation they seek to get the benefit.

For all these reasons I would confirm with costs.

Davies, J.

DAVIES, J.:—I would dismiss this appeal with costs for the reasons given by Mr. Justice Cassels in the Exchequer Court.

Idington, J.

IDINGTON, J.:—When the contract of agency between the parties concerned herein was put an end to, the Canada Foundry Company had no higher right than any one else to register as its trade-mark, one embodying the name of the Bucyrus Company. Such a trade-mark was within the meaning of section 11, sub-section (*c*) of the Trade Mark and Designs Act, calculated to deceive or mislead the public and hence properly expunged by the judgment appealed from.

The respondent company seems clearly to have used the mark the judgment gives it a right to register. The fact that "Bucyrus" is the name of a town in Ohio, does not of absolute necessity in law prevent its registration. The use of a geographical or other name might in some circumstances be good ground for refusing registration of a trade-mark containing such name. But the facts in this case disclose no such state of circumstances as to preclude either its use or the registration of the trade-mark containing it.

The appeal must be dismissed with costs.

Idington, J.

DUFF, J.:—The evidence establishes that the use of "Canadian Bucyrus" as descriptive of steam shovels, railway wrecking cranes or pile drivers manufactured by the appellants would be calculated to work a deception on the public. I think that is *primâ facie* sufficient ground for cancelling the registration. As to the respondents' right to have the term "Bucyrus" registered as their trade-mark there are only two points to consider.

Duff, J.

1. It is contended that the word "Bucyrus" being a geographical name is incapable of being registered as a trade-mark. That objection is met by the evidence, which shews that it has acquired a secondary signification as designating steam shovels, railway wrecking cranes and pile drivers manufactured by (or from the designs and plans in current use by) the respondents or their predecessors.

2. The agreement of 1904 unquestionably gave the appellants a license to use the term "Bucyrus" as descriptive of objects manufactured by them under the provisions of the agreement; but the respondents did not by virtue of this license lose their exclusive property in the name "Bucyrus" as descriptive of articles of the kinds mentioned for these reasons: (*a*) The appellants acquired the right to use the term "Bucyrus" as descriptive of such articles as the agent of the respondents only and on the termination of the agency the license came to an end except it may be as regards articles already produced or in process of manufacture at the time the agreement was cancelled. (*b*) Under the agreement the appellants became entitled to the use of all the plans, designs and engineering data of the respondents relating to the manufacture of the articles governed by the agreement as well as the fullest inspection of and information relating to the respondents' processes of manufacture and the respondents became bound to furnish the appellants with advice as to all improvements and changes in type or style; the intention of the agreement obviously being that the articles manufactured and sold by the appellants should from time to time conform in all substantial respects to those which the respondents were then producing. It cannot be successfully argued that the effect of such an agreement was to make the term "Bucyrus,"

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as applied for trade purposes to articles of the kinds in question, a term *publici juris;* because the license was a license to the respondents' agents and it was a license to use the mark only in respect of articles which in the only relevant sense were intended to be in substance the respondents' own productions.

BRODEUR, J.:—I am of the opinion that the appeal should be dismissed. I concur in the reasons given by Mr. Justice Cassels in the Exchequer Court.

Appeal dismissed with costs.

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DOLL v. KING.

Alberta Supreme Court. Trial before Stuart, J. April 23, 1913.

1. EVIDENCE (§ II E 7—197)—BURDEN OF PROOF—UNDUE INFLUENCE — WIFE'S SECURITY FOR HUSBAND'S DEBT.

The burden of proving undue influence lies upon those who allege it, even where the security impeached is a mortgage of a married woman's property given to secure her husband's debts.

[*Bank of Montreal* v. *Stuart*, [1911] A.C. 120, applied.]

2. HUSBAND AND WIFE (§ II F 2—99)—MORTGAGE OF WIFE'S SEPARATE PROPERTY—CONSIDERATION—HUSBAND'S BENEFIT.

A mortgage given by the wife to secure her husband's debt may be supported as to consideration by the extension of time and further credit given to the husband by the mortgagee or the creditors whom he represents.

Statement

ACTION to set aside a mortgage, made by a married woman on the grounds that it was obtained by undue influence and that there was no consideration for it.

The action was dismissed.

Lougheed & Co., for the defendant.

L. H. Doll, for the plaintiff.

Stuart, J.

STUART, J.:—I cannot discern any distinguishing features in this case to justify me in departing from the judgment given by my brother Scott in *Smith* v. *Doll*, 16 W.L.R. 471. There are only two grounds on which it is claimed that the plaintiff is entitled to set aside the mortgage, first, that it was obtained by undue influence and, secondly, that there was no consideration for it. I do not think either contention can be sustained. I think Mrs. Doll knew very well what she was doing and was quite willing to do what she did. There is no suggestion of any undue influence of any kind. She gave the mortgage in order to secure her husband's debts and in accordance with the opinion expressed by the Privy Council in the *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, I think there is nothing in this contention and the mortgage must stand as far as that is concerned.

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Then with regard to the lack of consideration, the questions addressed by Mr. Doll to his wife seem to suggest that he was under the impression that as Mrs. Doll got nothing for it, consequently there was no consideration. Of course, consideration is, first, something received by the person signing the mortgage, but also, if that is not there, it may consist in something given by the person to whom the mortgage was given. The mortgage was given to Mr. King and the creditors gave an extension of time; they did not proceed at once to collect their debt and Mr. Doll was given further time and credit and I think that may well be termed consideration under the mortgage.

For these reasons, the action to set aside the mortgage will be dismissed with costs. As far as an action for an accounting is concerned, I think the best way will be to leave it so that the accounts will go on unless the defendant, within a certain time, one month, brings an action to recover on the mortgage. In the circumstances, I think such an action would afford a better opportunity for a full and satisfactory accounting.

Action dismissed.

GODSON v. McLEOD.

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May 2.

Ontario Supreme Court. Trial before Middleton, J. May 2, 1913.

1. CONTRACTS (§ I D 3—62)—NATURE AND REQUISITES—SUFFICIENCY OF ACCEPTANCE—ADDING A TERM TO THE OFFER.

Where a written contract is expressed in such general or ambiguous terms as to admit of different constructions, it is open to either party to allege, consistently with the terms, that he accepted the contract with a different construction to that charged by the other party and to claim that there is no real agreement between them, though the written contract must be applied if possible; so where the offer was made by letter for the sale of machinery "in place," the latter phrase being intended by the seller to indicate that delivery must be taken by the buyer of the machinery where it stood, and this interpretation was consistent with the preliminary negotiations, and the proposed buyer replied by letter purporting to accept, but adding that "in place" was considered to mean on board a railway car and that advice would be sent as to the destination to which it should be shipped, the seller properly treats the added words as an attempt to impose upon him the duty of loading on the car, and may decline to consider the alleged acceptance as any acceptance in fact.

Statement

ACTION to compel delivery of a machine or for damages for breach of an alleged contract to deliver, and for an injunction restraining the defendants from parting with the machine.

The action was tried before Middleton, J., without a jury, at Toronto, on the 1st May, 1913.

James Haverson, K.C., for the plaintiffs.
Britton Osler, for the defendants.

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MIDDLETON, J.:—The defendants, the owners of a machine known as a "Brown hoist," having completed the work for which they required it, offered it for sale. The plaintiffs desired such a machine; and negotiations took place, resulting in a verbal offer of $4,800. Throughout the course of these negotiations, it was thoroughly understood that the purchasers were to take delivery of the machine where it stood, and themselves to load it upon the railway cars for removal to their own works. The defendant McLeod desired to communicate with his partner as to the acceptance of this offer. On the 15th April, he wrote the letter of that date, declining to accept $4,800, and stating readiness to accept "$5,000 for the machine in place." On the same day, the plaintiffs wrote a letter as follows: "We accept your fifteen-ton four-wheel Brown machine at the price you name in your letter of to-day now before me, viz., $5,000 in place, which means, we presume, on car. We will advise you in a day or two how we want it shipped."

The defendant McLeod, regarding his offer as meaning $5,000 for the machine as it stood where it was, and regarding the letter of the 15th April as a departure from the terms of that offer and as an attempt to impose upon the vendors the duty of placing the machine upon the cars, interviewed the plaintiffs, pointing out that the letter was not a satisfactory acceptance of the offer, as it purported to add this new term. Some discussion took place with the plaintiff Godson, during which he intimated that he was ready to pay the $5,000, and that his company would itself load the machine; but, when the defendant McLeod asked to have this put in writing, the plaintiff declined to give any further written document, contending that the letter was an adequate acceptance of the offer. Thereupon McLeod sold the machine to another purchaser.

I do not think that the letter in question constitutes an acceptance of the offer. I take the view that it was a deliberate attempt to engraft upon McLeod's letter a meaning which Godson well understood it did not bear, and that the refusal to clear the matter up by giving an unqualified acceptance indicated a desire to leave McLeod in a position which would be embarrassing and would leave it open to the plaintiffs thereafter to have controversy concerning the expense of loading.

When it is borne in mind that this machine weighed between thirty and forty tons, and that McLeod had no apparatus at hand which would facilitate loading, the seriousness of the controversy is clearly apparent.

Mr. Haverson argued the case with conspicuous ability. His contention is, that the letter can be subdivided; that the first portion of the letter is an unqualified acceptance of the offer; and that all that follows—namely, the words "which means, we

presume, on car. We will advise you in a day or two how we want it shipped"—is an erroneous assumption on the part of the purchaser as to his rights under the contract.

I quite agree in the law suggested by Mr. Haverson. I think it is borne out by the case he relied upon, *Clyde* v. *Beaumont*, 1 DeG. & S. 397. There may be an acceptance in the true sense of the term, and the parties may thereafter discuss matters in such a way as to indicate a misunderstanding of the agreement without intending to alter or modify the contract.

But that is not the case here. I think this was a deliberate attempt to import into the inapt and ambiguous words used by McLeod a definite meaning, and so to leave it open to the plaintiffs to say to him: "Either there is no contract, or the contract must be construed with the meaning attached by our letter of acceptance." Godson very well knew that the words "in place" in McLeod's letter did not mean upon the car; and by his letter he intended to affix that particular meaning to those words. That being so, on elementary principles, there is no contract.

The principle is well stated in Leake on Contracts, 5th ed., p. 219, 6th ed. 220.

"A written contract may be expressed in such general or ambiguous terms as to admit of different constructions, in which case, though the written contract must be applied, if possible, according to its terms, it is open to either party to allege, consistently with the terms, that he accepted the contract with a different construction to that charged by the other party, so that there is no real agreement between them."

Put as favourably as possible for Mr. Haverson, this means, as applied to this case, that there is no contract; because McLeod intended the words "in place" to mean "where the machine now is." Godson did not accept the expression with this meaning, but sought to attribute to it a totally different signification. He is precluded from saying that he did accept the words as he knew McLeod intended them, because, in his letter, he has stated otherwise.

The action fails, and must be dismissed with costs.

A reference was asked to ascertain damages under the undertaking given upon the injunction motion. The defendants are content to accept the demurrage upon the railway cars. Two cars were necessary. The demurrage is $2 upon each for the first day and $3 for each subsequent day for each car. This would make a total of $62, which I allow.

This case is an admirable example of the advantage of speedy trial in cases of this character. The dispute arose on the 21st April; the writ was issued on the 23rd; and the case has been disposed of in ten days' time.

Action dismissed.

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April 10.

THE KING v. WALEBEK.

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ.
April 10, 1913.

1. INTERPRETER (§ I—5)—WRITTEN STATEMENT OF ACCUSED—CHALLENGING ACCURACY OF TRANSLATION.

A statement made by the accused upon a preliminary enquiry and reduced to writing and signed by the accused under sec. 684 (3) of the Cr. Code 1906, is none the less admissible under Cr. Code sec. 1001, at the subsequent trial because the Crown tenders the evidence of the magistrate that it was taken through an interpreter, nor is the onus cast upon the Crown to prove that the interpreter correctly interpreted to the accused the statutory warning and the written statement as translated into the language spoken by the accused upon his signing it in English.

2. CARNAL OFFENCES (§ I—5)—AGAINST IMBECILES—PROOF OF NON-MARRIAGE.

Upon a charge of unlawful carnal knowledge of a woman under Cr. Code 1906, sec. 298, the fact that the woman was not the wife of the accused may be inferred from the difference in the respective surnames appearing upon the evidence at the trial.

[*R.* v. *Mullen* (No. 2), 18 Can. Cr. Cas. 80, applied.]

3. CARNAL OFFENCES (§ I—5)—AGAINST IMBECILES—PROOF OF INCAPACITY TO CONSENT.

If the evidence in support of a charge of unlawful carnal knowledge of a woman without her consent shews that the latter was in such a condition of imbecility that the jury might reasonably find that she was incapable of giving her consent to the act, a verdict of guilty will not be disturbed.

[*R.* v. *Fletcher*, 8 Cox C.C. 131, applied; *R.* v. *Fletcher*, 10 Cox C.C. 248, and *R.* v. *Barratt*, 12 Cox C.C. 498, referred to.]

Statement

HEARING of a reserved case after conviction of the accused on the charge of assaulting and having carnal knowledge of a woman without her consent.

The conviction was affirmed, LAMONT, J., dissenting.

E. L. Elwood, for the accused.

H. E. Sampson, for the Crown.

Newlands, J.

NEWLANDS, J.:—I concur with the judgment of Brown, J.

Brown, J.

BROWN, J.:—The accused in this case was tried before the learned Chief Justice and a jury on the following charge, in which there are three counts:—

1st. That he, the said John Walebek, at Dilke, during the month of November, 1912, did assault Eigna Thauberger, a woman who was not his wife, and did then and there have carnal knowledge of her without her consent.

2nd. That he, at the time and place aforesaid, did have carnal knowledge of Eigna Thauberger, a woman who was not his wife, she being at such time an idiot or imbecile, and he knowing, or having good reason to believe, at such time that she was an idiot or imbecile.

3rd. That he, at the time and place aforesaid, did indecently assault Eigna Thauberger, a female.

The second count was withdrawn from the jury, on the ground that there was no evidence that the accused had knowledge of the mental condition of the girl at the time of the alleged offence. The jury found the prisoner guilty on the first count of the charge, and the questions reserved for our consideration by the learned trial Judge are:—

1. Was I right in admitting the statement made by the accused before the magistrate on the preliminary inquiry?

2. Should I have instructed the jury to acquit on the first and third counts of the charge.

(*a*) On the ground that there was no evidence, or not sufficient evidence, to shew that Eigna Thauberger was not the wife of the accused?

(*b*) On the ground that there was no evidence, or not sufficient evidence, to negative consent?

The statement made by the accused on his preliminary hearing, and which was admitted in evidence, was in the form prescribed by the Criminal Code, and was duly signed by the accused and the justice of the peace. Under sec. 1001 of the Code, this statement may be given in evidence without further proof. Before the statement was put in evidence, however, the justice of the peace took the witness-stand and gave evidence to the effect that the accused was a foreigner, and that it was necessary to use an interpreter during the preliminary proceedings; that the statement made by the accused was taken down in condensed form, and was then read over to the accused by the interpreter, and duly signed. It is objected that, in the absence of evidence that the interpreter correctly interpreted the warning and the statement of the accused, the statement was not admissible in evidence. If the statement had been tendered without any explanation whatever as to the manner in which it was obtained, it would clearly be admissible, being in the form prescribed by the Code; and surely evidence tending to shew with more particularity the proceedings taken will not make the statement any the less admissible. If the accused did not understand what he signed, or the warning given, it was, of course, open to him to establish that fact, and the significance of the statement would correspondingly be weakened. There is no direct evidence that the girl was not the wife of the accused. There is, however, the sworn statement by one or more of the witnesses that the girl's name is Eigna Toburga, the surname Toburga being the surname of her father, who was sworn as a witness, and the accused's name is proved to be John Walebek. In the statement of the accused, taken at the preliminary hearing, and which was admitted in evidence, he signs his name as "J. Wollobek," and he refers to the girl as "Eigna Thauberger" (evidently a mis-spelling of "Toburga"). Under the authority of *Rex* v. *Mullen* (No. 2), 18 Can. Cr. Cas. 80, this is sufficient to

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establish a *primâ facie* case that the woman was not the wife of the accused.

The last question reserved is one which presents more difficulty. There must be evidence to go to the jury that the girl did not consent to the carnal knowledge; and it is contended that in this case there was no such evidence. It is established that the girl is an imbecile; but, even though she be an imbecile, she may still be capable of giving her consent. If she consents to the intercourse there is no offence in law, unless the man knows or has good reason to believe that she is an imbecile. See sec. 219 Criminal Code. It is contended on behalf of the prosecution that the evidence of imbecility is such as to shew that the girl was incapable of giving her consent. The three cases directly dealing with the point, and regarded as authorities on it, are *Reg.* v. *R. Fletcher*, 8 Cox 131; *Reg.* v. *Chas. Fletcher*, 10 Cox 248, and *Reg.* v. *Barratt*, 12 Cox 498. I am of opinion that the effect of these authorities is that if the evidence establishes that the girl was in such a condition of imbecility that the jury might reasonably find that she was incapable of giving her consent, then there is a case to go to the jury, and a verdict of "guilty" on their part will not be disturbed. There is language used in the case of *Reg.* v. *Chas. Fletcher*, 8 Cox 131, which would seem to indicate that there must be some positive evidence of want of consent, apart from the state of imbecility of the woman, before a conviction is justified; but if that be the effect of that decision, then it seems to me that the *Reg.* v. *Barratt*, 12 Cox 498, case disaffirms that view and supports the principle which I have just enunciated. In vol. 1 of Russell on Crimes, 7th ed., 947, it is stated that the case of *Reg.* v. *Chas. Fletcher*, 10 Cox 248, must be taken as a ruling on the particular evidence. In this case the girl herself was called, and, as in the case of *Reg.* v. *R. Fletcher*, 8 Cox 131, she was questioned at some length in the hearing of the jury to ascertain if she possessed sufficient intelligence to be sworn. It was held that she did not. That examination disclosed that she did not know the difference between truth and falsehood; that she did not know anything about God, or heaven, or hell; that her mother, when living, had tried to teach her the Lord's Prayer, and she remembered the words, "Our Father which art in heaven," but she did not know what the words "Father" or "heaven" meant. It was also disclosed by the evidence of her father, her uncle, and her sister that she was twenty-one years of age, and physically sound, that she had never gone to school, as she was not right in her mind and never fit to send to school; that she could not count at the outside more than ten, and that in so counting she had to use her fingers; that she could not dress herself, but had always to be assisted, and that when she attempted to dress

herself she put her clothes on all wrong; that she cannot, and never could, comb her hair; that she could not do any cooking; and generally, when attempting to do anything in the house, she did it wrong; that outside the house she was able to do some work, such as feeding the horses at times and running messages; that, in attempting to talk—to use the actual words of her sister —"whatever she said she said it opposite, the wrong way, talking, but never say the right way exactly;" that she was able to amuse herself by, and liked to be in, the company of small children. The medical evidence with reference to her seems to me to accurately describe her condition in these words, "Physically she seems to be strong, but mentally she is an infant." If, then, the effect of the evidence in that mentally she is a mere infant, that is, not simply a child, but a very young child, there is surely evidence from which the jury might reasonably find that she was not capable of giving her consent when two boys of eight years of age were ignorant of the moral nature of the act done to them, it was held that mere submission to an indecent act was not *consent* to the assault: *Rex* v. *Lock*, 42 L.J.M.C. 5; Roscoe, Crim. Evid., 13th ed., 253. By virtue of her imbecility the girl is precluded from giving any evidence to positively establish the fact that she did not consent; and in such a case I cannot conceive of more likely or better evidence to prove want of consent than shewing that her state of mind is such that she is incapable of giving her consent; and that is a question of fact on which the jury can properly make a finding. It is contended, however, by counsel for the accused that the statement of the accused shews that she was a consenting party. That statement is as follows:—

> That I committed the offence, but that it was done with Eigna Thauberger's consent; and that, at her request, before the deed, I promised her 25 cents, which I subsequently paid.

This statement at least shews that she did not consent from mere animal passion, and the very nature of the bargain goes to shew that from mere imbecility on her part she was incapable of exercising any judgment on the matter. In any event, it was open to the jury to disbelieve his statement to the effect that she did consent, and to find, under the evidence, that she was quite incapable of consenting. The case of *Reg.* v. *Connelly*, 26 U.C.Q.B. 317, was relied on by counsel for the accused. That case, while very illuminating, in that it fully reviews the authorities, does not decide anything that specially bears on this case. There the jury expressly found that the woman, though insane, was a consenting party; and the Court held that on such a finding a verdict of guilty could not be supported. In this case, in view of the charge of the learned Chief Justice, the jury must be held to have expressly found that the girl did not

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consent. There was, at least, in my opinion, evidence on which they could so find. In the result, therefore, question 1 should be answered in the affirmative and question 2 in the negative.

LAMONT, J. (dissenting):—The first question reserved by the learned Chief Justice is, "Was I right in admitting the statement made by the accused before the magistrate at the preliminary inquiry?"

By sec. 684 of the Code, the magistrate, after hearing the witness for the prosecution, shall ask the accused if he has anything to say in answer to the charge, at the same time giving him the caution prescribed by sub-section 2 of that section. Then sub-sec. 3 reads as follows:—

3. Whatever the accused then says in answer thereto shall be taken down in writing in form 20, or to the like effect, and shall be signed by the justice and kept with the depositions of the witnesses and dealt with as hereinafter provided.

Turning to form 20, we find that it states the charge against the accused, and that the said charge has been read over to him and that the witnesses for the prosecution have been examined in his presence. It also sets out the caution contained in sub-sec. 2 which the magistrate is to address to the accused, and then goes on to say:—

Whereupon the said A.B. says as follows: (*Here state whatever the prisoner says and in his very words, as nearly as possible. Get him to sign it if he will*).

Whatever the accused then says may, by virtue of sec. 1001, be given in evidence against him on his trial.

The statement of the accused, as it was returned by the magistrate with the depositions, is as follows:—

That I committed the offence, but that it was done with Eigna Thauberger's consent; and that, at her request, before the deed, I promised her 25 cents, which I subsequently paid.

This statement purports to be signed by the magistrate and by the accused, and, being regular on its face, would have been receivable without any further proof had nothing appeared to raise a question as to its admissibility. Counsel for the Crown, however, did not offer the statement as *primâ facie* admissible against the accused. Before tendering it he called the magistrate. From the magistrate's evidence the following facts appear:—

1. That the accused did not understand the English language, and that his statement had been taken through an interpreter.

2. That the interpreter, at the opening of the Court had been sworn to interpret the evidence correctly without any mental reservation or equivocation whatsoever, but that he had not been sworn to interpret

either the caution addressed to the accused by the magistrate or the accused's statement in reply.

3. That the magistrate addressed the accused in the words of the caution in sub-sec. 2, in the English language, and that the interpreter purported to interpret these words to the accused in some other language; but what that language was the magistrate could not say.

Then we have the following testimony:—

Q. After that warning did he make any statement? A. He did.

Q. Was it taken down in writing? A. The gist of it was taken down. He made a long statement which I condensed into the words that appear at the bottom of the form.

From this language it seems to me to be clear that the words which appear on the form as the statement of the accused are neither the words of the accused nor a translation thereof. They are wholly the words of the magistrate, embodying the gist, according to the magistrate's understanding, of what the accused said. They are simply a summary by the magistrate in his own language of a long statement made by the accused through the medium of the interpreter. The writing, therefore, in my opinion, cannot be said to be a statement by the accused at all within the meaning of sec. 684. To constitute such a statement it must be the language of the accused either as given directly by himself or as correctly translated by an interpreter. If the accused makes a long rambling statement, including matters not relevant as well as matters relevant, the magistrate may omit those portions not relevant to the charge, but it is his duty to take down everything the accused says which is relevant to the charge, and, as nearly as possible, in the accused's words: Russell on Crimes, p. 2231. If the magistrate takes down a portion of the accused's statement, but omits to take down another portion, the portion that he has taken down may be given in evidence, but the accused is at liberty to shew that a portion has been left out and what that portion was. But in such a case the portion admitted must be what the accused said. It must not be a statement by somebody else of what that person conceived to be the substance of the accused's words. The Code makes no provision for giving in evidence any statement, but that of the accused. As the statement sought to be put in was the statement of the magistrate and not the statement of the accused, I am of opinion that it was not admissible.

But, it is said, he signed the statement, and by so doing made it his own. The affixing by the accused of his signature to some other person's statement does not make it his within the meaning of the section. What the accused says is his statement. The allegations contained in a document to which he affixes his signature are not his, unless he placed his signature thereto, knowing the contents thereof, and with the intention of certify-

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ing to their correctness. There is no evidence before us to shew that when the accused affixed his signature to the writing, either that he knew the contents thereof, or that he was certifying to their correctness, and for two reasons I am of the opinion that such should not be presumed against him. First, because he could not read or understand the language of the document he signed, and, secondly, his signing of the document would presumably be at the request of the magistrate in carrying out the direction of form 20. There could otherwise be no reason for the accused signing it at all. If he signed it at the request or by the direction of the magistrate, it would seem to me that no presumption that his signature was intended to certify to the correctness of the allegations contained in the writing can arise where it is now shewn that he knew what the writing was. A statement in writing by the accused admitting his guilt, made to a magistrate, although it may not be admissible as his statement within the meaning of section 684, is admissible against him as a confession providing it was freely and voluntarily made. In *Reg.* v. *Thompson*, [1893] 2 Q.B. 12, Mr. Justice Cave, in giving the judgment of the Court of Crown Cases Reserved, lays down the test by which the admissibility of a confession may be determined as follows:—

> It is proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.

The proper way to prove that a confession was voluntary is to negative the possible inducements by way of hope or fear that would make the statement inadmissible: *R.* v. *Tutty*, 9 Can. Crim. Cas. 544. In *R.* v. *Kay*, 9 Can. Crim. Cas. 403, Duff, J., in referring to the statement made after the arrest of the accused in answer to questions put by a constable, said:—

> In such a case it is not, in my opinion, sufficient for the prosecution simply to shew that no inducement was put forward by way of threat or promise, express or implied. The arrest and charge are in themselves a challenge to the accused to speak; an inducement within the rule. The accused ought therefore, before speaking, to have been warned of the consequences of speech; and made to understand that he was being questioned with the object of extracting admissions to be used against him. In the absence of affirmative proof by the prosecution that these conditions were fulfilled, the statements of the accused made in such circumstances cannot be heard in support of the charge against him.

This seems to me to fit the case here. Before the prosecution could give in evidence any written admission of guilt by the accused, other than the accused's statement under section 684, it must be shewn that the inducement to speak arising from the

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arrest and charge had been entirely removed. To remove this inducement he must have been made to understand the consequences which might follow from anything he might say or from any document he might sign. The only thing done to remove that inducement was to read the caution in English. That language, however, he did not understand. The reading of the caution in English, therefore, did not make him understand what the consequences of so acting would be. That could only be attained by having the caution conveyed to him in a language which he understood. The onus of proving this was on the prosecution, and in the absence of evidence that it had been correctly interpreted to him, I am of the opinion the prosecution has not discharged that onus. If the interpreter had been sworn to correctly interpret the caution into the language of the accused and his statement into the language of the Court, it might be that a presumption would be raised that the accused had been made to understand it, and this might be sufficient to cast on the accused the onus of rebutting that presumption. But where the interpreter is not so sworn as against the accused no such presumption can arise.

I am, therefore, of opinion that the statement set out on the form to which the accused affixed his signature was not admissible either as a statement of the accused under section 684 or as a confession of guilt by him. This question, should, therefore, be answered in the negative.

Having reached this conclusion, it is unnecessary to consider the other question submitted. The statement admitted was the only evidence to connect the accused with the crime; and that, in my opinion, being inadmissible, the conviction should be quashed.

Conviction affirmed, LAMONT, J., *dissenting*.

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Jan. 29.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. January 29, 1913.

1. WATERS (§ II C—86)—USE OF WATER—TAKING FOR PUBLIC WATER SUPPLY—STATUTORY AUTHORITY.

The British Columbia Water Clauses Act (1897), relating to the control of water and water rights, operates in limitation of the common law right of user of waters of a stream by the riparian proprietors.

[*Esquimalt Waterworks Co.* v. *Victoria* (1907), 2 M.M.C. 480; *Martley* v. *Carson* (1885-9), 1 B.C.R., Pt. II., 189, 281, 20 Can. S.C.R. 634, at 654, 655, 658, 659.]

2. WATERS (§ II C—83)—USE OF WATERS—DIVERSION GENERALLY—NOTICE OF DIVERSION, REQUIREMENTS—RIPARIAN RIGHTS.

Where the defendants, who are not riparian proprietors, propose to divert the waters of a stream from flowing past the lands of the plain-

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tiff (a riparian owner entitled, at common law, to the user of such waters), the notice of the point of diversion, prescribed by secs 9 (c) and 40 of the British Columbia Water Clauses Act (1897), when it merely specifies that the intake will be "about ten miles from Burrard Inlet," is not too vague, where such was, in a rough irregular mountainous stretch of country, a fairly approximate designation, and the notice was posted at the very spot, and also on the plaintiff's lands, resulting in bringing the matter of the application to his attention, and he attended and objected, it appearing that the matter of real importance to him was not so much the exact point of diversion metrically as a knowledge that the diversion was to be made at a point above his land.

3. WATERS (§ II—60)—WATER RIGHTS AND EASEMENTS—STATUTORY CURTAILMENT OF COMMON LAW RIGHTS.

While riparian water rights may be curtailed or suspended by the statutory laws of British Columbia, authorizing the diversion of streams for agricultural and other purposes, such statutes were not intended to wholly abrogate such rights. (*Per* Martin, J.A.)

4. WATERS (§ II C—83)—USE OF WATERS—DIVERSION—STATUS OF RIPARIAN OWNER TO ATTACK.

The right of a riparian proprietor to attack a diversion of water as unlawful or wrongful, extending as it does to pre-emptors, homesteaders and lessees from the Crown, under the provisions of sec. 291 of the Water Act, R.S.B.C. 1911, ch. 239, is vested in a plaintiff grantee of the Crown owning lands bordering upon a stream from which such a diversion is attempted. (*Per* Martin, J.A.)

5. WATERS (§ II—65)—RIPARIAN WATER RIGHTS, WHAT CONSTITUTES.

The water right of a riparian owner is not a mere privilege, but a right incident to his ownership of the land, parcel of the inheritance. (*Per* Irving, J.A.)

[*Esquimalt Waterworks Co.* v. *Victoria* (1907), 2 M.M.C. 480, at 496, specially referred to; see also *Pickles* v. *The King*, 7 D.L.R. 698.]

Statement

APPEAL by plaintiff from judgment of Murphy, J., in an action brought against the city of Vancouver to restrain them from obstructing or diverting the waters of Seymour creek from flowing past his lands.

The appeal was dismissed.

J. A. Russell, for the appellant.

J. G. Hay, for the respondents.

Irving, J.A.

IRVING, J.A.:—The plaintiff, who, on December 9, 1892, obtained a Crown grant of 190 acres on Seymour creek, brought an action against the city of Vancouver to restrain the defendants from obstructing or diverting the waters of Seymour creek from flowing past his said lands.

The plaintiff complains of the invasion of the proprietary rights incident to the ownership of his property.

The defendants, who are not riparian proprietors, have done that which virtually amounts to a complete diversion of the stream, as great a diversion as if they had changed the entire watershed of the country and in place of allowing the stream to flow towards the south, had altered it near its source so as to make it flow to the north. This is, to continue to quote from the

elaborate exposition of riparian rights set out by Lord Cairns in *Swindon Waterworks Co.* v. *The Wilts and Berks Canal Navigation Co.*, L.R. 7 H.L. 697, "a confiscation of the rights of the . . . plaintiff."

The defendants justify their action under a grant of water rights, dated September 28, 1906, issued to them by the Provincial Government under the Water Clauses Act, 1897, and amending Acts, and they also rely on the statutory limitation of six months, conferred by sec. 145 of the Vancouver Incorporation Act, 1900, and amending Acts. This last point was not argued before us.

Mr. Russell, for the plaintiff, objects that the conditions prescribed by sec. 40 and sec. 9 (c) of the Act of 1897 were not complied with, in that the point of diversion was not specified with sufficient exactness. "About ten miles from Burrard Inlet," it must be admitted, is not very definite, but in a rough country it is not so very vague. A notice seems to have been posted at the very spot and also on the plaintiff's lands. These notices brought the matter of the application to his attention and he attended and objected. After all, so far as he is concerned, the knowledge of the exact point of diversion is not so much of importance to him as the knowledge that the diversion was to be made at a point above his land.

Mr. Justice McCreight, who for many years resided in Cariboo, and had there great experience in dealing with water questions under the Mining Acts, said in *Carson* v. *Martley* (1886), 1 B.C.R., Pt. II., 281, that if these conditions went to the jurisdiction, proceedings should have been taken by prohibition or *certiorari*, and in the Supreme Court of Canada, *Martley* v. *Carson*, 20 Can. S.C.R. 634, Gwynne, J., seemed to think that as the granting of the record was in the discretion of the commissioner these clauses were only directory.

It seems impossible to suppose that the legislature in 1897, when it, after reciting the provisions of the Act of 1892, passed the provisions it did, relating to the acquiring of water and the making of water power available to the fullest possible extent in aid of the industrial development as well as of the agricultural and mineral resources of the Province, did not intend to break in upon the rights which, at common law, would belong to the plaintiff.

The title of the Acts speaks of "making adequate provision for municipal water supply," and it seems to me that the idea was that the Board should do what Parliament had formerly done: grant, on conditions to be specified, the power to take the water.

I think the learned Judge was right in his conclusion, and I would dismiss the appeal.

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MARTIN, J.A.:—Under a grant from the Crown, dated December 9, 1902, the plaintiff became the owner of lot 851, group 1, New Westminster district, which admittedly carried with it riparian rights to that portion of Seymour creek which, for about half a mile, formed the eastern boundary of the said lot. No buildings have been erected on it, and no one has ever used it in any way except clearing a little of it and cutting about 300 cords of shingle bolts. The Crown grant contains the following proviso, which I shall notice later:—

> Provided, also, that it shall be lawful for any person duly authorized in that behalf by Us, Our Heirs and Successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through, or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation to the aforesaid David Cook, his heirs and assigns.

The defendant corporation, on the 28th September, 1906, obtained a record of 1,400 inches of water out of the said creek, and similar records were granted to four other municipalities for 1,600 inches, amounting in all to 3,000 inches. The intake and point of diversion for the water so recorded is about five miles above the plaintiff's boundary, and it is admitted that, if the whole 3,000 inches were diverted at the intake, there would be no surplus water immediately below it, and the plaintiff would get only the surface water and the water of certain tributary streams below the intake. At present the whole amount granted by the records, 3,000 inches, which is equivalent to a flow of 84 cubic feet a second, is not being taken, but it is admitted that the flow of water past the plaintiff's land has been materially diminished by about 16½ cubic feet a second by the defendants' pipe, though there is still, at present, at lowest known water, a flow of about 29 cubic feet a second past the plaintiff's land. The plaintiff had due notice of and did attend upon the hearing of the defendants' application for record before the Water Commissioner, and objected to the application, on the ground that as owner he had riparian rights, but made no application for a record on his own behalf, and did not appeal from the decision of the Commissioner. The position he takes before this Court is simply that as part of his riparian rights he is entitled to the natural and undiminished flow of the stream (as to which *Kensit* v. *Great Eastern R. Co.* (1883), 52 L.J. Ch. 608, and *Saunby* v. *London Water Commissioners*, [1906] A.C. 110, may be considered), and asks for an injunction to prevent further obstruction and diversion.

He further, under sec. 291 of the Water Act, R.S.B.C. 1911, ch. 239, attacks the validity of the defendants' record, for non-compliance with statutory provisions, which I shall consider

later. His contention, set up in his reply, that the Water Clauses Consolidation Act, 1897, and amending Acts, are *ultra vires*, was formally abandoned.

With respect to his riparian rights, I may, for the purposes of this case, adopt the general definition of their nature as given by Mr. Justice Duff in *Esquimalt Waterworks Co.* v. *Victoria* (1907), 2 M.M.C. 480, at 496, as follows:—

> The right of a riparian proprietor is not a mere privilege, but a right incident to his ownership of the land, "parcel of the inheritance," as it is commonly put by the text-writers on the subject.

And, speaking of one effect of the Water Clauses Consolidation Act of 1897, which is that which was in force when the defendants' record was obtained, he said:—

> As regards the Act of 1897, it cannot, I think, be maintained that it does not, indirectly, interfere in a most substantial way with pre-existing riparian rights; but it is not, I think, necessary to conclude that that Act, any more than the Act of 1892, abrogates those rights. It makes provision by which persons complying with the conditions prescribed by it may acquire rights to divert water, in circumstances under which such diversion, apart from the provisions of the Act, would be a wrongful invasion of the rights of riparian proprietors. But, because to that extent the Act is retrospective in its operation, one is not bound to give—indeed, one is bound not to give—to it any further retrospective operation, unless that be necessary in order to give effect to its provisions.

There is nothing new in this view, as it was held by Mr. Justice Gwynne, in *Martley* v. *Carson* (1885-9), 1 B.C.R. Pt. II., 189, 281, 20 Can. S.C.R. 634, at 654-5, 658-9, that so far back as 1865 the Water Ordinance of that year had

> qualified the common law right of riparian proprietors by substituting therefor those statutory rights which the conformation of the country made absolutely necessary to the beneficial use of the . . . province.

It is desirable to note that later and better knowledge of this vast province shews that his descriptive remarks should be much restricted in their application. See also the remarks of Idington, and Duff, JJ., in *Vaughan* v. *Eastern Townships Bank* (1909), 41 Can. S.C.R. 286, at 295, 321-3 (2 M.M.C. 444, 13 B.C.R. 77).

Sections 4 and 5 of the Act of 1897 are as follows:—

> 4. The right to the use of the unrecorded water at any time in any river, lake, or stream, is hereby declared to be vested in the Crown in the right of the province; and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, watercourse, lake, or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, lake, or stream vested in the Crown, and to which there is access by a public road or reserve.

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5. No right to the permanent diversion or to the exclusive use of the water in any river, lake, or stream shall be acquired by any riparian owner, or by any other person, by length of use or otherwise than as the same may be acquired or conferred under the provisions of this Act, or of some existing or future Act.

Section 4 is not very happily worded, but its meaning becomes plain, or plainer, when its construction is partly reframed so as to give what I am satisfied is its true meaning, thus:—

. . . vested in the Crown in the right of the province, and no person shall divert or appropriate any water from any river . . . etc. (save in the exercise of any legal right existing at the time of such diversion or appropriation) unless (except) he does so under the provisions of this or some other Act . . . etc.

Read thus, it is clear to me that, since the right to the use of unrecorded water is formally "vested in the Crown" (wherein it must remain till it is as formally divested therefrom), a riparian owner must "exercise" any legal rights to divert or appropriate such water before a valid application for record of it is made by another; and, if he does not so preserve his riparian rights, he is prevented from exercising them as regards the water covered by the record granted on such application during the duration of that record, as hereinafter noticed. To give an example: I have no doubt that a riparian owner who was duly "exercising" his existing legal right to use the water of a stream to run machinery to supply, say, electric light and power for his house and farm purposes, would retain that right as against an applicant for a record thereof. And such water would also be water which was "appropriated," "occupied," and "used" for a "beneficial purpose," within the meaning of the exception in the interpretation given to "unrecorded water" in sec. 2, thus: "'Unrecorded water' shall mean all water which for the time being is not held under and used in accordance with a record under this Act, or under the Acts repealed hereby, or under special grant by public or private Acts, and shall include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose."

This section has been considered in some aspects by the Privy Council in the *Esquimalt Waterworks* case, [1907] A.C. 499, 2 M.M.C., at 528, 529, and it is clear that the right to the use of all water which cannot be excluded from that definition, or which is not within the saving clause of exceptions contained in sec. 4, is "vested in the Crown" by that section. The expression "unrecorded water" obviously includes more than water not held by record. The contention made at Bar that water, the right to which was merely claimed under the general right of riparian owners derived from the customary grant from the Crown, was "appropriated" to the grantee, within the meaning of sec. 2, cannot, I

think, be supported for a moment in view of the context, which clearly contemplates activity and not mere passivity as the test. Essentially the same contention was unsuccessfully advanced in *Martley* v. *Carson*, 20 Can. S.C.R. 661, 680-1, based upon the ground that the water became "occupied" because "by the common law of England every riparian proprietor is entitled to the flow of the waters of every stream running along or through his property in its natural course without interruption." The terms "occupied" and "unrecorded and unappropriated water" are of long legislative standing; they are considered at the last reference in relation to sec. 44 of the Land Ordinance of 1865, 1870 (sec. 30) and 1875 (secs. 48 and 54); and *cf.* Duff, J., in *Vaughan* v. *Eastern Townships Bank* (1909), 41 Can. S.C.R. 322-3.

The same reasoning extends to sec. 4, as it is not the "legal right," but the "exercise" of it, that is safeguarded.

In the *Esquimalt Waterworks* case, [1907] A.C. 499, 2 M.M. C., at 528, 529, their Lordships of the Privy Council drew attention to the acts done which led them to reach the conclusion that the water in controversy there had been "appropriated," at 527, and also that it was water held under a private Act, and, therefore, not "unrecorded water," at 528-9; see also the remarks of Duff, J., in the Court below, at 494. But, as the same learned Judge pointed out, at 496,

> the fact that these (riparian) rights were subject to curtailment by reason of grants of water records under existing legislation did not, in the absence of such records, affect the validity or scope of the rights;

and he goes on to point out that riparian owners have a

> remedy . . . against a wholly wrongful and unauthorized diversion of the stream.

In short, it comes to this, that, though riparian rights may be curtailed or suspended, they are not abrogated. In the case at bar, for example, if there were a mesne flow of 30 cubic inches past the plaintiff's property, and a record of 15 cubic inches were granted to a third party, the plaintiff would, until an application for a record for the remaining 15 inches, preserve all his riparian rights therein; and, if he chose to "exercise" them as above mentioned, he could forestall any applicant and preserve them intact. See what Duff, J., says at 497:—

> No records have been granted in respect to any of the waters in question, and the rights to these waters incident to the ownership of the lands purchased by the company remained in the owners of these lands, unimpaired, as acquired by virtue of the original grants from the Crown at the time these rights were appropriated by the company. Does the Act of 1897, then, authorize any interference with these rights? To my mind it does not.

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And it might further be very plausibly argued, at the least, that, as it is only the "use" of the water that is vested in the Crown, in the case of the lapse by time or cancellation of a record, the riparian owner's original rights in the water (which were never abrogated, but merely suspended, or held in abeyance by reason of the record permitting another to use it, and which, I observe, in *Martley* v. *Carson*, 20 Can. S.C.R. 634, at 641, were stated by Chief Justice Ritchie in his dissenting judgment to "include the right to use the water for irrigating purposes"), were revived, and the water, having once more become "unrecorded," was likewise once more subject to his "exercise of any legal right therein," just as if it had never been recorded. There may also be other respects in which riparian rights still have a valuable existence, but it is unnecessary to pursue the subject. The riparian owner may, of course, avail himself of all the benefits of the statute—*Martley* v. *Carson*, 20 Can. S.C.R. 634, at 655—priority of a recorded grant "alone giving precedence to any one" over him.

With respect to sec. 5 (which first appeared substantially in its present form in the Water Privileges Act, 1892, ch. 47, sec. 3), I read it as a precautionary enactment, providing that in no circumstances shall any one, whether a riparian owner or not, "acquire . . . the right to the permanent diversion or the exclusive use of the water," etc., unless by the Act—the intention being, so far as riparian rights are concerned, not, for one thing, to allow the owner to acquire such rights by any combination of circumstances, *e.g.*, such as are pointed out by Mr. Justice Duff in the *Esquimalt Waterworks* case (1907), 2 M.M.C. 480, at 495, 496. Even so early as 1870, he had been denied the "exclusive right to the use of . . . water . . . flowing naturally through or over his land, except such record shall have been made," by sec. 30 of the Land Ordinance of 1870, referred to in *Martley* v. *Carson*, 20 Can. S.C.R. 634, at 674.

So far I have been considering the plaintiff's rights under the Act of 1897, under which the records complained of were granted. I now turn to the existing Act of 1911, R.S.B.C. ch. 239. Sec. 4 is as follows:—

> Saving the right of every riparian proprietor to the use of water for domestic purposes, the right to the use of the unrecorded water in any stream is hereby declared to be vested in the Crown in the right of the province; and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water except under the provisions of this or some former Act, or except in the exercise of the general right of all persons to use for domestic purposes water to which there is lawful or private access.

It will be noticed that this section has in one place a nar-

rower and in another a wider definition of "water" than the old section (4), viz., in line 3, the expression is "water in any stream"—not water "in any river, lake, or stream;" while in the sixth line, it is "any water" without limitation. How this might affect the decision in *Re Milstead* (1908), 13 B.C. R. 364, it is unnecessary to consider. Otherwise, and beyond the fact that it specifically recognizes the right of "every riparian proprietor to the use of water for domestic purposes," the section has, for the purposes of this case, the same effect as the old sec. 4; and, save as regards the expressions "any water" and "by license," the same remark applies to sec. 5.

It was not disputed that the plaintiff was entitled to water for domestic purposes (and, therefore, I have not been considering that phase of the matter at all), and it was pointed out that an abundant supply for that purpose is, as a matter of fact, flowing past his land, but that never was, and is not now, what the plaintiff claimed to get by this suit, as has already been noticed; and, in my opinion, he has failed to support his claim.

Then as to the attack upon the validity of the record, advanced under sec. 291, which is as follows:—

> 291. Any riparian proprietor, and this shall include pre-emptors, homesteaders, and lessees from the Crown, whether in the right of the province or the Dominion, may, without making the Crown a party, maintain an action and take any proceedings in any Court of competent jurisdiction to prevent any unlawful or wrongful diversion of water.

I assume, for the purposes of the argument, that this section entitled the plaintiff to question the validity of the defendants' record.

The irregularity complained of is, that, in the notice of application for record, the requirement of sub-sec. 2 (*c*) of sec. 9, ch. 190, R.S.B.C. 1897, as to stating "the point of diversion," has not been complied with. The notice says:—

> (*b*) The name of the lake, stream, or source is Seymour creek, running into Burrard inlet.
>
> (*c*) The point of diversion or intended ditch head is about 10 miles from Burrard inlet.

It is urged that a definite spot should have been given, and that as a matter of fact the distance was correctly given in the record which was issued upon the application, thus: " . . . at a point eleven miles or thereabouts from Burrard inlet."

In my opinion, the point of diversion is given sufficiently to put any one interested upon further inquiry, which is really what the Act contemplates; there is no suggestion that as a matter of fact the plaintiff was misled by it or that it was not sufficient for the purpose. It is, moreover, difficult to give distances correctly in a hilly, not to say mountainous, district, such as that in question. I note as a matter of precaution

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that the technical answer put forward by the defendants' counsel to this contention is untenable—viz., that sec. 2 (*c*) only requires the point of diversion to be stated when the water is intended to be used for power purposes. It is obvious, from a close perusal of the section, that there should be a semi-colon before the word "where" in the first line, as there is in the fifth line. It is clear that the intention is to require the point of diversion or ditch head to be given in all cases, and additional specified particulars "shall also be stated" where the water is to be used for power and mining purposes.

I have reached this conclusion apart from the opinion expressed in *Martley* v. *Carson*, 20 Can. S.C.R. 634, at 656, 663, 677-8, as to requirements of this nature being merely directory and as to the limitation of attacks upon water records, also noticed in *Vaughan* v. *Eastern Townships Bank* (1909), 41 Can. S.C.R. 286, at 295, 306-7-8, 2 M.M.C. 444, 445, 13 B.C.R. 77, 79; where the question of status to attack is also raised but not decided. It should be noted that leave to appeal to the Privy Council was given on July 9, 1911, in that case, but it was settled before the hearing.

I notice sec. 8, which was cited to us, only to shew that I have not overlooked the same; it obviously does not relate to riparian rights.

Finally, and with respect to certain water privileges and rights mentioned in the proviso in the Crown grant set out in the beginning of this judgment, it is only necessary to say that on the present statutes it obviously affords no assistance to the plaintiff nor to this Court in the study of the questions raised, because it is the long-established and customary provision relating to the use and carrying of water across the land for mining and agricultural purposes on other lands in the vicinity, which, save its extension to agriculture, may be found in Crown grants so early as 1864, at the least: *Martley* v. *Carson*, 20 Can. S.C.R. 634, at 641, 651. No inference respecting riparian rights can be extracted from it since the Water Privileges Act of 1892, whatever view might be taken of it in relation to water records granted before that statute was passed, in regard to which some observations are made by Mr. Justice Duff in the *Esquimalt* case, 2 M.M.C. 480, at 493-4.

It follows that, in my opinion, the appeal should be dismissed with costs.

Galliher, J.A.

GALLIHER, J.A.:—I concur in dismissing the appeal.

Appeal dismissed.

Re CANADIAN BUILDING AND LOAN ASSOCIATION and CITY OF HAMILTON.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 27, 1913.

1. PLANS AND PLATS (§ I—5)—SUBDIVISION PLANS—APPROVAL REQUIRED BY STATUTE.

The provisions of sec. 7 of the City and Suburbs Act, 2 Geo. V. (Ont.) ch. 43, that if no objection is made and filed with the board within a limited period, the applicant for approval of a sub-division plan "shall be entitled to have the plan certified as approved unless the board of its own motion shall have otherwise directed," does not limit the power of the board to "otherwise direct" to the period within which objections are to be filed, and does not entitle the applicant to a certificate as of right when objections have not been filed accordingly.

2. PLANS AND PLATS (§ I—5)—OBJECTIONS—JURISDICTION OF ONT. MUNICIPAL BOARD.

The lapse of the period of twenty-one days specified in the City and Suburbs Plans Act, 2 Geo. V. (Ont.) ch. 43, sec. 7, without notice of objections being filed to a sub-division plan, does not bar the Ontario Railway and Municipal Board from giving leave to an objecting municipality to be heard in opposition to the proposed sub-division at any time before the board has certified its approval; and the board may then, after hearing both parties, dispose of the application on the merits.

Statement

AN appeal by the association from an order of the Ontario Railway and Municipal Board refusing to certify its approval of the appellants' plan for the laying out of a tract of land into streets and building lots.

Section 6 of the City and Suburbs Plans Act, 2 Geo. V. ch. 43, provides: (1) that notice of an application to the Board for its approval of a plan shall be given to the corporation of the municipality in which the land is situate and to the corporation of the city, and all parties interested shall be entitled to be heard, and may be represented by counsel at the hearing of the application; (2) that a copy of the plan shall accompany such notice.

Section 7 provides: (1) that objections to the plan shall be stated in writing and be filed with the secretary of the Board within 21 days after delivery of the notice and plan; (2) that, if no objection is made within that period, the applicant shall be entitled to have the plan certified as approved, unless the Board of its own motion shall have otherwise directed.

The city corporation did not file objections to the plan within 21 days; and the association thereupon applied to the Board for a certificate as of right. Before the application was heard, the solicitor for the city corporation notified the Board that the city corporation objected to the plan. The Board decided to hear the objection; and, upon hearing, gave effect to it, and dismissed the association's application.

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J. P. MacGregor, for the appellants, relied on the language of sub-sec. 2 of sec. 7, "unless the Board of its own motion shall *have* otherwise directed."

H. E. Rose, K.C., for the city corporation.

At the close of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—We think that the objection of Mr. MacGregor that the Board, unless, within the 21 days after service of the notice, it had considered the application and determined not to approve of it, had no power to refuse the certificate if no objections had been filed within the 21 days, is not well taken.

The scheme of the Act would be entirely defeated if any such interpretation were given to the section. There is cast upon the Board not merely the duty that would be imposed upon it by the general terms in which the powers are conferred, but there is an express requirement that, in determining as to the suitability of the proposed plan, or as to the desirability of any change in it, the Board, where the land lies within the city, shall have regard to making the subdivision and roads and streets and their location and width, and the direction in which they are to run, conform, as far as practicable, with any general plan which has been adopted or approved by the council of the city in accordance with which it is contemplated that the city and suburbs shall be laid out or the re-arrangement of the streets and thoroughfares shall be effected, and where the land is situate without the limits of the city, the Board is to have regard to certain other matters which are mentioned in the section (sec. 4).

Now it would be absurd, unless it was absolutely necessary, to give to the statute a construction that would require the Board, within the 21 days—and before, indeed, as far as the requirements of the statute are concerned, the plan was before them at all—to exercise that judgment and act upon the direction of the statute, which would be the effect of Mr. MacGregor's argument.

As to the other point, whether there was proper evidence before the Board upon which it could act, different considerations apply.

Upon a question of fact there is no appeal from the Board; but upon a question of law there is an appeal, if leave is given to appeal.

It is a question of law if the Board acted without any evidence at all, where evidence is required; and I suppose there is no doubt that evidence was required in this case.

We think, therefore, that the proper order to make is, that the case should be remitted to the Board in order that it may

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deal with it under the powers conferred by the Act; and, in doing that, it is to be understood that the Board is to have the right to take such testimony as it pleases—relevant testimony, of course—with regard to the matter, and to exercise its judgment on the whole case as to whether the plan ought or ought not to be certified.

I do not suppose that the question can arise again. If it goes back to the Board, only questions of fact can arise. There can be no question of law.

MacGregor:—There are a number of questions of law which I have not gone into; one is, that the proposed plan takes about 20 per cent. more of our land.

MEREDITH, C.J.O.:—That is a question as to whether they should exercise their discretion upon such a state of facts.

The order will be that the case be remitted to the Board to deal with, and there will be no costs to either party.

Case remitted.

ROGERS HARDWARE CO. v. ROGERS.

P.E.I.

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Feb. 5.

Prince Edward Island Court of Chancery, Fitzgerald, V.-C. February 5, 1913.

1. CORPORATIONS AND COMPANIES (§ IV G 4—126)—FIDUCIARY RELATION—OFFICER DIVERTING FUNDS TO PERSONAL USE.

Where a managing director of a joint stock company, who is also its president, takes out of the assets of the company from year to year moneys belonging to the company in addition to his salary and diverts these moneys to his personal use, charging himself on the books with the overdrafts, he becomes a trustee of such moneys, in view of the fiduciary relationship between him and the company and the question of *bonâ fides* of the transaction does not enter into the matter.

[*Great Eastern R. Co.* v. *Turner*, L.R. 8 Ch. 149; *Re Forest of Dean Coal Mining Co.*, 10 Ch.D. 450; *Re Lands Allotment Co.*, [1894] 1 Ch. 616; *Gluckstein* v. *Barnes*, [1900] A.C. 241, referred to.]

2. INTEREST (§ I F—47)—INTEREST ON MISAPPLIED TRUST FUNDS.

A *cestui que trust* is entitled to interest on a fund in the hands of his trustee which fund has been misappropriated by the trustee so that the *cestui que trust* has been improperly kept out of its use and the enjoyment of its profits.

[*Re Sharpe*, [1892] 1 Ch. 171, referred to.]

3. CORPORATIONS AND COMPANIES (§ V E—210) — MISAPPROPRIATION OF FUNDS ON CONSENT OF DIRECTORS—SHAREHOLDERS' RIGHTS.

The consent of two co-directors of a joint stock company to an overdraft of salary on the part of the managing director of the company will not estop the stockholders of the company from claiming interest on the overdraft on an accounting against the managing director or his representatives for the amount of the overdraft, since such consent is not binding on the company unless the circumstances attending the dealing with the company's funds have been fully brought before a general meeting of the shareholders and their sanction thereto obtained.

[*Great Luxembourg R. Co.* v. *Magnay* (No. 2), 25 Beav. 586, referred to.]

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4. TRUSTS (§ II B—51)—MISAPPLICATION—OFFICER'S LIABILITY TO CORPORATION—INTEREST OR PROFITS EARNED ON FUNDS MISAPPLIED.

Property bought by a director on his personal account with money belonging to his corporation is presumed to have been bought on account of the corporation; and the method of accounting therefor is to return (in excess of the principal moneys so withdrawn) either all profits made in the use of such withdrawals, or legal interest thereon.

[See *Kelly* v. *Kelly*, 10 D.L.R. 343, a decision of the Privy Council on appeal from Manitoba.]

Statement

THIS was a bill filed by the complainants, an incorporated joint stock company having its liability limited to the property and assets of the company, against the executors of Benjamin Rogers, deceased, who in his lifetime was its president and managing director.

The bill charged that as such managing director the deceased, without the consent of the company, used large sums of money the property of the company in commercial adventures and other investments for his own personal gain and profit, and that though the defendants, since deceased's death, have as his executors, repaid the company the principal money so used by deceased, they have refused to account for the profits which the deceased derived from the use of such moneys, or for the interest thereof.

The defendants by their answer denied the allegations in the bill setting forth such charge; and also denied that they are liable to account for any profits or to pay any interest.

J. A. Mathieson, K.C., and *Æneas McDonald*, K.C., for complainants.

Gil. Gaudet, K.C., for defendants.

Fitzgerald, V.-C.

FITZGERALD, V.-C.:—There is but little dispute as to the facts. I will state them shortly. In 1904, the deceased, owning a hardware business, incorporated it as a joint stock company under the name of the complainants, distributing the stock to his three sons (who were previously working with him in the business), to his wife, and an infant grandson, he himself retaining a controlling amount thereof. No meeting of the stockholders was ever called except the first on the organization of the corporation, at which the deceased was appointed president and managing director, his son George, vice-president, and his son Benjamin, secretary-treasurer. The business of the corporation began on the 11th February, 1905. At that date the deceased had overdrawn, beyond the earnings of the company, his private account to the sum of $2,883.27, which sum was carried forward as an indebtedness by him to the company on that date, in an account continued until his decease in January, 1911. In the following year this overdraft, including the said sum of $2,883.27, appeared by the books of the corporation to have increased to $8,250.45. In this year under date 12th February,

1906, appears the entry in this account "estimated interest on overdraft $370," which sum is included in the balance brought forward of $8,250.45 on that date. Regularly every year afterwards this private account was balanced, giving deceased credit for his salary of $3,000 as president, and the amount to his credit in an account of his private business and investments wholly outside the business of the corporation, and the profits of the concern, if any. This was done because there was but one account in the bank into which went as well the credits and disbursements of the firm, as the private ones of the president, who was a large holder of real estate, stocks and bonds, etc. At his death the deceased's private account was overdrawn to the amount of $15,180.

We have here, therefore, a case in which the managing director of a company takes out of the assets of the company from year to year, moneys which belong to it for use in its business as a joint stock company, and diverts these moneys to his personal use, and as the account shews, as well for private adventures as for individual expenditures. There cannot be the slightest doubt under the authorities as to the deceased's position.

As president and managing director he was not only the executive organ and confidential agent of this joint stock company to whom its interests were confided, but he also filled the character of a trustee of the company's money and property, liable to make good moneys which he had misapplied upon the same footing as if he were a trustee, no matter how honestly he may have thought he acted: *Great Eastern R. Co.* v. *Turner*, L.R. 8 Ch. 149; *Re Forest of Dean Coal Mining Co.*, 10 Ch.D. 450; *Re Lands Allotment Co.*, [1894] 1 Ch. 616; *Gluckstein* v. *Barnes*, [1900] A.C. 240, to refer to a few of the many cases settling the law in this respect.

It is quite useless therefore, to contend, in view of such fiduciary relationship, that this is a mere overdraft of his salary by an employee. With this in view also, I am quite unable to see when money has been misappropriated by a trustee, and his *cestuis que trustent* have been improperly kept out of its use, and the enjoyment of its profits, or of its interest, that the interest ought not to be recoverable as well as the principal.

As Lord Justice Bowen expresses it in *Re Sharpe*, [1892] 1 Ch. 154, at 171, "It seems to me that the shadow must follow the substance."

No full accounting or complete restoration under the circumstances of this case is possible without a reimbursing to this joint stock company, of the loss sustained by the withdrawal of these moneys from its capital, and this can only be done by crediting it with the profits made by the deceased in his use of

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these moneys, or the usual equivalent, its interest. The defendants' counsel urge, that even admitting such a liability, the consent of the vice-president and secretary-treasurer to this overdraft releases deceased's estate from payment of any interest. This consent is implied because the overdraft was not stopped. No such consent, if given, by two co-directors can bind the corporation. It can be bound only after the circumstances attending the dealing with the company's funds have been fully brought before a general meeting of the shareholders, and their sanction obtained thereto: *Great Luxembourg R. Co.* v. *Magnay* (No. 2), 25 Beav. 586.

Nothing of the kind was attempted here; and there is evidence if it were necessary to refer to it, that the deceased fully recognized his liabilities, and agreed to pay this interest as a just claim against him.

It is also urged that the overdraft of deceased when he formed the joint stock company was a debt due to himself, and consequently only operated in reduction of capital stock. The deceased might undoubtedly have treated it so, but he deliberately treated it as an asset of the company, the same as any other debt to it. He—for as managing director every entry in the books is his—carried it forward as an indebtedness on the formation of the joint stock company, and continued it so until his death, and allowed a charge for interest on it at the end of the first year of the corporate existence. It cannot now be considered otherwise, nor used as is sought, as a set-off to the interest claimed.

Further I desire to say, wholly outside of the legal aspect of this case, that there is not the slightest evidence that deceased ever contemplated doing that which was not right and just; on the contrary his every act and word were in recognition of the justness of the claim now made by the company.

Judgment for complainants, with costs against deceased's estate; the interest to be computed by Master Morson at the rate claimed, viz., 5 per cent.

Judgment for complainants.

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March 17.

STITT v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. March 17, 1913.

1. APPEAL (§ VII L—470)—REVIEW OF FACTS ON NONSUIT.

On an appeal from a judgment of a County Court (Man.), ordering a nonsuit, the Manitoba Court of Appeal may draw its own conclusions from plaintiff's evidence brought out at the trial, where there are no conflicting statements nor any contradictory evidence.

2. RAILWAYS (§ II D 6—72)—INJURIES TO ANIMALS — CATTLE GUARDS — ONUS ON DEFENDANT.

Under sec. 294 of the Railway Act R.S.C. 1906, ch. 37, as amended

by 9-10 Edw. VII. ch. 50, sec. 8, imposing a liability on a railway company for injuries to animals "at large" on its right-of-way, the onus of proving negligence on the part of the owner of the animal in allowing a horse to be "at large" is upon the railway company.

3. PLEADING (§ II J—230)—STATEMENT OF CLAIM—SUFFICIENCY OF ALLEGATIONS.

A statement of claim in writing that on a certain day, near a certain place, plaintiff's horse was killed by the defendant railway company's engine, to his damage in a certain sum, is a fairly comprehensive statement of the facts shewing what the cause of action is for, within the meaning of sec. 95 of the County Courts Act, R.S.M. 1902, ch. 38, allowing a "simple statement in writing of the cause of action such that it may be known or understood by a person of ordinary intelligence what the action is brought for."

4. PLEADING (§ I N—111)—WHAT AMENDMENTS ALLOWABLE GENERALLY—ALLEGATIONS DEFECTIVE, EVIDENCE SUFFICIENT; EFFECT.

Where a statement of claim is defective in that it does not fully disclose a cause of action, but the evidence does shew a cause of action, and there is no surprise of the opposite party, the trial judge should amend if he thinks an amendment necessary.

5. EVIDENCE (§ XIII A—1003)—ADMISSIBILITY UNDER PARTICULAR PLEADINGS—NEGLIGENCE—RAILWAYS.

In an action to recover the value of a horse claimed to have been killed by an engine of the defendants' railway, the fact that the statement of claim alleges an absence of cattle-guards at the railway crossing on plaintiff's land, does not preclude the plaintiff from relying on evidence adduced at the trial as to a defective fence, where the statement of claim does not specifically allege that the loss of the horse was due to the absence of cattle-guards, but alleges in general terms that it was due to the negligence of the defendants. (*Per* Cameron, J.A.)

Statement

APPEAL from judgment of County Court ordering a nonsuit. The appeal was allowed.

G. A. Eakins, for plaintiff.

P. A. Macdonald, for defendants.

Howell, C.J.M.
Perdue, J.A.

HOWELL, C.J.M., and PERDUE, J.A., concurred with judgment of HAGGART, J.A.

Cameron, J.A.

CAMERON, J.A.:—This action was brought by the plaintiff to recover the value of a horse killed by an engine of the defendants. The diagram filed, ex. B., shews the plaintiff's quarter section, on a portion of which the horse had been at pasture, and the quarter section, diagonally across the road allowance, where the accident occurred. There was some evidence of a defect in the fence along the right-of-way crossing the plaintiff's property, and evidence also of absence of cattle-guards where the right-of-way crossed the road allowance.

There is, in the statement of claim, an allegation of the absence of cattle-guards at the crossing of the road by the railway, and on this the learned County Court Judge placed great stress, holding that the plaintiff was bound thereby and was not in a position to rely upon the evidence as to a defective fence. "The plaintiff," he says, "is not entitled to recover . . . except

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upon the cause of action which he has particularized . . . and the fact that his evidence might support a cause of action not set up and different from that which he has particularized does not entitle him to recover." And as the plaintiff's solicitor refused to amend, the action was dismissed. But, if the statement of claim is looked at closely, it does not allege specifically that the loss of the horse was due to the absence of cattle-guards, but, generally, that it was due to the negligence of the defendant. In any event, if the second clause of the statement of claim were disregarded altogether, as it might be, or taken as a superfluous assertion merely, the statement of claim sufficiently discloses a cause of action.

The horse came on the quarter section where it was killed either (*a*) through a defect in the fence along the right-of-way, or (*b*) over that fence or through or over the other fencing of the field in which it was pasturing, in which case (*b*) it was clearly at large on the road allowance before it reached the quarter section where it was killed. In any of these events the defendants were, on the evidence, liable under either sec. 254 or 294.

A nonsuit was moved for at the conclusion of the plaintiff's case, which the learned trial Judge refused to grant, and the defendants' counsel stated that he had no witnesses to call. The value of the horse seems to be well established at $150 by the evidence.

It may be that the defendants were misled by the allegations in the statement of claim, and, therefore, refrained from calling evidence bearing upon the facts. If such be the case, I think an opportunity should be given them to call any evidence they may feel advised. I would set aside the judgment of nonsuit and grant a new trial, if the defendants so elect, within ten days. Otherwise there should be a judgment for the plaintiff for $150 with costs of the trial and of this appeal. If a new trial be had the plaintiff must have the costs of this appeal in any event of the cause, and the costs of the former trial must abide the event.

Haggart, J.A.

HAGGART, J.A.:—At the close of the plaintiff's case the defendants moved for a nonsuit, which the trial Judge then refused. The defendants' counsel then stated he had no witnesses. There are no conflicting statements, nor is there any contradictory evidence. This Court can, therefore, draw its own conclusions. The pasture field from which the horse in question escaped was bounded on one side by the line of railway and on two other sides by the highway. There was evidence given at the trial that the fence along the railway was defective, but this defect was not noticed until two months after the time of the

accident, and the learned Judge thinks he was asked to assume too much to hold that the fence was in that defective condition when the horse was killed. He therefore held that the defendants were not liable under sec. 254 of the Railway Act, which imposes on the company the duty of maintaining fences and cattle-guards. There is evidence that there are no cattle-guards along the railway in that part of the country. If the fence along the railway was in good repair then the horse was just as liable to get out of the field at any of the other two sides which abut on the highway, when he would be "at large" and the onus of proving negligence under sec. 294 would be on the defendants. In going from sec. 6 to sec. 7, where the horse was killed, the horse would have to cross the highway between secs. 6 and 7, so that no matter where he escaped from the pasture field, whether direct to the line of railway or first to the highway and then on to the railway the horse would, before entering sec. 7, be "at large" within the meaning of sec. 294 of the Railway Act.

The learned County Court Judge holds that the plaintiff's pleadings are so framed that he could not recover under sec. 294 and that no amendment having been asked for at the trial he should nonsuit the plaintiff. With all due respect, I think the Judge should give a more liberal reading to sec. 95 of the County Courts Act, which says: "No formal statement of the cause of action shall be necessary" and it shall be a "simple statement in writing of the cause of action such that it may be known or understood by a person of ordinary intelligence what the action is brought for."

The statement of claim indicates that on a certain day, near a certain place, the plaintiff's horse was killed by the defendants' engine, and that he claims $150 damages. This is a fairly comprehensive statement of the facts, shewing what the action is brought for. In any event if the evidence did shew a cause of action, then, if there was no surprise, the Judge should amend, if he thought an amendment necessary. There is evidence as to the value of the horse.

With all due respect and deference to the learned trial Judge, I would allow the appeal with costs and set aside the nonsuit, with the provision for a new trial upon the terms set out in the reasons of my brother Cameron.

Appeal allowed.

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April 7.

CURRY v. PENNOCK.

(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 7, 1913.

1. LANDLORD AND TENANT (§ II B 1—14)—LEASES—COVENANTS AGAINST ASSIGNMENT—RELIEF FROM FORFEITURE, HOW LIMITED.

The Ontario Supreme Court has no power to relieve a lessee of premises against forfeiture of his term on breach by him of his agreement not to sub-let without the written consent of the lessor, which agreement provided that the lessee's right under it should continue only so long as he strictly observed, complied with and performed the terms of the lease, since, by the statute law of Ontario, though the courts have power to relieve against a right of re-entry or forfeiture for breach of a condition or covenant between the landlord and tenant, it expressly excludes the breach of a condition or covenant against sub-letting or parting with the possession of the leased land.

[*Curry* v. *Pennock* (No. 1), 10 D.L.R. 166, affirmed.]

2. LANDLORD AND TENANT (§ II E—35)—ASSIGNMENT; SUBLETTING—WHAT CONSTITUTES—"BUSINESS MANAGER" PAYING SUBSTANTIAL SUMS NOT FROM PROFITS, EFFECT.

Where the tenant under an agreement amounting to a lease containing a covenant or condition not to sell, mortgage, pledge, sub-let, or assign such agreement or license or any interest therein, or to permit any person to have an interest in or use any part of the premises, enters into an agreement with a third party purporting to authorize the latter to act as his business manager and to take the excess over $1,500 of the profits of a business conducted on the premises, and obligating the third party to pay to the tenant in two instalments the sum of $1,500 not necessarily to be derived from the profits of the business, such agreement is substantially a sub-letting and the tenant is guilty of a breach of the covenant or condition.

Statement

APPEAL by the defendants from the judgment of Meredith, C.J.C.P., 10 D.L.R. 166, 4 O.W.N. 712.

The appeal was dismissed.

G. Cooper, for the appellants.

T. J. W. O'Connor, for the plaintiff, respondent.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent is the assignee of a lease dated the 23rd February, 1909, from the owners of the land in question and other land, to Maurice Wolff, by which these lands were demised to Wolff for the term of ten years from the 1st May, 1909; and the action is brought to recover possession of the land in question.

Wolff, on the 24th May, 1909, and before the assignment of his lease to the respondent, executed an agreement under seal by which he granted to the appellants, who are described as licensees, "a license to maintain and carry on a restaurant in the roughcast house in Wolff's Park (except a room on the second floor) for ten years from the 1st day of May, A.D. 1909, less the last ten days thereof, upon and subject to the terms and conditions hereinafter expressed."

Wolff's Park is the land demised to him by the lessee, and

the rougheast house comprises the premises possession of which is claimed by the respondent.

Among the terms and conditions expressed in the agreement are the following: "The licensees . . . shall have no right or power to sell, mortgage, pledge, sublet, or assign this agreement or license or any interest therein, nor shall he (sic) permit any person to have any interest in or use any part of the premises, building, erection, or space covered by this license, for any purpose whatever, without the consent in writing of the owner."

The agreement also contains the following provisions:—

"The right to occupy the building and space covered by this license and to maintain and operate a restaurant or other concession, feature, or privilege, shall continue only so long as the licensees shall strictly observe, comply with, and perform the undertakings, provisions, agreements, and stipulations agreed and entered into by them in this agreement."

"If the licensees shall make default in the strict observance and performance of the undertakings, provisions, agreements, and stipulations agreed and entered into by them, the owner may, immediately or at any time after such default, close up and take possession of the space covered by this license, and this license shall thereby be and become forfeited, and all erections, structures, and articles belonging to the licensees on said premises shall forthwith be removed, and all privileges of the licensees to occupy or use said premises shall cease, and, in default of such removal, the owner may remove the same at the cost and expense of the licensees."

The agreement also contains a provision that the licensees "shall pay the owner annually in advance each year on the 1st day of May as compensation for this license the sum of $400."

On the 1st October, 1911, the appellants entered into an agreement with Olive Brooker, by which, as the respondent contends, they assigned to her an interest "in the agreement or license," contrary to the provisions of the agreement of the 24th May, 1909, and by which, and by the subsequent carrying on of the restaurant by Mrs. Brooker, as the respondent also contends, they permitted her to have an interest in and to use the demised premises without the prescribed consent and contrary to their covenant that they would not do so.

The agreement with Mrs. Brooker is peculiarly worded, and was, as it appears to me, worded as it is in order to enable the appellants to contend that what has been done does not constitute a breach of their agreement.

The agreement, after reciting that the appellants "are engaged in business under the name of Pennock Brothers' Restaurant Parlor," and reciting that they "are desirous of being relieved from the oversight and care of the said business, and have arranged with the party of the second part (Mrs. Brooker) to manage the same for them for a year from the date hereof,

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and that the party of the second part shall receive as compensation for her services the profits from the operation of the said business over and above the sum of $1,500," witnesses that, in consideration of $1,500 to be paid, $700 on the execution of the agreement and $800 on the 1st May next, the appellants "covenant and agree to allow the party of the second part to carry on said business for the said period and to enjoy and collect the full profits and benefits derived from the operation and carrying on of the said business for the said period."

By a subsequent clause of the agreement, Mrs. Brooker agreed to pay the $800 "on the said 1st day of April (sic), 1912."

The trial Judge held that the effect of this agreement was, at all events when considered in the light of the way in which it was carried out and the business of the restaurant was afterwards carried on, to permit Mrs. Brooker to have an interest in or use of the property within the meaning of the covenant, and was substantially a subletting of the property. With that conclusion I agree, and I also agree with the reasons given for it, to which may be added another and I think a very cogent reason—the fact that, although the agreement recites that the $1,500 are to be paid out of the profits of the business, $700 were paid in cash on the execution of the agreement, and Mrs. Brooker covenanted to pay the remaining $800 on the 1st day of April, 1912, not out of the profits of the business, but absolutely.

That conclusion having been reached, the respondent's right to recover possession seems to me beyond question, and the matters relied on by the appellants' counsel as obstacles to his obtaining relief have no bearing on the question which is to be determined.

Assuming that the agreement of the 1st October, 1911, was not a mere license to use the premises, but constituted a demise of them to the appellants, which is probably its legal effect, the answer to the argument of the appellants' counsel is, that ex vi termini the lease to the appellants came to an end when, in breach of its provisions, they permitted Mrs. Brooker to have an interest in the premises and to use them.

Although the demise to the appellants is in the earlier part of the lease for ten years from the 1st May, 1909, the later provision is, that her right to occupy and carry on the restaurant "shall continue only so long as the licensees shall strictly observe, comply with, and perform the undertakings, provisions, agreements, and stipulations agreed and entered into by them in this agreement;" and, in my opinion, upon breach of these undertakings, etc., as I have said, the term ex vi termini came to an end.

If authority for this proposition be needed, *Doe dem. Lockwood* v. *Clarke* (1807), 8 East 185, 9 R.R. 402, may be referred to.

The appeal fails and should be dismissed with costs.

Appeal dismissed.

LUCIANI v. TORONTO CONSTRUCTION CO.

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April 8.

Ontario Supreme Court, Middleton, J. April 8, 1913.

1. PARTIES (§ I A 5—50)—IN REPRESENTATIVE CAPACITY—ATTORNEY OR AGENT FOR BENEFICIARY, STATUS.

An action brought by an attorney or agent must be brought in the name of the person for whom he acts, and cannot be brought in the name of the person who holds the power of attorney, or the agency.

[See Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, secs. 4 and 8; also *Scarlett* v. *Canadian Pacific R. Co.*, 2 D.L.R. 891. As to actions for causing death, see also *Trawford* v. *British Columbia R. Co.*, 9 D.L.R. 817, headnotes 3 and 7.]

2. PARTIES (§ IV—125)—SUBSTITUTION—STATUTES OF LIMITATIONS.

Where a plaintiff seeks to amend by substituting plaintiffs other than himself, it can only be done on terms that the action shall be deemed to be brought as of the date of the amendment, and time under any statute of limitations affecting the case shall be deemed to have run up to the date of the amendment.

[*Dini* v. *Fauquier*, 8 O.L.R. 712; *Chard* v. *Rae*, 18 O.R. 371, referred to; see Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, sec. 6; see also *Scarlett* v. *Canadian Pacific R. Co.*, 2 D.L.R. 891.]

3. DEATH (§ II B—17)—WHO MAY MAINTAIN AND FOR WHOM—PERSONAL REPRESENTATIVE—INFANT.

Where defendants are liable, under the Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, at the suit of an administrator only, or in certain circumstances at the suit of the persons beneficially interested, as prescribed by sections 4 and 8 of the Act, and were sued by an infant who is not an administrator, and who is not the person *primâ facie* entitled to the grant, the action cannot be stayed until the infant attains his majority and takes out letters of administration, but will be dismissed on motion.

[*Dini* v. *Fauquier*, 8 O.L.R. 712; *Chard* v. *Rae*, 18 O.R. 371, referred to; see *Scarlett* v. *Canadian Pacific R. Co.*, 2 D.L.R. 891; as to actions for causing death, see also *Trawford* v. *British Columbia Electric R. Co.*, 9 D.L.R. 817, headnotes 3 and 7.]

Statement

MOTION by the defendants for an order, under Con. Rule 261, dismissing the action, upon the ground that, on the statement of claim, the action appeared to be unfounded and vexatious. See 4 O.W.N. 1025.

The motion was allowed.

Grayson Smith, for the defendants.

D. C. Ross, for the plaintiff.

Middleton, J.

MIDDLETON, J.:—The plaintiff, an infant suing by his next friend, alleges that he sues on behalf of his father and mother for damages by reason of the death of his brother, a labourer, said to have been killed by an explosion of dynamite—which he was thawing—owing to negligence and an improper and defective system in use by the company.

The accident is alleged to have taken place on the 3rd December, 1911. The action was not begun until shortly before the expiry of the year; that is, on the 22nd November, 1912. The

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writ of summons is endorsed laconically with a statement that the plaintiff's claim is for damages for negligence. The statement of claim, not delivered until the 10th December—after the expiry of the year—is the first intimation that the claim is for anything other than personal injury to the plaintiff himself.

On the 2nd November, 1912, the father and mother, in consideration of one dollar, assigned to the plaintiff, as his absolute property, all damages they are entitled to receive by reason of the death of the brother. It is conceded that this assignment is inoperative; and it is not referred to in the statement of claim. On the same day, the father and mother constituted the plaintiff their attorney to sue to recover the damages in question. It is said that the existence of this document makes this a suit by the father and mother. In the alternative, it is said that the plaintiff will, if the action is delayed until he is of age, apply for letters of administration to the estate of his deceased brother, and that his title as administrator will relate back to the death.

I do not think that either of these contentions is entitled to prevail. The person in whom the cause of action is vested, and not his attorney or agent, must be the plaintiff.

Dini v. *Fauquier*, 8 O.L.R. 712, undoubtedly determines that, where the plaintiff brings his action as administrator, it is sufficient to support the action if he can produce letters of administration issued at any time before the trial—the administration relating back to the death; but it is clear from all the cases cited that it is essential that the action should have been brought by the plaintiff as administrator—the production of the letters of administration being merely proof that at the hearing the plaintiff fills the representative character alleged. There is no case which goes to shew that a plaintiff, suing in his own right, can succeed upon a cause of action vested in the administrator of another, merely because he produces at the hearing letters of administration constituting him the administrator of that other.

The plaintiff is an infant suing by next friend; and, as I understand the practice, such form of suit is only authorised with respect to an action where the right is vested in the infant personally. This plaintiff has no right, as he is not within the provisions of the statute.

The plaintiff urges that the action should be allowed to proceed, being stayed, if necessary, until he attains his majority, when he will take out letters of administration. I would have no hesitation in allowing any necessary delay if I thought it would help the plaintiff. The difficulty is, that the defendants are liable to an action by an administrator only. They have been sued by one who is not and who does not claim to be an administrator, and who is not the person primâ facie entitled to the grant.

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Middleton, J.

In *Chard* v. *Rae*, 18 O.R. 371, the Chancellor apparently takes the view that the benevolent fiction by which the administration is related back has no application as against a statutory limitation, even when the plaintiff purports to sue as administrator. A fortiori, I cannot here allow the plaintiff to clothe himself with a title he does not now possess, and then permit an amendment in assertion of a title which he does not now assert, so as to deprive the defendants of the protection which the statutory limitation has afforded them.

The same reasoning answers the suggestion made by the plaintiff that he should now be at liberty to remodel his action by substituting his parents for himself as plaintiff. This could only be done on terms that the action should be deemed to be brought as of the date of the amendment; so that the plaintiff would not be helped.

Costs will probably not be asked.

Motion allowed.

GAUDET v. TOWN OF MEGANTIC.

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Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ. April 18, 1913.

1. MUNICIPAL CORPORATIONS (§ II C 4—135)—ENFORCEMENT OF LOCAL OPTION LIQUOR LAW—DEFENDING PROCEEDINGS TAKEN AGAINST MAYOR AS EX OFFICIO MAGISTRATE.

Where, under statutory authority, prosecutions for offences against a local option liquor law might be taken before the mayor of the municipality acting as an *ex officio* justice of the peace even where the municipality was in effect the prosecutor and interested in the fines, the municipality may lawfully undertake the defence of a prohibition motion seeking to prevent the mayor from acting in such cases so as to establish his jurisdiction; and the municipality may obligate itself to the defending attorney for the costs to be incurred in opposing the prohibition motion by a resolution of the corporation.

[*Thibaudeau* v. *Corporation*, 4 Que. S.C. 485, and *Rousseau* v. *Levis*, 14 Q.L.R. 376, distinguished.]

Statement

APPEAL by the plaintiff from the judgment of Superior Court for the district of St. Francis, maintaining the defendant's confession of judgment and dismissing plaintiff's action for the surplus with costs.

The appeal was allowed.

J. A. Gaudet, for the plaintiff.

J. A. Leblanc, for the defendant.

The judgment of the Court was rendered by

DeLorimier, J.

DELORIMIER, J.:—The plaintiff is an advocate practising in the district of St. Francis. He claims from the defendant the

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total amount of $872.80, made up as follows: 1, $532.80, his taxed bill of costs as attorney for the defendant in two cases of *Lamontagne* v. *Lemay and the Corporation of Megantic*, defendant; 2, $160 as travelling expenses and solicitor and client fees; 3, $180 as counsel fee of Mr. J. Nicol, who acted with him in the aforesaid cases. The plaintiff alleges that he was authorized by resolution of the corporation defendant to appear on its behalf and on that of the defendant Lemay, its then mayor, in these cases. The defendant confessed judgment for $320 and the costs of an action of that class, which confession was refused as illegal, insufficient and null. The defendant then pleaded that the aforesaid resolution of its council was *ultra vires;* that it could not oblige itself to pay the costs of Lemay's defence; that the plaintiff had never been authorized to retain the services of counsel; that the travelling expenses and solicitor and client fees charged were exorbitant; and that the sum of $320 for which it had confessed judgment was more than ample to cover the plaintiff's services in these cases. The trial Judge mantained the defendant's claim and dismissed the action for the surplus with costs.

The plaintiff's first ground of appeal is that the confession of judgment is insufficient and irregular, inasmuch as it was fyled without being supported by any resolution of the corporation defendant giving a special and authentic authorization for the production thereof (art. 527 C.P.), and inasmuch as it was only fyled of record at the hearing of the case; and the plaintiff contends that even if the confession could be maintained it should only, in any event, have been maintained with costs. against the defendant up to the time of its production. This objection only raises a question of costs, which we need not examine, in view of the conclusion which we have reached on the merits.

On the merits, and regarding the sufficiency of the confession of judgment, this is what the record discloses: There is a by-law obtaining within the limits of the corporation defendant forbidding the sale of intoxicating liquors. The defendant takes action itself against those violating the law and, in such cases, becomes the owner of the fines. (License law of 1908, art. 165, or 1108 R.S.Q. 1909). Now, the corporation defendant had instituted two actions against one T. Lamontagne, the one for having sold intoxicating liquors without a license, and the other for running a temperance hotel without a license. The warrants were signed by T. Lemay, mayor of the corporation defendant, who summoned Lemay to appear before him. On January 11th, 1911, Lamontagne served on Mr. Lemay, the mayor, who was to sit in these cases as justice of the peace, a writ of prohibition to prevent him from hearing and deciding

these cases as justice of the peace, on the ground that he was only a justice of the peace in his quality of mayor of the corporation defendant, which was the interested party. Mr. Lemay then went to Sherbrooke and consulted a legal adviser and asked him to confer with the present plaintiff. It would seem that Mr. Lemay would not have pleaded to these actions had not certain aldermen of the defendant corporation insisted upon his contesting them. He had no personal interest in so doing, but relying doubtless on the defendant's guaranteeing him, appeared through the plaintiff.

On January 24th, 1911, Lamontagne amended his prohibition proceedings by adding the corporation defendant as respondent. The plaintiff, an advocate, was also the clerk of the defendant. The defendant entrusted him with the defence of these actions and on January 28th, 1911, passed a resolution to this effect as follows:—

> That the clerk be authorized to appear and defend, at the expense of the corporation in the cases both against Mr. T. Lemay, mayor, and against the corporation of the town of Megantic, Nos. 228 and 229 S.C., St. Francis, cases instituted by T. Lamontagne.

The defendant was anxious to have these cases decided, as the mayor did not wish to contest them at his expense and would have declined to sit not only in these two cases, but also in any other case brought by the corporation against those who violated the license law. The plaintiff in his quality of attorney, therefore, appeared in these cases and brought them to final issue, obtaining their dismissal. Thereupon the defendant refused to pay the plaintiff's costs in the proceedings against the mayor on the ground that it could not validly bind itself to this, even by the above-mentioned resolution. Hence the present action and the judgment under review.

The defendant submits that its resolution of January 28th, 1911, is *ultra vires* in so far as the proceeding against Mayor Lemay were concerned, and that it could not validly bind itself to pay the costs of a contestation to which it was not a party and in which it was not interested. The defendant cites the case of *Thibaudeau* v. *Corporation d'Aubert Gallion*, 4 Que. S.C. 485, and argues that the proceedings of Lamontagne were for the purpose of preventing Lemay from filling the functions of justice of the peace and not to prevent him from filling those of representative of the municipal authority, and relies on the decision of *Rousseau* v. *Corporation of Levis*, 14 Q.L.R. 376 *et seq.* This contention of the defendant might have some weight if, as a matter of fact, it had had no interest in the cases in question. But, as already mentioned, there was in this locality a prohibition by-law under the provisions of the license law and the defendant itself brought action

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against those violating this law. Now, the mayor was often called upon to sit *ex-officio* as justice of the peace, and article 64 of the Cities and Towns Act apparently gave him the right to sit even in those cases where the corporation defendant was complainant. Nevertheless, as we have seen, Mayor Lemay, who had no personal interest at stake, was sued by Lamontagne, who wanted to prevent him from sitting *ex-officio* as justice of the peace in these cases, where the defendant was complainant. He never would have pleaded to such an action had not the aldermen insisted in the interest of all the municipal ratepayers on having this question definitely settled by the Courts. It was under these circumstances that the council of the corporation defendant passed the resolution of January 28th. Both cases are mentioned in the resolution and the present plaintiff acted as attorney for both parties without the least complaint.

In the case of *Thibaudeau* v. *Corp. d'Aubert Gallion*, 4 Que. S.C. 485, the point was about a resolution passed by the municipal council of the corporation defendant to guarantee the plaintiff his costs on a *quo warranto* brought to have him declared unqualified to sit as councillor. The plaintiff had been appointed by the council in replacement of a councillor by the name of Lessard, whose seat had been declared vacant by reason of absence. Lessard had attacked the validity of the resolution disqualifying him and naming Thibaudeau in his stead and proceeded by *quo warranto*; and then the council passed a resolution to guarantee Thibaudeau's costs on these proceedings. The *quo warranto* was maintained and Thibaudeau condemned to pay the costs. Thibaudeau then sued the corporation for these costs, but the corporation pleaded that its resolution was *ultra vires*. The Superior Court maintained this plea and its judgment was confirmed by the Court of Review—Casault and Andrews, JJ., and Routhier, J., dissenting. Mr. Justice Routhier, who dissented, was of opinion that the resolution of the counsel was legal and *intra vires*, as he considered that the corporation had a valid and sufficient interest in having the legality of its proceedings upheld or in indemnifying Thibaudeau for the damages he might be called upon to pay if the resolution of the council should turn out to be illegal. And he cites: Dillon, On Corp., p. 117; 1 Beach, On Corp., pp. 653 and 658 and 662; Jones, On Neglig. of Mun. Corp., p. 336, par. 172 *et seq.* The majority of the Court considered, however, that the interest of the corporation in that case was not sufficient. Andrews, J., said at 492:—

> The contention of the plaintiff is that the council has a right to come to the plaintiff's aid because the attack on him called in question the validity of its own resolution appointing him; but to admit this would

be to open the door very wide to the expenditure of the ratepayers' money in litigation in which they had little or no interest. It would be to say that in every suit between private individuals in which one of the litigants averred the illegality of a proceeding of any kind, whether by-law, *proces-verbal*, or resolution of a council, that council could engage in the fray at the expense of the ratepayers.

So that Mr. Justice Andrews refused to recognize the legality of this resolution solely because he considered that the municipal corporation had not a sufficient interest so to do; and this is revealed all the more clearly from his remarks anent another case, *Desroches* v. *Corp. of St. Bastile*, 17 R.L. 266, where the resolution of a municipal council guaranteeing the costs in a case to which it had not been party had been maintained. He said:—

> The reason in *Desroches* v. *Corp. of St. Bastile*, 17 Rev. Leg. 266, for maintaining a resolution by the council to pay the costs of sustaining a decision came to by it, is that such decision interested the whole of the ratepayers of the municipality. The rule of law on such matters laid down by Dillon, in his work on Municipal Corporations, vol. 1, ch. 6, par. 147 (page 174 of the 3rd ed.), is that "where a municipal corporation has not interest in the event of a suit, and the judgment therein can in no way affect the corporate rights, or corporate property, it cannot assume the defence of the suit, or appropriate its money to pay the judgment therein, and warrants or orders based upon such a consideration are void."

As will be seen, this case does not help the defendant in any way. In the present case the resolution in question was passed because the council of the corporation defendant considered that, in the interest of the municipal ratepayers, it was important to have it decided whether, in cases where the municipality was complainant, and an interested party as regards fines and costs, the mayor and the aldermen were competent to sit as justices of the peace. It is evident that this question interested the whole municipality, and fulfilled the conditions mentioned in the remarks of Mr. Justice Andrews. (Fuzier-Herman, C.C., Ann. on art. 1997, No. 5.)

In the case of *Rousseau* v. *Corporation of Levis*, 14 Q.L.R. 376, cited by the defendant, it was held municipal corporations are not responsible for the unauthorized and unratified actions of its constables or policemen which they have the power to appoint and dismiss. That was the case of an arrest by policemen for a criminal law offence. The constables had been appointed by the municipality, but their act was in the execution of the criminal laws. The municipality could evidently not be held responsible in such a case. The same principle was recognized by this Court in *Roy* v. *City of Montreal*, 39 Que. S.C. 151. This case has, therefore, no analogy with nor bearing on the present controversy.

After careful examination of the facts and of the law, we

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come to the conclusion that the resolution of January 28, 1911, is legal and valid. We, therefore, find the corporation defendant liable for the costs of the contestation in both cases, both on the writs of prohibition and as regards the subsequent proceedings . . . and accordingly modify the judgment of the Court below so as to grant the plaintiff the sum of $541.70.

The plaintiff also claimed a sum of $180 as fees for counsel in these cases. This item was rejected by the trial Judge. We are of opinion that the plaintiff did not, under the circumstances of the case, have a sufficient mandate to retain counsel. He should have obtained a special authorization for this purpose. He has produced none and this item cannot as a result be granted: *Augé* v. *Filiatrault*, 10 Que. S.C. 157; *Taylor* v. *Alexander*, 12 Que. S.C. 159.

Judgment will go for plaintiff in the sum of $541.70, with costs in both Courts.

Judgment for plaintiff.

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May 7.

WONG LING v. CITY OF MONTREAL.

Quebec Court of Review, Archibald, McDougall, and Chauvin, JJ. May 7, 1913.

1. HIGHWAYS (§ IV A—6)—INJURIES FROM DEFECTS—DEFECTIVE CROSSING PLACE.

While a city municipality is not obliged to keep the whole street surface in a condition safe for foot passengers, yet, if it so deals with a portion of the street adjoining a public building as to invite the public to use that part of the street as a crossing place for foot passengers, the city is under an obligation to make it safe for that purpose, although the place so used is not a continuation of any sidewalk and was not paved in the manner usual for street crossings in that locality.

[See also *Breen* v. *City of Toronto*, 2 O.W.N. 690; *Brown* v. *City of Toronto*, 2 O.W.N. 982; *Lowery* v. *Walker*, 27 Times L.R. 83 (H.L.); *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, 45 Can. S.C.R. 194.]

Statement

APPEAL by plaintiff from the dismissal of his action for personal injuries sustained by the dangerous condition of a city street.

The appeal was allowed, and the action maintained.

R. T. Stackhouse, for plaintiff, appellant.

J. A. Jarry, K.C., for city, respondent.

Archibald, J.

ARCHIBALD, J.:—Wong Ling had some business at the custom house. He boarded a street car at the corner of Craig and McGill streets on the Outremont line. That car proceeded down McGill street to the river-front and then turned eastward until it got opposite the custom house. There, upon plaintiff giving the usual signal, the car stopped and plaintiff disembarked with two others, on the extreme south side of the street. The plain-

tiff waited until the car had passed, and then proceeded with his companions to cross the street, but before reaching the other side of the street, he slipped and fell upon a place which he declares to be in a dangerous condition. He sued for damages in the sum of $1,999. The defendant pleaded that there was no crossing at that place at all, and that it was not obliged to keep the street where there was no crossing in a condition suitable for pedestrians. It says besides that, if there was a crossing there, it was well kept, as well kept as it could be at the time of the year, and it disclaims responsibility. The Judge has maintained the position of the defendant on the ground that it is not proved that there was a crossing at that point, and that the defendant is not obliged to keep its streets all over fit for the passage of pedestrians. The proof establishes that the cars have always been for years in the habit of stopping at that point to take on and let down passengers; that, upon the occasion in question, there was a space of some ten feet wide adjoining the revetment wall cleared by the city evidently for the disembarkation of passengers at that point, as there was no sidewalk on that side of Common street, and there was no passage to the wharf at that spot.

The proof of the defendant—that there was no crossing there—goes only to this extent: that there was no stone crossing laid in the level of the street, and that even does not seem to be very decisively proved. But the permission on the part of the city for years, to the street railway, to stop at that point and let down passengers and to take them up; the fact that the city itself excavated in the snow at that point, evidently for passengers getting off and getting on the cars, constituted an invitation by the city to the public using the custom house, to cross the street at that point, and constituted an obligation on the part of the city, during the winter at least, to treat that particular part of the street as a sidewalk and to make it safe for foot passengers crossing. There were streets on the north side leading up into the city, and passengers on the cars, wanting to make use of those streets, had to get off the cars at that point, and naturally the custom house is an important centre that many people have occasion to visit.

While I quite agree with the decision of the Judge that the city is not obliged to keep the whole street surface in a condition safe for foot passengers, yet I hold that the city in this instance, at that point, made preparation, by excavating snow and otherwise, for that particular point to be used as a crossing and that, having thus invited the public to cross at that point, it was obliged to treat it as a crossing for foot passengers and to make it safe for that purpose. I am of opinion that the judgment is erroneous and ought to be reversed.

Judgment for $1,200.

Appeal allowed.

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May 9.

Re STENHOUSE.

Quebec Superior Court, District of Montreal, Guerin, J. May 9, 1913.

1. INFANTS (§ I C—14)—CUSTODY—JUVENILE COURT—INTERIM DETENTION PENDING HEARING.

On the arrest of a juvenile under 14 years of age in respect of whose support a delinquency charge against the parent is pending before a Juvenile Court, the judge of the Juvenile Court may make an interim order for the detention of the child in a detention home pending the hearing of the charge.

Statement

MOTION on *habeas corpus* for discharge from custody of two children held at the Detention Home, under the direction of the Judge of the Juvenile Court, pending the inquiry before him.

Guerin, J.

GUERIN, J.:—Considering that, under art. 4031 of the Revised Statutes of Quebec, any ratepayer of the municipality may cause to be brought before two justices of the peace or other functionaries therein mentioned, any child of not more than 14 years of age, who is an orphan, or fatherless, or motherless, if the surviving parent is badly behaved; or any child who, in consequence of the drunkenness or other vices of his parents or his guardian, or the person with whom he resides, is brought up without education and without wholesome control, under circumstances which expose him to lead an idle and disorderly life;

Considering that, under art. 4036 (*b*) of the Revised Statutes of Quebec, any peace officer may arrest and bring before the Judge of the Juvenile Delinquents' Court any child to whom the aforesaid article of the R.S.Q. applies;

Considering that, under the same art. 4036 (*b*), if the Judge of the Juvenile Court, after inquiring into the facts and hearing such evidence as he thinks necessary, considers that such child is neglected within the meaning of art. 4031 of the R.S.Q. and needs protection, he may make any order he thinks in the interest of the child in accordance with the Act of Parliament of Canada, 7-8 Edw. VII. ch. 40;

Considering that in the present case, on April 23, 1913, the deputy high constable, acting in and for the city of Montreal, did arrest said minors in virtue of the warrant of April 14, 1913, issued by the Judge of the Juvenile Court;

Considering the return of the director of the Detention Home for Juveniles, upon the writ of *habeas corpus*, sets forth that the minors have been confined to his care by the Judge of the Juvenile Court;

Considering that these minors are properly under the detaining order of the Judge of the Juvenile Court, whose inquiry has been arrested by the present proceedings under the writ of *habeas corpus;*

Considering that, under the provisions of the R.S.Q., the Judge of the Juvenile Court is authorized by law to inquire into the facts set forth in the complaint and to hear such evidence as he thinks necessary to determine whether these two minors are neglected within the meaning of the R.S.Q., and need protection, and to make such order as he thinks necessary in the interest of these children in accordance with 7-8 Edw. VII. ch. 40, Canada;

Considering that the temporary detention of the said minors by the director of the Detention Home for Juveniles, in said Detention Home, is justified by law, and appears, moreover, under the facts surrounding this case to be best for the minors, pending the inquiry of the Judge of the Juvenile Court and his decision as to what is the wisest course to follow to secure their future safety and protection;

Considering that the petition for the writ of *habeas corpus ad subjiciendum* is unfounded, and that the respondent has shewn just cause for the detention of said minors and has established the justification of his acts;

Doth dismiss the petition; doth quash said writ of *habeas corpus ad subjiciendum* herein issued, and doth order that the minors remain in the custody of the respondent in the Detention Home of the Juvenile Delinquents' Court until otherwise ordered by the Judge of the said Court or other competent authority; in view of the intimate relations of petitioners towards the minors and in view of other circumstances of a painful nature which surround this case, does not grant any costs against petitioners.

Habeas corpus quashed.

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Feb. 17.

McHUGH v. UNION BANK.

Judicial Committee of the Privy Council, Viscount Haldane (Lord Chancellor), Lord Macnaghten, Lord Atkinson and Lord Moulton. February 17, 1913.

1. INTEREST (§ I B—20)—ON LOANS—SETTLEMENT OR PAYMENT, EFFECT—INTEREST RATE UNDER BANK ACT.

Where a bank's customer for about six years ran accounts with his bank, by which he was charged interest in excess of that permitted by the Bank Act (Can.) and where these accounts were then ascertained between the parties and covered by a chattel mortgage at excessive interest, and where three years later this chattel mortgage and concurrent additional accounts at excessive interest were all ascertained between the parties and covered by a new chattel mortgage stipulating for excessive interest, the latter mortgage amounted to a settlement of accounts between the bank and its customer having the same effect as payment would have had with regard to the question of excessive interest on the accounts and earlier mortgage and estopping the customer from disturbing such settlement as he must have known that the bank had no right to stipulate for or exact the excessive interest and he voluntarily assented to such settlement and thereby gave up his right to recover back any excess.

[*McHugh* v. *Union Bank*, 2 A.L.R. 319, affirmed; *McHugh* v. *Union Bank*, 3 A.L.R. 166; *Union Bank* v. *McHugh*, 44 Can. S.C.R. 473, reversed in part; Bank Act, R.S.C. 1906, ch. 29, sec. 91, referred to.]

2. INTEREST (§ II B—65)—RATE UNDER BANK ACT—ULTRA VIRES STIPULATION FOR EXCESS.

Notwithstanding prior dealings between the bank and its customer by which he had for a number of years acquiesced in the payment to the bank of interest on advances at a higher rate than seven per cent. the rate limited by the Bank Act, R.S.C. 1906, ch. 29, sec. 91, his subsequent mortgage to the bank settling the balance of indebtedness and containing a stipulation for the like excessive interest contravenes sec. 91 of the Bank Act, R.S.C. 1906, ch. 29, and the insertion by the bank of such a stipulation was *ultra vires* on its part and the stipulation itself was inoperative; the interest collectable in respect of such mortgage must be calculated at the rate of five per cent. as being the legal rate where no special rate has been legally fixed and not the intermediate rate of seven per cent. for which the bank was entitled to contract.

[*McHugh* v. *Union Bank*, 2 A.L.R. 319, dictum *per* Beck, J., affirmed; *Union Bank* v. *McHugh*, 3 A.L.R. 166, and 44 Can. S.C.R. 473, reversed in part.]

3. INTEREST (§ I B—22)—ON ACCOUNTS—ARITHMETICAL ERRORS—SURCHARGING AND FALSIFYING—STATUTORY LIMITATION.

On the surcharging and falsifying of an account with respect to arithmetical errors in the calculation of interest, the parties should not be limited to a period of six years before the action was commenced, where the Statute of Limitations was not pleaded, such errors being of a character which common honesty would demand should be rectified whenever they are discovered.

[*McHugh* v. *Union Bank*, 2 A.L.R. 319, affirmed; *McHugh* v. *Union Bank*, 3 A.L.R. 166, reversed in part, and *Union Bank* v. *McHugh*, 44 Can. S.C.R. 473, reversed in part.]

4. APPEAL (§ VII L 3—498)—OF FINDINGS OF COURT—DAMAGES.

A finding of the trial judge assessing damages for the negligence of a chattel mortgagee's agent in exercising the power of sale in the mortgage in such a manner that the mortgaged property became deteriorated and realized less than it ought to have realized upon the sale,

should not be set aside on review, unless it appears that the trial judge's conclusions from the evidence before it are clearly erroneous.

[*McHugh* v. *Union Bank*, 2 A.L.R. 319, affirmed; *McHugh* v. *Union Bank*, 3 A.L.R. 166, reversed in part; *Union Bank* v. *McHugh*, 44 Can. S.C.R. 473, reversed in part.]

5. CHATTEL MORTGAGE (§ VI—55)—ENFORCEMENT—REALIZATION OF MORTGAGED PROPERTY—SALE.

It is the duty of a chattel mortgagee when realizing the mortgaged property by sale under the power contained in the mortgage, to act in the realization by sale as a reasonable man would act in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

6. CHATTEL MORTGAGE (§ VI—55)—ENFORCEMENT—NECESSARY COSTS OF REALIZING.

On a realization of mortgaged property by a chattel mortgagee under a power of sale contained in the instrument, the chattel mortgagee should be allowed to deduct from the amount realized the reasonable expenses of such realization, *ex. gr.*, the necessary costs for care and removal of horses from quarantine and keeping them in good condition.

7. CHATTEL MORTGAGE (§ VI—55)—ENFORCEMENT—REALIZATION—STATUTORY TARIFF NOT EXCLUSIVE—ITEMS OF EXPENSE NOT SPECIFIED.

Section 2 of ch. 34 of the North-West Territories Consolidated Ordinances, 1898, merely fixes a statutory scale of costs for certain acts which ordinarily must be performed in connection with any seizure or sale, but it does not interfere with the rights of the parties to a chattel mortgage to deal with reference to other expenses of realization which are reasonable and necessary in the interests of both parties.

8. STATUTES (§ II A—104)—CONSTRUCTION; OPERATION; EFFECT—MEANING OF WORDS—MANDATORY OR DIRECTORY—"MAY."

The infliction of the penalty provided in sec. 3 of ch. 34 of the North-West Territories Consolidated Ordinances, 1898, to the effect that if greater or other than statutory costs be taken by the person making a distress, the Court "may" order such person to pay the party aggrieved treble the amount of moneys taken in excess, is permissive only.

[Section 8, sub-sec. 2, of Interpretation Ordinance, ch. 1 of the Consolidated Ordinance (N.W.T.) referred to.]

Statement

APPEAL by the plaintiff in the original actions from the judgment of the Supreme Court of Canada, *Union Bank* v. *McHugh*, 44 Can. S.C.R. 473, whereby the judgment of the Supreme Court of Alberta, *McHugh* v. *Union Bank*, 3 A.L.R. 166, was varied.

Atkin, K.C., *Geoffrey Lawrence*, and *Reilly* (of the Colonial Bar), for the appellants.

Ewart, K.C., (of the Colonial Bar), *Buckmaster*, K.C., and *H. Greenwood*, for the respondents.

The judgment of the Board was delivered by

Lord Moulton.

LORD MOULTON:—These are consolidated appeals in two cases in which Felix A. McHugh and Thomas P. McHugh were respectively the plaintiffs and the Union Bank of Canada was the defendant. They are brought by special leave from judgments of the Supreme Court of Canada in two cases, dated May 15,

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1911. The original plaintiffs, Felix A. McHugh and Thomas P. McHugh, have died during the pendency of the actions, and the present appellants are in each case the personal representatives of the original plaintiffs. The appeals were directed to be heard together. The points raised in them are substantially the same, with the exception of the point as to amount of damages, which turns upon the facts in the two cases, which, though similar, are not identical.

For the purposes of their Lordships' judgment it will be convenient, however, to deal with the actions separately, taking first the action of *Felix A. McHugh* v. *Union Bank of Canada*. The decision in that case will necessarily govern the decision in the case of *Thomas P. McHugh* v. *Union Bank of Canada*, with the exception of the question as to damages, which will be dealt with separately.

The action of *Felix A. McHugh* v. *Union Bank of Canada* arose out of the following circumstances. Felix A. McHugh was a rancher carrying on business in the Province of Alberta, with his brother Joseph McHugh, under the name of McHugh Brothers. On December 31, 1904, this firm executed a chattel mortgage to the Union Bank of Canada on a number of horses and other chattels, to secure a principal sum of $24,000, with interest at the rate of 8 per cent. per annum, with rests every three months. This chattel mortgage was held by the bank as collateral security for its advances to the firm, and continued so to be held until May 28, 1907, when the firm executed another chattel mortgage to the bank, on the same terms, on certain horses and other chattels, to secure a principal sum of $36,223, in substitution for the former mortgage. This sum represented the admitted indebtedness of the firm to the bank at the date on which it was executed, and was intended to be treated as collateral security for the advances to the firm in the same way as the mortgage of the 31st December, 1904, had been treated. Subsequently to the making of the last-mentioned mortgage, and prior to any of the events hereinafter referred to, Felix A. McHugh acquired the partnership business and assumed the liability to the bank. Early in July, 1908, Felix A. McHugh was in default under the chattel mortgage; and, accordingly, the bank, by a certain authority, dated the 6th July, 1908, directed Alden B. Smith to seize the mortgaged horses under the mortgage, and such seizure was thereupon made by him on behalf of the bank. The horses in question were at the time of the seizure upon Felix A. McHugh's ranch, situated about 55 miles from Calgary. Some of the horses on the ranch were suffering from mange; and, therefore, the whole of the horses were in quarantine; and, according to the regulations prevailing in the province at the time, no horses could be removed from the ranch either for the pur-

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pose of sale or otherwise until after they had been dipped in a bath of sulphur and lime. Accordingly, the bank caused the horses to be so dipped, and, after all the quarantine regulations had been duly complied with, had them driven to Calgary in two or three lots.

It is not necessary to go into the detail of the collection and treatment of the horses on the ranch, or of the way in which they were driven into Calgary for sale, excepting to say that the plaintiff complained that they were driven too hurriedly, and that, by reason thereof, some of them died and others were put out of condition; and it is in respect of these that the claim for damages is made. It is, however, admitted that it was proper for the bank so to collect, treat, and send to Calgary these horses in order to effect a proper realization of the mortgaged chattels. The only other alternative would have been to sell them to some buyer who would have been content to take them at the ranch under quarantine, and it is obvious that such a proceeding would have involved ruinous loss to the plaintiff, who was interested in their fetching as high a price as possible, seeing that he was entitled to have the amount realized by the sale put to his credit in reduction of the amount due by him to the bank. The horses were sold by public auction by the Alberta Stock Yards Company, Limited, at their stock-yards at Calgary, at various dates ranging from the 14th August to the 3rd September, 1908. No suggestion is made in the evidence that this was not a proper and prudent mode of conducting the sale, nor was any objection made to it at the time or subsequently. Indeed, from the evidence their Lordships would conclude that it was practically essential thus to sell the horses at the stock-yards at Calgary in order to get the benefit of a market.

The charges of the Alberta Stock Yards Company, Limited, for conducting the sale were their usual and customary charges, namely, expenses and 3½ per cent. commission, this commission including the necessary advertising. The company also, according to their practice, wrote round to such customers as they thought likely to become purchasers, giving them special notice of the proposed sales; and no complaint is made in this action of any lack of diligence on their part or on the part of the bank in advertising and otherwise making known such sales. The accounts of the Alberta Stock Yards Company, Limited, in respect of such sales are set out in a letter from the company to the assistant manager of the bank, dated September 9, 1908.

The present action was commenced in the month of September, 1908, the statement of claim being delivered on the 11th September. In substance the relief claimed was threefold:—

(1) A taking of accounts between the plaintiff and the defendant bank under the mortgages.

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(2) Damages to the amount of $8,000 for the defendant's negligence and want of care and skill in connection with the realization of the horses.

(3) Upon an allegation that the defendant bank had charged for expenses and commission on the sales a larger sum than that which could be properly charged under the provisions of the Ordinance respecting distress for rent and extra-judicial seizure, a claim is made for the sum of $2,232.12, being treble the amount of the alleged excess.

At the trial an application was made to amend the statement of claim by adding an allegation to the effect that the rate of interest provided to be paid by the said mortgage was illegal and in excess of the rate which the bank was entitled to stipulate for, take, reserve, exact, receive, or recover under the Bank Act. The learned Judge did not allow the amendment, taking the view that the plaintiff was estopped on the point, so far as related to matters previous to the mortgage of May 28, 1907, and that the question of the rate of interest to be charged under the later mortgage would probably be raised on taking the accounts. But, although the amendment was not formally allowed, the effect of the Judge's action and that of the Judges in the Superior Courts has been to make the question as to the proper rate of interest a question to be decided by their Lordships, as well as the question of the extent to which past payments and statements of account are to be affected by their decision.

The questions thus raised between the parties are so distinct and so diversified in their nature that it will conduce to clearness if they are taken separately, both in dealing with the history of the litigation and in deciding the questions raised.

Accounts.—The learned Judge at the trial, by a judgment dated July 12, 1909, directed the bank to file its account, beginning at May 28, 1907, the date of the latter mortgage. But, inasmuch as the plaintiff had shewn that certain arithmetical errors had been made in the calculation of interest in the accounts between the plaintiff or his firm and the defendant bank prior to May 28, 1907, which affected the amount due to the defendant bank on that day, he gave leave to the plaintiff to surcharge and falsify such accounts in respect of those arithmetical errors, and not otherwise, so as to correct the calculation of the amount due to the defendant bank on May 28, 1907, it being admitted that it was the intention of the parties that the sum therein named should be the sum actually due to the defendant bank at that date. In the accounts to be taken under the said mortgage, he directed that the amount so corrected should be taken to be the principal sum secured by the mortgage of that date, and should bear interest according to the terms of the said mortgage, *i.e.*, at 8 per cent., but that it should be open to the plaintiff to contend, on taking the accounts, that the interest should be calculated at the rate of 5 per cent., and not more. On the appeal from the judgment of Mr. Justice Beck to the Supreme Court of

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Alberta, that Court varied these directions by substituting a direction that in taking the accounts between the plaintiff and the defendant bank up to December 31, 1904, the date of the first mortgage, the plaintiff should not be charged with a higher rate of interest than 7 per cent. per annum. From December 31, 1904, to May 28, 1907, they permitted the interest to be charged at 8 per cent. per annum—in this respect agreeing with the judgment of Mr. Justice Beck—but they directed that subsequent interest should be taken at the rate of 7 per cent. per annum. They also directed that no accounts should be opened or inquired into for any period prior to six years previous to the date of the writ in the action.

The judgment of the Supreme Court of Alberta was unanimous, and was delivered by Mr. Justice Scott. The reason that he gives for fixing 7 per cent. is, that it is the highest rate per cent. which by the Bank Act the defendant bank is entitled to charge. He also considered that he was entitled to find that, prior to the first mortgage, the plaintiff was not aware that he was paying an excessive rate, but that from and after signing that mortgage, promising definitely to pay 8 per cent., the payments were voluntary and could not be recovered back.

An appeal and a cross-appeal were brought from this decision to the Supreme Court of Canada, and these directions as to accounts were affirmed, so far as the method of taking them is concerned. Mr. Justice Idington appears to have dissented from the judgment of the rest of the Court on this point.

Reserving for consideration later the question of the proper rate of interest to be allowed, their Lordships are of opinion that the mortgage of May 28, 1907, was intended to be a settlement of accounts between the parties, and that no case has been made out by the plaintiff for disturbing the accounts so settled, otherwise than that he should have liberty to surcharge and falsify previous accounts with regard to arithmetical errors. In this respect, therefore, their Lordships agree with the judgment of Mr. Justice Beck at the trial.

Damages.—At the trial Mr. Justice Beck considered all the evidence and came to the conclusion that there was negligence in connection with bringing some 360 of the horses to Calgary, considering their condition, the time of the year, and the road over which they were driven. He was of opinion that they should not have been driven so soon after they had been dipped, nor in so large a band, etc., and he assessed the damages at $2,800. On appeal to the Supreme Court of Alberta, that Court set aside that assessment, on the ground that it was unable to discover any method by which such an amount could properly be arrived at upon the evidence, but it granted to the plaintiff the option to have it referred to the clerk of the Court at Calgary

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to take an account of what damages, if any, the plaintiff had suffered by the negligence of the defendant, but limiting such damages to the difference between the sums of money received by the defendant from the sale of the horses, and what was a fair and full value of the horses as they stood before they were seized or handled at all while in the plaintiff's possession at his ranch, still ungathered and still in quarantine.

From this decision the plaintiff appealed to the Supreme Court of Canada. On such appeal, the order directing a reference at the plaintiff's option was affirmed by a majority of the Court, but the direction as to the mode of assessing damages on such reference was varied, the Court declaring that the measure of damages to be allowed should be the depreciation in value, if any, of the plaintiff's horses caused by the manner in which they were driven from the plaintiffs' ranch to the place at which they were sold. Duff and Anglin, JJ., who constituted the minority of the Court, were of opinion that the judgment of the Judge at the trial for $2,800, in respect of damages should be restored.

Their Lordships are of opinion that the assessment of damages by the learned Judge at the trial should stand. There was evidence on which the learned Judge could come to the conclusion that, by the negligent behaviour of the defendant's agent, the mortgaged property had become deteriorated so that it realized less than it ought to have realized upon sale. The assessment of the damages suffered by the plaintiff from such a cause of action is often far from easy. The tribunal which has the duty of making such assessment, whether it be Judge or jury, has often a difficult task, but it must do it as best it can; and, unless the conclusions to which it comes from the evidence before it are clearly erroneous, they should not be interfered with on appeal, inasmuch as Courts of appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give.

Their Lordships cannot see anything to justify them in coming to the conclusion that Mr. Justice Beck's assessment of the damages is erroneous; and they are, therefore, of opinion that it ought not to have been disturbed on appeal.

Penalties.—Before dealing with the decision of the Courts upon this point, it is necessary to explain in greater detail the nature of the claim under this head. The claim is based upon the provisions of the North-West Territories Consolidated Ordinances, 1898, ch. 34. By this Ordinance, statutory limits are prescribed for costs and charges in respect of seizures under chattel mortgages, bills of sale, or any other extra-judicial process whatsoever. This is done by means of a schedule to the Ordinance, setting out the charges for certain specific acts in connection

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with such seizures, namely: (1) levying the distress; (2) the man in possession; (3) appraisement; (4) advertising; (5) catalogue, sale, commission, and delivery. By the third section it is enacted that, if greater or other costs be taken by the person making the distress, the party aggrieved may summon him before the Supreme Court of the judicial district where the seizure is made, and that Court may order him to pay to the party aggrieved treble the amount of moneys taken in excess and costs of suit.

The contention of the plaintiff is, that the schedule is inclusive; and that, in return for the costs and charges specified in the schedule, the party making the seizure must bear all costs connected with it, whether for the matters named in the schedule or otherwise; and, further, that it is impossible contractually to exclude the operation of the statute; so that, whatever be the provisions of the chattel mortgage with regard to the rights of the mortgagee to be reimbursed necessary expenses in the realization of the mortgaged property in case of default, he can, under no circumstances, receive more than the sums set out in the schedule of the Ordinance. The plaintiff also contends that, if he does take or receive anything in excess of the scheduled sums, the Court has no option but to inflict upon him the payment of treble the excess by way of penalty.

The defendants, on the other hand, contend that the statute deals only with the costs of certain matters, which are, so to say, the ordinary and almost universal features of realization by seizure and sale, viz., seizure, possession, appraisement, advertisement, and sale; but that it does not refer to the costs of other acts which may be necessary and proper for the right realization of the property seized, and which, as between the mortgagor and the mortgagee, would, on well-recognized principles of equity, be regarded as costs of realization, which would be a first charge on the sums realized by the sale. They further contend that it is open to parties to insert provisions in the mortgage-deed entitling the mortgagee to other and different costs, and that such provisions are valid between the parties, notwithstanding the Ordinance. And, finally, they contend that the infliction of the penalty is permissive only and not obligatory; and that, if in the present case the Ordinance applies and there has been an infraction of it, the circumstances are such that the Court ought not to impose the penalties.

The Judge at the trial appears to have adopted the plaintiff's contention that the schedule was inclusive, but he declined to impose the penalties, for a reason which is now admitted to have been based on a mistake of fact, and, therefore, need not be examined.

On appeal to the Supreme Court of Alberta, the Court

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affirmed his judgment as to the schedule being inclusive, and further found in favour of the plaintiff with regard to the penalties. They held that it was obligatory on the Court to inflict the penalties where any excess above the schedule had been charged, and referred it to the clerk of the Court of Calgary to ascertain the excess and to tax the costs "allowable under a schedule to the said Ordinance, upon which the plaintiff may move before a Judge for judgment for treble the excess shewn to have been taken"—language which it is difficult, if not impossible, to construe, and which leads their Lordships to the conclusion that there must be some misprint in the record.

On appeal to the Supreme Court of Canada, the judgment on this point was not affirmed, the Court being unanimously of opinion that the defendant bank ought to be allowed its reasonable and necessary costs for care, maintenance, and removal of the horses seized by it under its said chattel mortgage. Inasmuch as there was no evidence or even contention that, if this was the legal position of the defendant bank, it had taken or received more than it was entitled to, the Court did not deal with the question as to whether the imposition of penalties by the Court was permissive or obligatory.

Their Lordships agree with the judgment of the Supreme Court of Canada on this point. It is well-settled law that it is the duty of a mortgagee, when realizing the mortgaged property by sale, to behave, in conducting such realization, as a reasonable man would behave, in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold. But such a doctrine recognizes as a necessary corollary the right of the mortgagee to treat the reasonable expenses of such realization as a deduction from the amount realized; and, indeed, unless this is done, the sale-price does not truly represent the value of the property sold, because it is a sum which the owner could not have obtained for it without paying the necessary costs of realization.

In the case of chattel mortgages it may frequently happen that some of the goods may not at the moment of seizure be in a condition which permits of immediate sale, or, in other words, that no reasonable man would attempt to sell them without previous preparation if they were his own. For example, the goods may be in process of manufacture, and may be so unfinished that they would be incapable of being transported without deterioration unless some further operation was performed upon them, or they might require to be baled before they could be put into the market, or they might require to be sent a substantial distance by rail to some place proper for the sale of such goods. Other possibilities of a like kind will readily suggest themselves. But for this purpose it is not necessary to travel beyond the circum-

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stances of the present case. No better instance could be found than that which we have here. The horses were in quarantine on a ranch situated at a considerable distance from any market. They had, therefore, to be dipped and then kept for a time, and then taken a considerable distance before they could reach a market. During all this time they must be fed and tended. All this is admitted by the plaintiff, his only complaint being that they were not kept for a longer time, and in reality he is claiming in this action damages because the defendant did not perform these duties more thoroughly, and in a manner involving greater outlay. But all these operations cost money, and it is common ground that it is only by going to this cost that any realization of the mortgaged property which is fair to its original owner can be obtained. Yet the contention of the plaintiff is, that, although as a mortgagor he is entitled to require that the mortgagee shall incur all these costs in order to increase the amount which the chattels will bring on sale, these costs are not to be a deduction from the sale-price, but must come out of the pocket of the mortgagee, and that it is actually illegal even to provide that it shall be otherwise.

In the present case the relevant provisions of the mortgage-deed are as follows:—

> And upon and from and after taking possession of such goods and chattels it shall and may be lawful, and the mortgagees, and each or any of them, is and are hereby authorized and empowered, at his or their discretion, to sell the said goods and chattels or any of them, or any part thereof, at public auction or private sale, on the premises hereinbefore described or elsewhere, as to them or any of them may seem meet; and from and out of the proceeds of such sale in the first place to pay and reimburse all such sums and sum of money as may then be due by virtue of these presents, and all costs and expenses (including the costs, if any, of the solicitor of the mortgagee) as may have been incurred by the mortgagee in consequence of the default, neglect, or failure of the mortgagors in payment of the said sum of money, with interest thereon as above-mentioned, or in consequence of such sale or removal as above-mentioned, or in consequence of failing in the performance of any of the covenants or agreements herein contained, and on the mortgagors' part to be performed and kept, and in the next place to pay unto the mortgagors all such surplus as may remain after such sale and after payment of all such sum or sums of money and interest thereon as may be due by virtue of these presents at the time of such seizure and after payment of the costs, charges, and expenses incurred by such seizure and sale as aforesaid.

There is nothing unreasonable in these provisions, which probably add but little to what the law would imply in any case of sale by a mortgagee under a power of sale. Yet, if the contention of the plaintiff on this point be correct, all such provisions are made inoperative and illegal by the Ordinance. It would require clear language to lead their Lordships to hold that it is

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the object and effect of any statute to render it impossible for the parties to a chattel mortgage to provide that the mortgagee in realizing the mortgaged property in case of default shall be allowed the fair and necessary cost of so doing. On examining the language of the Ordinance, their Lordships can find nothing which, when reasonably construed, points to anything of the kind.

Taken in connection with the schedule, the only effect of sec. 2 of the Ordinance is, in their Lordships' opinion, to fix a statutory scale of costs for certain acts which ordinarily must be performed in connection with any seizure or sale. For such acts it limits the charges, or rather statutorily ascertains them. But it does not deal in any way with other expenses of realization which are reasonable and necessary in the interest of both parties; and, therefore, in respect of such charges, the ordinary rules of law prevail, and the parties are free to contract, and must be held to the bargain they have made.

This being their Lordships' interpretation of sec. 2 of the Ordinance, it may well be that no question will arise under the penalty clause when the accounts are taken. But it may also happen that some case of an excess charge with regard to a schedule item may be found; and, therefore, it is necessary to consider the question whether the infliction of the penalties in such a case is obligatory or permissive. In deciding this question, the dominating consideration is, that the Ordinance, which is chapter 34 of the Consolidated Ordinances of the North-West Territories of Canada, passed in the year 1898, is subject to the Interpretation Ordinance, which is chapter 1 of the same year, and must be interpreted accordingly. By section 8, sub-section 2, of the Interpretation Ordinance, it is expressly provided that the expression "shall" shall be construed as imperative, and the expression "may" as permissive. It is true that (as is customary in interpretation clauses) these sub-sections are prefaced by the words "unless the context otherwise requires," but that does not take away from the authority of the express direction as to the construction of the words "shall" and "may." The Court is bound to assume that the legislature, when it used in the present instance the word "may," intended that the imposition of the penalties should be permissive, as contrasted with obligatory, unless such an interpretation would be inconsistent with the context, that is, would render the clause irrational or unmeaning. But there is nothing in the context which creates any difficulty in accepting this statutory interpretation of the word "may." The clause is just as intelligible with the one interpretation as with the other. So far from creating any difficulty, the interpretation which leaves it permissive appears more reasonable, seeing that there is no exception in the clause for cases where the excess has been taken either under mistake

or by inadvertence; and it is not likely that the legislature would insist on penalties being enforced where no blame attached. Be this as it may, there is nothing in the clause which will permit their Lordships to depart from the express provision of the Interpretation Ordinance stating that "may" shall be construed as permissive.

This being the case, it is not necessary to examine the English decisions which establish that in certain cases "may" must be taken as equivalent to "must." In the light of those decisions it is often difficult to decide the point; and, in their Lordships' opinion, the object and the effect of the insertion of the express provision as to the meaning of "may" and "shall" in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes.

Should any case of excess be found to have occurred, their Lordships are of opinion that, in view of all the circumstances, and especially of the fact that the conduct of the defendant bank in the course they pursued was reasonable and calculated to obtain the best price for the chattels sold, there is no ground for imposing the penalty.

Interest.—The contention of the plaintiff with regard to the interest chargeable by the bank is, that it is *ultra vires* on the part of the bank to charge a higher rate than 7 per cent., and that their stipulation in the mortgage of the 28th May, 1907, that interest shall be charged at the rate of 8 per cent. was *ultra vires* and void. But he does not contend that the bank is entitled to no interest, but admits that it is entitled to 5 per cent., which is the legal rate of interest where no special rate of interest is fixed. The defendant admits that it cannot recover interest at a higher rate than 7 per cent., but claims that it is entitled to recover interest at that rate. The statutory provisions applicable to the case are to be found in the Bank Act, 1906, which enacts, in section 91, as follows: "The bank may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per centum per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank."

Their Lordships are of opinion that the express provisions of the first portion of this clause rendered it *ultra vires* on the part of the bank to insert in the chattel mortgage of May 28, 1907, the stipulation that interest should be payable at the rate of 8 per cent.; and that, therefore, that stipulation is inoperative. They are of opinion, therefore, that the contention on behalf of the plaintiff in this respect is right, and that the interest under that mortgage must be calculated at the rate of 5 per cent. per annum.

It was further sought by the plaintiff to apply this principle to the earlier mortgage, and to the various bills or notes of hand

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which preceded it; but, in their Lordships' opinion, the mortgage of May 28, 1907, amounted to a settlement of accounts between the parties, having the same effect as payment would have had with regard to the question as to the interest charged between the parties. The plaintiff must be taken to have known that the bank had no right to stipulate for and no power to recover interest at 8 per cent., but he voluntarily assented to that which was equivalent to payment of interest at that rate, and he has no right to recover back any excess which he thus voluntarily paid.

Inasmuch as their Lordships are of opinion that the plaintiff should only be allowed to surcharge and falsify in respect of arithmetical mistakes in the calculation of interest in accounts prior to May 28, 1907, their Lordships do not think that in so doing he should be limited to a period of six years before the beginning of the action. The Statute of Limitations was not pleaded, and such mistakes are of a character which common honesty would desire should be rectified whenever they are discovered.

Thomas P. McHugh v. *Union Bank of Canada.* In this case the plaintiff executed a chattel mortgage on the 17th December, 1907, for an amount which, as in the previous case, represented the indebtedness of the plaintiff to the defendant bank at that date. He made default at or about the same time as Felix A. McHugh, and there was a seizure and sale by the defendant bank. But in this case the complaint against the defendant bank with regard to the sale of the horses is not that there was any negligence in over-driving them, etc., but that the sales were not sufficiently advertised. Mr. Justice Beck at the trial considered this contention established and awarded damages to the amount of $2,175. On appeal, however, to the Supreme Court of Alberta, this part of his judgment was reversed, and the action, so far as it relates to damages for an improvident sale, was dismissed. The Supreme Court of Canada agreed with the judgment of the Supreme Court of Alberta in this respect, and their Lordships see no reason to doubt that they were right in so doing.

Their Lordships will, therefore, humbly advise His Majesty as follows:—

First, that, as regards the appeal of the said Felix A. McHugh (since deceased), the same ought to be allowed in part; that the judgment of the Supreme Court of Canada, dated the 15th May, 1911, and the judgment of the Supreme Court of Alberta *en banc*, dated June 24, 1910, ought to be respectively set aside, and that the judgment of the Supreme Court of Alberta, dated July 12, 1909, ought to be restored, subject to the following variations:—

(1) That the directions as to taking accounts under (*a*) of

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the said judgment shall be varied by directing that the interest on the sum secured by the mortgage of May 28, 1907, shall be taken at the rate of 5 per centum per annum, instead of as in the said judgment directed.

(2) That the directions for taking accounts under (*b*) of the said judgment shall be varied by adding thereto the words "so far as such costs, commission, and charges are in respect of matters to which the schedule to the said Ordinance relates."

(3) That a declaration should be inserted in the said judgment to the effect that the defendant is not liable to pay to the plaintiff any penalties under the provisions of the said Ordinance in respect of the matters to which the suit relates.

(4) That it ought to be further declared that the sum of $2,800 damages is to be set off against such sum as may be found due from the appellants to the respondent on taking the accounts referred to.

And that the respondent should pay to the appellants all their costs in the Courts below, and that there should be no costs of the appeal to this Board.

Second, that, as regards the appeal of the said Thomas P. McHugh (since deceased), the same ought to be allowed in part; that the judgment of the Supreme Court of Canada, dated May 15, 1911, and the judgment of the Supreme Court of Alberta *en banc*, dated June 24, 1910, ought to be respectively set aside, and that the judgment of the Supreme Court of Alberta, dated July 13, 1909, ought to be restored, except so far as it relates to the award of $2,175 damages, as to which the said judgment of the Supreme Court of Canada ought to be affirmed, and subject (*mutatis mutandis*) to the variations set out in the first paragraph of this report, and that the respondent should pay to the appellants all their costs incurred in the Courts below, other than the costs of the proceedings before Mr. Justice Beck relating to the claim for damages, and that the appellants should pay to the respondent its costs of such proceedings, and that there should be no costs of the appeal to this Board.

Judgment below varied.

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April 7.

JOHN DEERE PLOW CO. (plaintiffs, appellants) v. AGNEW (defendant, respondent.)

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. April 7, 1913.

1. CORPORATIONS AND COMPANIES (§ III—31)—COMPANY WITH FEDERAL LICENSE—EXCLUSIVE AGREEMENT FOR SALES TERRITORY WITH RESIDENT OF PROVINCE—WHEN PROVINCIAL COMPANY LICENSE IS REQUIRED—"CARRYING ON BUSINESS," MEANING OF.

A contract made between a company carrying on business as implement dealers and holding a federal charter under the Companies Act, R.S.C. 1906, ch. 79, and a merchant in British Columbia whereby the latter was to sell their goods with an exclusive right within a part of the province and with a limitation on his selling prices, and whereby the company also retained title to the goods until paid for and the merchant agreed to take lien notes from customers to the company direct if it so requested, and to hold money received in partial payments from customers as in trust for the company, does not involve the "carrying on of business" within the province by the company under sec. 139 of the B.C. Companies Act, 10 Edw. VII. ch. 7, and the company, although it has not obtained a provincial license under that statute, may maintain an action against the merchant upon his promissory notes payable within the province for goods shipped by the company from another province to him in pursuance of such agreement.

[*John Deere Plow Co.* v. *Agnew*, 8 D.L.R. 65, reversed.]

Statement

APPEAL from the decision of Murphy, J., of the Supreme Court of British Columbia, *John Deere Plow Co.* v. *Agnew*, 8 D.L.R. 65, by leave of a Judge of the Supreme Court of Canada.

The appeal was allowed and judgment entered for plaintiffs for $3,315.85, with interest.

Chrysler, K.C., and *Caldwell*, for appellants.

George F. Henderson, K.C., for respondent.

Sir Charles Fitzpatrick, C.J.

THE CHIEF JUSTICE:—I am of the opinion that this appeal should be allowed with costs.

Both of the questions submitted for the opinion of the Court assume that the appellant company, in the circumstances of the transactions in question, carried on in British Columbia, "a part of its business," within the meaning of the statutory prohibition relied upon (sec. 166 of the Provincial Companies Act) or that the notes sued on were contracts made by that company in the province in the course of or in connection with its business. I do not pause to inquire whether the statute is intended to penalize contracts made in the province in connection with the business carried on there by an unlicensed or unregistered extra-provincial company, or whether all contracts made in the province by such companies are unenforceable. The distinction is not material in view of the conclusion I have reached.

As stated in the special case, the facts are: An agreement was entered into between the appellant and the respondent, at

Winnipeg, in the province of Manitoba, under which the respondent was given the exclusive right to buy and sell certain of appellants' machines within a defined area of the province of British Columbia. Under this agreement the respondent ordered a shipment of goods which was executed by delivering them f.o.b. at Calgary, in the province of Alberta; the goods to be, thereafter, at the expense and risk of the purchaser. The consignment was to be paid for by promissory notes, and the notes sued on herein were made in execution of that undertaking. All of the notes are dated at Winnipeg, where the head office of the company appellants is situate, and made payable at Elko, in British Columbia, where two of them were actually signed.

I cannot see how, assuming the respondent was the agent of the appellants, under the agreement made in Winnipeg, it can be said, on these facts, that the company appellants carried on "any part of its business" in British Columbia. The most that can be said is that the appellants sold and delivered goods to the respondent in the province of Alberta to be afterwards resold, possibly by the latter, within the province of British Columbia. The statute is not intended to reach those who trade with the province, but those who carry on business within the province, and no act was done by the appellants within the province. If we had to deal with the sale of goods by the respondent to a customer, then the question of carrying on business through an agent in the province might arise.

Can it be said that the promissory notes, made in the province and payable there, but sent to Winnipeg in payment of a debt due under a purchase made at the latter place is a contract made in the province in the course or in connection with the business of the company? A note executed, made payable and delivered to the payee in the province, may be a contract made there by the maker of the note, but it is not a contract made by the appellants who assume no obligation with respect to it. The notes must be considered in connection with the contract of sale and delivery, which is the consideration for which they were given. That contract was complete by the delivery of the goods beyond the limits of the province, and the notes made by the respondent, in British Columbia, were only made in performance of his obligation to pay the amounts specified in those notes under that contract.

As to whether a promissory note is a contract, see Pothier, "Lettre de Change," Bugnet ed., pp. 473, 474:—

> La lettre de change appartient a l'execution du contrat de change, elle est le moyen par lequel ce contrat s'execute; elle le suppose ou l'etablit, mais elle n'est pas le contrat.

Judgment will be entered for $3,515.85, the amount de-

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manded, together with interest from the date of the issue of the writ, at 5 per cent., and for costs.

DAVIES, J.:—I am of opinion that this appeal should be allowed. Under the facts stated in the case submitted to us, the plaintiffs were not doing or "carrying on business" in the province of British Columbia. I think myself bound by the principle of the judgment of this Court in *City of Halifax* v. *McLaughlin*, 39 Can. S.C.R. 174; and *Kirkwood* v. *Gadd*, [1910] A.C. 422. Applying the test stated in those cases to the facts in this case, it is impossible to hold, on the facts as stated, that the John Deere Plow Co. could be considered as "carrying on business" in British Columbia within the meaning of that phrase as used in the statute. In this view, it is unnecessary for me to categorically answer the questions submitted, as the answers I would give are evident from I have said above.

Idington, J.

IDINGTON, J.:—The judgment against which this appeal is taken is upon a stated case so framed as to raise questions that are not necessarily involved in determining the right of appellant to recover upon the promissory notes upon which it sues.

Counsel for appellant, in answer to a question I put as to whether or not this was the result of a design to obtain the opinion of the Court upon legal questions not arising out of the facts stated, but of importance to the parties contained therein, assured us such was not the case. Counsel for respondent did not dissent from this assurance. The learned trial Judge must be taken also to have so viewed the action or he would not have heard it. I think we must, therefore, treat the case as if on the facts stated the submission had been whether or not the provisions of the Companies Act of British Columbia as it stood in the earlier half of the year 1911, or as revised later, when applied thereto, constitute a defence in whole or in part to appellants' claim to recover on the promissory notes in question. The revision which took place in 1911 altered the numbering of sections and modified the language used in many parts. The action began in 1912, and the part prohibiting certain actions must be looked at as it stood in 1912. The pamphlet copy of this revision was used in argument, and hence I refer to sections as numbered therein.

The Act is badly drawn; in secs. 139, 152, 153 and 168, which we have specially to consider, the object designated by the phrase "every extra-provincial company" is expressly or impliedly referred to as subject thereto. The interpretation clause defines the term as follows:—

> "Extra-provincial company" means any duly incorporated company other than a company incorporated under the laws of the Province or the former Colonies of British Columbia and Vancouver Island.

By close examination we find later it does not mean what is thus interpreted, but only means it subject to the awkwardly expressed limitation which the language of sec. 152 gives. That section which I take as the key of this part 6 of the Act is as follows:—

152. Any extra-provincial company duly incorporated under the laws of:—

(*a*) The United Kingdom;

(*b*) The Dominion;

(*c*) The former Province of Canada.

(*e*) Any insurance company to which this Act applies, duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Legislature extends, may obtain a license from the registrar authorizing it to carry on business within the province on compliance with the provisions of this Act, and on payment to the registrar in respect of the several matters mentioned in the table B in the first schedule hereto the several fees therein specified, and shall, subject to the provisions of the charter and regulations of the company, and to the terms of the license, thereupon have the same powers and privileges in the province as if incorporated under this Act.

What does this phrase "any of the purposes or objects to which the legislative authority of the legislature of British Columbia extends" mean? Let it be noted that it is what "the charter and regulations" of the foreign legislative or creative power or both have authorized to be done by the supposed corporate body that is to become the purpose or object to which the legislative authority of the provincial legislature has been thus directed.

The puzzles of the section do not end with these lines in the beginning of it, but are continued by the lines

And shall, subject to the provisions of the charter and regulations of the company, and to the terms of the license, thereupon have the same powers and privileges in this province as if incorporated under this Act.

It is quite possible for a company by virtue of the limitations of its creation, to be prohibited from carrying on business in British Columbia and yet be able to make as the appellants did in the case in hand, a contract outside of that province and in respect of some breach thereof be under the need of suing in British Columbia and be entitled to sue therefor in the Courts of that province.

I know not whether the appellants have "by its charter and regulations" the right to apply for a license to do business in British Columbia or not. *Primâ facie* the patent creating it enables it to apply anywhere to do its business. This suggestion of its regulations limiting its capacity starts the enquiry I have just mentioned as possible. In light of what sec. 139 provides, it becomes a pertinent enquiry as to whether or not the scope of this part 6 of the Act is such that a company may by virtue

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of its Dominion charter be entitled to enter into such a contract as I have suggested yet be disabled from following its debtor in the Courts of that province without taking out a license which its self-restricted regulations may render useless for any other purpose than such litigation.

The language of sec. 139 seems to have been held by the learned trial Judge to have some such effect. True, he relies upon other incidents, such as the insurance of property that the appellants permitted another to carry into the province and deal with therein. Can the appellants not ship their goods through British Columbia, say to Seattle, and doing so employ men in British Columbia to take care of them, and if need be insure them there? And for breach of duty on the part of those bound by or concerned in such obligations, can they not bring an action in the Courts of that province?

I am not concerned with solving all these problems. I am only raising them here to illustrate the curious things that may happen if this section and some others are to be applied literally. We are concerned here with sec. 166 as it stood in 1911, and sec. 168, of which the first part is as follows:—

168. So long as any extra-provincial company remains unlicensed or unregistered under this Act, it shall not be capable of maintaining any action, suit, or other proceeding in any Court in the province in respect of any contract made in whole or in part within the province in the course of or in connection with its business, contrary to the requirements of this part of this Act.

This provision, it is said, bars this action. If the methods of interpretation and construction I have adverted to are correct, the defence herein may be well founded.

Section 152, quoted above, does not, however, seem to me to have been so framed as to warrant that mode of treatment. These other sections (including 168, just quoted) must be read as operative within its terms or not at all. It is one which provides for a license. The subject throughout part 6 is license, and the meaning declared by sec. 152 must be held as limiting the operative effect of all these other penalizing and puzzling sections aimed at the consequence of not obtaining a license. I must therefore revert to the consideration of the meaning to be extracted from sec. 152 to give the other sections vitality or force. It seems inconceivable that a charter of another power can have had in view the carrying out or effecting of "any of the purposes or objects to which the legislative authority of the legislature of British Columbia extends." Yet such creations are those that the literal meaning of this clause deals with.

Passing that for the moment what we are concerned with here is the recovery upon a number of promissory notes of which some were given in and others outside the province. Now it is as plainly written in the enumerated subjects of sec. 91 over

which exclusive power is given the Dominion, as anything can well be, that bills of exchange and promissory notes are not within either "the purposes or objects to which the legislative authority of the legislature of British Columbia extends." Hence, it seems to me that the line of contract involved herein is one over which the legislature enacting the disabling sec. 168, which is relied on, has no more authority than it has over the other corporations and contracts founded on any of the subjects enumerated in sec. 91 over which Parliament has exclusive legislative authority. It is possible that Parliament has not yet in this regard covered all the ground thus open to it to take in aid of its corporate creations which must rest only upon its residual power over "peace, order and good government" as distinguished from those other corporate creations I refer to above and hereinafter. But the language of this sec. 152, which I have called particular attention to, lends itself peculiarly to the application of the principle that the legislature cannot deal with promissory notes. Indeed, it seems as if intended, however awkwardly, to exclude the field of legislation beyond its powers, from the range of anything contemplated by this legislation.

The legislatures of the provinces having assigned to them exclusive legislative authority over property and civil rights beyond that part thereof primarily assigned exclusively to Parliament by said enumeration in sec. 91 and possibly by implication in a few other sections of the Act which do not concern us here, may, no matter how much inconvenience may possibly, by reckless and improper legislation arise, so enact as to contracts as to render them in certain cases null. This power clearly cannot be so used as to affect the validity of promissory notes which Parliament has declared shall not be thereby invalidated.

Parliament in the Bills of Exchange Act has not expressly dealt with this aspect of the matter and gone so far as it may have a right to go. But it may be asked, must we not hold that Parliament, by providing for the creation of such companies as the appellants with the evident purpose of making the franchises so granted as effective as Parliament acting within its powers can make them, for the execution of their respective purposes, has, so far as necessary therefor by implication, given such effect as it can in relation to promissory notes? I express no opinion.

Such is the problem which I conceive may arise upon this Act in relation to the rights of the Dominion corporate creations resting upon the residual power of Parliament alone and on the law as it stands at present. Of course other extra-provincial companies may not stand in the same position. It seems to me that in this case and in view of the phraseology used in sec. 152, to which I have adverted, the legislature has refrained from questioning the power of Parliament and so advisedly used

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the word "contract" in sec. 168, as to avoid any question of conflict. I admit the word contract might include promissory notes, but when we read it in the light of all these considerations I have referred to, I conclude it does not. For that reason alone the sec. 168 does not apply as a bar to this action.

There are many other considerations leading to the same result. The whole meaning of the section must turn upon the effect given to the words "carry on business within this province." That is what the license is provided for. The fees exacted indicate it must be something thus substantial and not the mere incident, for example, of bringing an action. I admit the language used in other sections does seem at times to strike at isolated acts. I cannot think they alter the scope and purpose of the whole of this part of the Act, but must be controlled or read in light of what seems to me the obvious purpose of sec. 152 as a licensing Act. I assume, for argument's sake, such a power of licensing exists but by no means express any opinion in regard thereto.

Then it has been urged it is a taxing Act within the power to impose direct taxation within the province, and the authority of *Bank of Toronto* v. *Lambe*, 12 A.C. 575, is invoked. It seems as clear as can be that banks and railways and other subjects falling within the enumerated subjects of sec. 91 of the British North America Act may be taxable by a province. But I do not think that involves the liability to comply with such regulations as these sections of the Companies Act in question require compliance with. And I should say that none of the conceivable corporate creations which may be the product of the exclusive powers over said enumerated subjects of sec. 91 fall within the sweeping language of these sections now in question unless restricted within the necessarily incidental powers for executing the taxing power. Destroying their right of contracting or suing does not seem to fall within that. And so far as the mere taxing power goes this should hold good also relative to other companies. These respective spheres of legislative authority of Dominion and provinces may well be viewed as if appertaining to two independent states in their relation to each other. Each may help the other, but can go no further. It never, however, was intended either should try to destroy the other.

It seems to me that there is also much to be said relative to the quality of the taxation. If it is imposed purely to enable a company to do what appellants have done then I submit, such methods of taxation would be indirect taxation and not within provincial powers. I am not to be taken as suggesting that promissory notes are as a matter of course to be held free from taints or illegality and consequence thereof. The causes of illegality founded on mere revenue laws, however, may in regard to promissory notes be ultimately found such as Parliament

alone may declare. I express no opinion here in regard thereto and only desire to avoid unwarranted inferences from what I have said.

I conclude that there is nothing in the facts submitted that entitles a province to deprive a company of its ordinary rights of contract and suing in the province. I think the appeal should be allowed with costs.

DUFF, J.:—I think the British Columbia Companies Act (R.S.B.C. 1911) does not on its true construction disable the appellant company from maintaining this action.

The relevant provisions of the Act are secs. 139, 167, 168. These are in these words:—

139. Every extra-provincial company having gain for its purpose and object within the scope of this Act, is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the province until such extra-provincial company shall have been licensed or registered as aforesaid.

This section shall apply to an extra-provincial company notwithstanding that it was heretofore registered as a foreign company under the provisions of any Act, but shall not apply to an extra-provincial investment and loan society duly licensed under the "Extra-provincial Investment and Loan Societies Act."

167. If any extra-provincial company, other than an insurance company, shall, without being licensed or registered pursuant to this or some former Act, carry on in the province any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business.

168. So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit, or other proceeding in any Court in the province in respect of any contract made in whole or in part within the province in the course of or in connection with its business, contrary to the requirements of this part of this Act:

Provided, however, that upon the granting or restoration of the license or the issuance or restoration of the certificate of registration or the removal of any suspension of either the license or the certificate, any action, suit, or other proceeding may be maintained as if such license or certificate had been granted or restored or such suspension removed before the institution of any such action, suit, or other proceedings.

I think it is quite clear that the disability to sue imposed by sec. 167 only affects the company in respect of rights of action alleged to arise out of some contract made "in course of or in connection with its business contrary to the requirements of this part of this Act"; the last words "contrary to the requirements of this part of this Act" refer, it seems to me, to secs. 139 and 167 which require that an extra-provincial company shall be licensed or registered under the Act before it can

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become entitled to "carry on in the province any part of its business." The contracts therefore in respect of which an extra-provincial company which is not licensed or registered under the Act is disabled from enforcing by action in the Courts of British Columbia by virtue of the provisions of sec. 168 are contracts made in "course of or in connection with" some business which the company in whole or in part "carries on" in that province.

The learned trial Judge held that the appellants were carrying on business by the respondent as their agent and that the contracts in question were made in connection with that business. In support of this conclusion the respondent relies upon the provisions of an agreement set out in the special case between the parties to the action. The appellants are manufacturers of plows and their principal place of business is at Winnipeg; the respondent is general merchant at Elko, B.C. The promissory notes sued on were given for goods shipped at Calgary by the appellants to the respondent at Elko under the terms of the agreement already mentioned. Some of these goods were ordered by the defendant in person at Winnipeg, and others by letter from Elko. The agreement in question binds the respondent to accept all goods shipped under it and to "settle by cash and notes" for all such goods according to the prices set forth in the price list on the first of the month following each shipment. All goods affected by the agreement are to be at the risk of the respondent until paid for; the respondent is to insure them for the protection of the appellants. In the event of the death of the respondent or his insolvency or of an action being brought against him, all moneys owing are to become immediately payable. In default of payment of any obligation given to the appellants for any goods shipped under the agreement, all moneys owing by the respondent become payable and the appellants are authorized to sell all goods to which the agreement relates and credit the proceeds to the respondent who is to remain liable for any deficiency. In the meantime, pending the payment of all obligations in full, the title to all goods shipped remains until they are sold by the respondent in the appellants, and all notes taken on the sale of any of them by the respondent from purchasers are to be taken in the name of the appellants. The sales made by the respondent are to be according to a price list furnished by the appellants. This agreement constituted, the learned trial Judge holds, the respondent the agent of the appellants for the sale of goods to which it relates. I cannot agree with this. It is, in my judgment, an agreement relating to the sale and purchase of goods embodying elaborate provisions for the protection of the sellers.

Until the sellers have been paid in full the property remains vested in them, and all moneys received on sale by the respond-

ent are to be treated as theirs; but the rights thus reserved to them are only for securing the payment of the purchase money; and on payment they would disappear at once. Subject to the rights so held by the sellers as security, the purchaser is the beneficial owner of the goods. True, there is a covenant that he will not sell except at the prices specified in the agreement. I doubt very much whether this provision was intended to bind the purchaser with respect to goods that have been fully paid for. If it was intended to apply to goods that have become fully vested in the purchaser, its validity is doubtful; but in any case it could only operate as a personal covenant by the respondent affecting the conduct of his own business.

I see nothing in these provisions requiring or indeed justifying the inference that the respondent in carrying out the agreement was acting as the agent or representative of the appellants in carrying on the appellants' business. What was contemplated was that in the conduct of his own business he should observe the provisions of this contract that he had made with the appellants. The second part of the first question, "whether the plaintiff is precluded from carrying on business in British Columbia or from maintaining action in respect of any of the claims or notes aforesaid" ought to be answered in the negative.

The first branch of the first question and the second question do not arise on the facts, and it would therefore be improper to answer them.

I may add, although it is not strictly necessary to the decision, that sec. 167 which subjects extra-provincial companies to penalties for carrying on in the province any part of their business without license or registration appears to indicate that the legislature by the phrase "carrying on business" contemplated such conduct on the part of the company as would, according to the general principles of law, amount to a submission to the jurisdiction of the British Columbia Courts. According to that view no company would come within the penalties or disabilities imposed by the enactments quoted above unless it had a fixed place of business at which it carried on some part of its own business within the province.

ANGLIN, J.:—In my opinion the notes sued on were not given to or taken by the plaintiffs in the course of carrying on their business within British Columbia. The burden was on the defendant to prove this. The evidence in the record does not establish that the plaintiffs carried on any part of their business in that province. On that short ground this appeal should, in my opinion, be allowed. Anglin, J.

BRODEUR, J.:—The main question to be decided in this case is whether the appellants are carrying on business in the province of British Columbia. Brodeur, J.

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By the Companies Act of that province, it is provided that every extra-provincial company having gain for its purpose is required to take out a license, and it is also provided, by the same Act, that "no person shall as the representative or agent of, or acting in any other capacity, for any such extra-provincial company, carry on the business of that company until such extra-provincial company shall have been licensed": sec. 139.

And, if any extra-provincial company shall carry on any of its business in the province, it shall not be capable of maintaining any action in any Court of British Columbia in respect to any contract made, in whole or in part, within that province in connection with its business: sec. 166.

It appears by the stated case that the head office of the company is at Winnipeg; that the respondent, Agnew, is residing in British Columbia, and carrying on there the business of a general merchant. In February, 1911, Agnew in Winnipeg made a contract with the appellants under which the appellants agreed not to sell, in a certain territory in British Columbia, the classes of goods which the respondent would order. In execution of that contract the respondent, at different dates, ordered from the appellants certain goods to be shipped to him in Calgary, in Alberta, and he gave his promissory notes for those goods. Some of those notes were made and signed in Manitoba. The other notes, though dated in Winnipeg, were in fact signed by the respondent at his place of business.

The company was not registered in British Columbia.

The trial Judge found that the appellants should be considered, on the above facts, as carrying on business in the province of British Columbia, and, as the company was not registered there, that it could not take any action to enforce the contract with the respondent.

I am not able, for my part, to come to such a conclusion. It cannot be said that the appellants were carrying on any business in the province of British Columbia. Some of the goods were being sold, it is true, by the respondent, defendant, but he was not their representative or agent, and did not act in any such like capacity for the appellants, but he was doing with those goods the same as he would do with any other goods which, in his ordinary business, he would bring from any other part of the country.

Having come to that conclusion, I do not think it is necessary, then, to examine the other question which has been submitted by the plaintiffs, namely, whether or not the appellants, being a company incorporated by the Dominion Parliament, could be subjected to the requirements of the Act above mentioned.

I think that the appeal is well founded, and it should be allowed with costs.

Appeal allowed.

WYERS v. WINLOW & IRVING CO.

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April 9.

Ontario Supreme Court. Trial before Middleton, J. April 9, 1913.

1. MASTER AND SERVANT (§ II A 4—71)—LIABILITY — GUARDING MACHINERY—USING FOR IMPROPER PURPOSE, ONUS.

Where an employee is injured while using a machine of his own accord for a purpose for which it was not intended, and the machine is without defect and is sufficiently guarded for use for the purpose for which it is intended, and a regular practice of using the machine for the improper purpose to the knowledge of the employer has not been shewn, the employer is not liable in damages.

Statement

ACTION for damages for injuries sustained by the plaintiff, while in the employment of the defendants, by a saw with which he was cutting firewood taking off his fingers.

The action was dismissed.

C. W. Bell, for the plaintiff.

Middleton, J.

MIDDLETON, J.:—The plaintiff was employed by the defendants since the 1st April, 1912, as a teamster and general labourer. He occasionally worked at the saw hereinafter mentioned.

On the 9th April, 1912, the day was wet and cold. Well on in the afternoon, the plaintiff put his horses in the stable and went to the company's office before quitting work for the day. Mr. Turner, a young man employed as bookkeeper, then said to the plaintiff: "It is very cold; please get some firewood." The plaintiff thereupon went to the lumber yard, and, not seeing any small pieces of waste wood convenient, procured some ends of boards and took them to the saw in question for the purpose of cutting them up into pieces that could be used in the office stove. The saw was not intended for use as a cross-cut saw, but was designed and equipped for ripping boards. It had an efficient guard, placed so that lumber to be sawn would be guided and held both before reaching the saw and after passing it.

Instead of standing in front of the saw and passing the board through in the ordinary way, the plaintiff went to the side of the machine, and, after setting it in motion by turning the electric switch controlling the motor, cut short lengths off the ends of the pieces of board, using the saw as a cross-cut saw. These pieces of board accumulated behind the saw, something caught, and the guard was thrown up at an angle of 45 degrees. Instead of then stopping the saw, the plaintiff used a short piece of board, some sixteen inches in length, remaining in his hands, and endeavoured to poke away from behind the saw the accumulated pieces of wood that held up the guard. While he was doing so, the guard fell, and brought his hand down upon the unprotected saw, severing the fingers.

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The guard used on this machine had in front of the saw a toothed wheel, driven by power, to feed to the saw the board being ripped; and two rollers were behind the saw to take care of the severed strips passing from it. Between these was a cover, supposed to come down and protect the revolving saw-blade. This cover was adjustable, so that it might be made to afford protection when either a large or a small saw was used, and when the saw projected a considerable distance or only a short distance from the table.

There was some evidence that the nuts for adjusting this were not tight. This would permit the guard to fall down by its own weight, over the saw-blade. I cannot conceive that this, if a defect at all, had anything to do with the accident. In the picture of the machine, exhibit 1, this cover is shewn lifted higher than it would be when the machine was in actual operation, and the picture is to that extent misleading.

On the matter being submitted to the jury, in addition to finding that the machine was out of repair by reason of these nuts being loose, the jury found that the defendants were negligent in "not having a notice posted warning unskilled employees in the proper use of the saw;" that the plaintiff was bound to conform to the order of Turner "because of his position as bookkeeper;" and that the plaintiff was justified in using the saw because "it had been customary."

There was no evidence, I think, to justify these findings; and it appears to me that I ought to grant the motion for a nonsuit.

The answer to the question whether the plaintiff had himself been negligent is: "No, for being unskilled in the use of saw." The plaintiff himself said that he knew how to use the saw, and did not need any instruction. The only evidence that the saw had been used for the same purpose before was the plaintiff's own evidence. He said that he had cut wood in this way three or four times before; but it was not shewn that any one knew that he had done so.

When he found that the guard had been lifted as the result of his experiment, there was nothing to prevent his turning the switch and stopping the saw, so that the guard could be replaced without danger.

With every sympathy for the unfortunate plaintiff, I think that, notwithstanding the finding of the jury, I must dismiss the action.

Costs will probably not be asked.

Action dismissed.

SMITH v. MILLS.

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Mar. 10.

(Decision No. 2.)

Saskatchewan Supreme Court, Lamont, J. March 10, 1913.

1. MASTER AND SERVANT (§ I E—22)—GROUND FOR DISCHARGE — DISOBEDIENCE OF UNREASONABLE ORDER.

In order to justify the dismissal of a servant by his master on the ground that the servant disobeyed the orders of the master, it must appear that there was on the part of the servant wilful disobedience to the lawful and reasonable order of the master, and this fact is not established merely because the servant refused to answer a general call of the master to his servants to assist in loading a waggon where it appears that the servant honestly believed that his services were not required at that moment because he thought there were sufficient men answering the call to accomplish the master's object.

[*Smith* v. *Mills* (No. 1), 8 D.L.R. 1041, affirmed.]

2. MASTER AND SERVANT (§ I C—10)—WAGES ON WRONGFUL DISCHARGE.

A servant who has been wrongfully dismissed may recover against the master on a *quantum meruit* for the services rendered, although the contract of hiring did not comply with the Statute of Frauds inasmuch as it was not to be performed within a year of the making thereof.

[*Rose* v. *Winters* (1900), 4 Terr. L.R. 353, followed; *Smith* v. *Mills* (No. 1), 8 D.L.R. 1041, affirmed; and see Annotation to *Murray* v. *Coast Steamship Co.*, 8 D.L.R. 382, as to right to wages where the dismissal is justifiable.]

Statement

ON November 6th, 1911, the plaintiff and defendant entered into a verbal contract by which the plaintiff was to work for the defendant from that date until December 1, 1912, for the sum of $365. The plaintiff worked until May 14, 1912, when he was dismissed by the defendant. The plaintiff then brought this action, in which he sets up that his dismissal was wrongful on the part of the defendant, and he claims on a *quantum meruit* for the services he had rendered the sum of $144, less $25 which he admits receiving. The action came on for hearing before the Judge of the District Court for the judicial district of Moosomin, who found that the plaintiff had been wrongfully dismissed, and that he was entitled to recover on a *quantum meruit* the value of the services which he had rendered, which the learned trial Judge fixed at the amount claimed, and he gave judgment for the plaintiff for $119. [*Smith* v. *Mills* (No. 1), 8 D.L.R. 1041.] From that judgment the defendant now appeals.

The appeal was dismissed.

D. Mundell, for appellant.

D. H. Cole, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—On the argument before us, counsel for the defendant contended: (1) that the circumstances shewn in

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evidence were sufficient to justify the defendant in dismissing the plaintiff, and (2) even if they were not, the plaintiff could not succeed, because an action on a *quantum meruit* would not lie where there was a contract between the parties in existence, although that contract was not enforceable by reason of the Statute of Frauds.

I agree with the learned District Court Judge that the dismissal of the plaintiff was entirely without justification. None of the circumstances urged on behalf of the defendant were sufficient to justify him dismissing the plaintiff. The one most relied on was, that the plaintiff had refused to obey the defendant's lawful order to assist in loading a pig. The facts were that a neighbour had driven over for a pig. Three men were necessary to load the pig into the waggon. The defendant sent one Gilbert to the bunk-house where the plaintiff and two other hired men then were. He says, "he sent him to the bunk-house for men to come and load the pig." One of the men went. The plaintiff did not go. The reason he did not go was because there were enough of men there already to load the pig without him. The evidence shews, and it was admitted by counsel on the argument, that there were at the waggon five men, and that three of them loaded the pig and the other two simply looked on. There was, therefore, no necessity for the plaintiff's assistance, and in my opinion he was justified in assuming that the order was not for all the men to go, but only for a sufficient number to load the pig. To justify dismissal on this ground, it must appear that there was on the part of the servant wilful disobedience to the lawful and reasonable order of the master: Halsbury, vol. 20, p. 98. "Wilful disobedience" means deliberate and intentional disobedience. It is a deliberate refusal to do that which he knows the master wants him to do. In the present case the defendant's order was not a direct order to the plaintiff, but a general call for men to load a pig. The plaintiff thought that when enough men answered the call to carry out the object of the call, the rest were not supposed to go, and he did not go. There is, in my opinion, nothing in the plaintiff's non-compliance with this call that could be construed into a wilful or deliberate refusal to obey the order of the defendant.

The dismissal of the plaintiff being wrongful, is he entitled to recover on a *quantum meruit*? I am of opinion that he is. In Halsbury's Laws of England, vol. 20, p. 110, the law is laid down as follows:—

> A servant who has been wrongfully dismissed may treat the contract as continuing and sue for damages for its breach, or he may acquiesce in the master's wrongful act and treat the contract as rescinded, in which case he may sue as upon a *quantum meruit* for the value of the work

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which he has actually performed, and for which he has not been paid. He may elect to pursue either remedy at his option, but he is bound by his election and cannot pursue both.

And in *Rose* v. *Winters* (1900), 4 Terr. L.R. 353, Wetmore, J., held that where a contract of hiring is not enforceable by reason of the Statute of Frauds, inasmuch as it is not to be performed within a year of the making thereof, the servant is entitled to recover on a *quantum meruit* where he is dismissed without justifiable cause. This is exactly the case here. The plaintiff is prevented by the Statute of Frauds from recovering on the contract, but he is, in my opinion, entitled to be paid for the services he performed whatever those services are worth. The District Court Judge found they were worth the amount claimed; and it was not contended before us that the amount allowed was unreasonable.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

RUMELY CO. v. GORHAM.

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(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Walsh, JJ., March 31, 1913.

1. JUDGMENT (§ I E 3—35)—CONFORMITY TO PLEADINGS AND PROOF—DAMAGES—VERDICT—APPEAL.

Where a verdict is rendered for a sum larger than that claimed by the pleadings, such verdict is not sufficient basis upon which to enter judgment for the excessive sum, unless the statement of claim shall have been amended to conform with the verdict.

[See *Rumley Co.* v. *Gorham*, 1 D.L.R. 823; *Chattel* v. *"Daily Mail"* (1901), 18 Times L.R. 165, applied.]

2. JUDGMENT (§ I E 3—35)—CONFORMITY TO PLEADINGS AND PROOF—AMENDMENT OR REDUCTION—APPEAL.

Although, even after verdict, a claim may be amended to conform to the verdict, yet where the matter of a verdict, rendered for a sum larger than that claimed by the pleadings, comes on by way of appeal from a judgment based on such verdict, rather than on a motion for a new trial, the judgment will be reduced to conform to the claim, where such course appears to meet the justice of the case.

[*Wyatt* v. *Rosherville Co.* (1885), 2 Times L.R. 282; *Modera* v. *Modera* (1893), 10 Times L.R. 69, considered.]

Statement

APPEAL by plaintiff from verdict for $5,500, rendered by a jury on the trial of the action before Simmons, J.

The appeal was allowed in part.

Jas. Muir, for plaintiff.

A. A. McGillivray, for defendant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The facts respecting the pleadings in this case are set out in the report of the judgment on an appeal on

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the pleading at 1 D.L.R. 825, 4 A.L.R. 216, 21 W.L.R. 24, though it may be noted that the figures 45960 in paragraph 10 represent the number and not the amount of the indebtedness. On that appeal the defendant was given leave to amend his counterclaim in order to claim alternatively under the original contract of sale of the machinery and under a subsequent contract entered into for the purpose of settling the claims under the original contract. The only amendment made to the pleadings set out in that report was to insert at the beginning of par. 12 (*e*) the words, "in the alternative."

The case was tried before my brother Simmons with a jury, who rendered a verdict of $5,500 expressly stated to be "for breach of the 2nd agreement."

It is clear, as was pointed out in the former appeal, that the defendant cannot have damages under both agreements and the jury having found the damages under the second agreement thereby negative any right to damages under the first, and argument, therefore, that defendant cannot have any damages under the first agreement appears unnecessary.

The finding of the jury also involves the conclusion that the second agreement constituted both the accord and satisfaction of the claim under the first agreement and it seems also clear from the former decision that that was a fact which was to be determined at the trial and was a matter for the jury and not for the Judge. By the second agreement, which is not all contained in the written document and of which necessarily oral testimony was required, the plaintiff agreed to deliver certain parts of machinery. There was delay in delivering this machinery for between two and three months at a period of the year when it would be very useful to the defendant for plowing, for which he required it. When it was ready for delivery he refused to accept it. While the evidence justifies a finding that the defendant suffered damage from the delay and that such a delay was an unreasonable one for which the plaintiff should be held liable the amount awarded seems very excessive. It is not necessary to consider whether this would be a sufficient ground for setting aside the verdict since there is another ground which makes it impossible to support it.

The claim for damages under heads (*a*), (*b*), (*c*), and (*d*), amounting in all to $14,900, are all specifically for damages under the first agreement. The claim under (*e*) is specifically for damages under the second agreement and is for $2,000. Another claim (*f*) is for "General damages, $5,000." What the last may mean I do not know, but it is unimportant, for the verdict is expressly for the damages under the second agreement and as the amount claimed for that is only $2,000 there is a variance between the pleading and the verdict of $3,500. It

appears that even after verdict a claim may be amended to conform with the verdict, as was permitted in *Wyatt* v. *Rosherville Co.* (1885), 2 Times L.R. 282, and *Modera* v. *Modera* (1893), 10 Times L.R. 69, but an amendment is a matter of indulgence and is permitted only when it appears just that such should be done. In *Chattell* v. *"Daily Mail"* (1901), 18 Times L.R. 165, in which a claim was made for £1,000 and a verdict given for £2,500 the Court of Appeal held that the judgment which had been entered for the amount of the verdict was bad and that to entitle the plaintiff to judgment for £2,500 the claim required amendment. The Court was of opinion that the damages were excessive, and the motion being for a new trial directed a new trial unless the plaintiff accepted judgment for £1,000.

In the present case it appears to me that as the matter came before us by way of appeal rather than on motion for a new trial the proper course is to reduce the judgment to $2,000 so as to conform to the claim, especially as, in my opinion, that amount is ample compensation for the damage suffered by the defendant by reason of the plaintiffs' default. The plaintiffs have given the defendant the credit they agreed to give him and offered to deliver the machinery, which, however, he refused in the belief that he was not bound by the second agreement to accept it. The effect of the jury's verdict is to hold him bound by that agreement and he should not be deprived of his right to the machinery by reason of his prior refusal due to a misapprehension of his rights. He should, however, have no right to put the plaintiffs to any expense in delivering it to him, but whatever expense there may be in that respect should be borne by him. As the appellants' success is only partial and is on a ground not expressly raised by the notice of appeal there should be no costs of the appeal.

The judgment below should be set aside and judgment entered for the defendant for $2,000 and costs of the action, but with a set-off in favour of the plaintiffs of the costs of the issues on which they succeeded.

To avoid any question later it may be here pointed out that as the costs of the former appeal were left to abide the result of the issues in which the plaintiffs succeeded on the trial the plaintiffs are entitled to the costs of that appeal.

Appeal allowed in part.

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WALLACE v. POTTER.

Alberta Supreme Court. Trial before Simmons, J. April 18, 1913.

1. LIMITATION OF ACTIONS (§ III G—135)—RECOVERY OF LANDS — ALBERTA STATUTORY LAW.

An action for the recovery of land in Alberta as against a person holding adversely must be brought within twelve years by virtue of the Imperial Statutes of Limitations, 37 and 38 Vict. ch. 57, the Alberta Ordinances (1911), ch. 31, sec. 2, and the Alberta Act, 4 & 5 Edw. VII. (Can.) ch. 3.

2. LAND TITLES (TORRENS SYSTEM) (§ V—50)—CERTIFICATES OF TITLE—OWNER UNDER TITLE BY ADVERSE POSSESSION—CANCELLATION OF OLD CERTIFICATE.

Notwithstanding the provisions contained in secs. 44 and 104 of the Alberta Land Titles Act, Alberta Statutes (1906), ch. 24, land held under a registered title is not exempt from the operation of the Statute of Limitations in force in Alberta, and a person who entered on land and had been in adverse possession for the statutory period acquires a title to the land which cannot be attacked by the registered owner in whose name a certificate of title stands; the entry of the name of the new owner upon the register is not provided for in the Land Titles Act, and will not be ordered by the Court, nor will the certificate of title of the former owner be ordered to be cancelled.

[*Belize Estate and Produce Co.* v. *Quilter*, [1897] A.C. 367, referred to.]

3. ADVERSE POSSESSION (§ I K—59)—EXTENT AND KIND OF POSSESSION—ENTRY WITHOUT TITLE.

Where a purchaser of a quarter section of land went into possession of the adjoining quarter section, which was enclosed with the section purchased, and he continued in uninterrupted and quiet occupation thereof for more than twelve years, using the land as pasturage, repairing fences, establishing a roadway through it, fencing the same, and planting shade-trees along part of it, and breaking up and cultivating a large tract of the land, the requirements of the Statute of Limitations in force in the Province of Alberta are fully satisfied so as to give him a title by adverse possession, and such occupant may, in an action against the registered owner, be declared to the owner in fee simple.

[See Mr. Armour's Annotation on Adverse Possession, 8 D.L.R. 1021.]

Statement

ACTION for a declaration that the plaintiff is the owner in fee simple of certain lands owing to length of possession, and for a certificate of title to said land.

Judgment was given for the plaintiff declaring him owner in fee simple but cancellation of the existing certificate of title was refused.

A. J. Arnold, for the plaintiff.

E. A. Dunbar, for the defendant.

Simmons, J.

SIMMONS, J.:—The defendant homesteaded the north-west quarter of section 18, township 19, range 28, west of the 4th meridian in the province of Alberta and on September 15, 1890, a certificate of title issued to him for said lands from the South Alberta land registration district. In May, 1895, the plaintiff purchased the adjoining lands from the defendant's brother and

at that time the land in question was enclosed with the lands purchased by plaintiff from the brother of the defendant. The plaintiff was then living on the north-west quarter of section 20 in the same township and used the north-west quarter of section 18 as pasture and made repairs on the fences on the west side and south side in 1896. In 1900 the plaintiff went into residence on the north-east quarter of section 18, adjoining the land in question on the east side and placed substantial farm buildings on said north-east quarter of section 18, and graded a driveway across the north-west quarter of section 18. In 1901 the plaintiff broke from the sod and cultivated thirty acres on said north-west quarter of section 18, and planted shade trees part way along the roadway across said lands in 1901 and 1902 and fenced the graded road on the north side. The plaintiff has continued in occupation and use of said lands up to the commencement of this action. The plaintiff has in my opinion quite fully satisfied the requirements of the Limitation Act as to possession for twelve years.

The plaintiff claims a declaration of right that he is the owner in fee simple by length of possession of said north-west quarter of section 18, and is entitled to the certificate of title for said lands.

It appears that the defendant left the said lands in 1895 and went to reside near Calgary and soon after that returned to the United States. The plaintiff heard from him in 1897 but since that has not heard from him.

Pursuant to the order of a Judge service was made substitutionally upon the defendant by serving a brother of the defendant in the state of Washington and by publication in a newspaper in High River and also a newspaper in Seattle, Washington.

Upon application by the plaintiff before Mr. Justice Walsh for leave to sign judgment in default of appearance, he directed the action to be set down for trial at the ensuing sittings of the Court and appointed counsel to represent the defendant.

Section 2 of ch. 31, Consolidated Ordinance of the N.W.T., declares the Real Property Limitation Act, 1874, to be in force and to have been in force in the north-west territories since the date of its enactment. The Alberta Act, ch. 3, Statutes of Canada, 4-5 Edw. VII., continued in force this ordinance in the province of Alberta. It is not disputed that the terms of the Limitation Act if taken alone are sufficient to include and to apply to all lands in the province of Alberta. Our Real Property Act, ch. 24, of Alberta, 1906, contains no provision which expressly exempts lands held under a registered title from the operation of the Limitation Act. Counsel for the defendant claims, however, that having been in possession for the statutory period of twelve years cannot have the effect of over-riding secs. 44 and

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104 of the Alberta Real Property Act. In other words, that notwithstanding the fact that the Imperial limitation is in force in the province yet the Alberta Real Property Act confers on the registered owner rights and privileges which are inconsistent with the application of the Limitation Act to the lands in question.

Belize Estate and Produce Co., Ltd. v. *Quilter*, [1897] A.C. 367, which is a decision by the Privy Council on a stated case under the Honduras Land Titles Act has positively disposed of that view. The Honduras Act preserves to the registered owner practically the same immunity from attack upon his registered title as the Alberta Real Property Act but did not by express provision repeal the Imperial Limitation Act which was in force in the colony. The registered owner sued the defendant in action for ejectment and it was held that the defendant having been in uninterrupted possession for the statutory period the action of the registered owner failed. Lord Watson in the Honduras case, *Belize* v. *Quilter*, [1897] A.C. 367, observes that it would appear that while provision was made for entering and keeping on the register the names of those persons who may become entitled to land by transfer or by succession, no provision has been made for enabling a person who has been in adverse possession for the statutory period to put upon the register an entry of any right or interest which he may thereby have acquired. That seems to be quite applicable to the Alberta Real Property Act.

The result is that the plaintiff has acquired a title to the land which cannot be attacked by the person actually registered as the owner and in whose name a certificate of title is now upon the register. The result is quite an anomalous one but the authority for removing the anomaly is in the legislature and not in the Courts.

The plaintiff is entitled to a declaration that he is the owner in fee simple of the lands by virtue of possession for the statutory period but he fails in the second part of his case in which he asks for the cancellation of the present certificate and for the issuing of a certificate of title under the Act to himself.

Pursuant to the order of Mr. Justice Walsh, Mr. Dunbar, who was appointed by Mr. Justice Walsh to act for the defendant, will have his costs against the plaintiff which I fix at $100.

Judgment accordingly.

COLLING v. STIMSON & BUCKLEY et al.
WAINWRIGHT LUMBER CO., Limited v. LOGAN.

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Alberta Supreme Court. Trial before Scott, J. April 1, 1913.

1. MECHANICS' LIENS (§ VIII—66)—HOW WAIVED OR DEFEATED—COMPLETION OF CONTRACT—FILINGS AND NOTICES.

A plumbing contract to furnish and install a hot air furnace for heating a house, including the necessary pipes, registers and fittings, comprises the furnishing and installation of the incidental cold air registers as a material part thereof; and the time within which a mechanics' lien may be filed for such work under the Mechanics' Lien Act (Alta.), 6 Edw. VII. ch. 21, sec. 13, is to be computed with reference to the installation of the cold air registers where that is the last work done under the contract, notwithstanding a delay of two months after the installation of the furnace itself and of the other incidental fittings.

[See Annotation on Mechanics' Liens, 9 D.L.R. 105.]

2. MECHANICS' LIENS (§ III—13)—PRIORITIES — OVER MORTGAGE—MORTGAGE MONEY NOT ADVANCED WHEN WORK COMMENCED, EFFECT OF.

Under the Mechanics' Lien Act (Alta.), 6 Edw. VII. ch. 21, a mechanics' lien attaches to the interest which is vested in the owner at the time the work is commenced, or to any interest which he may acquire during the progress of the work; and the lien will take priority over a mortgage upon which no money was advanced until after the commencement of the work, although the mortgage had been registered before that time.

3. MECHANICS' LIENS (§ III—13)—OVER MORTGAGE—"INCREASE IN VALUE" BY WORK, WHEN IMMATERIAL.

The limitation of the priority of mechanics' liens over mortgages declared by the Mechanics' Lien Act (Alta.), 6 Edw. VII. ch. 21, sec. 9, to the amount whereby the premises have been increased in value by the work, does not apply where no money was advanced by the mortgagee until after the commencement of the work for which the lien is claimed.

4. MECHANICS' LIENS (§ VIII—68)—ENFORCEMENT—DISCHARGE OF LIEN—SUB-CONTRACTOR—CONTRACTOR—OWNER—CONTINGENT FUND.

A mechanics' lien filed by a sub-contractor is not to attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor under the Mechanics' Lien Act (Alta.); consequently if the latter's contract with the owner does not entitle him to a further payment until completion, the lien of the sub-contractor who has completed his sub-contract cannot be made effective until completion of the entire work of the principal contractor, but the Court may, on the trial of the lien action, direct that such lien shall remain in force, so that it may attach in respect of further sums that may thereafter become due by the owner to the principal contractor, reserving leave to the owner to apply to discharge the lien.

5. MECHANICS' LIENS (§ VIII—68)—ENFORCEMENT—DISCHARGE OF LIEN—SUB-CONTRACTOR—MORTGAGEE—CONTINGENT FUND.

Where progressive payments under the contract of the principal contractor are made contingent upon advances being made to the owner by the mortgagee, the Court may, on the trial of a mechanics' lien action brought by a sub-contractor who had completed his sub-contract, direct that his lien remain in force, so that it may attach in respect of any such further advances which may in future be made by the mortgagee, reserving leave to the owner and the mortgagee to apply for the discharge of the lien.

Statement

TRIAL of mechanics' lien actions in which the land owner, the principal contractor, and the mortgagees of the property were joined as defendants.

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COLLING v. STIMSON & BUCKLEY.

Scott, J.

H. H. Hyndman, for the plaintiff Colling.

Frank Ford, K.C., for defendants Stimson and Buckley.

L. W. Brown, for the plaintiffs the Wainwright Lumber Co., Ltd.

SCOTT, J.:—These are mechanics' lien actions which by order dated June 2, 1911, were directed to be consolidated and to be proceeded with as one action in the judicial district of Edmonton. At the trial before me I heard the first mentioned action and it was then agreed by counsel for the parties that the trial of the last mentioned action should stand over until I had disposed of the other.

On September 16th, 1910, the firm of Stimson & Buckley entered into a contract with defendant Logan to erect a dwelling-house for her at Wainwright at the contract price of $2,900. The plaintiff Colling shortly afterwards entered into a verbal contract with that firm to furnish and install a heating furnace including the necessary pipes, registers and fittings and to do all the plumbing and tinsmithing work required to be done by them under their contract, the contract price being $575. He began work upon his contract about October 1, 1910, and worked upon it from time to time as the building progressed, the bulk of the work having been done and materials furnished before January 1, 1911. His work was finally completed on March 11, 1911, he having on that day furnished and installed three cold air registers which I hold was a material part of his contract. The delay, if any, in the completion of his work was due to the fact that certain materials ordered by him for the work were not received by him within a reasonable time. He registered his lien against the property on March 17, 1911, commenced his action on May 10, 1911, and registered a *lis pendens* on the following day. On March 22, 1911, he gave defendant Logan notice of his claim of lien. The amount claimed by him under his lien is the whole contract price of $575, no portion of which having yet been paid him. I hold that he is entitled to a lien for that amount.

On September 28, 1910, the defendant Logan mortgaged the property to the defendant company to secure $2,100 but the total amount which has yet been advanced upon the mortgage is $1,300, which advance was made on November 1, 1910, after the work on the building had commenced. It appears from a statement furnished by the company that it claims interest on the advance at the rate of 14 per cent. per annum, but it has not been shewn what rate of interest it is entitled to claim. It appears also that in addition to the advance of $1,300 the defendant company has paid $48.30 for insurance premium.

The contract between defendant Logan and Stimson & Buckley is an open one. It does not provide for the completion of

the work at a fixed date or within a reasonable time nor does it authorize the owner for any cause to take over the work from the contractors and complete it at their expense. It provides for the payment of the contract price as follows: the amount of the loan from the defendant company, less a payment on the lot not exceeding $450, to be paid when the money from the loan company should arrive and the balance to be paid by notes at three, six and nine months from the date of the completion of the contract. The lot payment referred to appears to be the amount due by defendant Logan on the purchase of the lot upon which the building was erected and a statement furnished by the company's solicitor shews that the unpaid balance on the lot amounted to only $31.15. In April, 1911, the contractors Stimson & Buckley stopped work on the building, having notified defendant Logan that they could not go on with the work unless they received a further payment on account of it which payment she refused to make. Up to that time they had received $1,242.59, viz., $1,192.59 out of the $1,300 advanced on the mortgage and $50 paid by defendant Logan for excavating the basement of the building. By the terms of their contract they were entitled to receive $2,100, less the balance of $31.15 due on the lot, as soon as it was paid over by the defendant company, and it is reasonable to assume that when they entered into the contract both they and defendant Logan thought that the whole of the mortgage moneys would be advanced within a reasonable time. The evidence does not explain why the whole amount was not advanced long before the contractors stopped work on the building and, for anything that appears, the non-payment of the remainder of the loan may have been due either to the default of defendant Logan or to the intention on her part to delay its payment. Had the full amount been advanced within a reasonable time the contractors would have been entitled at the time they stopped work to a further payment of $826.26 as I hold that defendant Logan was not entitled to deduct from the $2,100 either the insurance premiums paid by the company, or the expenses of procuring the loan, or in fact anything beyond the $31.15 paid on the purchase money of the lot. The building is not yet completed and the evidence is conflicting as to the amount which would require to be expended in order to complete it in accordance with the plans and specifications. The husband of defendant Logan, who acted as her agent throughout in all matters connected with the building, estimates it at from $350 to $400, while her solicitor, who states that he has been a practical carpenter, fixes it at from $500 to $600. I doubt whether it is necessary for me to decide that question, but as it may hereafter be held to be a material one, I hold that the amount required to complete the building is $400.

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I hold that at the present time the plaintiff is entitled to realize his lien only upon a fund of $26.26 made up as follows:—

Amount advanced upon the mortgage		$1,300.00
Less payment on the lot	$ 31.15	
Less amount paid the contractors before notice of plaintiff's lien	1,242.59	
		1,273.74
		$26.26

Whether the plaintiff will be entitled to realize upon any further fund in the future will depend, in the first place, upon whether any further advances are made by the company on its mortgage. If any such advances should be made I am of opinion that they will be subject to the lien. As to the remaining portion of the contract price, which is not payable until after the completion, I think it is clear that the plaintiff's lien will not attach to it unless the contractors complete the building. As by sec. 32 of the Act as amended by sec. 12 (4), ch. 20, 1908, no lien except for certain wages shall attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor. If in this case the contractors fail to complete, the defendant Logan will not be liable to pay them the remainder of the contract price: see *Appelby* v. *Myers*, L.R. 2 C.P. 651* and Phillips on Mechanics' Liens, sec. 62.

As further advances may be made upon the mortgage and as the contractors may proceed to complete the building, the plaintiff's lien will remain in force so that it may attach in respect of any such further advances and of any further sums that may hereafter become payable by the defendant Logan to the contractors. The defendants Logan or the company may apply at any time on one week's notice to discharge the lien.

It was contended on behalf of defendant company that it is entitled to priority in respect of its mortgage over the plaintiff's lien. As no money was advanced by the defendant company upon its mortgage until after the commencement of the plaintiff's work on the building, its mortgage is not one within the meaning of sec. 9 of the Act which provides that, where works or improvements are put upon mortgaged premises, liens upon it shall be prior to the mortgage as against the increase in value of the premises by reason of such works or improvements. I can find no other provision in the Act which gives a mortgage priority to any extent over a lien the right to which was prior in point of time. On the other hand the effect of the proviso in sec. 4 appears to be that a lien will attach to the interest in the land which is vested in the owner at the time the work is commenced or to any interest which he may acquire during the

*See Wallace, Mechanics' Lien Laws in Canada, 2nd ed., 158, 159.

progress of the work. At the time the plaintiff commenced his work the defendant Logan was the owner of the entire interest in the land. It may be the case that the company registered its mortgage before the work was commenced but, as no money was advanced upon it until after that, the company could not then claim upon it as a mortgagee. I therefore hold that the plaintiff's lien is entitled to priority over the mortgage. The plaintiff will have as against defendants Stimson & Buckley his costs of the action.

Judgment for plaintiff.

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British Columbia Supreme Court, Gregory, J. March 14, 1913.

1. LANDLORD AND TENANT (§ II D—33)—FORFEITURE OF LEASE—WAIVER—NON-PAYMENT OF RENT—RELIEF.

A failure on the part of the lessor to re-enter the demised premises and to declare a forfeiture under the terms of the covenant for non-payment of rent, does not constitute such a waiver of rights as is contemplated by sub-sec. 17 of sec. 2 of the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, to the effect that no relief shall be granted against forfeiture of a lessee's term where a forfeiture under the covenant in respect of which relief is sought "shall have been already waived out of court in favour of the person seeking the relief," so as to preclude the lessee from maintaining a summons for relief against such forfeiture.

[See Annotation to this case.]

2. LANDLORD AND TENANT (§ II D—33)—RELIEF AGAINST FORFEITURE OF LEASE—NON-PAYMENT OF RENT—CHANGE IN TERMS BY USAGE—EFFECT AS TO FORFEITURE.

A lessee of demised premises is entitled to an order for relief against forfeiture on the ground of non-payment of rent, under the Laws Declaratory Act, sec. 2, sub-sec. 14 (B.C.), where it appears that he had been in the habit of paying several months rent at a time instead of monthly as called for by the lease, with which arrangements the lessor seemed to have been satisfied, that no request for payment was made by the lessor for about five months, but instead thereof he served his notice of re-entry, at which time the lessee tendered all the rent then due, but the lessor would not accept it, and where the lessee brings into court all arrears of rent due under the lease.

Statement

SUMMONS for relief against forfeiture of a lease on the ground of the non-payment of rent.

The relief asked for was granted.

H. B. Robertson, for plaintiff.

Higgins, for defendant.

Gregory, J.

GREGORY, J.:—Defendant brings into Court all arrears of rent and makes an affidavit that he has been in the habit of paying several months at a time instead of monthly as called for by the lease, and that the plaintiff appears to have been quite satisfied. That since paying last rent in October, he received no de-

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mand or request for payment from plaintiff until served with notice of re-entry on March 5, 1913, and the defendant on the said 5th of March tendered plaintiff all the rent then due, and plaintiff would not then accept it, but made an appointment for the following day, when the amount was again tendered and again refused. Defendant further swears that after paying his rent in October, the plaintiff offered him $300 to surrender his lease.

Plaintiff filed an affidavit contradicting the defendant in several particulars, but I have no doubt that the defendant's material statements are all substantially true.

This seems to me to be a typical case for relief: see sub-sec. 14 of sec. 2 of the Laws Declaratory Act, but it is urged by counsel for the plaintiff that I have no jurisdiction, as sub-sec. 17 of the same section and Act provides as follows:—

> The Court or Judge shall not have power under this Act to relieve the same person more than once in respect of the same covenant or condition; nor shall it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of Court in favour of the person seeking the relief;

and argues that every time the rent was not paid on the due date, there was a forfeiture which the plaintiff waived by taking no steps to re-enter, etc.; and he states that this sub-section is peculiar to our statute. In this he is mistaken: it was introduced into our statutes in 1881, ch. 12, sec. 4, and was taken *in toto* from the Imperial Act (1859), of 22 and 23 Vict. ch. 35, sec. 6, and since that date the English Courts have frequently granted relief.

Relief has also been granted in such cases by our own Courts since 1881. It does not appear to me that there has been such a waiver out of Court as is contemplated by the statute. The lease is in the short form. There is no forfeiture until there has been a re-entry under the terms of the covenant. The lessor may or may not re-enter as he sees fit, but until he does, and declares the lease forfeited, there is no forfeiture to waive.

The best that can be said for the plaintiff lessor is that he elected not to re-enter. There will be an order relieving the defendant from the forfeiture for non-payment of rent due up to the present upon his paying into Court on or before March 22, 1913, the sum of one hundred and fifty dollars as security for the plaintiff's costs herein. If this is not done, the summons will be dismissed with costs. Defendant must pay plaintiff's costs of the action and of this summons.

The costs will be taxed and the amount thereof paid to the plaintiff's solicitor out of the fund so deposited for security, and

the balance paid to defendant's solicitor without any further order. Should the plaintiff not deliver his bill of costs before March 29, 1913, and proceed promptly to the taxation thereof, the whole sum so deposited will be returned to the defendant, or to his solicitor upon his filing the usual written consent.

The registrar will indorse upon the lease a record of the relief hereby granted.

Judgment accordingly.

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Annotation—Landlord and tenant (§ II D—33) — Forfeiture of lease — Waiver.

Annotation
Forfeiture of lease—Waiver.

Where a forfeiture has been incurred, it is in the option of the landlord whether he will take advantage of it or not, even where, under a proviso, the lease is declared to be wholly void. In such a case the lease does not become void on breach of the covenant or condition, but only voidable, and the landlord may enforce the forfeiture or he may waive it, either expressly or by implication from his acts. Any act by which he recognizes the tenancy as still subsisting after the breach which gives rise to the forfeiture comes to his knowledge, amounts to a waiver, or is evidence from which an intention to waive the forfeiture may be inferred: *Roe* v. *Harrison* (1788), 2 T.R. 425, 1 R.R. 513; *Evans* v. *Wyatt* (1880), 43 L.T. 176. But actual knowledge of the breach is necessary before any act can amount to a waiver, and constructive notice, or means of knowledge is insufficient: *Ewart* v. *Fryer* (1900), 17 Times L.R. 145, 82 L.T. 415.

If, however, the lessor does nothing, and is merely aware that a breach of a covenant has been committed, he is not thereby disentitled to claim a forfeiture, as mere knowledge, without any positive assent, is not sufficient to constitute a waiver: *Doe* v. *Allen* (1810), 3 Taunt. 78, 12 R.R. 597. Mere knowledge or acquiescence in an act constituting a forfeiture, does not amount to a waiver; there must be some positive act of waiver, such as a receipt of rent: *McLaren* v. *Kerr* (1878), 39 U.C.R. 507. It would seem to be no waiver of the breach of a covenant not to dig beyond a prescribed depth, that the landlord, though aware of such breach, and threatening to take proceedings in consequence, did not take any steps at the time, but allowed the tenant to remain in possession until his subsequent insolvency: *Kerr* v. *Hastings* (1875), 25 U.C.C.P. 429.

If a person entitled to the reversion, knowing that a forfeiture has been incurred by breach of the covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at the later period, he thereby waives the forfeiture: *Dendy* v. *Nicholl* (1858), 27 L.J.C.P. 220, 4 C.B.N.S. 376; *Penton* v. *Barnett*, [1898] 1 Q.B. 276. A right of entry, for breach of covenant in a lease, is waived by the lessor bringing an action for rent accrued due subsequent to the breach: *Ibid.* A forfeiture is waived where the landlord expressly declares to the tenant that he will not enforce it: *Ward* v. *Day* (1864), 5 B. & S. 359. So, if he agrees to grant a new lease to the tenant on the expiration of the old one: *Ibid.*; or if he notifies the tenant to do repairs under the lease: *Griffin* v. *Tomkins* (1880), 42 L.T. 359. So, where the landlord accepts rent from the lessee which became due after the forfeiture was incurred, it amounts to a waiver: *Doe* v. *Rees* (1838), 4 Bing. N.C. 384; *Keith* v. *National Telephone Co.*, [1894] 2 Ch. 147; *Roe* v. *Southard* (1861), 10 U.C.C.P. 488, although the landlord

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Forfeiture of lease—Waiver.

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protests that such acceptance is without prejudice to his right to insist on the forfeiture: *Davenport* v. *The Queen* (1877), 3 App. Cas. 115; *Croft* v. *Lumley* (1858), 6 H.L.C. 72. So, where the landlord makes an unqualified demand on the tenant for rent due after the forfeiture: *Doe* v. *Birch* (1836), 1 M. & W. 402, 46 R.R. 326, or sues him for such rent: *Dendy* v. *Nicholl* (1858), 4 C.B.N.S. 376, it amounts to a waiver. In like manner, a distress for rent after the forfeiture is incurred, whether such rent became due before or after the forfeiture, operates as a waiver: *Cotesworth* v. *Spokes* (1861), 10 C.B.N.S. 103. But acceptance after forfeiture of rent which became due before the forfeiture, is not sufficient to constitute a waiver: *Price* v. *Worwood* (1859), 4 H. & N. 512; *Dobson* v. *Southeran* (1888), 15 Ont. R. 15.

Where the landlord credits moneys received on a note given by the tenant for previous arrears of rent, it was held to be no waiver of a forfeiture arising in respect of rent accruing after the note was given: *McDonald* v. *Peck* (1859), 17 U.C.R. 270.

In an action to recover possession on the ground of forfeiture for breach of covenants, and to recover arrears of rent, acceptance by the landlord of the sum paid into Court by the defendant in satisfaction of the rent, is not a waiver of a breach of covenant which took place after the rent became due: *Toogood* v. *Mills* (1896), 23 V.L.R. 106. A reference to arbitration after default operates in the meanwhile as a suspension of the right of re-entry: *Black* v. *Allen* (1867), 17 U.C.C.P. 240.

A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors, six months' rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment which was afterwards done, the lessors executing the assignment as creditors assenting thereto. It was held that the lessors and the company were distinct legal persons and the individual interests of the lessors were not affected by their action as shareholders or directors of the company, and the lessors were not estopped from taking advantage of the forfeiture clause: *Soper* v. *Littlejohn* (1901), 31 Can. S.C.R. 572, following *Salomon* v. *Salomon*, [1897] App. Cas. 22.

Where, however, the act or omission which constitutes the breach of a covenant and occasions the forfeiture, is of a continuing nature, these acts of the landlord operate as a waiver only to a limited extent. Thus, acceptance of rent in the case of a continuing breach is a waiver down to the time such rent is received, but not afterwards: *Doe* v. *Gladwin* (1845), 6 Q.B. 953. So, a distress is a waiver of a continuing breach down to the time the distress is made: *Thomas* v. *Lulham*, [1895] 2 Q.B. 400.

It has been held that covenants to repair, to insure, to cultivate or use the premises in a particular manner, are continuing covenants, and the omission to observe them is a continuing breach: *Doe* v. *Jones* (1850), 5 Ex. 498; *Coward* v. *Gregory* (1866), L.R. 2 C.P. 153; *Coatsworth* v. *Johnson* (1886), 54 L.T. 520; *Doe* v. *Woodbridge* (1829), 9 B. & C. 376. Breaches of a covenant in a farm lease to keep the fences in repair, and to keep

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eighteen acres in meadow during the term, are continuing breaches, and the right to re-enter for them is not waived by acceptance of rent: *Ainley* v. *Balsden* (1857), 14 U.C.R. 535.

A covenant which requires the complete performance of a definite act within a specified time, is not a continuing covenant: *Morris* v. *Kennedy*, [1896] 2 I.R. 247. Thus, a covenant to build within a specified time is not such a covenant: *Jacob* v. *Down*, [1900] 2 Ch. 156. Where the lessee covenanted to build a house within four years and failed to perform it, it was held that the receipt of rent by the lessor after that time was a waiver of the forfeiture: *Roe* v. *Southard* (1861), 10 U.C.C.P. 488. But the forfeiture on a breach of a covenant, the necessary effect of which, although a continuing breach, is to put it out of the lessee's power to remedy it, may be completely waived. Thus, where a landlord accepts or distrains for rent, after and with knowledge of a breach of a covenant against subletting, it operates as a complete waiver during the whole term of such sub-letting, but not afterwards: *Walrond* v. *Hawkins* (1875), L.R. 10 C.P. 342; *Lawrie* v. *Lees* (1881), 14 Ch. D. 249, 7 App. Cas. 19.

A demand of rent falling due after a notice to repair has expired, does not operate as a waiver, if there be subsequent non-repair: *Penton* v. *Barnett*, [1898] 1 Q.B. 276. Acceptance of rent which becomes due pending a notice to repair, is no waiver of a forfeiture on the expiry of the notice. And an agreement to allow further time for the repairs is not a waiver of, but only suspends the right of entry: *Doe* v. *Brindley* (1832), 4 B. & Ad. 84.

Where, however, the landlord elects to claim the forfeiture, and brings an action of ejectment, nothing that he may then do will be construed as a waiver of the forfeiture. Thus, neither acceptance of rent, nor his distraining for it, will operate as a waiver. An election to forfeit once made by bringing action, is irrevocable: *Doe* v. *Meux* (1824), 1 C. & P. 346; *Jones* v. *Carter* (1846), 15 M. & W. 718; *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360. Where the right to re-enter has arisen on the bankruptcy of the lessee, the annulment of the bankruptcy after the issue of the writ in ejectment will not defeat the forfeiture: *Smith* v. *Gronow*, [1891] 2 Q.B. 394.

But if a claim is made in the writ for an injunction to restrain the breach giving rise to the forfeiture, in addition to the claim for possession, or if the lessor in his pleading treats the tenancy as subsisting, it has been held to operate as a waiver: *Evans* v. *Davis* (1878), 10 Ch. D. 747; *Holman* v. *Knox*, 3 D.L.R. 207.

The action of ejectment shews an irrevocable intention on the part of the landlord to avoid the lease. Acceptance of rent, after the issue of the writ, will not operate as a waiver, nor set up the former tenancy, but it may be regarded as evidence of a new tenancy on the same terms from year to year: *Evans* v. *Wyatt* (1880), 43 L.T. 176. Thus, where a landlord, after an action of ejectment was commenced for the forfeiture of the lease, distrained for and received rent subsequently accruing due, it was held that such course did not, *per se*, set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year: *McMullen* v. *Vannatto* (1893), 24 Ont. R. 625.

In Ontario it is provided by statute that a waiver of the benefit of a

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Forfeiture of lease—Waiver.

Annotation (*continued*)—Landlord and tenant (§ II D—33)—Forfeiture of lease—Waiver.

covenant or condition in a lease shall not be deemed to extend to any instance or breach thereof, other than that to which it specially relates, unless a contrary intention appears. This is enacted by section 16 of the Landlord and Tenant Act, R.S.O. 1897, ch. 170.

A waiver of a forfeiture made by the beneficial owner of unpatented land under lease, is binding on the purchaser who afterwards obtains a patent with notice of the lease: *Flower* v. *Duncan* (1867), 13 Gr. 242.

It has been held that where the action is against defendant as plaintiff's tenant for a forfeiture, the receiving of rent after the writ of possession has issued, is a waiver of the execution: *Bleecker* v. *Campbell* (1857), 4 C.L.J. (O.S.) 136. There can be no waiver after entry for a forfeiture: *Thompson* v. *Baskerville* (1879), 40 U.C.R. 614.

The landlord's conduct in permitting his tenant's assignee of the term to take possession and in accepting payment of his rent from the latter without claiming any forfeiture and his objection to signing a written consent to the transfer on the ground that it was not necessary, will amount to a waiver of a covenant which requires a written consent to the assignment of a lease: *Minuk* v. *White* (1905), 1 W.L.R. 401 (Man.).

The plaintiff's deceased testator in his lifetime leased to the defendant the Royal Hotel Block, consisting of an hotel, barber shop, stores, offices and stable, for a term of years. The lease contained lessee's covenants not to sell, assign, let or otherwise part with the demised premises without leave in writing and not to alter the premises without leave in writing. The lessor roomed in the hotel and usually took his meals there. During his lifetime certain alterations were made in the premises and other alterations were commenced, without his written consent, but with his knowledge and implied consent and acquiescence, and after his death the alterations were continued, with the knowledge of the plaintiff. One sub-tenant had without leave in writing from the head lessor assigned his lease. In the case of two other sub-leases the rent had been increased without consent, and in respect of another a monthly tenancy on a verbal lease had been changed without consent to a two-years' term, with a lease in writing, at a higher rent. The dining-room of the hotel had been placed under separate management on an agreement that the manager should pay defendant a fixed sum of the income from the dining-room and should be entitled to the balance earned by the dining-room. In an action by the executor of the lessor against the lessee claiming forfeiture of the lease on account of the breach of covenants, the Court held that (1) an assignment without consent by a sub-lessee of his lease which has been granted with consent is no breach of the lessee's covenant in the head lease not to assign without leave. (2) The mere increase in the monthly rental payable by a sub-lessee is not a termination of one tenancy and the creation of a new tenancy, and will, therefore, not be a breach of the covenant in the head lease not to sub-let, etc., if done without consent. (3) The alteration of a monthly tenancy to a two years' term on a written lease without such consent is a breach of the covenant. (4) The agreement with the dining-room manager was not a lease, sale or assignment, and, therefore, no breach. (5) Under the circumstances the Court should exercise the jurisdiction to relieve against forfeitures on terms.

Annotation (*continued*)—**Landlord and tenant (§ II D—33)—Forfeiture of lease—Waiver.**

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The terms imposed were increased rent to make up the increase obtained from the new tenancy created by the conversion of the monthly tenancy to a two years' tenancy, and the defendant was required to execute a lease covenanting to pay to the plaintiff such increased amount, and was also required to pay the plaintiff's costs as between solicitor and client within one month. *Quære*, whether the plaintiff was estopped from taking advantage of the condition for forfeiture in respect of alterations authorized verbally by the testator in his lifetime, but executed after his death: *Royal Trust Co.* v. *Bell*, 2 Alta. R. 425.

The right of re-entry under the Act respecting Short Forms of Lease applies to the breach of a negative as well as of an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sub-let without leave: *Toronto General Hospital* v. *Denham* (1880), 31 U.C.C.P. 207. The making of an agreement for the assignment of a lease the settlement of the terms thereof and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant; the fact of the document shewing the transfer not having been made until after action brought is immaterial: *McMahon* v. *Coyle*, 5 O.L.R. 618 (Boyd, C.).

Plaintiff, as lessee, and defendant, as lessor, on the 1st of January, 1906, entered into a lease for a term of five years, at a rental of $70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to the 23rd of January, 1907, inadvertently allowed the rent for January to fall in arrear, but on the latter date, tendered defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced. No third party interests having intervened, plaintiff was entitled to relief against forfeiture, both as to the term and the option, and that, the case coming within Rule 976 of the B.C. Supreme Court Rules, 1906, plaintiff should also get the costs of the action: *Huntting* v. *McAdam*, 13 B.C.R. 426; *Newbolt* v. *Bingham* (1895), 72 L.T.N.S. 852.

A provision in a lease against sub-letting without the written consent of the lessor is not *de rigueur* so as to prevent the lessor pleading a verbal consent to an action under the Quebec law to resiliate the lease for breach of this provision brought by an assignee of the lessor. Oral evidence by the lessor of such consent prior to the sale of the immovable to the plaintiff, coupled with the implied consent of the latter to the sub-lease resulting from the fact that he was aware of it for several months without taking action is sufficient: *Vaillancourt* v. *Saint Denis*, Q.R. 34 S.C. 25; *Jilbert* v. *Bowen*, Q.R. 36 S.C. 309.

Where a lease contains a covenant not to assign without lessor's consent and an assignment of the lessee's interest in the lease is made, and thereafter the lessor assigns his title, and the lessor's assignee, subsequently learning of the prior assignment by the lessee, accepts rent from the party in possession under the lessee, and later distrained on his goods for other

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Annotation (*continued*)—**Landlord and tenant (§ II D—33)—Forfeiture of lease—Waiver.**

rent, and makes no re-entry, the breach of the covenant not to assign is waived: *Pigeon* v. *Preston* (No. 3), 8 D.L.R. 126, 22 W.L.R. 894, 49 C.L.J. 76.

A forfeiture for breach of covenant in a lease (except for payment of rent) cannot be enforced by action, or otherwise until after a notice has been served pursuant to sec. 20 (2) of the Ontario Landlord and Tenant Act; this provision is general and applies to both positive and negative covenants: *Harman* v. *Ainslie*, [1904] 1 K.B. 698; *Walters* v. *Wylie*, 1 D.L.R. 208, 3 O.W.N. 567, 20 O.W.R. 994.

A forfeiture in a lease is waived if the lessor elects not to take advantage of it and shews his election either expressly by a statement to that effect to the lessee or impliedly by acknowledging the continuous tenancy, and if after a cause of forfeiture has come to his knowledge he does anything to recognize the relation of landlord and tenant as still subsisting, he is precluded from saying he did not do the act with the intention of waiving the forfeiture: *Evans* v. *Davis* (1878), 10 Ch. D. 747; *Moore* v. *Ullcoats Mining Co.*, [1908] 1 Ch. 575; *Holman* v. *Knox*, 3 D.L.R. 207, 3 O.W.N. 745, 25 O.L.R. 588, 21 O.W.R. 325.

ONT.

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1913

April 12.

Re JANNISON.

Ontario Supreme Court, Middleton, J., in Chambers. April 12, 1913.

1. INSURANCE (§ IV B—170)—CHANGE OF PREFERRED BENEFICIARY—BEQUEST—SUFFICIENCY OF.

General words of bequest, such as "all my property, including all my insurance policies at present in force and that I may hereafter have," are not a sufficient identification of a contract of insurance to make the will an appointment of a particular beneficiary of a policy of life insurance in which a beneficiary of the preferred class had been designated but had died in the life-time of the assured so as to prevent the operation of secs. 151 and 159 of the Insurance Act, R.S.O. 1897, ch. 203 (as amended 1 Edw. VII. (Ont.) ch. 21, sec. 2, and 4 Edw. VII. (Ont.) ch. 15, sec. 7, which provides that, in default of any new appointment, the benefit shall go to the children of the assured; the insurance money had, by the first appointment of a beneficiary of the preferred class, become a trust fund and not transferable by the assured out of the preferred class of beneficiaries except in the statutory manner by an instrument in writing "identifying the policy by number or otherwise."

[See sec. 245 of Insurance Act, 1912, 2 Geo. V. (Ont.) ch. 33, repealing R.S.O. 1897, ch. 203, and amendments; see also *Re Stewart Estate*, 8 D.L.R. 165.]

2. INSURANCE (§ IV B—170)—CHANGE OF BENEFICIARY—DISTINCTION OF INSURANCE MONEYS.

Under the Ontario Insurance Act, R.S.O. 1897, ch. 203, and amendments thereto, the words "surviving beneficiaries" and "surviving infant children" in the provisions for the appointment of the insurance money in the event of the death of preferred beneficiaries in the life-time of the assured, refer to survivorship after his death and not to survivorship after the death of the beneficiary.

[See sec. 245 of Insurance Act, 1912, 2 Geo. V. (Ont.) ch. 33, repealing R.S.O. 1897, ch. 203, and its amendments.]

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RE JANNISON.

MOTION by the widow of William Jannison, deceased, for payment out of Court of $1,000, the amount of an insurance upon his life, paid in by the insurance company.

F. D. Davis, for the widow.

J. R. Meredith, for the infant.

Middleton, J.

MIDDLETON, J.:—William Jannison was married three times. During the life of his second wife, Chattie, he had the insurance in question made payable to her. She died in 1902, childless. On the 3rd October, 1904, the deceased married the present wife; and on the 1st April, 1905, he made his will, by which he gave all his property, "including all my insurance policies at present in force and that I may hereafter have," to the applicant.

On the 16th January, 1907, the infant was born. The testator died on the 29th February, 1912, leaving him surviving the applicant and the infant, his only child.

The insured having died before the Insurance Act of 1912 came into force, the rights of the parties must be determined on the earlier legislation. Under the Insurance Act, R.S.O. 1897 ch. 203, sec. 151, as amended by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 7, if all beneficiaries named in an insurance contract die during the life of the assured, "the insurance shall be for the benefit in equal shares of the surviving infant children of the assured, and if no surviving infant children, then the benefit of the contract and the insurance money shall form part of the estate of the assured." This section is general, and applies to all beneficiaries, whether within the preferred class or not.

Some confusion existed by reason of the failure to make a corresponding amendment in sec. 159, dealing with preferred beneficiaries; but the two sections would have to be read together, and this amendment would serve to supplement the provisions of sec. 159, sub-sec. 8, which did not cover the case of the death of all beneficiaries, but only the case of the death of some of the beneficiaries.

This was the position of the law when the second wife died; and, as there were then no children, the policy would form part of the estate of the assured, unless the expression "surviving infant children" refers to the death of the assured.

In 1904, before the marriage took place, the law was again amended, and sub-sec. 8 of sec. 159 was remodelled by 4 Edw. VII. ch. 15, sec. 7; a provision being added recognising the amendment of 1901 as applicable to preferred beneficiaries, and providing that, in default of any new apportionment, upon the death of the preferred beneficiary the benefit shall be for the survivors, and if "there is no such survivor the insurance shall be for the benefit, in equal shares, of the children of the assured,

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and if no surviving children of the assured then the assurance shall form part of the estate of the insured."

I have come to the conclusion that the whole context indicates that the words "survivor" and "surviving children" relate to the death of the insured, and not to the death of the beneficiary. The destination of the insurance money upon the death of the insured is what is being dealt with by the Legislature. If the beneficiaries have then predeceased the testator, the insurance money, which has become a trust fund, is to be given to those named by the statute; the survivor of any beneficiaries named, or, if there is no survivor, then to the children.

All this is subject to the power conferred by the statute upon the insured. He may, by an instrument in writing attached to, endorsed on, or referring to and identifying the policy by number or otherwise, deal with the policy as he sees fit, so long as he does not transfer the benefit outside of the class of the preferred beneficiaries.

Re Cochrane, 16 O.L.R. 328, determines that the use of general language in a will, such as that here found, does not affect policies theretofore designated to beneficiaries.

Although the testator in this case may reasonably have thought that this policy would form part of his estate, its destination could not be ascertained until his death. It then appeared to belong to the infant children. Two courses were open to the testator if he desired it to go to his wife. He could have placed the matter beyond question by identifying the policy in the first instance, or he could have reconsidered the matter after the child was born.

I, therefore, think that the moneys in Court belong to the infant. In the outcome it will probably make little difference, as an order will, no doubt, be made for payment to the mother for the maintenance of the child.

Judgment accordingly.

Re LLOYD and ANCIENT ORDER OF UNITED WORKMEN.

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May 5.

Ontario Supreme Court, Middleton, J. May 5, 1913.

1. Insurance (§ IV B—171)—Transfer of interest—Life policy—Change of beneficiary.

Where the assured has made a designation of preferred beneficiaries in or upon his policy of life insurance under the Ontario Insurance Act by declaring one half payable to his first wife by name and the other half to one of his children also named, and he remarries after the death of his first wife, and does not in his lifetime change such designation, the daughter so named takes the entire fund as survivor of the designated preferred beneficiaries; the case is not controlled by sub-sections 3 and 4 of sec. 178 of the Ontario Insurance Act, 2 Geo. V. ch. 33, so as to make the designation apply to the surviving second wife notwithstanding the designation of the first by name, as those subsections are in terms limited to designations for the benefit of the wife only or of his wife and children generally.

[*Re Jannison*, 10 D.L.R. 608, 4 O.W.N. 1084, referred to.]

Statement

Motion by Alice Lloyd, the widow of James L. Lloyd, deceased, for payment out of insurance moneys paid into Court by the insurance society.

The application was dismissed.

J. M. Ferguson, for Alice Lloyd.

G. G. Mills, for Mary Eliza Birtch, daughter of the deceased.

Middleton, J.

Middleton, J.:—James L. Lloyd was insured in the Ancient Order of United Workmen, on the 5th July, 1884, for $2,000, payable "to his wife Sarah Anne Lloyd one-half and the other half to his daughter Mary Eliza Lloyd"—now Mrs. Birtch.

Lloyd died on the 24th February, 1913. His first wife, Sarah Anne Lloyd, predeceased him, dying on the 13th November, 1909. He married Alice Barton on the 11th January, 1911, and she survives him. There is no question as to the title to Mrs. Birtch to one-half of the money, and this has been paid to her. The remaining $1,000 has been paid into Court, and is the amount in question here.

No will of the assured has been found, but an unsigned document is produced purporting to be a copy of his will. This document is in the handwriting of the assured, and is probably the only document that ever existed. It is not signed, and counsel agree that it has no effect upon the matters in question.

Mrs. Birtch bases her claim to the money upon two contentions.

First, she says: "Assuming the Ontario Insurance Act, 2 Geo. V. ch. 33, to apply, then, upon the true construction of the various sub-sections of sec. 178, I am entitled. Applying subsec. 7, one of the designated preferred beneficiaries has died in the lifetime of the assured. The assured has made no new declaration. I, as survivor of the designated preferred beneficiaries, take the whole fund."

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This contention is unanswerable, unless sub-secs. 3 and 4 can be made to apply. By sub-sec. 3, if the assurance "is for the benefit of the wife of the assured only, or of his wife and children generally. . . . 'wife' shall mean the wife living at the maturity of the contract;" and, by sub-sec. 4, this is to be "whether or not the wife is designated by name." Here the assurance is not for the benefit of the wife of the assured only, nor is it for the benefit of the wife and children generally, but it is for the benefit of the wife and one named child. It seems to me that the case is not brought within sub-secs. 3 and 4, and that the daughter's claim must prevail. I arrive at this conclusion with regret; but the right is a statutory right, and must depend upon the exact terms of the statute.

The alternative contention presented by the daughter is as follows. Under sec. 159 of the Ontario Insurance Act, R.S.O. 1897 ch. 203, and its amendments, upon the death of one of two or more designated beneficiaries, the right to receive the whole fund, in the absence of a new apportionment, became vested in the survivors. This right became vested upon the death of the first wife, Sarah, on the 13th November, 1909; and the subsequent legislation, even if sufficient to confer the right upon the second wife, would not operate to divest this vested interest.

In the result I have arrived at, it is not necessary for me to discuss this point. I content myself with referring to my recent decision in *Re Jannison*, 10 D.L.R. 608, 4 O.W.N. 1084.

It is not a case for costs.

Application dismissed.

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Ex parte SERIESKY.

Supreme Court of New Brunswick, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. November 22, 1912.

1. HABEAS CORPUS (§ I—12*a*)—SCOPE OF WRIT—RELEASE UPON RECOGNIZANCE BEFORE APPLICATION.

A writ of habeas corpus *cum causa* in respect of an alleged illegal arrest and a subsequent detention order made by a justice will not be granted when the accused has obtained a release upon giving bail and remains at liberty under the recognizance; such habeas corpus process is intended to give relief only to persons in actual custody under illegal process.

2. CERTIORARI (§ I B—10)—OTHER REMEDY—OBJECTION TO PRELIMINARY PROCEEDINGS—RAISING SAME QUESTION AT TRIAL.

The court may exercise its discretion by refusing a *certiorari* when sought to remove into a superior court an information and proceedings thereon before a magistrate under which the defendant was held to bail with sureties to appear at the County Court for trial upon a quasi-criminal charge under a provincial statute, if the same grounds upon which the claim of irregularity or nullity in the magistrate's proceedings is founded would be open to the defendant on the hearing

in the County Court, while a rule for a *certiorari*, if granted, would not be returnable until a later date and might prejudice the enforcement or renewal of the recognizance of bail.

3. JUSTICE OF THE PEACE (§ I—2)—APPOINTMENT AND OFFICIAL TITLE — EX OFFICIO JUSTICES.

Statutory proceedings authorized to be taken before a justice of the peace will not be set aside because of failure to describe the magistrate in the record of proceedings by the words "justice of the peace," if he is designated therein as stipendiary magistrate for the county and consequently is an *ex officio* justice of the peace by virtue of a provincial statute.

4. CERTIORARI (§ II—28)—DISCRETION IN GRANTING—STATUTORY PROCEEDINGS—CURATIVE STATUTE.

Where, by statute certain defects in proceedings under the Bastardy Act, C.S.N.B. 1903, ch. 182, are declared not to prevent the trial of the accused or to avail as a defence *upon the trial*, the discretion of the court to grant or refuse a *certiorari* will be exercised by refusing to remove the information and preliminary proceedings thereon for defects of the class which, if raised before the trial tribunal, would be cured by the statute.

Statement

APPLICATION for a writ of habeas corpus *cum causa* on behalf of Maurice Seriesky, who had been arrested under a warrant issued by Elijah F. Shaw, stipendiary magistrate for the county of Carleton, upon a bastardy information laid by Anna Canovan under the Bastardy Act, C.S.N.B. 1903, ch. 182. A motion was made at the same time for a rule absolute for a certiorari to bring up the bastardy proceedings in connection with the warrant, and a rule nisi to quash.

T. J. Carter, K.C., for the applicant.

The opinion of the Court was delivered by

White, J.

WHITE, J. (oral):—From the statement of the learned counsel and the papers before us it appeared that at the time the application was made Seriesky was not in custody. It appeared that the information having been laid before the stipendiary magistrate mentioned, a warrant was issued and Seriesky arrested thereunder, and thereupon proceedings were had in pretended compliance with the provisions of section 5 of the Bastardy Act, C.S.N.B. 1903, ch. 182. The magistrate having refused to discharge the prisoner as the result of that examination, Seriesky entered into the recognizance provided for by the Act, with sureties as thereby provided, and was thereupon released from arrest, and was not under arrest when the application was made to this Court.

It is quite clear, therefore, that a writ of habeas corpus *cum causa* could not be granted by the Court, because that is a writ intended to give relief to persons who are in custody and to secure their release from a custody which is illegal. If the writ were granted, directed to some officer, to bring in the body of Seriesky, the first proceeding thereunder necessarily would be

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to arrest Seriesky and bring him before the Court. Therefore, I say the application as to habeas corpus must fail.

Then as to the certiorari. A number of objections have been urged against the sufficiency of the information laid before the justice, and it is claimed that the evidence taken before the justice on the examination, under section 5 of the Act, fails to shew certain facts which it is contended should be shewn, to make valid the proceedings before the magistrate and the recognizance into which the defendant has entered. I do not intend to enter into a discussion of the question as to whether any or all of these objections are sufficient, or, rather, whether the proceedings are or are not defective in the points to which these objections are directed, except as to one objection—the first urged by the learned counsel—that a stipendiary magistrate has no jurisdiction to hold a preliminary examination in bastardy cases. As to that objection, ch. 119 of the Consolidated Statutes, sec. 1, sub-sec. 2, provides that "every stipendiary or police magistrate so appointed shall be *ex officio* a justice of the peace for the county over which he is given jurisdiction as such magistrate." The information to which exception is taken appears upon its face to have been "taken and sworn to at the parish of Kent, on the 26th of August, 1912, before me, the undersigned Elijah J. Shaw, stipendiary magistrate for the parish of Kent, in the county of Carleton." It was argued that as he is described there as stipendiary magistrate it must be assumed that he took it in his capacity as stipendiary magistrate and not as a justice of the peace: but the fact remains that being stipendiary magistrate he is a justice of the peace, and justices of the peace, under the Bastardy Act, have authority to take information; and I think the objection, therefore, on that ground must fail.

The other objections were directed to shew that the proceedings were insufficient and either void or defective for various reasons, into which, as I have said, I will not enter, because, by the Bastardy Act, section 13 and the several following sections, provision is made that a number of irregularities or defects therein specified shall not avail to prevent the trial of the accused or as a defence upon the trial. If the irregularities or defects complained of in the present case fall within those sections, so that they would not avail the defendant on the trial, I do not think that this Court, exercising such discretionary power, as it has a right to exercise, in granting or refusing certiorari, should grant the certiorari. If, on the other hand, the defects are such as to render void the proceedings and deprive the Court below of jurisdiction to go on in the case, it is not necessary that we should grant a certiorari, because the defendant can get his relief at the trial of the cause, or when the cause is called on for trial.

It is quite true that it has been held, that where a party has been arrested under a warrant which is void for want of jurisdiction the Court may grant a certiorari, even though, beyond question, without setting the warrant aside, the action might have been maintained for false arrest on the ground of want of jurisdiction in the officer issuing the warrant, but it is, I say, in every case a matter of discretion; and in exercising the discretion which we do exercise in refusing to grant a certiorari we have in mind the fact that it appears that the defendant is recognized to stand trial at the next sitting of the County Court of Carleton county which opens in December or January next,—at all events, before the writ of certiorari could be returned and heard by this Court; and if a stay were granted a question might arise whether, under the Act, the trial could be heard at a later Court. At all events, the trial would have to be postponed, and as we are not, by our refusal to grant the certiorari, depriving the defendant absolutely of a remedy in case the irregularities complained of are such as to render the proceedings void, or are such as are not covered by the remedial section of the statute to which I have referred, we have decided to refuse the rule, doing so, as I say, without expressing any opinion as to whether or not the proceedings are valid or invalid, or regular or irregular, in respect to the points to which the objection against them was urged before us.

Rule refused.

Re DORWARD.

Ontario Supreme Court, Middleton, J. May 5, 1913.

1. WILLS (§ III A—77)—DEVISE AND LEGACY—BLANK WILL FORM—CONTEXT.

Where a testator drew his own will upon a "blank will form" and left blank the space where ordinarily would be found the name of the residuary devisee but filled in his wife's name in the blank next following for the appointment of executors, so that read together the wording was, "All the residue (etc.) I give (etc.) unto . . . And I nominate and appoint Mrs. Isabella Dorward to be executrix," both clauses may be read together as disclosing an intention to give his property to his wife so named as well as to appoint her executrix, where otherwise there would be an intestacy.

[*Re Conger*, 19 O.L.R. 499, and *May* v. *Logie*, 23 A.R. (Ont.) 785 referred to.]

Statement

MOTION by the executrix for an order declaring the construction of the will of Walter Dorward, who died on the 22nd February, 1911.

Shirley Denison, K.C., for the executrix and for William and David Dorward.

H. M. Ferguson, for the other next of kin.

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MIDDLETON, J.:—"The country conveyancer" and "The man who makes his own will" are favourite toasts at lawyers' gatherings. "The man who invented printed will-forms" will soon be equally popular. As excellent as these forms often are, so many errors arise in filling them up, that already a formidable list of cases can be found dealing with the problem prescribed. This testator used the same form as that considered in *Re Conger*, 19 O.L.R. 499, and filled it up in the same way, save that he inserted his wife's name in the clause for the appointment of executors, and left the space blank in the residuary devise. So the will reads: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto and I nominate and appoint Mrs. Isabella Dorward to be executrix of my last will and testament." This can, I think, be read as an awkward sentence by which the wife is made residuary devisee as well as executrix. Dorward did not mean to die intestate, and I think that from the will itself his intention can be gathered, and that intention was to give his property to his wife.

May v. *Logie*, 27 O.R. 501 and 23 A.R. 785, shews that the intention may be gathered and given effect to, even when the actual words used do not form a sentence, and are quite incapable of grammatical analysis.

Costs may come out of the estate.

Motion granted.

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REX v. SPARKS.

British Columbia Supreme Court, Murphy, J. February 27, 1913.

1. PROHIBITION (§ IV—17)—PROCEEDINGS UNDER MUNICIPAL BY-LAW.

Prohibition will lie against the enforcement of a summary conviction under an invalid municipal by-law, as the magistrate in assuming to find the by-law valid attempted to give himself jurisdiction by an erroneous conclusion of law.

2. LICENSES (§ II C—44)—VEHICLES FOR HIRE—CHARACTER CERTIFICATE REQUIREMENTS FOR LICENSE.

Statutory authority to a municipality to license and regulate the driving of cabs, hacks, motor cars and other vehicles plying for hire, does not authorize the municipality to limit licenses to such persons as are certified by the Chief of Police to be of good moral character.

[*Slattery* v. *Naylor*, 13 A.C. 446, referred to; and see *Toronto* v. *Virgo*, [1896] A.C. 88.]

Statement

APPLICATION for writ of prohibition.

The application was granted.

T. R. Robertson, for the City.

Aikman, for applicant.

Murphy, J.

MURPHY, J.:—Section 291 of vol. 10, Halsbury's Laws of England, states that where the Judge of an inferior Court has

given himself jurisdiction by an erroneous conclusion on a point of law, prohibition will lie. I therefore think if it can be shewn that the by-law in question here is invalid the writ should issue, particularly having regard to the facts. The material before the Court is not exhaustive, but I take it to be admitted from what was stated in argument that Sparks, previous to any proceedings against him, took all necessary steps and fulfilled all conditions required by the by-law to obtain a license, and that the only reason he did not obtain one was because the Chief of Police, in the exercise of discretion purported to be conferred upon him by the by-law, refused to issue it on the ground that Sparks was not of good moral character.

It was contended that prohibition would not lie because at any rate sec. 2 of the by-law is valid, and therefore the magistrate had jurisdiction. In my opinion if sec. 3 is invalid, then sec. 2 cannot be relied on, for it provides that all drivers must have licenses obtained from the Chief of Police, else by driving such driver commits an offence. Since such license can only be obtained under the provisions of sec. 3, if these are invalid a man who, but for the by-law, would be exercising his common law right of earning a livelihood by the pursuit of a lawful occupation, becomes guilty of a quasi-criminal offence, involving the possibility of imprisonment because he has not fulfilled illegal conditions. I therefore hold that sec. 2 cannot be thus divorced from the other sections dealing with the issue of licenses.

The question remains as to the illegality of these sections. This depends on whether the legislature has authorised the council to enact them. It is contended such power is conferred by sub-sec. 3 of sec. 3 of the Victoria Special Powers Act, which authorizes the passing of by-laws, as follows:—

> (3) For licensing and regulating motor cars, hacks, cabs and every vehicle plying for hire, and the chauffeurs or drivers thereof, and to impose, as a condition of such license, that the said chauffeurs or drivers will adhere to a scale of charges applicable to all such chauffeurs or drivers plying for hire to places within and to a distance of not exceeding six miles without the city, and to establish such scale of charges for the use of such motor cars, hacks, cabs and vehicles; and for authorising and assigning stands for motor cars, hacks, cabs and vehicles plying for hire on the public streets or in public places; and every chauffeur or driver when upon a stand shall be deemed to be plying for hire. Wharves, depots, yards or enclosures used for the arrival or departure of the travelling public or for transportation, whether on private or public property, shall be deemed public places and stands within the meaning of this sub-section.

The principal decision that "regulating" may include prohibiting in certain cases is *Slattery* v. *Naylor*, 13 A.C. 446. The *ratio decidendi* of that case is stated by King, J., in *Virgo* v. *City*

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of Toronto, 22 Can. S.C.R. 447, at 475,* to be upon the consideration "that otherwise the matter cannot in common understanding be efficiently regulated." One would hesitate to hold that in common understanding the regulating of the business of hack driving requires that absolute discretion be conferred upon the Chief of Police to prohibit anyone whom he considered not to be of good moral character from engaging therein; and if this view be correct, I think the sections of the by-law in question invalid under the principles laid down in *Merritt* v. *Toronto*, 22 A.R. (Ont.) 205. The business of hack driving is not *per se* an unlawful calling. Any individual has a common law right to engage therein, and such right is in no way dependant on his previous character. If the legislature intended to confer the power here contended for, it could easily have done so by express words. Where it has intended to confer power to prevent or prohibit the doing of certain acts, it has used apt and clear language, as appears by the words employed in sub-sec. 2 of sec. 3 of the Act under discussion, being the sub-section immediately preceding the one herein relied upon. Further, in said sub-sec. 3 certain conditions are set out which may be imposed as requisites for obtaining a license. Good moral character as determined by the absolute discretion of the Chief of Police is not amongst such conditions.

It is true that Maclennan, J.A., in *Merritt* v. *Toronto*, 22 A.R. (Ont.), makes a distinction between regulating the business, say, of hack driving and the excluding of an individual from acting as a hack driver, and suggests that in the former case regulation would, under *Slattery* v. *Naylor*, 13 A.C. 446, include prohibition. I do not think that said sub-sec. 3 can be construed as regulating the business of hack driving solely, inasmuch as it deals directly and cumulatively with licensing and regulating individuals. Even if such were not the true construction, I think the scope of such regulation of the business, insofar as such regulation can be held to import power of prohibition, is defined and circumscribed by the terms as to charges, location of hack stands, etc., that appear in the sub-section.

The writ is granted. The matter of costs and any other question incidental to the working out of the order may be further spoken to if counsel cannot agree.

Application granted.

*See same case on appeal to the Privy Council, *City of Toronto* v. *Virgo*, [1896] A.C. 88.

UNITED INJECTOR CO. v. JAMES MORRISON BRASS MANUFACTURING CO.

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Ontario Supreme Court. Trial before Boyd, C. May 9, 1913.

1. PATENTS (§ II B—15)—PATENTABILITY OF INVENTIONS—COMBINATIONS.

Where the merit of an invention consists in an idea or principle, a machine based on the same idea or principle may be an infringement although the detailed means of carrying it into effect be different, but it is otherwise if the invention is merely of the particular means employed and consists of the combination of old parts to produce a new and useful result; the latter is properly the subject of a second patent.

[*Consolidated Car Heating Co.* v. *Came*, [1903] A.C. 509, 72 L.J.P.C. 110, 19 Times L.R. 692 (affirming *Consolidated Car Heating Co.* v. *Came*, 11 Que. K.B. 103), and *Chamberlain* v. *Bradford*, 20 R.P.C. 673 (H.L.), referred to.]

Statement

ACTION for infringement of the plaintiffs' patent for improved inspirators and their trade mark and trade name.

Judgment was given for the plaintiffs.

D. L. McCarthy, K.C., for the plaintiffs.

G. H. Watson, K.C., and *S. C. Smoke*, K.C., for the defendants.

Boyd, C.

BOYD, C.:—This patent is for a combination of parts, and it is not anticipated by another patent granted to the same patentee for another combination of parts, the constituents of which are not the same as in the impeached patent.

I had no doubt at the hearing as to the ultility of the patent. It was strongly urged that what the plaintiff had put in his last patent was substantially described to the world in the drawings and parts of the earlier patent. The lack of novelty in the gauge bolster was said to be because it represented what was called in the former patent the correcting ring or collar, and that the ring or collar was the equivalent of the gauge bolster if the adjustment of parts by increase or decrease of thickness on the under part of the leg of the fulcrum bracket was substituted.

It was sought to support this position by the familiar doctrine in patent law that, if the prior inventor shews one way of carrying out his invention, he is entitled to claim it for all other ways. This rule applies when the invention is in respect of a principle, and not the case of a combination of old parts producing a new and useful result.

The application of this doctrine is to be found discussed in *Chamberlain* v. *Bradford*, 20 R.P.C. 673, and *Consolidated Car Heating Co.* v. *Came*, [1903] A.C. 509.

Under the prior patent, when the parts of the machine are assembled for the purpose of being sent out of the shop ready to be operated, a collar or correcting ring of the right thickness

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is put in between the leg of the fulcrum bracket and the top of the casing. When the machine thus set up is tested, it always happens that there are cumulative errors which require to be corrected, and this is done by adjusting the thickness of the correcting ring (filing it down, for example), so as to get it of exactly the right size for the particular machine. That collar so adjusted cannot be used in any other machine without making the like appropriate adjustment.

In the later patent, the preliminary adjustment of a new machine is attained by making the correction upon the lower face of a collar forming part of the leg of the fulcrum bracket. Apart from and in addition to this, in the later patent there is the standard gauge bolster placed between the leg of the fulcrum bracket and the casing of the machine. That is a distinct and separate factor, by changing which, according to the capacity required, different capacities of tubes can be used in the same machine without any need of going back to the machine-shop.

I think the addition of the gauge bolster to the former combination patented by the same inventor is not an obvious thing to the ordinary workman. There is inventive insight displayed, which appears to be accentuated in this case by contrasting the evidence of a witness given for the attack upon the patent at the first hearing and the evidence given by the same witness at the adjourned trial of the case.

I pointed out at the close of the evidence wherein I thought the two patents were distinguishable, and I see no reason to withhold making effective the terms of the judgment then indicated.

Judgment was accordingly pronounced restraining the defendants from using the words "Hancock" or "Hancocks" or "inspirators" in connection with locomotive injectors not manufactured by the plaintiffs; for $50 damages for the improper use by the defendants of the plaintiffs' trade name; restraining the defendants from infringing the plaintiffs' patent; for $300 damages for infringement, or, at the election of either party, a reference to ascertain the damages; and dismissing the defendants' counterclaim. The defendants to pay the costs of the action and counterclaim. In case of a reference, the defendants are to pay the damages found by the Master forthwith on confirmation of his report.

Judgment for plaintiff.

WINTERBURN v. BOON.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. March 10, 1913.

1. SALE (§ II A—26)—EXPRESS WARRANTY—WHAT CONSTITUTES—HORSE—INTENTION AND INDUCEMENT.

An affirmation by the seller as to the character of goods made at the time of the sale thereof is a warranty provided it was so intended and was relied upon by the purchaser; *ex gr.*, that a horse was a good horse to pull and was eleven years old.

2. CONTRACTS (§ I B—9*a*)—IMPLIED AGREEMENTS—PURCHASE PRICE PAYABLE WHEN OTHER GOODS SOLD.

Under an agreement that payment for goods is to be made when certain other goods then in the possession of the buyer were sold by him, there is an implied agreement that such goods are to be sold within a reasonable time, and in the absence of very special circumstances the keeping of such goods for six years after the contract was made is not selling them within a reasonable time.

3. INTEREST (§ I H—55)—NECESSITY AND EFFECT OF DEMAND—ABSENCE OF AGREEMENT TO PAY.

Where a debtor does not agree to pay interest and the debt is payable otherwise than by virtue of a written instrument at a certain time, interest should not be allowed except where a demand for payment is made and the debtor is informed that interest will be claimed from the date of the demand.

4. PLEADING (§ III D—325)—PLEAS AND ANSWERS—SUFFICIENCY—BREACH OF WARRANTY.

Where the plaintiff sold to the defendant a horse with a warranty as to age and soundness, and the horse died after the defendant had kept the horse in his possession for about two months without returning it, such a plea of failure to return the horse is no answer to a claim for damages for breach of warranty, however effective it might have been as an answer to a defence of fraudulent misrepresentation.

Statement

THIS is an action for the price of a horse sold by the plaintiff to the defendant in May, 1907. The defendant admits the purchase of the horse, but he claims: (1) that the plaintiff warranted the horse to be sound, to be in every way a first-class horse to pull, and to be only eleven years old. He alleges that the horse did not answer the warranty in any of these respects, and he claims damages therefor. (2) And in the alternative, that the plaintiff falsely and fraudulently represented the horse to be sound, and a good horse to pull, and to be eleven years old, well knowing said representation to be false. And (3), that payment for the said horse was not to be made until he had disposed of a yoke of oxen then in his possession, and that the oxen had not yet been disposed of. The action was tried before the Judge of the District Court for the judicial district of Moose Jaw, who gave judgment for the plaintiff on the claim for $145, the price of the horse, and $48 interest thereon from the date of the sale. From this judgment the defendant now appeals to this Court.

The appeal was allowed.

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J. F. Frame, for appellant.
G. T. Brown, for respondent.

The judgment of the Court was rendered by

LAMONT, J.:—In his evidence the defendant swore that the plaintiff sold him the horse saying that it was eleven years old, that it was a good work horse and a good horse to pull. He said it was sound, and that he would take the horse back if it was not good. The plaintiff testified that he did not guarantee the horse, but admitted that he had said that the horse was a good horse to pull. He also stated in his evidence that he had bought the horse for eleven years old and sold him for the same. In addition to this, the plaintiff's brother, who was present when the sale was made, testified "that the plaintiff sold the horse for a good strong horse and said it was a good horse to pull." On this evidence there can be no doubt but that at the time the sale was made the plaintiff told the defendant that the horse was a good horse to pull and that he was eleven years old.

Every affirmation as to the character of goods made at the time of the sale thereof is a warranty, provided it was so intended and was relied upon by the purchaser: Smith's Leading Cases, 10th ed., vol. 2, p. 53. That the defendant relied on the plaintiff's statements is apparent from the fact that he knew nothing about horses, having previously been a sailor and a bartender. In using the above-quoted language the plaintiff must be held to have intended the defendant to believe that the horse was a good horse to pull, and that he was eleven years old. This constitutes a warranty. The evidence also abundantly establishes that the horse did not fulfil the warranty. All the witnesses who saw the horse after the defendant bought him agree that the horse was unable to pull or to do a day's work. As some of the witnesses expressed it, "he took blind staggers when put to pulling." The uncontradicted evidence also was that the horse was more than eleven years old; one witness fixed his age at over twenty years. Notwithstanding that the defendant took good care of the horse, he died a couple of months after the sale.

In his reasons for judgment the learned District Court Judge said:—

> I find, on the evidence, that the horse sold to the defendant was not at the time of the sale suffering from any disease known to the plaintiff, nor did he suspect or have cause to suspect that it was diseased. I also find that the defendant worked this horse before he took it away, and was quite satisfied with it at the time; that he kept it in his possession for nearly two months without returning it; and that, on the whole claim, the plaintiff is entitled to succeed; and there will therefore be judgment for the plaintiff for the amount and costs. The counterclaim will be dismissed with costs.

While the findings of fact here set out may be a complete

answer to the defence of fraudulent misrepresentation on the part of the plaintiff, they are, in my opinion, no answer to the claim for damages for breach of warranty contained in the counterclaim. On the question of warranty no findings of fact seem to have been made. As both the warranty and the breach thereof are amply established by the evidence, and as the horse was of absolutely no value, I am of opinion that the defendant was entitled, on his counterclaim, to damages equal to the amount which the plaintiff is entitled to on his claim. That amount was allowed at $193, being $145 principal and $48 interest. The judgment for interest cannot stand. The defendant says the $145 was to be without interest. The plaintiff does not contradict this; and the defendant's statement that no interest is to be charged is corroborated by a document produced by the defendant, signed by the plaintiff, which reads as follows:—

Davidson, Sask., May 10, 1907.

I, Herbert Winterburn, having sold to J. P. Boon, one bay horse for the sum of $145, hereby agree to accept payment for same on the following terms: as soon as Mr. Boon sells a yoke of oxen now in his possession he is to pay me the same in full.

The bargain, therefore, was that the $145 was not to be paid until the defendant sold his oxen. They are not yet sold. *Primâ facie*, therefore, the debt is not yet due. I am of opinion, however, that there must be read into contracts of this kind an implied agreement that the oxen are to be sold within a reasonable time, and that, in the absence of very special circumstances, the keeping of the oxen for six years after the contract was made was not selling them within a reasonable time. The plaintiff, however, so far as the evidence shews, did not complain that the defendant was acting unreasonably, nor did he ever make a claim for interest until he began this action. Where the debtor does not agree to pay interest, and the debt is payable otherwise than by virtue of a written instrument at a certain time, the rule is that interest is not allowed except where a demand for payment is made and the debtor is informed that interest will be claimed from the date of the demand: Judicature Act, sec. 37, sub-sec. 2. No such demand was made until the writ here was issued. The $48 interest claimed in the statement of claim must be disallowed.

In my opinion, therefore, this appeal should be allowed with costs; the judgment for the plaintiff on the claim reduced to $145; and judgment entered for the defendant on his counterclaim for $145 and costs, with a right to set off judgment against the other, should there be, on the taxation of the costs of each party, any balance in favour of the plaintiff after the costs of the defendant have been set off, such balance may be set off against the costs of this appeal.

Appeal allowed.

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LAMB v. LASBY.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Brown, JJ.
March 10, 1913.

1. PARTIES (§ II B—115)—DEFENDANTS—JOINDER—COURT WITHOUT APPLICATION MAY ADD STRANGER, WHEN.

Where it appears on the trial of an action for breach of contract that the defendant is jointly liable with another person who was not made a party, but who ought to be made a party defendant, the court of its own motion or upon application of either party, may add such interested stranger, and the cause shall not be defeated by reason of the non-joinder in any event, as the rights of the parties actually before the court may be dealt with apart from the rights of the stranger.

[Rule 41 of Sask. Jud. Rules (1911) applied; *Van Gelder* v. *Sowerby Bridge* (1890), 44 Ch. D. 374; Annual Practice (1913), p. 234; *Re Harrison*, [1891] 2 Ch. 349, referred to.]

2. PARTIES (§ II B—115)—DEBTORS UNDER JOINT LIABILITY—JOINDER AS DEFENDANTS ESSENTIAL.

It is the right of persons jointly liable to pay a debt to insist upon being sued together, because otherwise one such debtor may through non-joinder become severally liable for the whole debt.

[*Kendall* v. *Hamilton* (1879), 4 A.C. 504 at 515; *King* v. *Hoare*, 13 M. & W. 494, referred to.]

Statement

APPEAL by plaintiff from judgment at trial dismissing action.

The appeal was allowed and a new trial ordered.

N. R. Craig, for appellant.

J. F. Hare, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—This action was brought on a written agreement by which the defendant promised to pay the plaintiff $2,000, provided the plaintiff would find a purchaser ready and willing to purchase certain hotel property in the city of Moose Jaw. The plaintiff alleged performance of the agreement, and claimed $2,000. The defendant defended on various grounds, but for the purposes of this appeal the defence is limited to the grounds set up in pars. 6 and 7 of the statement of defence, which are as follows:—

6. The defendant says that the plaintiff, upon his said failure to find a purchaser ready and willing to purchase the said property, upon the said terms, delivered up the said alleged agreement in writing to one H. F. Stryker (acting for or on behalf of himself and the defendant), in consideration of the promise of the said Stryker (acting for and on behalf of himself and the defendant) to pay to the plaintiff the sum of $500 should the plaintiff use his best endeavours to induce the said Swan Nelson to purchase the said property and should the said Swan Nelson purchase the said property and transfer his said lands to the plaintiff or his nominee in part payment.

7. The defendant says that the plaintiff did not use his best en-

deavours to induce the said Swan Nelson to purchase the said property, but, on the contrary, the plaintiff did his utmost to prevent the said sale and to induce the said Swan Nelson to purchase other property instead of the property of the defendant.

The pleadings were closed on January 17, 1913, and the case came on for trial on January 31, 1913. On the case being called, the plaintiff's counsel was allowed to amend his statement of claim and reply. The statement of claim was amended by adding the following paragraph:—

4. In the further alternative, that, by agreement in writing, dated on or about the 30th day of July, 1912, one H. F. Stryker, acting on behalf of and as agent of the defendant, promised to pay to the plaintiff the sum of $500 if the said Swan Nelson purchased the said Empress Hotel and the said Swan Nelson did purchase the said hotel on or about the said date.

The amended reply alleged false and fraudulent representations inducing the plaintiff to deliver up the $2,000 agreement, and also pleaded want of consideration for delivery up of the $2,000 agreement and acceptance of the smaller amount of $500.

On the close of the plaintiff's case, the learned trial Judge decided that the plaintiff "had accepted the $500 document in satisfaction of the other agreement for $2,000," and his finding on that question will not be disturbed.

After the learned Judge's decision as above stated, it appears from the appeal book that the following discussion between the Court and counsel took place:—

Mr. Hare (counsel for defendant) moved for dismissal of the action.

HIS LORDSHIP:—What about the $500? Are you prepared to bring any evidence about that?

Mr. Hare:—Yes, I think so, if your Lordship thinks it is necessary.

His Lordship states that the only question is, whether it is a case where the parties can be sued severally or whether jointly.

Mr. Craig:—Then I would like to put myself on record as applying for the addition of Mr. Stryker's name as a defendant, if necessary.

HIS LORDSHIP:—You cannot do that, Mr. Craig, because we would have to stop the suit; another writ would have to be served.

After argument, during which Mr. Craig pointed out that it was admitted in the defendant's pleadings that exhibit A was signed by Mr. Stryker on his own behalf and on behalf of the defendant,

His Lordship holds that all the parties are not before the Court.

The action for the claim of $2,000 is dismissed, and after further argument, his Lordship states that if there is joint liability and counsel for the defendant takes legal objection, the action will have to be dismissed.

Mr. Hare:—Well, I take the objection, my Lord.

HIS LORDSHIP:—I must dismiss the action.

Action dismissed.

It is quite plain from the foregoing that the whole discussion

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arose from a misapprehension of the rules relating to joinder of parties on the part of both the Court and both counsel, owing, no doubt, to the somewhat sudden way the point arose. The learned trial Judge held, and rightly held, that the defendant and Stryker were only jointly liable on the agreement in question. That being the case, the plaintiff should have had Stryker added as a party defendant, if he so desired, as soon as he decided to rely alternatively on the substituted agreement. He did not set up the alternative claim until the trial had actually begun, and up to that time, as is shewn by his pleadings, relied on the original agreement.

Each party to a joint contract is severally liable in one sense, *i.e.*, if sued severally, and he does not plead in abatement, he is liable to pay the whole debt: *King* v. *Hoare*, 13 M. & W. 494, 505.

But

it is the right of persons jointly liable to pay a debt to insist upon being sued together: Cairns, L.C., in *Kendall* v. *Hamilton* (1879), 4 A.C. 504, 515.

Now that no objection can be taken by way of a plea in abatement, the proper remedy is to move to add such persons as in the opinion of the defendant ought to have been joined. In this case, if the defendant had wished to insist on his right, he should have made it a condition to the plaintiff's being allowed to introduce his alternative claim by way of amendment. This was not done, and apparently counsel for the defendant on the trial was quite contented not to have Stryker added as a defendant, although he was willing to adopt and rely upon the objection that Stryker was a necessary party. The application on behalf of the plaintiff to add Stryker was only made to meet the ruling of the learned trial Judge that his non-joinder was fatal.

In my opinion the action in any event should not have been dismissed, because rule 41 of the rules of Court says that

no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: *Van Gelder* v. *Sowerby Bridge, etc.* (1890), 44 Ch.D. 374.

The Court may decline to proceed without all parties properly interested, and in that event may make such changes in respect of the parties, by striking out or bringing in new parties, as may be necessary. But the Court may deal with the matter as far as regards the rights and interests of the parties before it, and this will be usually done where a case has reached the trial stage without any objection as to parties having been previously taken. When this course is adopted the rights and liabilities of persons not before the Court are unaffected and the order is usually made "without prejudice to" such rights and liabilities: Annual Practice (1913), p. 234; *Re Harrison*, [1891] 2 Ch. 349.

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Apart from this point, the appeal and cross-appeal must both fail. The plaintiff has no right to ask for judgment for $500 in a case only partially heard, and the evidence, so far as it goes, at least establishes a *primâ facie* case, and the defendant is not entitled to a dismissal of that branch of the action as asked for in his cross-appeal.

The action, therefore, will be restored so far as the $500 agreement is concerned, and a new trial ordered, either party to be at liberty within two weeks to make such application as he may be advised to have Stryker made a defendant to the action.

The plaintiff will be allowed the costs of this appeal and of the cross-appeal, and the costs of the previous trial will, under the circumstances of this case, abide the event of the new trial.

New trial ordered.

CITY OF TORONTO v. FOSS.

(Decision No. 3.)

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Jan. 15.

Ontario Court of Appeal, Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. January 15, 1913.

1. BUILDINGS (§ I A—9c)—MUNICIPAL REGULATION — ROOM IN DWELLING USED FOR LADIES TAILORING—"MANUFACTORY."

The use of a room in a dwelling-house as a sewing-room for three or four persons who make up clothes for customers who furnish the material, does not constitute the premises a "manufactory" within the meaning of a municipal by-law, prohibiting the location, erection or use of manufactories in certain districts.

[*City of Toronto* v. *Foss* (No. 2), 8 D.L.R. 641, 27 O.L.R. 264, affirmed.]

2. BUILDINGS (§ I A—9c)—MUNICIPAL REGULATIONS—ROOM IN DWELLING-HOUSE USED FOR LADIES TAILORING—SALE OF CLOTH—STORE.

A family residence used by a tailor who makes clothes on the premises from material supplied to him by his customers, but who does not sell any cloth from the roll or cut it into lengths, and which premises are not fitted up with counters or shelving and has no sign on the outside to indicate the nature of the place, is not a "store" within the meaning of by-law No. 4469 of the corporation of the city of Toronto, prohibiting the location, erection or use of manufactories in certain districts.

[*City of Toronto* v. *Foss* (No. 2), 8 D.L.R. 641, 27 O.L.R. 264, affirmed.]

Statement

APPEAL by the plaintiffs from the judgment of a Divisional Court, *City of Toronto* v. *Foss* (No. 2), 8 D.L.R. 641, 27 O.L.R. 264, reversing the judgment of Middleton, J., *City of Toronto* v. *Foss* (No. 1), 5 D.L.R. 447, and holding that a building in Avenue road, in the city of Toronto, occupied by the defendant and used as his dwelling-house and also for the purposes of a ladies' tailoring business, was not a "manufactory" or a "store," within the meaning of a by-law of the plaintiffs, passed

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pursuant to sec. 541*a* of the Municipal Act, 1903, as enacted by 4 Edw. VII. ch. 22, sec. 19,

The appeal was dismissed.

Argument

G. R. Geary, K.C., for the plaintiffs, argued that they were authorised by statute to pass by-laws to prevent the erection and use of buildings as stores or manufactories, and that the evidence shewed that the business carried on by the defendant at the building in question was that of a store or manufactory, within the recognised meaning of these terms: *Wilkinson* v. *Rogers* (1864), 2 De G. J. & S. 62.

Grayson Smith, for the defendant, relied on the cases and arguments in the judgments of the majority of the Judges in the Court below, and in the argument, *City of Toronto* v. *Foss* (No. 2), 8 D.L.R. 641, 27 O.L.R. 264, referring especially to *The State* v. *Canney* (1848), 19 N.H. 135.

Geary, in reply.

The judgment of the Court was delivered by

Meredith, J.A.

MEREDITH, J.A.:—The onus of proving that the defendant carries on a business in violation of the provisions of the by-law is upon the plaintiffs; and I cannot think that they have proved it. It is quite plain that neither the by-law, nor the legislation upon which it is founded, was intended to be applicable to all kinds of work or trading; neither comprises shops of all kinds, nor businesses of all kinds. If the legislation had been meant to be as comprehensive as the plaintiffs contend for, it should, and doubtless would, have been embodied in very different language.

No doubt, the purpose of the legislation was to prevent a residential street being turned into a business street; to preserve its residential character; all of which, however, can be done, as the legislation itself indicates, without decreeing that no trade or business of any kind shall be done in any house or building upon it.

If the defendant's house could, in any sense, be deemed a shop or a store, its better description would, I have no doubt, be a shop, because it is unquestionably used to some extent as a workshop; but as a shop it is not within the by-law or the legislation; it can be brought, if at all, within them only as a manufactory or a store; and I am unable to consider that this dwelling-house has been proved to be either.

I cannot think that in ordinary conversation it would ever be described as either a factory or a store; and these words are to be given their ordinary meaning. In the ordinary use of the word "manufactory" much more in the nature of a work-shop is meant than merely a room where a very few persons ply their

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needles in making women's clothing. So, too, of the word "store;" when one carries on in his or her own home, even with the assistance of a very few seamstresses, the business of dress-making, a thing which is quite common, I cannot think that any one would ordinarily call that house a "store," even though he or she might sometimes sell material to be used in making the dresses there, or even sell an already made garment occasionally. The by-law and legislation relate to the "erection and use of buildings," but the building in question carries none of the outward and visible signs of a store, nor is the business carried on within it such as, in my opinion, makes the defendant a store-keeper, within the meaning which, I think, would commonly, and therefore should, be attached to the word "store" as used in the legislation in question. At the most, it would, I think, be said that he used his house as a ladies' tailor shop; and the by-law prohibits only "butcher shops" not barber shops, blacksmith shops—unless manufactories—nor even "gin-shops."

It may be that the common use of the word "store," instead of "shop," by the English-speaking people of this continent, arose out of the "country store" known to all in the earlier days, and to most of us now; a place of trading which was—to meet the needs of the community—a veritable storehouse of the "needle to anchor" character in all trades in a very small way; and so there arose a need to distinguish them from the shops of the mother country, in which it was the custom of the shop-keeper to stick closely to his own trade only.

I would dismiss the appeal.

Appeal dismissed with costs.

LESLIE v. CANADIAN BIRKBECK CO.

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April 14.

Ontario Supreme Court. Trial before Britton, J. April 14, 1913.

1. BUILDING AND LOAN ASSOCIATIONS (§ V—39)—POWERS GENERALLY—AS TO DIVIDENDS.

The amount of surplus profits of a building and loan association, after payment of preferred dividends, to be made available for distribution among the holders of shares is to be determined by the directors, after making in good faith all reasonable and proper provision for the safety and prosperity of the association, having regard to expenses, contingencies, actual and possible losses, and the necessity of keeping a reserve fund.

[*Bain* v. *Ætna Life Insurance Co.*, 21 O.R. 233, applied.]

Statement

ACTION for an account of profits earned by the defendants or their predecessors, the Birkbeck Investment Security and Savings Company of Toronto, in respect of or on the moneys paid in by the plaintiff, and for a declaration that such profits should be applied upon the plaintiff's shares until payment should

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be made in full of the plaintiff's shares so that her shares should rank as fully paid-up to the amount of $1,000.

The action was dismissed.

J. R. Roaf, for the plaintiff.

Wallace Nesbitt, K.C., *Britton Osler*, and *E. D. Wallace*, for the defendants.

BRITTON, J., referred to the incorporation of the first company on the 10th May, 1893, under the Building Societies Act, R.S.O. 1887 ch. 169; to the rules and by-laws of that company; to the allotment to the plaintiff, in 1895, of ten shares of the prepaid six per cent. stock of the first company, upon which she paid $50 per share; to the regular receipt by the plaintiff of dividends at the rate of six per cent. per annum upon the money paid for the shares; and to the following statement issued by the company and received by the plaintiff: "Partially prepaid stock of the par value of $100 is issued at $50 a share, on which a portion of the profits earned, not to exceed six per cent. per annum upon the original sum invested, is paid to holders in cash semi-annually. This stock is entitled to receive, in addition, its proportionate share of the entire profits of the company. Profits earned in excess of the six per cent. so paid are retained and loaned by the company to hasten the maturity of the shares."

The learned Judge then proceeded:—

On the 11th August, 1899, the present defendants were incorporated by 62 & 63 Viet. ch. 103(D.) By sec. 5 of that Act, "shareholders of the old company . . . are hereby declared to be holders respectively of shares in the fixed and permanent capital stock of the new company to the same extent and with the same amounts paid-up thereon as they are holders respectively of such shares in the old company.

Section 10 of the same Act is as follows:—

> The new company shall be liable for, and subject to, and shall pay, discharge, carry out and perform all the debts, liabilities, obligations, contracts and duties of the old company, and any person having any claim, demand, right, cause of action or complaint against the old company, or to whom the old company is under any liability, obligation, contract, or duty, shall have the same rights and powers with respect thereto and to the collection and enforcement thereof, from and against the new company, its directors and shareholders as such person has against the old company, its directors and shareholders.

It is clear that if the plaintiff had or has any cause of action against the old company, not barred, the same can be enforced against the present defendants.

As this case was presented to me, it is not necessary for the determination of it that I should say anything about the liability of the plaintiff to the defendants for any further payment on the $50 prepaid stock, but my opinion is, and I need not re-

frain from expressing it, that there is no such liability. There is nothing to shew that the defendants intend to treat that stock as liable for any unpaid balance against the holders. If there are profits they are not obliged to pay excess in cash to the holders of the stock in question, but may put that excess to the credit of those shares until the shares amount to $100 each, as mentioned. Neither the six per cent. dividends, if left to the credit of the shares, nor the profits, if any, put to the credit of these, carry any interest to the holders of these shares until $50 are added to each share. It so happens that the sum of $36.43, over and above the $500 prepaid, was placed to the credit of these shares.

So far, I am dealing with the matter as it stood with the old company; but I may mention here that this amount of $36.43 was by these defendants transferred to the reserve fund. Up to the present time that can make no difference to the plaintiff, as she cannot get interest on the $36.43—no interest or dividend being payable on any amount in excess of $50 until that excess reaches the sum of $50 on each share. . . .

The plaintiff did understand all about the $50 prepayment, and that she was to get semi-annual dividends upon that, at the rate of six per cent. per annum, but she did not understand, as the company understood, what was meant by the sentence "This stock is entitled to receive in addition its proportionate share of the entire profits of the company." The plaintiff did not expect to pay any more in cash.

She could have allowed her dividends to remain, instead of taking the money, but she did not. She expected that profits would flow in so that she would soon have a dividend on $100 a share, instead of on $50. Her expectations were not realised; and the question is, simply, has she now, upon the evidence, any right to the account asked for?

This stock may not be preference stock, as properly defined, but it is in reality preference stock as to dividend. If there are profits sufficient, the three per cent. semi-annual dividend upon it is assured and must be paid in preference to the other stock. To use the words of the company, "this dividend is to be deducted from profits earned," the balance of the earnings being credited to the stock. When the profits (net profits) shall be sufficient to permit of a dividend in excess of six per cent. per annum, she will get the increased dividend, not in money, but by a credit to these shares until the amount so credited will amount in all to $50 for each share.

The plaintiff's interpretation of the contract with the old company is that when the gross earnings of the company were in excess of six per cent. per annum, she was entitled to have the *pro rata* part of these gross earnings put to the credit of her

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shares. For the purpose of having this done, the plaintiff asks for an account, and, if it be found that the gross earnings—or gross profits as sometimes called—are sufficient, that her shares be credited with such amount as will bring them up to $100 each share.

The defendants admit that the business carried on by the old company down to the 27th June, 1900, and then transferred to and subsequently carried on by the defendants, has produced gross earnings in excess of the dividend at the rate of six per cent. per annum from time to time declared and paid on the capital stock of the companies from time to time outstanding.

I am not able to agree with the plaintiff's interpretation of the contract.

I am not able to find any promise, express or implied, on the part of the company, that the money paid in on these shares would be kept separate, and profits made on that money appropriated and credited to these shares; no company would undertake such a task.

Even if the old company had not been merged in the new—if it had continued to do business in its own name and under the old Act—the plaintiff, upon the facts disclosed, would not be entitled to have an account for the purpose mentioned. There being nothing in the contract to compel the company to set aside a part of the gross earnings, and put the same to the credit of the plaintiff's shares, the case is governed by *Bain* v. *Ætna Life Insurance Co.*, 21 O.R. 233.

The old company carried on business down to the 27th June, 1900. On that day, all its assets were, with the consent of all its shareholders, including the plaintiff, conveyed and transferred to the defendants. By the Act incorporating the defendants, all the shareholders of the old company became shareholders in the defendant company. On the 3rd March, 1902, the directors of the defendant company passed a new by-law in regard to the stock of the company. This by-law was approved and confirmed by the shareholders at their meeting on the 5th March, 1902. A by-law was also passed and confirmed authorising the creation of a reserve fund. The by-law in regard to stock dealt with stock already issued and that to be issued—dividing it into two classes, permanent and terminating. Permanent was subdivided into: (1) fully paid shares of $100 each; (2) fully paid ordinary shares of $100 each; and (3) part paid ordinary shares of the par value of $100 each, issuable at $50 per share, payable in advance, the holders of which shall be entitled to receive in cash out of the net earnings of the company dividends as declared by the directors, not exceeding such rate per cent. per annum as may be named at the time of issue. "Holders of ordinary shares shall participate in such surplus

profits of the company beyond the rate per cent. so named as may be deemed available for distribution by the directors. When the amount standing to the credit of any part paid ordinary shares, consisting of the amount paid thereon, exclusive of premiums, and the surplus profits apportioned thereto, together equal $100, such share shall rank thereafter as a fully paid ordinary share of the company."

In my opinion, this by-law places the plaintiff's stock in the defendant company exactly as it was and as it was intended to be in the old company. It makes clear what was obscure—and it was within the power of the defendants to pass it.

There was not, in my opinion, any such contract as the plaintiff alleges—either with the old company or the defendants. If any such with the old, it was broken by the new in passing the by-law of the 3rd March, 1902.

The matter of surplus profits available for distribution must be determined by the directors, in the honest administration of the affairs of defendant company. They must determine it having regard to expenses, to contingencies, to actual and possible losses, and to the necessity of keeping a reserve fund. It is not in dispute that the defendants have on hand real estate taken as security for loans, upon which there may be losses on realisation. No fraud nor improvidence is charged. The plaintiff for all the years since 1895 has received the directors' reports and statements, and notices of meetings of shareholders, and has made no complaint until this action.

From any point of view, this does not appear to me to a case in which an account should be ordered. This case was spoken of as a test case. It is one which interests all shareholders of the same class of stock as that held by the plaintiff; and, having regard to the want of clearness in the representations made to the plaintiff when she purchased, the dismissal of the action should be without costs.

Action dismissed.

TORONTO TYPE FOUNDRY CO., Limited v. **RIDDETT** et al.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. April 10, 1913.

1. BILLS OF SALE (§ II C—10)—STATUTORY REQUIREMENTS—STATING CONSIDERATION.

A bill of sale is not made void as not truly expressing the consideration therefor under the Chattel Mortgage Act, R.S.S. 1909, ch. 144, sec. 13, by reason of the inclusion therein after a statement of the amount of the money consideration of general words such as the words "and other valuable considerations" where the latter words were introduced only by the conveyancer and were without special significance in the transaction; and in such case the unnecessary words may be considered as mere surplusage.

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TORONTO TYPE FOUNDRY CO. v. RIDDETT.

Newlands, J.

APPEAL by the execution creditors from the judgment of the Master in Chambers in favour of the claimant.

The appeal was dismissed.

F. B. Bagshaw, for appellants.

B. T. Graham, for respondents.

The judgment of the Court was delivered by

NEWLANDS, J.:—The appellants are execution creditors of the defendants and the respondent is the claimant.

The local Master found in favour of the claimant without ordering the trial of an issue.

The execution creditors appeal on the grounds that the bill of sale upon which the claimant bases his title to the goods under seizure is void against the creditors of the defendant, because the consideration for which the same is given was not truly expressed, and because the local Master erred in not directing an issue.

As to the second ground of appeal: the bill of sale recites the sale to be for $820 and other valuable considerations, and goes on to say that it is in consideration of the said valuable considerations and of the sum of $820. The affidavit of *bona fides* states that the consideration is $850, and it was admitted by counsel on the argument that the figures "$820" in the bill of sale were a clerical error, and that they should have been $850. The only evidence produced before the local Master was to the effect that the bill of sale was given for the consideration therein set out, and no evidence was given on the other side that there was any other consideration. This being the case, I see no reason why the local Master should not decide the same summarily if he were convinced that the true consideration was the money consideration, and that the words "and other valuable considerations" had no meaning and could be rejected as surplusage.

At the argument, the learned counsel for the respondent read the respondent's affidavit, which had been procured too late to be read before the local Master, the respondent residing in England, which was also to the effect that the money consideration was the only and the true consideration.

As to the words "and other valuable considerations" in the bill of sale, I think they are mere surplusage. From the evidence produced before the local Master and at the argument, they mean nothing and can therefore be rejected. I do not think that sec. 13 of the Bills of Sale Act, where it says, "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" was intended to cover a case of this kind, where the actual consideration is truly

expressed, but where the conveyancer has added other words through ignorance of their effect because they sounded well. Not having intended these words to have any effect, they may be regarded as a mere clerical error, and should be ignored as not affecting the actual consideration, which is otherwise truly expressed.

I think the appeal should be dismissed with costs.

Appeal dismissed.

WHITCHELO v. COLVIN.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. March 10, 1913.

1. TROVER (§ I B—10)—SALE BY WRONGDOER—ASSUMPSIT—WAIVER OF CONVERSION.

Where one wrongfully takes possession of another's property and sells and collects the price of it, the rightful owner may waive the wrongful conversion and treat the wrongdoer as his agent and sue in *assumpsit* for money had and received.

2. ACTION (§ II D—60)—JOINDER—TORT AND CONTRACT—"SMALL DEBT PROCEDURE"—SEVERANCE.

A small debt summons under the "small debt procedure" should not be entirely set aside, under the Saskatchewan practice, because some of the claims therein are in tort and hence not within the purview of rule 4 of the District Court Rules (Sask.) allowing small claims and demands for debt to be brought in one action, but those claims in tort should be struck out and the other issues which do come within rule 4 should be allowed to stand.

[*Paradis* v. *Hotton*, 3 W.L.R. 317, criticized; *Fitzsimmons* v. *McIntyre* (1869), 5 P.R. (Ont.) 119, applied.]

Statement

THIS action was brought in the District Court of the judicial district of Moosomin, under the "small debt procedure." In his statement in writing of the cause of action the plaintiff claims, first, $41.25 for hire of horses and draying. He then proceeds to state that the defendant entered upon the premises of the plaintiff and took three bags of oats, one raw hide whip, one work bridle, and one oat box, the property of the plaintiff, and converted them to his own use. He further states that the defendant borrowed three planks from him under promise to return them, and that the defendant has not returned them, although requested to do so. The value of each of the articles above-mentioned is stated, amounting altogether to $9.75. The statement of claim then proceeds as follows:—

16. The plaintiff expressly waives the torts mentioned in paragraphs 11 and 14 hereof and sues the defendant as for goods bargained, sold and delivered to the defendant at his request by the plaintiff.

The plaintiff therefore claims:—

(*a*) Judgment against the defendant for the sum of $51.

(*b*) His costs of this action.

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Statement

After the action was begun, the plaintiff issued a garnishee summons directed to one George Boyles, and garnisheed a certain amount of money owing by Boyles to the defendant, which was paid into Court by Boyles.

The defendant moved to set aside the small debt summons and garnishee proceedings on the ground that the summons disclosed no ground of action against him under rule 4 of the District Court rules, and also moved for an order for payment out to him of the money paid into Court by George Boyles, the garnishee. Rule 4 of the District Court rules is as follows:—

> In all claims and demands for debt, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100 the procedure shall, unless otherwise ordered or allowed by a Judge, be as follows.

The learned District Court Judge, who heard the motion held that the plaintiff could not waive the tort and sue for goods sold and delivered so as to bring the second part of his claim within the meaning of rule 4. He accordingly ordered the small debt summons to be set aside, and the garnishee summons as well, and payment out of Court to the defendant of the moneys paid in by the garnishee Boyles. The plaintiff now appeals from this decision.

The appeal was allowed, and the garnishee proceedings allowed to stand.

D. Mundell, for appellant.

E. L. Elwood, for respondent.

The judgment of the Court was rendered by

Haultain, C.J.

HAULTAIN, C.J.:—The learned District Court Judge, in his written judgment, and counsel for both appellant and respondent, have supplied us with a store-house of learning on the question as to how far and in what circumstances under the old forms of action a plaintiff could waive the tort involved in the conversion of his property and sue in *assumpsit*. I shall not attempt a review of the innumerable cases cited, but will state my opinion that the doctrine that the injured persons may waive the tort and sue in *assumpsit* is limited by an overwhelming mass of authority to the case where the wrongdoer has sold the property and received money or money's worth for it. In other words, if a man wrongfully takes possession of another man's property and sells it, the rightful owner may waive the wrongful conversion and treat the wrongdoer as his agent and sue him for money had and received. To this extent the finding of the learned District Court Judge must be allowed.

The question now arises as to how far it was necessary, in view of that finding, for the small debt summons to be entirely

set aside. There can be no question that the first part of the claim, involving $41.25 out of a total amount sued for, is approximately made under rule 4. The learned District Court Judge, on the authority of *Paradis* v. *Hotton* (1904), 3 W.L.R. 317, and *Cosgrave* v. *Duchek* (1906), 3 W.L.R. 320, set aside the entire small debt summons. The appellant contends that, in any event, the action should have been allowed to stand in so far as it was obviously within the provisions of rule 4, and raises the point specially in his notice of appeal. This will necessitate a consideration of the two cases above cited, and of the practice established by them. The learned Judge in *Paradis* v. *Hotton* (1904), 3 W.L.R. 317, made his finding on this point in the following words:—

> The claim for money had and received unquestionably comes within the small debt procedure, and that is not disputed. But defendant's counsel contended that if one of the alleged causes of action was not within the small debt procedure, it would be sufficient to support the application, as it would be an abuse of the process of the Court, if the plaintiff had a cause of action which could only be brought under the ordinary practice, and another cause of action which was, by itself, within the small debt procedure, for him to bring two actions. I think that he is correct in this respect.

The case of *Cosgrave* v. *Duchek* (1906), 3 W.L.R. 320, was decided by the same learned Judge, and his judgment on the point in issue is as follows:—

> I held in *Paradis* v. *Hotton*, that a plaintiff cannot combine in a small debt action a claim for debt and one for damages, and, if he has such a claim and wishes to press it, he must bring his whole action under the ordinary procedure; he cannot split it up and bring one action under the small debt procedure and another action under the other procedure; and I set aside the proceedings when he combined both causes of action under the small debt procedure. . . . Proceedings set aside with costs.

While *Cosgrave* v. *Duchek* is avowedly decided on the same principle as *Paradis* v. *Hotton*, a consideration of the facts in both cases leads me to the opinion that the decision in the first-named is right, and in the second, wrong.

> The action in *Cosgrave* v. *Duchek* was brought on a promissory note which purported to have been given for two oxen, and the claim also contained an item "for the value of two loads of hay which the defendant agreed to deliver to the plaintiff on account of the purchase price of the oxen mentioned in said note and which the defendant has failed to deliver."

The reasoning in the two cases, when applied to these facts, is unanswerable. In *Cosgrave* v. *Duchek* the whole claim is founded on one transaction, the sale of two oxen, and it would have been a manifest abuse of the process of the Court to split up the action and bring one action under the small debt proced-

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ure and another action under the other procedure. But in *Paradis* v. *Hotton* and the present case the facts are quite different. Here we have, not one cause of action or transaction, but several distinct and separate causes of action, each one arising the same time or in the same action.

An analogous condition arises in England when part of a plaint in the County Court exceeds the jurisdiction of the Court. In that case a writ of prohibition will be granted.

> A writ of prohibition may be partial, and prohibit so much of a plaint as exceeds the jurisdiction of the inferior Court, allowing it to proceed as to the residue. Thus, where the cause of action disclosed by the particulars was divisible, and part had arisen within the jurisdiction of a County Court and part out of the jurisdiction, the Court of Queen's Bench granted a prohibition as to the latter only: Annual County Courts Practice, 1909, p. 90.

In *Fitzsimmons* v. *McIntyre* (1869), 5 P.R. (Ont.) 119, the County Court Judge at the trial of the case struck out the third count of the declaration and all pleadings relating thereto which dealt with matters outside the jurisdiction of the Court and tried the remaining issues. A verdict was given for the plaintiff, and the defendant then obtained a summons for a prohibition. Gwynne, J., in refusing the writ, is reported as follows:—

> Now these counts contain several and distinct causes of action, and I think it is clear, upon the principle and authority of *Walsh* v. *Ionides*, 1 E. & B. 383, and *Kerkin* v. *Kerkin*, 3 E. & B. 398, that the prohibition, if granted, should be restricted to the cause of action contained in the third count. Causes of action of this nature, though capable of being joined in one action under the provisions of the Common Law Procedure Act, are still so far distinct that a Judge may, if he thinks fit, order one or more of the causes of action contained in several counts to be tried separately from those in another or others; and I can see no reason, therefore, why a prohibition may not, nor indeed why it should not, be restricted to that count which alone is in excess of the jurisdiction, leaving the others to be disposed of by the County Court, as the proper Court wherein they should be tried. It further appeared that what in fact has been done is that, at the trial which came on before the summons was served, the Judge, by an order made on the record, expunged the third count and all the pleadings in respect thereof from the record, and thereupon the trial of the issue joined on the other counts proceeded, and the verdict was rendered on them alone. This, as it appears to me, is just what the exigency of the case required the Judge to do, and the defendant has therefore obtained all the relief that he was entitled to, or that he would have received by a writ of prohibition. It is therefore unnecessary that the writ should issue, and the summons must be discharged.

In my opinion, the reasoning of Gwynne, J., applies *a fortiori* to the present case. This is only a question of procedure, and not of jurisdiction. The portion of the claim objected to

should have been struck out, and the other issues should have been allowed to go to trial, and the garnishee proceedings allowed to stand.

There will be judgment, therefore, to that effect; appellant to have his costs of appeal.

Appeal allowed.

CITY OF TORONTO v. HILL.

Ontario Supreme Court, Middleton, J. April 8, 1913.

1. PLANS AND PLATS (§ I—5)—APPROVAL BY MUNICIPALITY OR BOARD—SUBURBAN SUBDIVISIONS.

The City and Suburbs Plans Act, 2 Geo. V. ch. 43, is not retroactive in its intent, and the provisions requiring the submission of a plan proposed to be registered of any subdivision of land lying within five miles of a city having a population of not less than 50,000, to the Ontario Railway and Municipal Board for its approval, and forbidding sales of lots on such a plan by description referring to the plan, until such approval has been obtained, do not apply to the case of a plan of a survey completed and approved by the proper municipality before the passing of the Act, but not tendered for registration until afterwards.

2. STATUTES (§ II D—125)—CONSTRUCTION—PROSPECTIVE OR RETROACTIVE OPERATION.

An Act is presumed to be prospective and not retrospective unless there is some clear and unequivocal declaration of intention by the legislature, or unless there are some circumstances rendering it inevitable that the other view should be taken.

[*Gardner* v. *Lucas*, 3 A.C. 601, followed.]

3. PARTIES (§ III—120)—THIRD PARTIES—INTERVENTION.

Upon a motion for an injunction against a registrar of deeds to restrain him from registering a plan, the propounders of the plan may be heard by leave of the judge, guided by analogy under Ont. Con. Rules 3 and 1086, and if the motion fails may be entitled to costs as against the applicant.

Statement

MOTION by the plaintiffs for an interim injunction in an action to restrain the defendant, the Registrar of Deeds for the County of York, from registering certain plans.

The motion by consent of counsel, was turned into a motion for judgment and judgment given dismissing the action.

Irving S. Fairty, for the plaintiffs.

W. E. Raney, K.C., for the defendant.

H. E. Rose, K.C., for the British and Colonial Land and Securities Company.

Middleton, J.

MIDDLETON, J.:—The British and Colonial Land and Securities Company, though not parties to the action, appeared by counsel and desired to be heard. I allowed this, as they are the parties really concerned; and Con. Rule 1086, relating to mandamus, appeared to me to afford a proper analogy for my guidance, as directed by Con. Rule 3.

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The question arises under the City and Suburbs Plans Act, 2 Geo. V. ch. 43. By that Act, assented to on the 16th April, 1912, and coming into operation by proclamation on the 14th May, 1912, it is provided: "Where any person is desirous of surveying and subdividing into lots, with a view to a registration of a plan of the survey and subdivision, any tract of land lying within five miles of a city . . . he shall submit a plan of the proposed survey and subdivision to the Ontario Railway and Municipal Board for its approval," And, by sec. 5, that "no plan of any such land shall be registered unless it has been approved by the Board . . . and no lot laid down on a plan not so approved shall be sold or conveyed by description containing any reference to the lot as so laid down on such plan."

The company, holding a large tract of land intended to be subdivided and sold in small lots, long prior to the passage of the Act in question had the same surveyed and subdivided, and a plan submitted to the Council of the Township of York for its approval. One general survey and plan was prepared, covering the entire parcel. This was the plan submitted and approved by the council. Part of the land being registered under the Land Titles Act and part under the Registry Act, it was found necessary to prepare separate plans of different sections for registration. These plans were merely copies of separate portions of the original survey. The survey and the subdivision were complete before the Act came into force; but the plans were not actually tendered for registration until after that time.

The Act does not profess to have any retroactive effect; and, apart from the general principle to be found in such cases as *Gardner* v. *Lucas*, 3 A.C. 582, "unless there is some declared intention of the Legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we are to take the other view, we are to presume that an Act is prospective and not retrospective." Apart from that principle, it is clear from the Act itself that it is prospective. It does not purport to affect any subdivision already made or to invalidate any plans or transactions made before it came into force.

The extreme inconvenience of any other finding is evidenced by the provisions of sec. 5, which invalidates a sale according to the plan.

The action, therefore, fails; and I think that the plaintiffs should pay the costs, not only of the defendant, but of the company.

Action dismissed.

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BERRY v. McKENZIE.

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Alberta Supreme Court, Harvey, C.J., Scott, and Walsh, JJ. March 17, 1913.

1. SALE (§ II C—35)—DEFECT IN QUALITY—DAMAGES—EFFECT OF RE-SALE.

A purchaser of goods is not deprived of his right to set up a counterclaim by reason of a defective condition of some of the goods, in an action by the seller against him for the contract price, merely because the purchaser made no attempt to settle with persons to whom he had re-sold part of the goods claimed to be defective, although he had been requested to do so by the seller.

Statement

APPEAL by defendant from judgment of the District Court Judge in favour of the plaintiffs to an action for the balance due for hay sold and delivered.

The appeal was allowed in part.

W. E. Payne, for the appellant.

R. C. Murphy, for the respondents.

Walsh, J.

WALSH, J.:—The plaintiffs sue to recover $225.60, being the balance claimed on the sale by them to the defendant of several carloads of hay. The correctness of this claim in so far as the quantity and price of the hay and the payments made on account are concerned is admitted. The defendant says, however, that two carloads of these shipments were so defective in condition that he should be allowed the full amount charged against him in respect of the same as damages. He seeks to have the plaintiff's claim against him wiped out on this account and by further claims against the plaintiffs arising out of his dealings with them in connection with this hay.

The learned Judge of the District Court, from whose judgment after the trial of the action this appeal is taken, did not make any finding of fact upon the principal matter in controversy, namely, the condition of the hay in the two cars in question, although he says that he thinks he "would be quite justified in finding, on the preponderance of evidence, that the hay was shipped in good condition." He rests his judgment in favour of the plaintiffs on the ground that after complaint had been made to them by the defendant of the condition of this hay, the defendant undertook the duty of making the best possible settlement that he could for it with the two men to whom he had sold it and "then made no reasonably diligent efforts to do this." He says, "Having done this and having failed in his duty to get some kind of settlement from them, he is not in a position, at least for the present, to maintain his counterclaim and I so hold." I do not think that this ground is well taken. The facts shortly are that the men who bought this hay from the defendant refused to pay for it because of its condition. He communicated this to the plaintiffs, who wrote asking him to "go ahead and settle this up the best way you

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can. We think we can reckon on your giving us a square deal, so we will leave it in your hands. Trusting you will obtain a satisfactory settlement, I remain, etc." The defendant replied to this two months later by letter in which he says, "I am sorry I was not able to send you a settlement for this hay long before, but I am trying to get an adjustment for these two cars shipped to Red Deer. I will write again Monday morning, when I think I will be able to get something. I have to sue one or two parties."

I can see nothing in this correspondence to evidence the undertaking by the defendant of the duty which the learned Judge finds that he assumed, and apart from it he was certainly under no such obligation. There was no privity between the plaintiffs and these purchasers. If they owed anyone anything for this hay it was the defendant, for it was from him that they bought. The defendant and no one else was liable to the plaintiffs. It was to the interest of the defendant that the purchasers from him should pay for the hay, for his liability to the plaintiffs could be in no wise affected by their failure to pay him. What the learned Judge has practically found is, that because the defendant made no real attempt to make them pay him he has no right to set up the defence or counterclaim arising out of the defective condition of the hay. I am quite unable to appreciate the logic of this. If he bound himself in any way to the plaintiffs in this respect, which I do not think that he did, it was a purely voluntary obligation on his part, and his failure to live up to it could not, in my opinion, deprive him of any right of action against the plaintiffs based upon the bad condition of the hay.

It is not disputed that this hay when it reached Red Deer, after the comparatively short run from Halkirk, was in a condition which rendered it absolutely unfit for use. The evidence of all of the witnesses who speak of it, those of the plaintiffs as well as of the defendant, satisfies me that this condition was due solely to the fact that the plaintiffs shipped in each of these cars some bales of hay which contained sufficient moisture to affect all of the rest of the load, which, as a result, heated when the doors were closed and consequently spoiled. It was the plaintiffs' duty under their contract with the defendant to load the hay on the cars and to include in the shipments only good upland hay. In shipping in each of these cars hay such as I have described, although I am sure that they did it innocently, they failed in their duty and must be held liable for the result.

There was such an acceptance of the hay as makes the defendant liable for its price. Each car was unloaded by the man who purchased it from the defendant. Part of one carload was sold by the purchaser of it for a nominal figure and the rest of

it was dumped by him into the river because of its condition. A few hundred pounds of the other were used for cow feed and the rest of it was taken by the purchaser to the dumping pound. This was done by men claiming under the defendant, and I think with his knowledge and as it was impossible for him for these reasons to return it to the plaintiffs in the condition in which it reached him, he is liable for the agreed price. The plaintiffs are therefore entitled to judgment against the defendant for $225.60 and costs. The amount which is charged against the defendant by the plaintiffs for the hay in dispute is $155.80. I think that $20 is a fair value to place upon it in the condition to which it was reduced through the fault of the plaintiffs. The plaintiffs are liable to him under this head by way of damages for the difference between these two sums, namely $135.80. The freight on these two cars was paid by the purchasers, to whom the defendant is liable for the same, and it amounts to $46.80, and it cost the defendant $3.50 to unload one of the cars. I think the plaintiffs are liable to the defendant for these three items of $135.80, $46.80 and $3.50, making $186.10 in all. The learned Judge in the Court below properly dismissed the defendant's claim for damages resulting from the alleged failure of the plaintiffs to load the cars to their maximum capacity. The defendant is not, in my opinion, entitled under the circumstances of this case to any damages by way of loss of profit on these two cars. There will be judgment for the defendant on his counterclaim for $186.10 and costs of the counterclaim.

The defendant is entitled to his costs of this appeal.

Appeal allowed in part.

Re NATIONAL HUSKER CO. WORTHINGTON'S CASE.

Ontario Supreme Court, Meredith, C.J.C.P. April 8, 1913.

1. CORPORATIONS AND COMPANIES (§ V F 2—262)—SHAREHOLDERS' LIABILITY—EXAGGERATION OF PROSPECTUS—DECEIT.

A shareholder is not relieved from his liability as a contributory in winding-up proceedings, on the ground that a prospectus or some other document put forward by the company contained extravagant and exaggerated language, if he was not deceived thereby, and was not induced to subscribe on the faith of such prospectus or document.

2. CORPORATIONS AND COMPANIES (§ V F 2—262)—SHAREHOLDERS' LIABILITY—FRAUD AS A DEFENCE—WAIVER AFTER DISCOVERY.

A subscriber to company shares will be listed as a contributory for the amount unpaid thereon in a winding-up proceeding although his subscription may have been induced by a fraudulent prospectus, if after discovery of the fraud the subscriber elects by his conduct to approbate the contract instead of repudiating liability thereon.

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3. JUDGMENT (§ II D 8—145)—CONCLUSIVENESS—WINDING-UP ORDER OBTAINED BY JUDGMENT CREDITOR—JUDGMENT FOR RETURN OF SUBSCRIPTION MONEY.

A winding-up order obtained by a judgment creditor of the company in respect of a judgment recovered for the cancellation of his stock subscription and the return of money paid thereon is *res judicata* as to his right to be relieved from his subscription on the settling of the list of contributories in the winding-up.

Statement

APPEAL by Worthington from an order of the Master in Ordinary, in a proceeding for the winding-up of the company under the Dominion Winding-up Act, placing the appellant on the list of contributories for $3,760, the balance due upon a subscription for $5,000 worth of shares.

The appeal was dismissed.

W. E. Raney, K.C., for the appellant.

J. M. Ferguson, for the liquidator.

Meredith, C.J.

MEREDITH, C.J.C.P.:—The outstanding features of the litigation involved in this appeal seem to me to be inconsistent and unsatisfactory. I find it difficult to account satisfactorily for the shareholder in the former litigation being taken out of liability and the shareholder in this litigation left to bear the brunt. I am also unable to understand why the roundabout, costly, and needless process of winding up the company should have been resorted to and authorised, if the truth be, as it was asserted in the argument of this appeal, that there are no ordinary creditors of the company unpaid, and that these proceedings are being carried on for the one purpose of enabling the shareholder who got relief from his subscription to recover from the shareholder who did not, the amount of the former's payment upon his stock for which he has judgment against the company; why he was not left to the more usual and direct method of doing so.

But there is no power to deal with the latter question upon this appeal; the winding-up order must be treated as a valid, subsisting one, which it is: if it should not have been made, objection should have been raised before it was granted. So, too, as to the relieved shareholder who is prosecuting the winding-up proceedings; the judgment upon which his rights are based is a valid and binding judgment now, and must be given full effect to as such—however much one might think that, if his case were to be decided now, upon the whole evidence available upon this appeal, he might very well fail.

Nor can the appellant succeed merely to make the conclusion of each case alike: nor even because one may think he has a better right to succeed than, or at least as good a right to succeed as, the other shareholder seems now to have had. The single question is, whether the learned Master was right or wrong in his conclusion that the appellant is not entitled to be relieved from liability for his shares.

I am quite sure that there never was any intention on the part of any one connected with the company to cheat, at any time; sincere belief in the future of the patented process was the mainspring of all that was said and done by the patentee. The high-sounding descriptions of the process and machine set forth in the paper called—perhaps erroneously—the prospectus of the company, emanated from the professor of modern languages who was the secretary, as well as a shareholder, of the company; and were to some extent but visions, sincere ones, of the future, stated as facts of the present; but visions which have not yet come to pass.

That the process and machine were things of great promise is obvious. A pea-sheller had been invented and had proved to be a very successful, useful, and profitable contrivance and labour-saver. A corn-husker was and is much needed; the patentee's invention did its work admirably, but only with small quantities, becoming soon clogged, and so being of no value for practical purposes. But, the difficult task of producing a machine that would husk well having been accomplished, it was but natural that it would be expected by all that the trouble of clogging could soon be overcome. The professor of modern languages, with mistaken foresight, described that which was to be as that which was; and to that mistake added the very prevalent mistake of the misuse of superlative adjectives and exaggerated language generally; but there was always on the part of the patentee, and for a good while on the part of the secretary, a firm belief that all that was said would surely come to pass; and the hyperbolic prospectus—if prospectus it can truly be called—admittedly had no part in inducing the appellant to subscribe, as his letters to McGaffanay plainly state.

The appellant came into the company with a knowledge that these things had not come to pass, and that a machine doing continuous good work had not then been made, but imbued with the faith that the patentee still had, but which the professor of modern languages had lost or was fast losing: a faith which, I think, he, as well as the patentee, still has, and one which it may well be is not wholly unwarranted. He came in with the very object of enabling the development of the process to the looked-for successful and profitable end.

There was no deceit practised on the appellant by the patentee, or by any one acting for the company; though to some extent, and of a passive character, there was, I think, by the professor of modern languages and his friend McGaffanay; they abstained from repudiation of their subscriptions in the hope of new shareholders coming in, who, and whose money, would either make the thing a success, with much profit to them all, or else would be contributing to losses with them, lightening their burdens.

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The McGaffanay successful litigation made a final end to further efforts to make a success of the process, with all the gain that that meant to those who had speculated in it: and then there was the usual rush for cover, as was to be expected.

I cannot find that the appellant's subscription was procured by fraud; and, if I could, I could not but find also that his conduct proves an election, after discovery of it, not to avoid the contract—approbation not reprobation.

Much reliance was placed, for the appellant, in argument, upon the character of the patent which the patentee had, but which the company by inaction lost; but I cannot believe that the character of the patent was in any way a substantial factor in the transaction by which the appellant acquired his shares, or indeed weighed at all as an inducement to any subscriber. This is merely a defensive plank picked up out of the wreckage caused by the McGaffanay litigation. If the machine would only do continuously that which it does so well for a short time, the rush of all these subscribers would be not to get out of, but to get more into, the company.

And so I am unable to say that the learned Master was wrong on either point; on the contrary, I agree with him.

The appeal must be dismissed; but, exercising my discretion in that respect, I make no order as to the costs of it.

Appeal dismissed.

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March 10.

LEKAS v. ZAPPAS.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. March 10, 1913.

1. GARNISHMENT (§ I C 1—24)—WHAT SUBJECT TO—JOINT PAYEE OF PROMISSORY NOTE.

A debt to be attachable under garnishment process must be a debt due to the judgment debtor alone, and where the debt is due to the judgment debtor jointly with another, it cannot be attached.

[*Macdonald* v. *The Tacquah Gold Mines Co.*, 13 Q.B.D. 535; *Beasley* v. *Roney*, [1891] 1 Q.B. 509; *Parker* v. *Odette*, 16 P.R. (Ont.) 69; *Minger* v. *Anderson*, 1 A.L.R. 400, referred to.]

Statement

APPEAL by defendant from judgment in favour of the plaintiff.

The appeal was dismissed.

T. D. Brown, for appellant.

A. E. Doak, for respondent.

The judgment of the Court was rendered by

Haultain, C.J.

HAULTAIN, C.J.:—This action was brought by the plaintiff against the defendant for the amount of the following promissory note.

Prince Albert, May 23rd, 1912.

Three months after date I promise to pay to the order of Thomas Lekas and George Georgas at the Imperial Bank of Canada, here, $100, one hundred dollars, value received.

(Sgd.) M. ZAPPAS.

The note was endorsed over to the plaintiff by George Georgas on the 20th July, 1912. On the 31st July, 1912, the McCormick Manufacturing Co., Ltd., began an action against George Georgas for $539.21 for goods sold and delivered, and on the same day issued a garnishee summons in the action, addressed to Michael Zappas, the defendant in this action, requiring him to appear and state "whether or not there is any debt due or accruing due" from him to George Georgas. On the 26th August Zappas filed an appearance and statement as follows:—

In the Supreme Court of Saskatchewan.
Judicial District of Prince Albert.

Between:

The McCormick Manufacturing Company, Limited, Plaintiffs.

—and—

George Georgas, alias Thomas Lekas, Defendants,

—and—

Michael Zappas.

The above named Michael Zappas, garnishee herein, appears hereby to the garnishee summons herein served upon him and says that he is indebted to the above-named defendant, George Georgas, alias Thomas Lekas, in the sum of five hundred ($500) dollars, which amount is secured by the personal notes of the said Michael Zappas, payable as follows:—

Note for $100, due August 26th, 1912.

Note for $100, due on or about September 16th, 1912.

Note for $100, due on or about October 16th, 1912.

Note for $100, due on or about November 16th, 1912.

Note for $100, due on or about December 16th, 1912;

and he further says as to the first note above-mentioned, the same is now held by the Imperial Bank of Canada at Prince Albert for collection as agents for the Bank of Montreal at Weyburn, in the Province of Saskatchewan, and the said Imperial Bank is claiming payment of the said note as holder thereof.

He further says that he has paid into Court the said sum of one hundred ($100) dollars due on the said last-mentioned note, having first deducted the sum of five ($5) dollars for his necessary disbursements and costs, and prays the order of the Court therein.

Dated at Prince Albert, in the Province of Saskatchewan, this 28th day of August, 1912.

Witness: (Sgd.) M. ZAPPAS.

(Sgd.) C. E. GREGORY.

On the 23rd September, 1912, the plaintiff began the present action against Zappas on the note above-mentioned. Zappas defended, and in addition to the usual formal denials set up the following special defences. In the alternative:—

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4. That he paid the amount of the note alleged in paragraph (1) of the statement of claim into Court before this action was brought, on August 27th, 1912, in an action, No. 88, of 1912, in the Supreme Court of Saskatchewan, judicial district of Prince Albert, wherein the McCormick Manufacturing Company is plaintiff and George Georgas alias Thomas Lekas, is defendant and this defendant was garnishee.

5. In the further alternative that the said note was satisfied by payment into Court under garnishee summons as alleged in paragraph (4) thereof.

The case came on for trial in due course and the learned trial Judge gave judgment for the plaintiff holding that the garnishee proceedings in the McCormick Company action did not bind the money in question as service of the garnishee proceedings was made before the note was due, and the note was, therefore, not attachable. From this judgment the defendant Zappas now appeals.

In my opinion the appeal should be dismissed on the ground that Zappas was not, so far as the note in question is concerned, indebted to the judgment debtor George Georgas. George Georgas had, some eleven days before the garnishee summons was issued, parted with all his interest in the note by endorsement to his joint payee, Thomas Lekas, the present plaintiff. Even if he had retained his joint interest in the note, the garnishee proceedings would not have affected that interest.

A debt to be attachable must be a debt due to the judgment debtor alone, and where it is only due to him jointly with another person it cannot be attached:

Macdonald v. *The Tacquah Gold Mines Co.* (1884), 13 Q.B.D. 535; *Beasley* v. *Roney*, [1891] 1 Q.B. 509; *Parker* v. *Odette* (1894), 16 P.R. (Ont.) 69; *Minger* v. *Anderson, re Crist* (1908), 1 Alta. L.R. 400. See also *Webster* v. *Webster* (1862), 31 Beav. 393, and *McNaughton* v. *Webster* (1859), 6 U.C.L.J. (O.S.) 17.

In view of these findings it will not be necessary to express an opinion as to the effect of garnishee proceedings upon a promissory note not yet due, except to say that a very strong line of Canadian decisions seems to favour the view that such promissory notes are excluded from the operation of garnishee proceedings: *Jackson* v. *Cassidy* (1883), 2 O.R. 521; *Roblee* v. *Rankin* (1884), 11 Can. S.C.R. 137; *Simpson* v. *Phillips* (1896), 3 Terr. L.R. 385; *Halsted* v. *Herschmann* (1908), 18 Man. L.R. 103; see also *Pyne* v. *Kinne* (1877), 11 Ir. L.R. (C.L.) 40, and, *contra, Hyam* v. *Freeman* (1890), 35 Sol. Jour. 87; see also *Bence* v. *Shearman*, [1898] 2 Ch. 582.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Middleton, J., in Chambers. April 21, 1913.

1. INSURANCE (§ IV B—170)—CHANGE OF PREFERRED BENEFICIARY—STATUTORY WORDS IN PLURAL—APPLICATION TO SINGLE BENEFICIARY.

The words "one or more or all of the designated preferred beneficiaries" in sec. 178 (7) of the Ontario Insurance Act (2 Geo. V. (Ont.) ch. 33), apply to the case of a sole designated preferred beneficiary.

Statement

MOTION by the three adult children of William E. Caiger, deceased, for payment out to them of their shares of insurance moneys paid into Court.

M. Macdonald, for the applicants.

E. C. Cattanach, for the infant children of the deceased.

G. F. McFarland, for the North American Life Assurance Company.

W. D. McPherson, K.C., for the P. R. Wilson Printing Company, creditors.

Middleton, J.

MIDDLETON, J.:—By policy dated the 1st October, 1901, the deceased W. E. Caiger insured his life in favour of his wife, who died on the 13th October, 1911. The deceased survived his wife, dying on the 8th November, 1912, but executed no document in any way affecting this insurance. The sum of $3,128.25, the proceeds of the policy, has been paid into Court by the insurance company, as a contest has arisen between the creditors and the children of the deceased.

The rights of the contestants depend upon the construction of sec. 178(7) of the Ontario Insurance Act, 2 Geo. V. ch. 33. If that section applies, the children take. If not, then under sec. 171(9) the money forms part of the estate of the insured.

Section 178(7) applies if the words "one or more or all of the designated preferred beneficiaries" can be held to cover the case of a sole designated preferred beneficiary; for then the section, as applied to this case, directs the money to go to the children.

The wording of the statute is not uniform throughout, and in some of the sections the Legislature has, as in the case of 171(9), been careful to say "all the beneficiaries or the sole beneficiary;" but, in seeking to interpret the words used, I think the words here used, "all the beneficiaries," are wide enough to cover the case of a sole beneficiary. To hold otherwise would be to create an unwarrantable exception and an indefensible anomaly.

The money will be declared to belong to the children, and will be paid accordingly.

The creditors must pay the costs of this motion and the costs of the company deducted when the money was paid into Court.

Judgment accordingly.

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March 17.

LARSON v. RASMUSSEN.

Alberta Supreme Court. Trial before Walsh, J. March 17, 1913.

1. CONTRACTS (§ V C 3—402)—RESCISSION—GROUNDS OF—FRAUD—VALUE OF LANDS SOLD, IMPOSITION.

An agreement for the sale of land whereby the purchaser was to take the property at "its fair actual value" to be fixed by the vendor, may be rescinded, where it appears that the vendor fraudulently made the purchase price of the property several hundred dollars in excess of "its fair actual value" the purchaser being a woman who lacked business experience and who was unable to form an opinion herself as to the real value of the property, notwithstanding that she went into possession and leased part of the land and sold another part, it appearing that she had not became aware of the fraud until the action.

2. ESTOPPEL (§ III E—70)—BY CONDUCT—VENDOR OF LANDS—INCONSISTENT LEASE—RESCISSION.

Where a vendor, notwithstanding his contract to sell the lands whereby the purchaser was entitled to possession, leases for a year to a stranger, he has thereby disabled himself from performing his contract of sale and entitled the purchaser to rescind.

3. PLEADING (§ I N—110)—AMENDMENTS AFTER TRIAL—PRIOR PLEADING NOT ADOPTED—JUDICIAL LATITUDE.

Rescission of an agreement for the sale of land on other grounds than those set up in the pleadings may be decreed where evidence in support of such grounds on the part of the plaintiff was given at the trial without objection and the defendant in his evidence went fully into those questions, but such failure to plead will affect the disposition of the costs of the action, and any amendments of the pleadings necessary to effectuate this may be allowed (with or without application by the parties) at any stage of the trial.

Statement

ACTION for the rescission of agreement for the purchase of land and for the recovery back of payments made thereunder.

Judgment was given for the plaintiff.

G. T. Davidson, for the plaintiff.

J. J. Mahaffy, for the defendant.

Walsh, J.

WALSH, J.:—As I intimated when making my findings of fact at the close of the trial the plaintiff is not entitled to rescind the agreement because of the fraudulent omission from it of lot 2 in block 15. She knew of this omission and of the defendant's refusal to supply it on the very day on which the agreement was executed, and, with that knowledge, she took possession of both lots under the agreement, carried on, in the building upon one of them, the boarding house business which the defendant had theretofore carried on therein and which passed to her under the agreement, sold the building that was on the other lot, made several payments of purchase money under the agreement, and eventually made a lease of the boarding house. These are admittedly the facts. The other fraud alleged by the pleadings against the defendant as entitling her to rescind is that the defendant fraudulently represented that the purchase price set

out in the agreement was $3,000 whereas it is in fact $3,200. There is, however, no evidence to justify this allegation.

I think though that the plaintiff is entitled to have the agreement rescinded on either of the two other grounds developed during the course of the trial. Upon my findings the defendant was guilty of fraud in fixing the purchase price of the property at $3,200. The agreement as I found it was that the plaintiff was to take the property at its fair actual value to be fixed by the defendant. He fraudulently made the purchase price several hundreds of dollars in excess of this value. There is nothing in the evidence to shew that the plaintiff ever became or is even now aware of this. I am inclined to think that from her absolute lack of business experience she was quite unable to form any opinion herself as to its real value and she seems to have made no enquiries and no one seems to have told her anything about it. Under these circumstances, I think it is still open to her to repudiate the agreement upon this ground. Although this ground was not taken in the pleadings evidence in support of it was given on the part of the plaintiff at the trial without objection and the defendant in his evidence went fully into it. I think it therefore not unfair to deal with it here as if it had been raised in the pleadings.

I think that the defendant by making a lease of this property for a year as he has done, has given the plaintiff another opportunity to be freed from this contract which he should never have imposed upon her. By his pleadings he treats the contract as still subsisting and seeks by his counterclaim a judgment against her for the balance of the purchase money. She has the right under her contract to possession and even though she may have temporarily lost it pending the continuance of her default she has the undoubted right upon payment of the arrears of the purchase money to have possession again restored to her. The lease of the premises which the defendant has improperly made will not expire until the 1st of November next, so that as matters now stand the defendant has through this act made his contract impossible of performance and this I think entitles the plaintiff to rescission. This phase of the question is not disclosed by the pleadings, but was developed in the course of the trial by the defendant's own evidence and is established conclusively by it. I have for this reason less objection to giving effect to this contention than I have to the other one for no element of surprise or unpreparedness to meet the facts can be present here.

The plaintiff is entitled to a judgment rescinding the agreement and directing the defendant to pay to her $1,200 with interest at 5 per cent. from the 27th of December, 1911, and to a charge for the same on both of these lots described in the statement of claim. I do not think she is entitled to get back

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the other payments made by her which came either from the sale of portions of the chattel property included in the purchase or from her occupation of the land. I do not think that it would be fair to impose the payment of the plaintiff's costs upon the defendant. If the plaintiff had by her pleadings based the right to rescission upon the grounds upon which I am decreeing it, he might not have defended the action. I do not think, however, that he should have any costs, for his treatment of this woman has been most reprehensible. The counterclaim is dismissed without costs. If necessary, the plaintiff may amend her statement of claim so that it may allege the facts upon which this judgment rests and the defendant may then amend his defence as he may be advised.

Judgment accordingly.

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May 7.

TOWNSEND v. NORTHERN CROWN BANK.

Ontario Supreme Court. Maclaren, J.A. May 7, 1913.

1. APPEAL (§ II C 4—68)—TO PRIVY COUNCIL FROM ONTARIO COURT—AMOUNT IN CONTROVERSY.

In an action by an assignee for benefit of creditors brought against a bank to set aside securities given by the debtor to the bank, where the issue is whether the bank is entitled to the whole of the proceeds of certain property or only to a *pro rata* share with other creditors, the difference between such sums is the amount of the matter in controversy by which the statutory right of appeal to the Privy Council from the Ontario Supreme Court is governed under the Ontario statute, 10 Edw. VII. ch. 24, if the total amount of the bank's claim against the debtor, which was in excess of the statutory minimum of $4,000, was not in dispute.

Statement

MOTION by the plaintiff for approval of a security bond and the allowance of his appeal to His Majesty in His Privy Council from a judgment of this Court (4 O.W.N. 1165) which affirmed the judgment dismissing his action.

H. S. White, for the plaintiff.

F. Arnoldi, K.C., for the defendants.

Maclaren, J.A.

MACLAREN, J.A.:—This appeal is governed by sec. 2 of the Privy Council Appeals Act, 10 Edw. VII. ch. 24, the material part of which reads as follows: "Where the matter in controversy in any case exceeds the sum or value of $4,000 . . . an appeal shall lie to His Majesty in His Privy Council; and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

This action was brought by an assignee for creditors to set aside certain securities, under sec. 88 of the Bank Act, given by the insolvent to the defendants. The securities have been upheld in so far as regards the lumber covered by them.

Before the trial, the parties agreed that the assignee should go on and sell the assets of the estate, the proceeds to stand in substitution for the property so sold, according to the respective rights of the parties. The plaintiff's evidence shewed that the assets realised $3,900. This included $1,000 received for the mill, to which the defendants made no claim. It also included goods, chattels, and accounts to which the defendants were held not to be entitled; their claim being limited to the lumber alone and its proceeds.

The whole controversy in the case was, whether the defendants were entitled to the whole of the proceeds of the lumber under their securities, or whether they should rank concurrently thereon with the unsecured creditors. The total liabilities are $12,800; the defendants' claim, $4,100. The plaintiff does not dispute the amount of the defendants' claim. The question is, whether the defendants are entitled to the whole of that part of the $2,900 which comes from the lumber, or only to their pro rata share of it, which would be approximately one-third. The amount in controversy in this action is, therefore, brought down to two-thirds of a portion of $2,900. Even if it were the whole of that sum, it would still be too small to justify an appeal to the Privy Council, under the section above-quoted, which requires over $4,000.

I am, consequently, of opinion that the appeal is incompetent; and the application must be dismissed with costs.

Application dismissed.

HICKS v. SMITH'S FALLS ELECTRIC POWER CO.

Ontario Supreme Court. Trial before Latchford, J. May 3, 1913.

1. MASTER AND SERVANT (§ II A 4—71)—LIABILITY OF MASTER—GUARDING DANGEROUS MACHINERY.

To maintain in an electric power house a rapidly rotating shaft with a "key-seat" cut into it for coupling more shafting and left exposed in such a manner as was likely to catch the clothing of workman in the narrow passageway facing that end of the shaft, constitutes an omission by the employer to take reasonable care for the safety of the employees for which he is liable, both at common law and under the Workmen's Compensation Act, R.S.O. 1897, ch. 160, for injuries sustained by an employee through being caught by the shaft while in the discharge of his duty in circumstances under which he could not be expected to have in mind the dangerous shaft-end.

[See also *Kizer* v. *Kent Lumber Co.*, 5 D.L.R. 317.]

2. MASTER AND SERVANT (§ II A 4—71)—LIABILITY OF MASTER—DANGEROUS MACHINERY—STATUTORY REGULATIONS.

An electric power house is not a "factory" within the meaning of the Ontario Factories Act, R.S.O. ch. 256, so as to make applicable to it the statutory regulations as to the guarding of machinery in factories.

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ACTION by the widow and infant child of Robert Hicks, a workman employed by the defendants, who was killed while working for the defendants, owing, it was alleged, to their negligence.

Judgment was given for the plaintiff.

The action was tried without a jury.

J. A. Hutcheson, K.C., for the plaintiffs.

D. L. McCarthy, K.C., and *H. A. Lavell*, for the defendants.

LATCHFORD, J.:—Between nine and ten o'clock on the morning of the 20th May, 1912, the deceased, who was twenty-six years old, and in excellent health, and one Jaecle, were engaged with Henderson, the defendants' superintendent, in moving a heavy pulley or fly-wheel from the power-house in which the water turbines and connected shafting and machinery were situated, into a building adjoining, where the defendants were establishing a steam plant auxiliary to their water power system. The fly-wheel weighed about four and one-half tons. It was forty inches across the face or rim and about four feet in diameter. It had to be moved in the power-house a distance of seven or eight feet, up an incline of approximately eighteen inches, through a narrow space between the end of a shaft and the east wall of the power-house. The space had until January of 1912 been in large part taken up by a stairway leading to the floor above. After the removal of the stairs, the men were in the habit of using the place it had occupied as a passage to a door giving on the engine-room.

Ordinarily during the day-time the shaft was not in motion. But on this occasion it had become necessary to repair the driving-belt of the machine generally used for day power; and, that generator being out of commission, the shaft projecting into the space through which the fly-wheel was being moved had been linked up with one of the turbines, and was rotating at a speed of 160 revolutions a minute. The shaft, which had a diameter of nearly five inches, projected twenty-three inches beyond a pulley, from which a belt led to a generator up-stairs. This projecting end was three feet six inches above the uneven floor of the power-house, and had cut into it a key-seat, a foot or more in length, one and a quarter inches in width, and three-sixteenths of an inch in depth. The shaft had been installed sixteen or seventeen years, and had, when placed in position, the key-seat cut into it—no doubt, as a means of coupling on an additional length of shafting or attaching another pulley. The angles formed by the key-seat with the periphery of the shaft-end were sharp—"auger-like," as one witness described them—and the edges of the key-seat and the end of the shaft itself slightly indented from contact with the tools of the workmen or with other hard bodies.

I credit the testimony of the witnesses who deposed that the passage was dangerous when the shaft was in motion. It is beyond question that the place was extremely dangerous when men were moving through it a wheel of over four tons in weight, requiring on their part very hard labour continued through a period of about an hour. The men were using pinch-bars about five feet in length, and to obtain proper leverage had to lean on the bars in a stooping position at some distance from the fly-wheel. Hicks's position was near the projecting end of the revolving shaft. Henderson, the superintendent, was on the same side of the fly-wheel, and Jaecle near the door leading into the engine-room. All three, by prying and blocking, had succeeded in working the fly-wheel up the inclined plane, and in giving it a quarter turn on the platform near the engine-room door. Henderson then said, "That's all right boys," and rose from the stooping position which he, like the others, had occupied. Hicks also rose, and, in straightening himself up, stepped, according to Henderson, back towards the projecting shaft, which, engaging the jacket of his overalls, "made a rope of it," as put by Fraser—the joint superintendent with Henderson—and caused injuries of which the man died a few hours later.

The power-house was not a factory as defined by the Factories Act, and no liability under that Act attaches to the defendants. But the defendants are, I think, liable at common law, as well as under the Workmen's Compensation for Injuries Act. It was their duty to take reasonable care that the safety of their servants should not be imperilled, as it undoubtedly was imperilled, by a thing so dangerous as the sharp points on the rotating shaft. The end of the shaft might have been cut off or securely guarded. But the defendants failed to adopt any of the obviously practicable precautions which would have protected their workmen from danger in the narrow passage.

I, therefore, find that there was in use by the defendants a defective and negligent system which caused the death of Hicks.

There was no contributory negligence. The space in which Hicks had to move between the fly-wheel and the end of the shaft was but fifteen or sixteen inches. A slight movement backward, even if it amounted to a step, as Henderson calls it, is not negligence, in the circumstances of this case. It is, I think, unreasonable to expect that Hicks, recovering as he was from the strain and restricted circulation resulting from heavy labour in a cramped position, should have in mind the dangerous shaft-end.

The plaintiffs being entitled to recover at common law, I fix the compensation to which they are thus entitled at $4,000. They would not be entitled to so much under the Workmen's Compensation for Injuries Act, which, in my opinion, also undoubtedly applies.

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Hicks's death was caused by a defect in the condition of the machinery and premises used in the business of his employers. Henderson was negligent in having the fly-wheel moved through the passage while the shaft was in motion, and in ordering Hicks, who was bound to conform to his orders, to assist in moving the wheel, and who was so conforming when injured.

Hicks's earnings were from $55 to $60 a month. Others in the same grade in a like employment were earning about the same wages. Upon the basis prescribed by the Act mentioned, the plaintiffs would be entitled to but $2,000 as compensation. I think, however, they are entitled to the larger amount stated; and I accordingly direct that judgment be entered in favour of the plaintiffs for $4,000 and costs—the compensation to be apportioned two-thirds to the widow and one-third to the child.

Judgment for plaintiff.

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March 5.

TAPRELL v. CITY OF CALGARY.

Alberta Supreme Court, Walsh, J. March 5, 1913.

1. MUNICIPAL CORPORATIONS (§ II C 3—62)—BY-LAWS—VALIDITY—QUASHING—DIVERS OBJECTS, WHEN FATAL.

A city by-law which provides for the raising of a certain sum of money for the purpose of building certain specific bridges in the city is a by-law which authorizes the borrowing of money to accomplish more than one object, and is, therefore, illegal unless it can be shewn that the money was asked for to carry into effect a comprehensive bridge policy, the carrying out of each detail of which was essential to the success of the scheme as a whole.

[Dillon on Municipal Corporations, 5th ed., secs. 213 and 891, referred to.]

2. COURTS (§ I C 3—110)—REVIEW OF MUNICIPAL BY-LAWS—QUASHING—DISCRETION.

Under sec. 118 of the city charter of the city of Calgary (Alta.), providing that a Judge may quash a by-law in whole or in part for illegality, the power to quash rests in the sound discretion of the court after an examination of extraneous evidence unless the by-law appears on its face to be illegal.

[*Grierson* v. *County of Ontario*, 9 U.C.Q.B. 623; *Re Johnston* v. *Township of Tilbury East*, 25 O.L.R. 242, applied.]

Statement

THIS is an application under sec. 118 of the City Charter of Calgary, to quash by-law No. 1388, of the city of Calgary entitled:—

A by-law of the city of Calgary to raise the sum of $900,000 for the purpose of erecting and constructing bridges in the city of Calgary across the Bow and Elbow rivers, as follows.

The application was granted and the by-law quashed.

James Muir, K.C., for applicant.

A. H. Clarke, K.C., and *Clinton Ford*, for city.

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WALSH, J.:—The first recital of the by-law reads as follows:—

> Whereas the city is about to erect and construct bridges in the city of Calgary across the Bow and Elbow rivers as follows: combined high and low level bridges across the Bow river at Centre street, across the Elbow river at 4th street west, across the Bow river at 9th street west, re-erecting of bridge as at present at 9th street west, at 14th street west, and to provide for the purchase or otherwise of the necessary land for the approaches and abutments or otherwise, right-of-way thereto, and the necessary engineering and incidental expenses in connection therewith.

It was submitted to the ratepayers and carried, the vote being 1431 for and 509 against it. It has since received its third reading but nothing has been done under it.

But two grounds were urged before me in support of the application, namely:—

> (1) That the by-law is not limited to one object but provides for several distinct and separate objects, no specific sum being appropriated to each or any of them, and (2) that the council had not before it at the time of the passing of the by-law sufficient estimates of all of the costs and expenses involved in the carrying out of the works mentioned in it.

The by-law was submitted to the ratepayers under the provisions of section 109 of the Charter, sub-section 3 (*a*) of which provides that the by-law shall recite "the amount of the debt which such new by-law is intended to create and, in some brief and general terms, the object for which it is to be created." In support of the first objection it is contended that, under this wording, a by-law for borrowing money for more than one object is illegal, especially when contrasted with sec. 141, which provides that "the council may embody in one by-law one or more local improvements." It is then argued that the building of each of the three bridges mentioned and the removal of the fourth is a separate and distinct object so that instead of the money being required for but one single object the design is under cover of it to make possible the carrying out of at least four objects each of which is entirely separate from and independent of the others.

There is a singular dearth of authority upon this question. The corresponding section of the Ontario Municipal Act is identical in wording with the above quoted sub-section but there is no reported decision under it. In *Re Croome* v. *City of Brantford*, 6 O.R. 188, the point was suggested, but Rose, J., evidently thought that the question did not arise in that case for he dismissed the suggestion with the remark that it "can be discussed when the question arises." And apparently to this day it has not arisen in Ontario. I have not been referred

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to nor have I been able to find the report of any case bearing upon the question in which this point has even been suggested in any other Canadian Court. It has not come up for decision in the English Courts, probably for the reason that there is no corresponding municipal legislation in England. It has been a fruitful source of litigation in many of the States of the American Union, but I have not had access to any of the reported decisions of the Courts of that country which have, of course, been rested entirely upon the municipal laws in force in the various states, and I therefore have received no help from this source. I am in consequence forced to a decision of this most important application, with practically no precedent to guide me.

I am of the opinion that a by-law which attempts to authorize the borrowing in one sum of money which is to be expended for more than one object is illegal. If, for instance, the money to be borrowed under the authority of a by-law was to be devoted to the building of a city hall, and the extension of the street railway system, I do not see how its validity could be even contended for. It is the duty of a municipal council to submit its by-laws which require the assent of the ratepayers in such form that they may receive the intelligent approval or disapproval of those to whom they are submitted. But two classes of ratepayers could vote intelligently on such a by-law, namely, those who favoured and those who opposed both projects. The ratepayer who approved of one but disapproved of the other must either not vote upon it at all or stultify himself by voting for the project of which he disapproved or against the scheme which appealed to him. In this way a proposal inimical to the best interests of the ratepayers might by a corrupt council be linked with one freighted with advantage to the municipality in the hope that the ratepayers rather than lose the benefit of the advantageous proposal would load themselves with the burden of the other. So manifestly unfair a way of submitting to the ratepayers the question as to whether or not they are willing to assume the statutory debt which would be imposed upon them by the passing of the by-law would at once brand it with illegality.

My difficulty though is to decide whether what is sought to be accomplished through the medium of this particular by-law is one or more than one object. I have already pointed out what the applicant's contention is in this respect. For the city it is contended that the by-law has but one object, namely, the bridging of the rivers and that the methods by which that object is to be accomplished are but the details of this one single scheme. It is, I think, upon the true solution of these conflicting contentions that the decision of this question must rest.

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I think it quite competent for a municipal council to formulate a comprehensive plan for the working out of its policy along any given line of authorized civic enterprise and to borrow under one by-law the money needed to finance it. For instance, I think that it might lay down its policy for street railway extensions and have the money needed to carry that policy into effect voted to it under one by-law. That would be but a single scheme although it would involve the council in the necessity of constructing branch lines in different parts of the municipality. If the by-law in question here had been put forward as an embodiment of the policy of the council on the question of linking by means of bridges those portions of the city lying beyond the rivers with those portions of it lying within them, I do not see how objection could properly be taken to it simply because in the practical working out of this policy the throwing of bridges across the rivers at three different points and the removal of an existing bridge to another point are involved. The council might, with perfect propriety say to the ratepayers, "this is our bridge policy, take it or leave it as you see fit, but unless we can go ahead with the scheme as a whole we will not put it into effect at all." Upon the facts as presented to me, however, I cannot say that this by-law was placed before the electors in that way. On the contrary, it would appear that entirely different considerations led to the bulking of this proposed expenditure in one by-law. So far as is shewn from the records of the council which are before me, the question as to the form in which the proposal should be submitted to the ratepayers was raised for the first time in the Commissioner's report to the council under date of October 14th, 1912, in these words:—

> As to the manner in which this should be presented to the citizens, that is, whether it should be included in one or two by-laws, we should like the council to decide, as we feel that we were not required to consider this phase of the question.

The council thereupon, by resolution, of the same date, instructed the Commissioners "to have a by-law prepared covering total amount for the three bridges," and this is all that appears of record upon the question. Mr. Mitchell, who was mayor of the city for the year 1912, gave evidence *viva voce* before me on the hearing of this application and under cross-examination was asked why it was that all of the proposed expenditures were provided for in one by-law. In reply he gave every reason for it except the one which, in my opinion, might have been sufficient to validate the by-law. He said that there was some discussion upon the question and it was decided to put it all in one by-law because the work could be done more cheaply in that way as the contract for all of the work could be given to one man, and because it would be "much more convenient to do

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the work under one by-law for the book-keeping end at the city hall than if three by-laws were in operation," and because "it would be very much easier to sell our debentures under one by-law than it would under three." This is the only evidence before me on the point and these are the only reasons given for the adoption of this course. I have no difficulty in concluding therefore that this money was not asked for by the council to enable it to carry into effect a comprehensive bridge policy, the carrying out of each detail of which was essential in its view to the success of the scheme as a whole. From what appears before me, I am satisfied that it was not within the contemplation of the council that either all or none of these new bridges should be built. I think that the refusal of the ratepayers to authorize the construction of any one or two of them, if they had been given the opportunity to do so, would not from the point of view of policy have prevented or made impracticable the construction of the other or others, and, apart from that point of view there is nothing to suggest the interdependence of these bridges. They are intended to replace existing bridges at points which are far distant from each other along two rivers and each of them leads from and to sections of the city which are widely separated from each other. I am suspicious that these different works were all provided for by one by-law so that it might receive the support of those who favoured one or two of the bridges even though they opposed both or either of the others.

In the notes to sections 213 and 891 of the 5th edition of Dillon on Municipal Corporations are to be found many illustrations of what the American Courts have held to be one or more than one proposition. None of the reports of these cases have been available to me, however, and it is, of course, impossible for me to say simply from the reference to them in these notes how the facts or the reasoning of any of them would apply in this case.

Under the circumstances of this case, I am of the opinion that the debt under this by-law is to be created for more than one object, and that it is, therefore, illegal. I do not think that this illegality appears upon the face of the by-law, for, as I read it, there is nothing in it to indicate that it is not submitted as the bridge policy of the council. Its illegality is established by evidence *aliunde*. Sec. 118 of the Charter provides that the Judge "may quash the by-law order or resolution in whole or in part for illegality," which is word for word the language of the Ontario counterpart of this section. Ever since *Grierson* v. *The Municipality of the County of Ontario*, 9 U.C. Q.B. 623, the principle laid down in the following language of

Chief Justice Robinson has been accepted and acted upon by the Courts of that Province, namely:—

> I am of opinion that the true construction to give to the powers vested in the Court to quash by-laws is that unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is such a manifest illegality that it would be unjust that the by-law should stand or that it had been fraudulently or improperly obtained.

Garrow, J., speaking of this discretion in *Re Johnston* v. *Township of Tilbury East*, 25 O.L.R. 242, at 249, says:—

> The discretion is, of course, a judicial one to be exercised judicially and not arbitrarily, and I see no reason at all in the circumstances why I should interpose my discretion if I have one to shield the respondent in its exceedingly irregular and ill-advised proceedings.

I think that I might, with propriety, adopt these as my own for the purposes of this application. I do not suggest anything more improper in the conduct of the council than this: that its members being anxious, no doubt, in what they considered the best interests of the city, that all of these bridges should be built, carried their zeal a little too far when they made it impossible for any but straight supporters or opponents of all three of the bridges and of the other works to vote intelligently upon the by-law and thereby either disfranchised many of the ratepayers or caused them to vote otherwise than they would, if the propositions had been submitted separately. For this reason, I think, that the by-law must be quashed.

In view of the conclusion at which I have arrived upon this first objection I would not deal with the second one at all, but for the fact that in my opinion the disposition which I should make of the costs depends upon the view that I take of it. I do not think that this objection should be given effect to. The evidence given before me satisfied me that the council took all reasonable precautions to procure satisfactory information as to the probable cost of all of the work contemplated by the by-law and of the damages resulting or likely to result from the same. For the actual cost of the bridges it had the tenders of many contractors and it adopted the figures of that tenderer whose plans most appealed to it. There are no land damages or expenses for right-of-way except in the case of the Centre street bridge, and in that case I think an ample allowance for these items was made. The estimated cost of removal of the bridge now over the Bow from 9th street to 14th street seems low but not so much so as to make the otherwise ample estimate of the entire cost too small. The substantial sum of $51,000 is provided for contingencies. While the council had adopted the

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tender of one Turner at $769,000 as giving the cost of the bridges it is in no sense bound to him as its contractor, and in the list of tenders received appears the names of at least one other reputable contractor whose bid is lower than his by $31,000. On the whole, I think that the council acted with admirable discretion in fixing the estimated cost of these structures including all claims arising out of their construction at $900,000. Even if the by-law is illegal because the amount provided is insufficient for its purposes (as to which I express no opinion) that is not an illegality which appears upon the face of the by-law and I would, I think, properly exercise the discretion which I therefore have by refusing to give effect to this objection.

The applicant is entitled to his costs as of a motion based upon the ground to which I have given effect. The city should have its own costs of opposing the application upon the ground which I have decided in its favour. I was engaged for more than a day in hearing evidence which was directed almost exclusively to the question of the sufficiency or otherwise of the city's estimate of $900,000. Apart from that, the hearing of the motion lasted but little more than an hour. I think that upon a taxation of the costs to which each side is entitled there would be practically no difference between them and I will therefore save everyone concerned a lot of trouble by ordering as I do, that there shall be no costs of the motion to either side. The by-law is quashed without costs.

By-law quashed.

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April 26.

Re NORTH GOWER LOCAL OPTION BY-LAW.

Ontario Supreme Court, Kelly, J. April 26, 1913.

1. ELECTIONS (§ II A—23)—OFFICERS AND INSPECTORS—ELIGIBILITY OF RETURNING OFFICER—PARTISAN.

There is no legal objection to the appointment of a person known to hold partisan views on the question voted on as a returning officer.

2. INTOXICATING LIQUORS (§ I C—33)—BY-LAWS—LOCAL OPTION—VALIDITY—PUBLICATION OF NOTICE.

A local option by-law which has received the approval of three-fifths of the electors voting upon it, will not be quashed on the ground that it was finally passed by the council within a month of the first publication of the notice required by sub-sec. 3 of sec. 338 of the Consolidated Municipal Act 1903 (3 Edw. VII. (Ont.) ch. 19), where a scrutiny has taken place before the County Court Judge, and the rights of electors or other persons having an interest in the result of the voting have not been interfered with or prejudiced.

[*Re Duncan and Town of Midland*, 16 O.L.R. 132, referred to.]

3. ELECTIONS (§ II B 2—46)—BALLOTS—CASTING — ASSISTING VOTER — OMISSION OF DECLARATION, EFFECT.

The taking of the declaration provided for by sec. 171 of the Consolidated Municipal Act in the case of illiterate persons or persons in-

capacitated from marking the ballot papers is not a statutory condition precedent to the right to vote, and its omission is merely an irregularity in the mode of receiving the vote, which is cured by sec. 204 of the Act.

[*Re Ellis and Town of Renfrew*, 23 O.L.R. 427, followed.]

4. INTOXICATING LIQUORS (§ I C—33)—BY-LAWS—LOCAL OPTION—QUASHING—EFFECT OF JUDICIAL CERTIFICATE.

Upon an application to quash a by-law submitted to the electors on the ground that unauthorized names were entered upon the list of voters used in voting upon the by-law, the Court will not go behind the certificate of the County Court judge affixed to the revised list under the provisions of sec. 21 of the Municipal Act.

[The Voters' Lists Act, 7 Edw. VII. (Ont.) ch. 4, secs. 17 *et seq.*, 21 and 24; *Re Ryan and Village of Alliston*, 22 O.L.R. 200, referred to: see also 1 Geo. V. (Ont.) ch. 2, sec. 5, amending above sec. 21.]

Statement

MOTION to quash a local option by-law of the township of North Gower.

The motion was refused.

F. B. Proctor, for the applicant.

G. F. Henderson, K.C., and *George McLaurin*, for the township corporation.

Kelly, J.

KELLY, J.:—By the notice of motion the applicant rests his case on six objections:—

1. That the by-law did not receive a three-fifths majority of the votes of the duly qualified voters.

2. That the voting upon the by-law was not conducted in accordance with the provisions of the Municipal Act and of the Liquor License Act, and that persons were allowed to vote whose names did not appear upon the last revised voters' list of the municipality as persons qualified to vote at municipal elections.

3. That unauthorised names were entered upon the list of voters used in voting upon the by-law, which names had not been entered upon the list of voters in accordance with the provisions and requirements of sec. 17 and subsequent sections of the Ontario Voters' Lists Act.

4. That illiterate voters were allowed to vote on the by-law without first having taken the declarations required by sec. 171 of the Consolidated Municipal Act.

5. That the by-law was finally passed within one month after its first publication in a public newspaper, contrary to the provisions of sec. 338 (3) of the Consolidated Municipal Act.

6. That Norman Wallace, who was appointed and acted as deputy returning officer for polling subdivision No. 1 of the township upon the taking of the vote, was disqualified by interest from holding that office.

Objections 1 and 2 rely for their effect upon the validity of the other objections or some of them.

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The first publication of the by-law was on the 13th December, 1912, and the by-law was finally passed by the municipal council on the 13th January, 1913.

The result of the vote, as declared by the clerk, was, that 297 votes were cast in favour of the by-law and 191 against it, being a total of 488 votes. A scrutiny having taken place before the Senior Judge of the County Court of the County of Carleton, he, on the 19th February, 1913, certified as the result thereof as follows:—

Total No. of votes cast..... 487
For the by-law.....295
Against the by-law .....192..... 487

And that, on an inquiry as to the qualifications of certain persons who had voted, he found that four such persons had not, on the date of the election, the necessary qualifications, and he deducted these four, thus reducing the total number of votes cast to 483
For the by-law 291
Against the by-law .....192..... 483

On this finding, which I adopt, the by-law was carried by a majority of one vote and one-fifth.

Objection 5. To this objection—that the by-law was finally passed within one month after the first publication—*Re Duncan and Town of Midland*, 16 O.L.R. 132, and particularly that part of the judgment of Osler, J.A., appearing on p. 155, has special application. I need not repeat the line of reasoning adopted in the judgments of the Court of Appeal in that case. In the present case the final passing of the by-law, on the 13th January, did not in any way interfere with or prejudice the rights of any elector or other person having an interest in the result of the voting. It did not take away the right to demand a scrutiny; and it is not conceivable, and it is not alleged, that the result would have been different had the final passing been delayed for a few hours until the full month had elapsed from the first publication.

The essential thing in the submission and passing of what is known as a local option by-law is the expression of the will of the persons entitled to vote thereon; and when, as in this case, at least three-fifths of the qualified voters who have voted have expressed themselves in favour of the passing of the by-law, the statute makes it plain that it is the duty of the council finally to pass the by-law; and, on neglect or refusal to do so, they may be compelled by mandamus to take that action. Their duties in that respect are of the most formal kind.

If what the applicant characterises as a premature passing of the by-law had in any way affected the merits of the vote or

deprived persons entitled to object thereto of any of their rights, a different conclusion might be reached; but, under the present circumstances, I see no reason for giving effect to this objection.

Objection 6. The facts sworn to, to substantiate this objection, are: that Wallace, a deputy returning officer, was a strong and active worker in endeavouring to procure the passage of the by-law; that he was largely instrumental in obtaining signatures to the petition for its submission to the electors; that it was presented by him to the municipal council; and that he held the position of secretary in the local option organisation which carried on active propaganda for the passing of the by-law. There is no evidence, nor has it even been hinted, that, in the performance of his duties as deputy returning officer, Wallace committed any act which could be considered illegal or which would have had the effect of invalidating any vote or votes or frustrating the will of the voters. It is well known that at times persons appointed as deputy returning officers and poll clerks entertain strong views in favour of one or the other side of the question voted on; but I know of no express prohibition against such persons holding such positions. This objection is not sustained.

Objection 4. The facts relied upon in support of this objection are: that three voters were incapacitated from marking their ballots—two, Rusheleau and Trimble, through illiteracy, the other, Pettapiece, by reason of blindness—and that their ballots were marked for them by the deputy returning officer without his requiring them to make the declaration required by sec. 171 of the Consolidated Municipal Act. This objection is fully met by the decision of the Court of Appeal in *Re Ellis and Town of Renfrew*, 23 O.L.R. 427, where it is held not to be a statutory condition precedent to the right of an illiterate person to vote that he should take the declaration required by sec. 171; that the omission to take the declaration is merely an irregularity in the mode of receiving the vote, and so covered by the curative clause of the statute, sec. 204. The reasons for the conclusions arrived at by the majority of the Court in that case are set out in the judgments of Garrow and Magee, JJ.A., and deal with declarations both of illiterate persons and of those incapacitated through blindness.

Objection 3. To affect the general result of the vote, it is necessary that at least 4 of the 483 votes allowed by the County Court Judge should be disallowed; or, in other words, that the total vote of 483 be reduced to 479 or less. The disallowance of the votes of Dalglish and McQuaig here objected to would not alter the general result. Notwithstanding this, however, I express the opinion that the objection cannot be sustained. The ground of objection is, that the procedure prescribed by

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the Voters' Lists Act, 7 Edw. VII. ch. 4, to be adopted in adding names to the list, was not followed. It is not contended that, apart from non-compliance with the terms of the Act in that respect, Dalglish and McQuaig were not persons who were then entitled to have their names on the list as voters. Their names not appearing on the original list, an application was made to the Judge of the County Court to have them added, and they were so added by him, after which he certified to the revised list, as required by sec. 21 of the Act. I do not think I am required to go behind this certificate and examine into the sufficiency of the various steps by which the Judge arrived at his results: *Re Ryan and Village of Alliston* (1910-11), 21 O.L.R. 582, 22 O.L.R. 200, 1 O.W.N. 1116, 2 O.W.N. 161, 841; 7 Edw. VII. ch. 4, sec. 24.

The applicant, on all grounds, fails, and the motion is dismissed with costs, such costs to include only one counsel fee.

Motion dismissed.

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May 2.

Re SHELLY.

Alberta Supreme Court, Walsh, J. May 2, 1913.

1. MUNICIPAL CORPORATIONS (§ II C 2—59)—HEALTH BY-LAW—FUTURE DATE FOR GIVING EFFECT.

A by-law passed by a municipality as a provision of public health may legally provide that it shall not become effective until the beginning of the next year after the one in which it was enacted.

2. BAKERS (§ I—5)—HEALTH REGULATIONS—WRAPPING BREAD FOR DELIVERY.

A municipal by-law compelling the delivery of bread by bakers and shopkeepers in enclosed containers or wrappers is not unreasonable so as to invalidate the same by reason of the fact that compliance with the by-law involves additional expense to the sellers.

3. CONSTITUTIONAL LAW (§ II C—502)—HEALTH REGULATIONS—TRADE AND COMMERCE—RESTRICTIONS

If the aim of a municipal by-law be to provide for the public health as authorized by provincial legislation, the mere fact that it incidentally affects the mode in which persons engaged in trade and commerce shall supply containers or wrappings for certain classes of goods does not make the subject matter one of "trade and commerce" exclusively under federal jurisdiction under the British North America Act.

4. MUNICIPAL CORPORATIONS (§ II C 3—108)—REGULATION OF BUSINESS—SALE OF BREAD.

A municipal by-law making it compulsory for bakers to deliver bread in wrappers intended to keep it clean is, on its face, a health by-law within the terms of a city charter empowering the municipality to pass by-laws "for providing for the health of the city and against the spreading of contagious or infectious diseases."

Statement

AN application for a certiorari to remove the conviction for a violation of a by-law of the city of Calgary.

The application was dismissed.

M. B. Peacock, for motion.
D. S. Moffatt, contra.

WALSH, J.:—The applicant having been convicted by the police magistrate of a breach of by-law No. 1377 of the city of Calgary applies for a certiorari to remove the conviction with a view to having it quashed. This by-law amends by-law No. 821 which deals with health matters by adding to it the following section:—

11-B. No person shall deliver bread to any person or at any place within the city of Calgary unless such bread before it leaves any bakery, shop or place has been completely and securely enclosed and is, thereafter so kept enclosed until delivered in some enclosed envelope or covering of such material and in such manner as effectually to protect such bread from dirt, dust and flies. And the chief of police or any officer of the Board of Health of said city is hereby authorized and empowered at any time to inspect such bakeries, shops, and places and baker's carts or other conveyances or means of conveyance used for the conveying or carrying of such bread for the purpose of ascertaining whether the provisions of this section are being observed.

The provisions of this amendment shall come into force on the first day of January, 1915.

Several grounds were taken in the material filed upon this application in support of the contention that this by-law is *ultra vires* of the corporation and that the applicant's conviction based upon it is bad. Some of these were abandoned on the argument and others were not pressed. I will deal simply with those which were argued before me.

It was objected that the by-law is bad because, although it was passed in the year 1912, it did not become effective until 1913. No argument was made and no authority was cited in support of this contention. The proposition was baldly stated as I have put it above and I will dispose of it with equal brevity. In my opinion there is nothing in it.

It is urged that the by-law deals with matters relating to trade and commerce and that the city is by this legislation entering upon the domain of Dominion legislation. No authority was quoted to me in support of this argument. The by-law was passed under sec. 117 sub-sec. 19 of the city charter which gives the city power to pass by-laws "for providing for the health of the city and against the spreading of contagious or infectious diseases." The right of the legislature to confer this power upon the city is not questioned. If the aim of the by-law is as it purports to be to provide for the health of the city, the mere fact that it applies to men who are engaged in trade and commerce and that it incidentally affects their business cannot without more make it a by-law relating to trade and commerce.

It is said that the by-law is unreasonable and therefore invalid. This argument rests entirely upon the question of ex-

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pense. The mere fact that those who will be obliged to conform to the by-law will thereby be put to greater expense than would be the case if they were not obliged to wrap their bread can surely not constitute a sound argument that the by-law is unreasonable. If so, it must follow that no municipal enactment can be lawfully passed which involves those affected by it in any measure of expense.

It is contended that the onus is upon the city of shewing that this measure is really designed to protect the health of the citizens and is calculated to achieve that result. I do not think that this point is well taken. It surely needs no evidence to satisfy any intelligent man that a by-law which aims to protect bread from dirt and contamination is one which relates to a matter pertaining to the health of the citizens. As to whether or not the discretion of the council was wisely exercised in the passing of the by-law it is not necessary that I should express an opinion. The discretion to be exercised was that of the council and I cannot, even if I would, substitute mine for it. Upon its face it clearly is a health by-law and that I think meets this objection.

It is said that the evidence discloses that on the day on which the applicant is charged with a breach of this by-law no dirt or dust was in the air and no flies were hovering around, so that there was no need to wrap the bread to protect it from these enemies of the public health. That, however, is quite beside the question for the by-law does not say that bread is only to be wrapped upon occasions when the presence of dirt, dust or flies may make it unsafe for delivery in an unwrapped condition.

The argument is made that the by-law discriminates in this, that it only applies to bread delivered elsewhere than in a shop and it is only those who so deliver it as distinguished from those who sell and deliver it over the counter that are within it. I do not think that this is so. In my opinion a loaf of bread handed to a customer in a shop must under this by-law be wrapped in the same manner as a loaf which the delivery man leaves at the customer's house.

I have considered all of these objections although I am not sure that they are all open to the applicant on such a motion as this. As in my opinion, they all fail, I have not concerned myself with the question as to whether or not they are properly raised here or could only be urged on a motion to quash the by-law. Some objection was taken to rulings of the police magistrate rejecting evidence offered by the applicant, but I do not think that I can here review the decisions of the magistrate in this respect.

The motion is dismissed with costs.

Application dismissed.

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Nov. 30.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. November 30, 1912.

1. EVIDENCE (§ VIII—674)—CONFESSIONS—PROOF THAT VOLUNTARY—INDUCING FELLOW PRISONER TO ELICIT STATEMENT.

The admissibility of a confession in a criminal case is to be determined by the evidence given at the trial, and where a confession had been admitted in evidence as not having been shewn to have been induced by a person in authority upon the facts then deposed to, and an application after conviction for leave to appeal upon the question of law under Crim. Code, 1906, sec. 1015, will not be granted upon the ground, supported by affidavits, that the fellow prisoner who testified to the confession by the accused had been induced to obtain the confession by a detective acting in the interests of the prosecution but not present when the confession was made.

2. EVIDENCE (§ XII L—986)—WEIGHT—CRIMINAL CASES—CONFESSIONS.

While the matter of a confession in a criminal case should go as a whole to the jury, it is within the province of the jury to accept a part of it and discredit other parts.

3. TRIAL (§ III E—260)—CRIMINAL CASE—INSTRUCTION AS TO EXCULPATORY ADMISSIONS.

In instructing the jury on a criminal trial the Judge may properly direct the jury that it is for them to credit or not the exculpatory part of the story given by the accused in an implicating admission made to a fellow prisoner in the gaol, if the jury consider it not to be plausible and that it is open to them at the same time to credit other portions of the admissions if they see fit.

4. HOMICIDE (§ III A—21)—EXCUSE—DURESS AND COMPULSION.

Compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence, does not in point of law acquit of the crime the party so under compulsion to assist in a murder, where no actual physical force is exercised upon the person of the compelled party, nor is the nature of the offence thereby reduced; so, where matter relied upon as a confession of the accused included an exculpatory statement by him that he had been forced by an alleged third party to hand over a razor to him, with which then and there to cut the throat of the murdered person under a threat by the third party that if the accused did not give up the razor the third party would forthwith shoot the accused, and that the noise of the shooting would bring the police, it is not error for the trial Judge to instruct the jury that such part of the prisoner's story, even if believed, formed no excuse in law and that his participation would make him an accessory liable as for the principal offence under sec. 69 of the Crim. Code, 1906.

5. CRIMINAL LAW (§ I F—28)—COMPULSION AS DEFENCE.

Compulsion is not a defence when the crime is of a heinous character unless the compulsory act is such as to make the accused person a mere inert physical instrument; the making of threats of immediate death or grievous bodily harm to be inflicted upon the accused should he fail to immediately comply with the direction to commit or participate in committing a heinous crime, *ex. gr.* murder, does not constitute an excuse in law.

Statement

MOTION by the defendant for leave to reserve certain questions for the decision of the Court.

The motion was dismissed.

Alban Germain, for the applicant.

J. C. Walsh, K.C., for the Crown.

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The judgment of the Court was delivered by

CROSS, J.:—This is a motion by the defendant praying that five questions be reserved for the opinion and decision of this Court. One of the questions was not insisted upon at the hearing. The first of the four questions which it is now argued should be reserved may be summarized as follows:—

1st. Was there error of law in the Judge's direction to the jury, that, even if the prisoner, in handing to another man named Pardillo the knife which was used to kill the deceased, so handed the knife to Pardillo upon threat of the latter to kill the prisoner if he did not give up the knife, it would still be murder on the part of the prisoner?

It is not alleged and it does not appear that any objection to the learned Judge's summing up was made before verdict. The circumstance in respect of which the learned Judge was speaking when he made the observations which are now said to constitute a misdirection came about in this way. Proof had been made of the finding of clothing belonging to Hotte (the man who was killed) in the prisoner's valise at his boarding place. In cross-examination of the constables who gave evidence to that effect, they were pressed to say who had told them that Hotte's clothes were in the prisoner's valise, and one of them gave the name of Battista, at the time a prisoner in the jail, as that of the person who told about the clothes. Battista was thereupon brought forward as a Crown witness and testified of conversations which he had had in the jail corridor with the prisoner wherein the prisoner told him of having been in the company of a big Italian, Pardillo, of Pardillo having asked him if he had a razor, of having asked him for the razor and of its being given to him to kill a man, and of Pardillo having thereupon in his presence knocked the man down and cut his throat with the razor, and of Pardillo having taken the dead man's valise, and told the prisoner to come later and take it to his boarding place. Thereupon, in cross-examination, the witness Battista, in answer to questions, testified that in asking for the razor Pardillo told him that if he did not give it up he (Pardillo) would shoot him and that the revolver shot would make a noise and attract the police. He also testified that the prisoner said that Pardillo commanded him to take charge of Hotte's valise, saying that he, Pardillo, would come for it on the morrow. I have made this reference to the facts merely to indicate in what relation the learned Judge was speaking when he made use of the expressions to which I shall presently refer.

It is, of course, true that instructions to a jury upon matters of law must be free from error no matter what the particular facts may be, but it is equally true that the purport of particular words and sentences made use of by the Judge must de-

pend to some extent upon what he is speaking about. The observations made by the learned Judge to which exception is now taken before this Court followed upon certain comments upon the exculpatory matter found in the statements of the prisoner to Battista. The jury were told that it was for them to accept or discard this exculpatory matter if they found it to be plausible or not plausible. Thereupon the learned Judge proceeded to say:—

Je vais plus loin que cela. Même si on prend l'histoire telle que racontée par le prisonnier à Battista, si c'est vrai que c'est un grand Italien qui a coupé le cou de Hotte—le prisonnier, dans sa confession à Battista, a dit qu'il avait donné le rasoir au grand Italien; après cela que le grand Italien a dit: "C'est pour tuer le défunt Hotte—c'est-à-dire que le prisonnier à la barre, suivant sa confession faite à Battista, a donné son rasoir au grand Italien, sachant que le grand Italien allait commettre un meurtre avec son rasoir. Il a fourni l'instrument de mort au grand Italien, suivant sa propre confession racontée à Battista. Il a fourni le rasoir lui-même, l'instrument qui a causé la mort.

Celui qui aide à commettre un crime, celui qui fournit le couteau ou qui, sciemment, sachant qu'une personne qui va commettre le meurtre, est coupable, est responsable comme s'il l'avait fait lui-même.

Même si nous acceptons l'histoire racontée par le prisonnier à Battista, le prisonnier à la barre est encore responsable du meurtre, suivant notre loi.

L'article 69 de notre Code dit que celui qui est présent pour aider, pour encourager une personne à commettre un crime, est coupable comme principal. S'il prend part dans le meurtre, il est responsable.

Même si nous acceptons l'histoire racontée par le prisonnier comme vraie, le prisonnier est encore responsable du meurtre.

C'est une question de droit, je crois. Vous êtes obligés, d'accepter mon opinion; elle est basée sur notre loi. L'article 69 dit qu'une personne qui encourage quelqu'un dans un crime est elle-même responsable de ce crime-là. C'est celà que je dis au prisonnier.

Si vous trouvez l'histoire du prisonnier invraisemblable—et c'est mon opinion—vous devez la mettre de côté. Si vous trouvez son histoire vraie dans ce cas, le prisonnier a fourni un instrument pour commettre un meurtre.

Quelle excuse a-t-il? Pas d'excuse. Personne n'a le droit de commettre un meurtre, même s'il est menacé de mort par l'autre. Ce n'est pas une excuse.

Pourquoi n'a-t-il pas défendu le défunt Hotte? Pourquoi n'a-t-il pas dénoncé le grand Italien, ce nommé Pardillo? Il dit qu'il avait peur d'être tué par Pardillo. Vous jugerez s'il était en danger d'être tué. Même s'il etait en danger d'être tué, il n'avait pas de droit de fournir le moyen de commettre un meurtre.

Do these observations constitute misdirection? At the outset, it is important to observe that the case is not presented as one of those cases of self-defence or repulse of force by force wherein the aggressor has been killed, cases much more fre-

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quently met with in practice. The question raised by this motion upon the Judge's charge is whether or not the giving of a weapon to be used forthwith in the killing of a third person is in law murder if the weapon be given up in answer to the threat "if you do not give it to me, I will shoot you and the noise of the shooting will attract the police." It is upon the answer to be given to that question that we have to decide whether there has been misdirection or not.

Section 20 of the Code gives the rule as follows:—

> Except, as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats, and who believes such threats will be executed, . . . of any offence other than treason as defined by this Act, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm and arson.

That, in substance, is a rule which leaves it to be inferred that the killing of a man under compulsion of threats is murder. It is declared in section 69 that:—

> Everyone is a party to, and guilty of an offence who:—
> (*a*) Actually commits it; or,
> (*b*) Does or omits an act for the purpose of aiding any person to commit the offence.

Upon the subjection of section 20, it is said in note A of the royal commissioners upon codification of the criminal law (p. 43) that:—

> There can be no doubt that a man is entitled to preserve his own life and limb; and, on this ground, he may justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not one of a heinous character. But killing an innocent person, according to Lord Hale, can never be justified. He lays down the stern rule: "If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself than kill an innocent man."

The commissioners pointed out that that stern rule appeared to have been relaxed in the high treason cases, in 1746, but they conclude by saying:—

> We have framed section 23 of the draft code (66) to express what we think is the existing law, and what at all events we suggest ought to be the law.

That must mean, I take it, that the view of Lord Hale has received the approval of the high authority of the English com-

missioners upon whose report our code is based. Hence the rule of section 20. It does not follow that compulsion is never an excuse for killing, but the compulsion must be such as to make the accused person a mere inert physical instrument. Thus it is said in Russell (Can. ed.), p. 90:—

> Persons are properly excused from those acts which are not done of their own free will, but in subjection to the power of others. Actual physical force upon the person and present fear of death may in some cases excuse a criminal act. . . . Thus, if A. by force takes the arm of B. in which is a weapon, and therewith kills C., A. is guilty of murder, but B. is not; but if it is only a moral force put upon B. as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. . . . Sir J. Stephen expresses the opinion that in most, if not all cases, the fact of compulsion is matter of mitigation of punishment, and not matter of defence.

The observation is repeated at p. 662 of the same work in the part treating of homicide. The same opinion in substance is to be found expressed in Halsbury's Laws of England, vol. 9, 243.

Now, bearing in mind that in the proof of the so-called confession which the learned trial Judge and the jury had before them, the only ingredient of compulsion is what is brought out in the cross-examination to the effect that Pardillo said he would shoot the prisoner if he did not give up the razor and the qualification that the revolver shot would make a noise and attract the police, it is clear that the trial Judge could conclude that there was no case of such compulsion as could constitute an excuse, and thereupon was within the rule of section 20 of the Code in saying in substance to the jury:—

> The prisoner could have resisted or could have run away, and, taking the confession as it stands, my direction is it shews that the prisoner is guilty of murder.

There was, therefore, no misdirection in the sense asserted in the first question sought to be reserved.

The next of the questions proposed to be reserved is formulated thus:—

> L'honorable juge n'a-t-il pas erré dans ses commentaires sur la confession du prisonnier à Battista?

In view of what I have felt it necessary to say of the purport of the confession and of the proceedings by which it came to be put in evidence at the trial as also of the fact that the subject will have to be again adverted to upon another of the questions, it is unnecessary to treat of this question further than to say that it is well established that while the matter of a confession should go as a whole to the jury, it is within the province of the jury to accept part of it and to reject part of it. Our law is in accord with English law on that point. Reference may

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be made to Archbold (23rd ed.) p. 338, and to the cases there cited. In this case, the jury were left free so to treat the confession.

A third one of the four questions puts forward the contention that the confession made to Battista was not voluntary because of having been induced by a person in authority. The substance of the argument is that Battista in obtaining the confession was instigated by detective Pusie, that the confession was in effect procured by Pusie and was consequently procured by a person in authority. It is not contended that this ground was taken at the trial, nor was the fact of any conversation between Battista and the detective anterior to the confession proved, but the affidavit of Battista is now placed before us and is to the effect that he consented, at the request of constable Pusie, to try to procure the confession from Farduto; that Pusie promised in return to help to have him acquitted of the murder charged against him (Battista) and that he told Farduto to confess to an Italian detective, namely, Pusie, and it would help him. He had testified at the trial that no promise or threat had been made to him to induce him to testify. It appears that, after certain preliminary questions, the witness Battista was asked what the prisoner had told him that he had been doing on the night of the 29th July, whereupon counsel for the prisoner said:—

> Je m'objecte à cette conversation-là et à tout le témoignage du présent témoin comme illegal.
>
> Par la Cour:
>
> Je ne vois rien dans la loi qui empêche le témoin de donner son témoignage dans ces circonstances-là, je renvoie donc l'objection.
>
> Le procureur de l'accusé s'est objecté au témoignage du présent témoin en alléguant que vu que le dit témoin était à la prison de Montréal sous le coup lui-même d'une accusation grave, qu'il ne pouvait pas dans ces circonstances, rendre un témoignage dans la présente cause en rapportant une conversation qu'il prétend avoir eue avec l'accusé.
>
> L'objection du Procureur de l'accuser étant renvoyée, Mr. Lafortune continue à interroger le témoin comme suit.

No further objection was made and in answer to questions apparently at first directed towards proving that the prisoner had told the witness about Hotte's clothing being in his (the prisoner's) valise, the witness went on to tell (through an interpreter) what turned out to have been a confession by the prisoner.

The matter having been led up to in that way, it is easy to understand why nothing in the nature of preliminary proof of the admissions having been made voluntarily was addressed to the Judge. The evidence was brought out just as any statement by a prisoner or suspected person to another private

person would be proved by making the latter a witness at the trial. He (Battista) told in evidence of having repeatedly conversed with the defendant in jail. He also made the somewhat peculiar statement that the defendant, after having made the disclosures to him, told him that he desired him to be a witness for him at his trial, a statement from which it is difficult to draw any inference. It is said in Archbold, Pleading and Practice (23rd ed.), p. 332, that:—

> It has, however, been long settled that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and that if a person not in any office or authority held out to the accused party an inducement to confess, this will not exclude a confession made to that party.

This, indeed, appears not to be disputed by counsel for the defendant, but it is sought to be shewn by the affidavit produced with the application to this Court that detective Pusie procured Battista to get the defendant to confess and to say to him that he should confess to an Italian detective (Pusie) and that that would help him. We are asked to say that the trial Judge erred in admitting evidence of the confession. But how can we say that, when it is only after verdict and sentence that it is sought to shew that the confession was induced by a person in authority? Irrespective of that difficulty, however, it appears to me that the argument is not sound. While it is accurate to say that:—

> It is immaterial whether the inducement is held out by the person in authority or in his presence without his dissent by a third person,

ib. p. 332, the rule is not the same, if no person in authority be present, and it is laid down that:—

> It is no objection to the admissibility of a confession that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though it were created by artifice with a view to obtain the confession, *ib.* p 334.

The case of *Hope Young*, 10 Can. Cr. Cas. 466, which was cited to us, is one of an admission made to a Crown officer after the making of it had been suggested by a peace officer and the admission was properly held not receivable in evidence. In *Choney's* case (13 Can. Cr. Cas. 289), also cited for the defendant, the question was one of confidential communication to a legal adviser and had to be decided by application of different principles, but, in the reporter's notes, cases are referred to which go to support the view that confessions may be given in evidence even if brought by stratagem.

Upon this question we consider that the learned trial Judge could rightly conclude that the admissions made to Battista were voluntarily made and were admissible in evidence.

The remaining questions sought to be raised involves the

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contention that the instructions of the learned Judge, taken as a whole, were such as to anticipate a particular verdict and to exclude from the consideration of the jury another verdict which could have been rendered. It is admitted by counsel for the defendant, and is in fact shewn by the charge, that the jurymen were told that they need not accept the opinions of the Judge upon questions of fact, but it is argued that the effect of that statement was destroyed by what the learned Judge subsequently said and that the effect upon the jury was to lead them to take such a view of the facts as to bring out a verdict of guilty of murder. In so far as there is anything specific about it, the contention is that it was not left open to the jury to find a verdict of guilty of manslaughter. An objection of this nature, made to the charge as a whole, makes it opportune to refer to the trial-proceedings at greater length than was necessary in treating of the other questions proposed by the motion and already considered. It is conceivable that cases may arise wherein it may not be possible for the defendant to make a well-founded specific objection to the directions or charge of the trial Judge, but wherein it would nevertheless be right for an appellate Court to order a new trial if, viewing the charge as a whole, it was not satisfied that justice had been done. The circumstances of this case may accordingly be looked at in order to see if the charge is such as leaves it open to that general objection, and at the same time to see if the objection, as to exclusion of consideration of the case as one of manslaughter, is well founded or not. In this case, until after about twenty-eight witnesses had been examined, the cross-examination of the Crown witnesses tended to shew that the reliance of the defence was upon the absence of any evidence sufficient to connect the prisoner with the death of Hotte, and upon a suggestion that it was reasonable to conclude that Hotte had committed suicide while in a state of alcoholic delirium. It was towards the close of the case for the prosecution that the enquiry was started by counsel for the prisoner in cross-examination of two detectives, as to who had told about Hotte's clothes being in the prisoner's valise. Battista being indicated as the source of this information, it was for the Crown to bring out all the material facts whether favourable to its case or not. Hence the examination of Battista as a witness, and the statement of the prisoner disclosed in his testimony as above pointed out. This occurrence, which developed in the closing stages of the enquete, at one and the same time seriously affected the grounds of defence till then relied upon, and introduced the subject of admissions or confessions. The case for the prosecution having been rested, no witnesses were brought forward on the prisoner's behalf.

Now, turning to the learned Judge's charge, it is seen to

have proceeded as follows: At the outset, it is pointed out to the jury that they are the Judges of the facts, but must accept the Judge's views as to the law. Next, the jurors are told that they must not rest upon doubtful evidence, but are to give the prisoner the benefit of any reasonable doubt. Next, there is a definition of murder and a distinction between murder, manslaughter and excusable homicide, in the course of which it is said:—

> S'il a tué un homme sans provocation suffisante, il doit être trouvé coupable du crime de manslaughter ou d'homicide involontaire. Dans cete cause, je ne crois pas qu'il soit question d'homicide involontaire. Le prisonnier est ou coupable de meurtre, ou il n'est pas coupable du tout. Vous devez décider cette question là suivant la preuve. Quelle est la preuve? La seule question est celle de savoir, s'il y a eu un meurtre de commis et si le prisonnier est responsable de ce meurtre.

Next, it is pointed out that the case was clearly not one of suicide, but that Hotte was killed by somebody other than himself, and the proof made by the surgeons and the prisoner's statements to Battista are referred to in proof. Next, there is a discussion upon the question whether Hotte was killed by the prisoner or by a stranger, and comment is made upon the confession and, as already pointed out, the jury are told that they may accept part and discard part of the confession, accept what they consider to be the truth and discard falsehood. Next, there is comment upon the improbability of the story that it was a stranger, un gros Italien—Pardillo—who killed Hotte, and upon the fact that nobody appears to have seen the "gros Italien" and that no witness has come forward to say anything about him. Next, there is the passage already quoted about the responsibility of the prisoner in the case of it being admitted that his razor was used by another to kill Hotte. Next, it is pointed out how strikingly the details narrated by Battista fit in with facts testified to by other witnesses in relation to such facts as the locality, the time, the buying of bottles of beer and the disposal of Hotte's clothing. Concluding, the learned Judge reminds the jurors that they have heard the proof, that he need not review it at length, but has referred to what he regarded as important in it, that though Battista is himself under a capital charge his testimony may be believed and that it seems to him that, no matter what view they take of the whole story, the prisoner is responsible, but that if they have reasonable doubts in the matter, if they think it possible that the prisoner may be innocent, it is their duty and their right to acquit him.

As to what a Judge should or should not say to a jury in summing up, it is not practicable to state the rules. It would appear that long ago there was a practice of Judges taking up the evidence of one witness after another following their notes

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and repeating or commenting upon it to the jury. Modern practice is different. It is even said that in *R.* v. *Mayer* (1909), L.J. Weekly 395, tried in England in 1909, the Judge's charge to the jury consisted of the words: "On these facts, gentlemen, I ask you to find a verdict of guilty." In the work of Bowen-Rowlands "Proceedings on Indictment," etc. (2nd ed.), at p. 256 it is said:—

> It is the duty of a Judge in summing up to point out to the jury the salient facts of the case, and he must be careful to confine himself to proved facts, for, if he treats as proved facts which have not been proved, a resulting conviction will be quashed on appeal. He must direct the jury as to the law applicable to the case and instruct them properly as to its application to the proved facts. If he fails to do so, a resulting conviction will be set aside, provided that the misdirection has caused a substantial miscarriage of justice. If, however, there has been a misdirection without consequent substantial miscarriage of justice, that is, where the proved facts are consistent only with guilt, the conviction will be upheld.

As authorities for these propositions the writer cites: *R.* v. *Coleman*, 72 J. P. 425; *R.* v. *Joyce*, 72 J. P. 483; *R.* v. *Stoddart*, 73 J. P. 348; *R.* v. *Cohen*, 73 J. P. 352; *R.* v. *Dyson*, [1908] 2 K.B. 454.

It may be added that whether it is or is not necessary that the Judge should give direction upon a matter of law, may depend upon whether the defence has been so conducted as to make that matter an important one to the defence or merely a secondary issue, and in the latter case a direction upon it is unnecessary. *Rex* v. *May*, 29 Times L.R. 24.

In the present case, the learned Judge and the jury had before them a narrative of an admission, the exculpatory part of which was incredible and could not hold with the incriminating part. In the circumstances he was warranted in law in saying to the jury in effect: "In my view this is not a case of manslaughter, but a case of murder or nothing; the prisoner is either guilty of murder or is not guilty of anything." I consider that taking the charge as a whole, the learned Judge did not go as far as that, because he explained that there might be a verdict of murder or one of manslaughter or a verdict of not guilty.

Then, as to the general purport of the charge, it is true that the remarks of the learned Judge upon the subject of defence of compulsion and these upon the bearing of section 69 gave the case an aspect unfavourable to the defendant, but we have already seen that in these respects his deductions and directions were warranted by the law. We do not overlook the fact that all that is before us at present is a motion for leave to appeal and to have the questions reserved, but, as has been seen, three of the suggested questions turn upon the Judge's summing up

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and the other one relates to the admissibility of evidence of a confession.

Upon all the questions, we have before us the same materials which would come before us if the questions were to be reserved. We, therefore, express our opinion and decision now. It is our unanimous conclusion that the defendant does not make out a case to obtain leave to appeal. The motion is dismissed.

Leave to appeal refused.

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CHESLEY v. BENNER et al.

(Decision No. 2.)

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Drysdale, JJ. March 3, 1913.

1. JUDGMENT (§ I F—45)—ENTRY—RECORD—ORDER FOR LEAVE TO ENTER—PERIOD AFTER JUDGMENT, HOW COMPUTED.

Under Order 46, rule 1, of the rules of the Supreme Court of Nova Scotia providing for an order of arrest in certain actions and that the defendant be imprisoned until final judgment in the action and for thirty days thereafter, if the final judgment is against him, and further providing that within thirty days after final judgment an order may be made under the Collection Act for his appearance at a further examination, the period of thirty days in which such order may be obtained runs from the time of the entry of the judgment and not from the time of the order for leave to enter judgment.

[*Chesley* v. *Benner*, 8 D.L.R. 625, affirmed.]

2. JUDGMENT (§ I F—45) — ENTRY — RECORD — ORDER FOR JUDGMENT, EFFECT OF.

An order obtained under Order 14, rule 1 (*a*), of the Rules of the Supreme Court of Nova Scotia for leave to enter final judgment, is not in itself a "final judgment" though it is a final order deciding the rights of the parties and one from which an appeal may be taken.

[*Chesley* v. *Benner*, 8 D.L.R. 625, affirmed.]

3. JUDGMENT (§ I F—45)—ENTRY—RECORD—LAST JUDICIAL ACT—JUDICIAL ORDER—CLERK'S INSCRIPTION.

Where an order is obtained under Nova Scotia Order 14, rule 1 (*a*), to enter summary judgment upon affidavits when no defence is shewn to send the case for trial, the "final judgment" in the action takes place on the date of entering the judgment and not upon a prior date when the order was pronounced.

[*Re Debtor*, 19 Times L.R. 1521; *Standard Discount Co.* v. *Otard de la Grange*, 3 C.P.D. 67; *Re Garney*, [1896] 2 Ch. 863, applied.]

Statement

PLAINTIFF brought an action against the defendant Benner, December 4, 1911, in which he sought to recover the amount of a promissory note made by the defendant to plaintiff. Subsequently, on an affidavit made by plaintiff, an order was issued by a Commissioner of the Supreme Court for defendant's arrest and detention unless he should deposit in Court the amount of plaintiff's claim, with an additional amount for costs, or should execute a bond with two sufficient sureties for his appearance for examination under the Collection Act within 30 days

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after final judgment and would surrender himself to prison in case of an adjudication of imprisonment.

This was an action against defendant and his sureties on the bond given to obtain his release from arrest. The defence was that on December 22, 1911, final judgment was obtained in the action on the writ of summons mentioned, by order of the Hon. Mr. Justice Drysdale, and that although the defendant Benner was continuously in the town of Amherst from such date to January 29, 1912, no order for his appearance for examination was served until long after the period of 30 days mentioned in the condition of the bond had expired and defendants were therefore released and discharged from said bond and the obligations therein mentioned.

The case now came up on appeal from the judgment of Ritchie, J., *Chesley* v. *Benner* (No. 1), 8 D.L.R. 625.

The appeal was dismissed with costs.

L. Ralston, for the plaintiff.

C. R. Smith, K.C., for defendants.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—The bail bond on arrest upon which this action is brought contained the usual provision that (if within thirty days after "final judgment" in the original action an order is made under the Collection Act for the appearance of the said George W. Benner at an examination to be held thereunder, and the said order has been served at least thirty days before the time fixed in the order for his appearance, then he will appear at such examination, etc., and will surrender himself to prison in case of an adjudication of imprisonment) the bond shall be void.

The defendant contended that the order for examination under the Collection Act was not made within thirty days after final judgment in that action. That depends upon whether the time ran from the date of the order for leave to sign judgment under Order 14, on it being shewn by affidavit that there could be no defence, or from the date of entering the judgment. That is to say, which of these is the final judgment? If the first one is the final judgment the order was not in time in order to bind the sureties on the bond. But if the other was the final judgment then it was made in time, and, the defendant in that action not having attended for the examination, the sureties are liable. As a fact, in the original action, the order for judgment was made December 22, 1911, and the judgment was entered January 5, 1912.

I was disposed to think at the hearing that the order for leave to sign judgment must be the final judgment because, after that, no Court or Judge pronounces any express judgment.

The entry of judgment is ministerial, not judicial. But the English authorities on this Order 14 are the other way: *Re Debtor*, 19 Times L.R. 152; *Standard Discount Co.* v. *Otard de la Grange*, 3 C.P.D. 67; *Re Gurney*, [1896] 2 Ch. 863.

After the order for leave to sign judgment is made there is another judgment, though not pronounced by any Court or Judge. It is like the judgment which is entered by the proper officer when there is a default for want of an appearance or a statement of defence.

The forms in the Appendix to the Judicature Rules, taken from the English forms, explain the English decisions on the rules. Appendix K., No. 6, "Order under Order 14":—

> Upon hearing, etc., it is ordered that the plaintiff may sign final judgment in this action for the amount endorsed on the writ with interest, if any . . . and costs to be taxed.

Then Forms of Judgment, Appendix F., No. 5.

> Judgment after appearance and order under Order 14, r. 1.
>
> Heading in the cause. "The . . . day of . . .
>
> The defendant having appeared to the writ of summons herein, and the plaintiff having by the order of . . . obtained leave to sign judgment under Order 14, r. 1, for (recite order).
>
> It is this day adjudged that the plaintiff recover against the defendant $..... and costs to be taxed. The above costs have been taxed and allowed at $.....

The latter is what the English decisions call the final judgment.

The learned counsel for the defendants contends that this carries the case no further, that the final judgment entered up should bear the date of the Judge's order for leave to sign judgment.

But Order 39, rr. 2 and 3, shew that this contention is not tenable. Rule 2 applies to judgments pronounced by the Court or a Judge in Court. Those are to date back. But this being a Judge's order in Chambers comes under Rule 3.

> In all cases within the next preceding rule the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date.

The learned counsel contends that the English decisions should not be held to apply to this exceptional case of imprisonment and security to come up for examination and, because in England this peculiar procedure does not exist there, that it works a hardship. For suppose that no bail is given, the defendant would remain in prison, notwithstanding the order is made for judgment until the plaintiff, long after thirty days, at his own will brings in the documents to the officer and directs judgment to be entered.

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I am disposed to think that Order 44, r. 12, would be construed to apply. There is nothing else but this same rule in England for such an abuse, and the contingency may arise there.

Where a defendant is in custody or has given security on an order to arrest, and the plaintiff may obtain final judgment against him for default of appearance or default of pleading or other default, and fails to do so, the Court or a Judge, unless good cause is shewn to the contrary, shall discharge the defendant, or if he has given security shall release the security.

It could not come up now, but the period between December 22, 1911, and January 5, 1912, when judgment was entered, considering that meanwhile the costs required to be taxed and after notice, would hardly be considered an abuse such as I have indicated. An appeal may have been threatened.

In my opinion the appeal must be dismissed and with costs.

Appeal dismissed.

MAN.
C. A.
1913
March 17.

SPENARD v. RUTLEDGE.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. March 17, 1913.

1. BROKERS (§ II B—12)—REAL ESTATE—COMPENSATION—SUFFICIENCY OF SERVICES—EFFECTIVE CAUSE—BUYER'S FRAUD.

A real estate agent employed to procure a customer, and whose acts in bringing the buyer and seller together were the effective cause of the sale, is entitled to the commission, although the sale was finally completed through another agent whom the prospective customer had brought in under a scheme to deprive the real agent of his commission, the real agent acting promptly in claiming the commission from the seller before it was paid over to the other agent.

[*Stratton* v. *Vachon*, 44 Can. S.C.R. 395, and *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614, applied; *Spenard* v. *Rutledge* (No. 1), 5 D.L.R. 649, reversed. See also Annotation on Real estate agents' commissions, 4 D.L.R. 531.]

2. BROKERS (§ II B—12)—REAL ESTATE — COMPENSATION — NEGOTIATIONS WITHOUT PRINCIPAL'S KNOWLEDGE, WHEN SUFFICIENT.

The right of a real estate agent to commissions for procuring a customer for his principal is not dependent upon the knowledge of the principal that the agent was the means of bringing the parties together, if as a matter of fact the agent was the efficient cause of the sale, and asserted his rights to the commissions promptly. (*Per* Perdue and Cameron, JJ.A.)

[*Stratton* v. *Vachon*, 44 Can. S.C.R. 395, applied; *Spenard* v. *Rutledge* (No. 1), 5 D.L.R. 649, reversed.]

3. BROKERS (§ II A—5)—REAL ESTATE—AUTHORITY—"TO BRING A PURCHASER," CONSTRUED.

In an agreement between an owner of land and an agent employed to procure a customer, the words "to bring a purchaser," or "to produce," or "to introduce," or "find a purchaser," have no real difference in meaning so far as liability of the seller to pay the commission is concerned, if the steps taken by the agent were the efficient cause of bringing the owner into relation with the person who finally became the purchaser.

[*Spenard* v. *Rutledge* (No. 1), 5 D.L.R. 649, reversed.]

4. WITNESSES (§ III—57)—DISCREDITING OWN WITNESS IN EFFECT, WHEN.

Where an adverse witness, whether a party to the action or not, is called to prove a case, but his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit him, but to contradict him on facts material to the issue.

[*Stanley Piano Co.* v. *Thomson*, 32 O.R. 341; *Roberts* v. *Reynolds*, 23 U.C.Q.B. 560; *Ewer* v. *Ambrose*, 3 B. & C. 751; *Greenough* v. *Eccles*, 5 C.B.N.S. 786, referred to; *Spenard* v. *Rutledge* (No. 1), 5 D.L.R. 649, reversed.]

5. WITNESSES (§ III—57)—DISCREDITING OWN WITNESS—ADVERSE IN INTEREST—NOT CONCLUDED, WHEN.

A party at a trial is not concluded by a statement of one of his witnesses brought out on cross-examination, where it appears that the witness, who was opposed in interest to the party calling him, was called merely to establish certain material facts necessary to enable the party calling him to make out a case. (*Per* Perdue, J.A.)

[*Spenard* v. *Rutledge* (No. 1), 5 D.L.R. 649, reversed.]

Statement

APPEAL by the plaintiff from judgment of Prendergast, J., in *Spenard* v. *Rutledge* (No. 1), 5 D.L.R. 649, dismissing action brought to recover a broker's commission.

The appeal was allowed.

A. B. Hudson, for the plaintiff.

W. R. Mulock, K.C., and *J. W. E. Armstrong*, for the defendant.

Howell, C.J.M.

HOWELL, C.J.M.:—I concur with judgment of Haggart, J.A.

Perdue, J.A.

PERDUE, J.A.:—This is an action by a real estate agent against the defendants, who are husband and wife, to recover commission claimed to have been earned on a sale of land. The defendants were the owners of 61½ acres of land, being part of lot 93 in the parish of St. Charles. One evening about 6th April, 1911, the plaintiff and the defendant, R. A. Rutledge, while both were returning home, got into conversation on a street car. The plaintiff enquired of defendant whether his land was for sale and the defendant said he would sell at $500 an acre, $5,000 to be paid in cash and terms to be arranged for the balance. The defendant was willing to pay the usual commission for effecting a sale. The defendant's statement as to this is: "Out of this price I was ready to pay the commission and I did not care who brought me the buyer. The man who would bring me the buyer would get the commission and no other man." The plaintiff then said he would put an advertisement in the papers and look up clients who might be willing to buy.

About 10th April the two met again on the car and the plaintiff shewed Rutledge an advertisement he had inserted in the *Free Press* newspaper offering 60 acres of land in St. Charles for sale. The cash payment of $5,000 was mentioned, but Rutledge claims that the price was incorrectly stated at $300

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per acre. If the price was so stated it was a clerical error, although the copy of the advertisement which appeared in the *Free Press* of 11th April, put in at the trial, appears to shew the price correctly as $500 per acre. Whether it was stated as $300 or $500 per acre in the earlier issue, does not appear to me to affect the question before the Court. Neither the exact location of the land nor the name of the owner was mentioned. Spenard's name and address were mentioned at the foot of the advertisement.

The plaintiff says that on 13th April, in response to a telephone message from Gunn, who shortly afterwards became the purchaser, he gave Gunn a description of the land and Rutledge's name and telephone number, so that he could communicate with Rutledge and arrange the payments for the balance. He further states that on the same day, Thursday, 13th April, he saw Gunn at his office and Gunn said, "Will you come into my office to-morrow morning? I think I will make a deal with you." Spenard says he did not call the next morning, Good Friday morning, as it was too stormy, but that he again saw Gunn on Saturday morning, 15th April, when the latter said to him, "I don't want to see you now." Spenard asked him if he had changed his mind and Gunn said, "No, but we don't require you, I have nothing to say now to you." Gunn denies the telephone conversation and the interview with Spenard on the 13th and 15th April, but in his examination-in-chief Gunn admitted that he saw Spenard in his, Gunn's, office on the 15th.

For reasons which I shall presently point out, I believe the plaintiff's evidence on that point. On Friday, the 14th, one Harper, a real estate agent and a friend of Gunn's, went to St. Charles, as he states, and made enquiries concerning the land and the owner of it. He then saw Rutledge on the same day and arranged a sale of the land to Gunn at $500 an acre, subject to Mrs. Rutledge's approval. On the following day the sale was arranged and a deposit of $500 was paid by Gunn to Rutledge through Harper. On Monday or Tuesday following, Spenard saw Rutledge and was informed by him that he had sold to Gunn. Spenard then told him Gunn was his client and demanded his commission. This the defendant refused to pay. On Tuesday, 18th April, Spenard's solicitors wrote to Rutledge demanding payment of the commission. The sale was duly carried through; and, on 15th May, Rutledge paid Harper $1,500 commission, which was divided between Gunn and Harper.

Harper, in his evidence, states that on Thursday evening, 13th April, Gunn called him up on the telephone and asked him

if he had heard or knew of anything in 93, meaning 93 St. Charles, at $300 per acre. This was what set Harper in motion concerning the land. Now the question at once arises, how did Gunn know the number of the lot unless he had got it from Spenard at the conversation that same day, which Spenard says took place and which Gunn denies? Further, Harper says, "I think he (Gunn) said, 'a man by the name of Spenard is advertising this property at $300 an acre.'" From the foregoing it appears clear to me that Gunn had the conversation with Spenard which Spenard says took place and that he got the description of the land from him. Harper says he had arranged with Gunn that if the deal went through Gunn would get a share of the commission. The sequence of the events and the rapidity with which they followed one another are important. The arrangement as to the commission, by which Gunn was to profit, and did profit, as he admits, to the extent of a half, is a very important element. I have no hesitation in believing Spenard's account of what took place and am convinced that Gunn, after getting the information from Spenard, enlisted Harper's assistance and arranged the scheme by which Spenard should be deprived of his commission and by which it should be diverted into the pockets of Gunn himself and his associate, Harper.

With great respect, I think the learned trial Judge quite overlooked the importance of the portions of Harper's evidence to which I have above referred. I understand that judgment was not given in this case until some eight months had elapsed since the trial. The trial Judge had not the advantage, when making up his judgment, of reading the extended report of the evidence, and he would necessarily have to rely on his notes taken at a period some months prior to making up his reasons for judgment.

The plaintiff had to call Gunn as a witness to prove a part of his case. In cross-examination Gunn denied that he had had any conversation with the plaintiff on the 13th. The learned trial Judge, speaking of the possibility that Gunn may have got his information as to the land from the plaintiff, says:—

> But whatever may be the implication from this fact alone, it cannot avail the plaintiff against the testimony of Gunn, whom, unfortunately for him, the circumstances of his case required that he should call as a witness on his behalf.

Evidently the learned trial Judge took the view that the plaintiff was concluded by Gunn's statements, because he had called him as his witness, even though these statements were brought out in cross-examination and were not elicited by the plaintiff himself. I must, with respect, entirely disagree with

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this conclusion. Gunn was a hostile witness who had, for his own benefit, deprived the plaintiff of the commission and who was anxious to justify himself in what he had done: In *Stanley Piano Co.* v. *Thomson*, 32 O.R. 341, where the point is fully discussed and the authorities collected, it was held that where a witness, whether a party to the action or not, is called to prove a case and his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit him, but to contradict him on facts material to the issue.

For the reasons I have above given, I think the plaintiff's version of the facts is the correct one. With the facts as he gives them established, his acts brought the buyer and seller together and were the effective cause of the sale. This principle was settled in *Green* v. *Bartlett*, 14 C.B.N.S. 681, and *Mansell* v. *Clements*, L.R. 9 C.P. 139, and recently affirmed in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited*, [1910] A.C. 614, and *Stratton* v. *Vachon*, 44 Can. S.C.R. 395.

Nothing turns upon the words "bring me a buyer" which the defendant so strongly insists that he used. To bring a purchaser, or to produce, or introduce, or find a purchaser, have no real difference in meaning so far as the liability of the seller to pay a commission is concerned, if the agent actually brings buyer and seller together.

The plaintiff acted with the utmost promptness in claiming the commission from the defendant before the latter had paid it to Harper. Although, as Sir Louis Davies has pointed out in *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, knowledge on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay commission, the defendant had full knowledge within a day or two after the deposit was made and long before the sale was formally completed.

I think the appeal should be allowed with costs, the judgment in the Court of King's Bench reversed, and judgment entered for the plaintiff for $793.75, and costs of suit.

Cameron, J.A.

CAMERON, J.A.:—Gunn, the purchaser, first received his information that the property in question was for sale through an advertisement (not giving the name of the owner or specifying the number of the lot) in the *Free Press* newspaper, which was inserted by the plaintiff over his signature. As a result of this Gunn called up the plaintiff at his office on the telephone and, the plaintiff not being in, left a message giving his own number. This was on April 12. Gunn says he had no conversation, telephone or otherwise, with the plaintiff until April 15.

According to Harper, Gunn, on April 13, called him up on the telephone and asked him if he "had heard or knew anything

in 93 at $300 per acre." Harper went out the following day and saw Mr. Ness, the secretary of the municipality, and ascertained from him the name of the owner of lot 93. In the course of that day Harper saw Rutledge and finally tendered a cheque for the deposit, which Rutledge would not accept without consulting his wife. The next morning Rutledge accepted the cheque and gave Harper a receipt.

Harper says that Gunn told him, "A man by the name of Spenard is advertising this property at $300 an acre." Harper did not consult the plaintiff, who was advertising the property, but went to Mr. Ness and, ultimately, directly to the owner. That he made no attempt to put himself in touch with Spenard leaves him open to the suspicion that his plan of operations was adopted for the express purpose of avoiding too great a sub-division of the commission on the transaction, and that the original suggestion with reference to this course came from Gunn, who, in the result, received apparently one-half of it.

I must say that Gunn's evidence is not wholly satisfactory. He is uncertain on several material points, and if he did not get the number of the lot from Spenard he should have disclosed the source of his information. The fact that Gunn had the knowledge is a corroboration of Spenard's story, and he certainly did not linger long before he took action in accordance with what he states actually occurred.

There is no question that the advertisement inserted by the plaintiff was the cause of Gunn's ultimate introduction to the vendor. The mistake of $300 for $500 in the advertisement as it originally appeared is entirely immaterial. It is true that Rutledge may not have known of the plaintiff's connection with the sale to Gunn. But such knowledge is no test of the agent's right to a commission, and the agent here certainly lost no time in asserting his rights. It appears to me that the instructive judgments in *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, dispose of this case.

Had some person outside this transaction altogether noticed the advertisement and mentioned it casually to Gunn, who had thereupon instituted inquiries through Harper, who had finally discovered the number and owner of the lot, then the case might be different, and come within the principle of the decision in *Imrie* v. *Wilson*, 3 D.L.R. 826, 21 O.W.R. 964. It might well be held that in such a case Spenard was a cause of the introduction of the purchaser, in truth a *causa sine qua non*, but not the effective cause or *causa causans*, and therefore not entitled to recover. Such a transaction might easily be viewed as a new and independent transaction. I would allow the appeal and give the agent his commission.

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HAGGART, J.A.:—I accept the finding of facts of the trial Judge as proved in the evidence, but with all due respect, I do not agree with some of his conclusions.

Counsel for the respondent says the agreement was to "bring" a purchaser, the meaning of which, he contended, was to put the proposed buyer in personal contact with the vendors. Lord Bramwell says: "The expression, 'If you can find a purchaser,' may be explained as meaning, if you can introduce a purchaser to myself or can introduce a purchaser to the premises, or call the premises to the notice of the purchaser": *Wilkinson* v. *Alston*, 48 L.J.Q.B. 733, 744. I believe the parties really meant the getting, finding or procuring or bringing someone who should subsequently become the buyer. This is not a serious objection.

The defendant further takes the ground that the plaintiff having called Robert R. Gunn, the purchaser, as a witness, is bound by his evidence, and that such evidence disproves the plaintiff's case.

There is no doubt that Gunn is an adverse witness. He contradicts the plaintiff in certain material facts. The question as to how far a party is bound by such a witness was considered in *Stanley Piano Co.* v. *Thomson*, 32 O.R. 341. It is a judgment of the Divisional Court, and the principle established is:—

> Though one called as a witness (party or not) may disprove the case of the plaintiff calling him, yet that case may be established by other witnesses called not to discredit the first, but to contradict him on facts material to the issue.

This is the substance of Chancellor Boyd's decision, and Ferguson, J., at 349, says:—

> It seems to me that the plaintiff had the right, without any ruling or leave of the trial Judge to go on and give his evidence though such evidence, being as it was, relevant to the issue, should contradict the evidence already given by him and even though it would incidentally have the effect of discrediting his former witness. What the plaintiff wanted to do was simply to give more relevant evidence. I am of opinion that the law entitled him to do this, and I have not found any decision that forbids him so doing.

See *Roberts* v. *Reynolds*, 23 U.C.Q.B. 560; *Ewer* v. *Ambrose*, 3 B. & C. 751; *Greenough* v. *Eccles*, 5 C.B.N.S. 786, 802; Odgers, Law of Evidence, 705(*d*).

If we believe the plaintiff, it is clear how the defendant and Gunn came together and in considering the contradictory evidence, I think, in order to displace the effect of the plaintiff's evidence, it was for the defendant to shew how Gunn was introduced to the defendant, whose identity was known in the earlier stages of the transaction only to the plaintiff, or how Gunn was introduced to the land whose description was known only to the

plaintiff. Where did Gunn or Harper get the number of lot 93 or the name and whereabouts of the defendant? Under the circumstances, I think the defence should have given some evidence on this point. This feature, I think, is some corroboration of the plaintiff's story.

I would draw the inference from the whole evidence that Gunn having obtained the clue from the plaintiff's advertisement, or from the plaintiff himself, employed Harper to look up the owner and the land and to commence negotiations. It was his interest to do so. Harper was his friend, and had been interested with him in former deals. He, Gunn, was benefited in the reduction of the purchase price to the extent of at least half of the commission. The whole commission amounted to $1,500.

I would further infer that having got the information and having been put in communication with the defendant and introduced to the property, Gunn desired to shove the plaintiff aside, to get rid of him.

Shortly after the payment of the $500 deposit and the giving of the receipt, notice is given to the defendant of the plaintiff's claim, certainly before the transaction is closed, by paying the balance of the initial payment, the giving of the deed of conveyance and the mortgage for the balance of the purchase money.

Gunn's subsequent conduct, I think, supports the above inference. Gunn is not bound by the receipt for the deposit or the memorandum satisfying the Statute of Frauds. The defendant is bound. Gunn refused to close unless a commission of $1,500 is paid to Harper. He insists upon changing the contract by adding this term. The defendant then has to choose between conceding this or allowing the deal to go off. The defendant closes the deal and pays Harper the commission demanded, and takes his chances with the plaintiff. All this time the defendant had notice of Spenard's claim. He at least had notice of existing circumstances sufficient to put him on enquiry.

If I am right in my inferences above mentioned, I think that this sale would not be brought about but for the action of the plaintiff, and it has been held sufficient in most cases that the agent has been instrumental in bringing the purchaser and vendor together, although negotiations were subsequently exclusively by the parties: *Stratton* v. *Vachon*, 44 Can. S.C.R. 395 at 406, Duff, J.:—

> The legal rule is thus stated by Lord Atkinson, delivering the judgment of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614. There was no dispute about the law applicable to the first question. It was admitted that in the words of Erle, C.J., in *Green* v. *Bartlett*, 14 C.B.N.S. 681: "If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission

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although the actual sale has not been effected by him." Or in the words of the later authorities, the plaintiff must shew that some act of his was the *causa causans* of the sale: *Tribe* v. *Taylor*, 1 C.P.D. 505; or was the efficient cause of the sale.

And Anglin, J., in *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, at 410, says:—

In my opinion the defendant has established that his introduction was the foundation upon which the negotiations which resulted in the purchase proceeded and without which they would not have proceeded: *Wilkinson* v. *Martin*, 8 Car. & P. 1, at 5. The relation of buyer and seller was really brought about by him: *Green* v. *Bartlett*, 14 C.B.N.S., at 685, that is, by his introduction: *Barnett* v. *Isaacson*, 4 Times L.R. 645.

I note how frankly the defendant R. A. Rutledge gives his story of the transaction. He does not keep back anything, even if it tells against him.

Amongst the exhibits is what purports to be an affidavit sworn to by Harper on the 21st of April, six days after the date of the deposit receipt, and the day before the registration of the transfer and mortgage, in which Harper assumes to swear that he negotiated the sale to Gunn, had no negotiations whatever with the plaintiff, had no acquaintance with the plaintiff and never had any negotiations whatsoever with him either directly or indirectly, in connection with the sale. Now, what was the purpose of this document? Does it not appear that the defendant, having notice of the plaintiff's demand, was fearing trouble from this quarter and that this document was given to allay his apprehension? It is to be observed that it is really not an affidavit, nor a statutory declaration, and the responsibility of the party making it amounts only to that of a person making a statement over his signature. Inquiry from Harper alone, interested as he was in the transaction, was not sufficient.

I agree with the observations of the trial Judge as to there being no explanation as to how Harper located the land and his suggestion of the possibility of Harper getting the information from Gunn and of Gunn getting it from the plaintiff, and the further finding that the plaintiff somewhere, somehow or by some one or other, was taken advantage of; but differ with all due respect, from him when he says this cannot avail the plaintiff against the testimony of Gunn, the plaintiff's witness, and that nothing has been brought to the defendant's door. Before the deal was closed the defendant had notice of enough to put him on enquiry. He chose to close the transaction; in fact he made a new deal so as to direct $1,500 of the purchase money into the channel demanded by the purchaser.

I would allow the appeal with costs.

Appeal allowed.

TOUHEY v. CITY OF MEDICINE HAT.

(Decision No. 2.)

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March 31.

Alberta Supreme Court, Harvey, C.J., Scott, Simmons and Walsh, JJ.

March 31, 1913.

1. HIGHWAYS (§ IV A 5—154)—DEFECTS—SNOW AND ICE.

Under a city charter requiring the municipality to keep in repair every street and sidewalk in the city in default of which it is made "civilly responsible for all damages sustained by any person by reason of such default," it is the duty of the municipality, apart from its common law liability, to keep its sidewalks in such condition as not to be dangerous to pedestrians by reason of accumulation of snow or ice.

[*Derochie* v. *Town of Cornwall* (1891), 21 A.R. (Ont.) 279, 24 Can. S.C.R. 301, specially referred to; *Touhey* v. *City of Medicine Hat* (No. 1), 7 D.L.R. 759, affirmed.]

2. HIGHWAYS (§ IV A 5—154)—DEFECTS—SNOW AND ICE.

The mere existence of ice or snow on sidewalks in a city will not make the municipality liable so long as there is no danger, but it is the duty of the municipality to provide against a dangerous condition which may result from such accumulation of ice or snow, and the liability of the city is established if after the lapse of a reasonable time the sidewalk is not put into safe condition for pedestrians.

[*City of Kingston* v. *Drennan* (1897), 27 Can. S.C.R. 46, referred to; *Touhey* v. *City of Medicine Hat* (No. 1), 7 D.L.R. 759, affirmed.]

3. HIGHWAYS (§ IV A 5—154)—DEFECTS—SNOW AND ICE—AVOIDANCE OF DANGEROUS WALK.

A woman who is injured by falling on a slippery sidewalk is not guilty of contributory negligence as a matter of law because she failed (*a*) to walk on the other side of the street which was less dangerous, or (*b*) to take the arm of her escort for support, where it appears that she was perfectly able to walk unassisted.

[*Gordon* v. *Belleville*, 15 O.R. 26, referred to; *Touhey* v. *City of Medicine Hat* (No. 1), 7 D.L.R. 759, affirmed.]

Statement

APPEAL by the defendants from judgment of Stuart, J., *Touhey* v. *City of Medicine Hat* (No. 1), 7 D.L.R. 759.

The appeal was dismissed.

G. T. Davidson, for plaintiff.

J. J. Mahaffy, for defendant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The female plaintiff, a married woman living in the city of Medicine Hat, while walking on the sidewalk in that city in February, 1911, slipped and fell, breaking her leg. The slippery condition of the sidewalk was due to accumulations of snow and ice. She obtained a judgment for damages from my brother Stuart who heard the case without a jury and the defendant now appeals. It is contended by appellant's counsel that the corporation is under no obligation to clear away snow and ice accumulating and forming upon the sidewalk by natural means and is in no way liable for accidents arising therefrom.

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By defendant's charter it is required to keep in repair every street and sidewalk in the city and in default it is made "civilly responsible for all damages sustained by any person by reason of such default."

In *Leek Commissioners* v. *Stafford*, 20 Q.B.D. 794, Bowen, L.J., says:—

> The repairing of a road includes whatever is necessary to keep it in a proper condition for the traffic, having regard to the character and original manufacture of the road.

It appears clear, therefore, that it was the duty of defendant to do whatever was necessary to keep the sidewalk upon which the accident happened in proper condition for use by foot passengers, which is the kind of traffic applicable to that portion of the road. If it failed in this respect it was in default and became liable under the terms of the charter apart from any common law liability.

Appellant's counsel, however, refers to *City of Kingston* v. *Drennan* (1897), 27 Can. S.C.R. 46, in which Sedgewick, J., in delivering the judgment of the Court at 57 says:—

> A municipality is not liable for accidents occasioned solely by the presence of snow or ice upon a street or sidewalk. It is not as a rule bound to remove either.

In view of the fact, that in that case the liability of the city was maintained, it is quite evident that it is no authority for the wide argument advanced. In *Derochie* v. *Town of Cornwall* (1891), 21 A.R. (Ont.) 279 at 281, Hagarty, C.J.O., also says:—

> I have always resisted the proposition that if a person slip or fall upon a frozen surface of a sidewalk with merely proof that it was so frozen by the sudden fall of the temperature in our winter, such by itself created a cause of action. If, as is not uncommon, rain fall in the evening or night, and a sudden frost cause the sidewalk to present a glassy surface on the following morning or day, I cannot see how the municipality could be answerable for the slipping of a pedestrian.

But in that case also the liability of the municipality was maintained and the learned Chief Justice on the following page quotes with approval the statement of Wilson, J., in *Caswell* v. *St. Mary's Road C.*, 28 U.C.R. 247, where he says:—

> If snow collects at a spot, and by the thawing and freezing the travel upon it becomes specially dangerous, and if this special difficulty can be conveniently corrected by removing the snow or ice or by other reasonable means, there must be the duty on the person or body on whom the care of reparation rests to make such place fit and safe for travel.

The judgment in the *Derochie* case was affirmed on appeal by the Supreme Court of Canada, 24 Can. S.C.R. 301, for the reasons given by the learned Chief Justice in the Court below. In the *Drennan* case above referred to the above statement of Wilson, J., is also quoted with approval on p. 58.

In *Ince* v. *City of Toronto* (1900), 27 A.R. (Ont.) 410, there had been a sudden change in the temperature about 6 o'clock in the morning causing ice to form on the sidewalk upon which about 11 o'clock the accident happened. Although the trial Judge had held that the failure to make the sidewalk safe under these conditions constituted gross negligence which under the Ontario statute was necessary to create liability for such accidents, it was held by two Judges of the Court of Appeal that a lapse of only four or five hours without anything being done, in the absence of any special notice of the dangerous condition, did not constitute gross negligence. One of the other Judges, however, rested his judgment on the ground that the evidence satisfied him that sand had been sprinkled on the ice twice that morning before the accident occurred and the other Judge gave no reasons. It seems perfectly well established by the cases cited that it is the duty of a municipality, upon which is cast the burden of keeping the sidewalks in repair, to see that the sidewalks, in the words of Maclennan, J.A., in the last mentioned case at p. 417, "are not in a condition, by reason of snow or ice, dangerous to pedestrians."

As pointed out in the extract from the judgment of Sedgewick, J., in the *Drennan* case, it is not the mere existence of ice and snow that creates liability so long as there is no danger, but a dangerous condition resulting from ice and snow it is the duty of the municipality to provide against.

Naturally there must be a reasonable time to put the sidewalks in repair after they become dangerous if they become so suddenly, but in the case under consideration this feature requires no consideration, for the sidewalk had been in the condition it was in for weeks, if not months, to the actual knowledge of the city engineer and nothing had been done to remedy it either by clearing away the snow and ice or by covering it with sand or ashes or by some other means which would render it less dangerous. There is ample evidence of the dangerous condition of the sidewalk where the plaintiff fell, apart from the fact of the accident itself.

It is contended, however, in any event that the plaintiff was guilty of contributory negligence (1) because she did not take the other side of the street which was less dangerous and (2) because she did not take the arm of her husband who was walking beside her. The absurdity of the first ground is pointed out by the learned trial Judge, who refers, on the point, to the judgment of Armour, C.J., in *Gordon* v. *Belleville*, 15 O.R. 26. The second appears to me equally unreasonable. There is nothing in the evidence to suggest that the woman was not perfectly able to walk alone, in fact the evidence is quite the reverse. Moreover, she had taken the precaution to put on rub-

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bers, which should reduce the danger of slipping. No one is guilty of negligence in failing to do something which an ordinarily cautious person would not consider it necessary to do, and I can see no reason why an ordinarily cautious person in full vigour should consider it necessary to take the arm of another in order to pass safely along a city street.

In my opinion the defendant was unquestionably dereliet in its duty in leaving the sidewalk in the condition in which it was and the plaintiff was on her part in no way at fault. I would therefore dismiss the appeal with costs.

Appeal dismissed.

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DODD (plaintiff) v. J. W. VAIL (defendant); Percy VAIL et al. (claimants).

(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Brown, JJ. April 10, 1913.

1. LEVY AND SEIZURE (§ II—30)—MODE AND SUFFICIENCY—PHYSICAL ENTRY NEAR GOODS AND INTIMATION OF INTENTION TO SEIZE.

In order for a sheriff to make a valid seizure of the goods of an execution debtor, it is necessary for the sheriff or his bailiff (1) to be upon the premises where the goods are, or so close thereto that if his authority to seize is disputed by one in actual possession he is in a position to lay hands on the goods; (2) to intimate an intention of seizing the goods.

[*Dodd* v. *Vail*, 9 D.L.R. 534, affirmed.]

2. INTERPLEADER (§ I—10)—BY SHERIFF—CLAIMANT DISPUTING THAT SEIZURE MADE.

Where a seizure of a crop of grain cut and in stook in the field was made by the sheriff's officer going to the debtor's farm and serving a notice of seizure of such grain describing it as "about one hundred acres of wheat in stook," what was done is at least tantamount to an effective seizure under the writ of execution, and an adverse claimant who has intervened upon an interpleader application brought by the sheriff, and who has asked therein that his right under the adverse claim shall be determined, will not be allowed to set up that there was in fact no valid seizure.

Statement

APPEAL from the judgment of Lamont, J., *Dodd* v. *Vail* (No. 1), 9 D.L.R. 534, as to certain points raised by way of preliminary objections to an interpleader application.

The appeal was dismissed.

D. Mundell, for appellants.

E. L. Elwood, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—The questions involved in this appeal, and in the proceedings below, are confined to certain points raised by way of preliminary objection on an interpleader application. It will not be necessary to relate the facts of the case as they

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are fully set out in the decision appealed from. I fully concur in the reasoning and decision of my brother Lamont from whose decision this appeal has been taken. As between the plaintiff and defendant there was an effective seizure made, or in any event what in the result was tantamount to an effective seizure. That being the case, and a claim having been made, all the prerequisites to interpleader proceedings were in existence. The appellants took a position and relied on grounds before the local Master which were inconsistent with any other character than that of claimants asking to have their rights determined by an issue. They should not be allowed to come in now and say that there was no seizure. Many other grounds for appeal were raised by the appellants, most of which, notably the question of an alleged partnership, in my opinion only emphasize the necessity for an issue in this case.

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

Appeal dismissed.

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April 12.

CROFT v. MITCHELL.

Ontario Supreme Court. Trial before Lennox, J. April 12, 1913.

1. BROKERS (§I—2)—STOCK BROKERS—SALE OF STOCK ON MARGIN.

On an ordinary purchase of stock on margin through a broker, if the broker fails to deliver the shares upon a demand being made with a tender of the balance due on them, the purchaser is entitled to the value of the shares at the time of such tender and demand, less any balance owing upon them and less commission and interest.

[*Conmee* v. *Securities Holding Co.*, 38 Can. S.C.R. 601, and *Clarke* v. *Baillie*, 45 Can. S.C.R. 50, referred to; see also *Long* v. *Smiley*, 6 D.L.R. 904.]

Statement

ACTION to compel the defendants to deliver to the plaintiff forty shares of paid-up stock in the Rock Island Railroad Company, or for repayment of a sum alleged to have been paid to the defendants by the plaintiff on account of the price of the shares, with interest, and for damages for non-delivery.

Judgment was given for the plaintiff.

G. H. Watson, K.C., for the plaintiff.

R. S. Cassels, K.C., for the defendants.

Lennox, J.

LENNOX, J.:—There is no ground for the contention that the plaintiff is entitled to recover back the money he paid to the defendants, with interest. That might be his right—if he so elected—if the defendants had failed to execute their contract to purchase Rock Island Railroad stock for him. The default here was failure to deliver to the plaintiff forty shares of this stock upon demand made therefor and upon the offer of the plaintiff to pay the balance owing to the defendants.

On the other hand, there is no ground for the pretence set up

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in the statement of defence that the defendants submitted to the plaintiff the names of three firms of brokers doing business on the New York Stock Exchange, employed by the defendants as correspondents, and the plaintiff thereupon "selected the said R. B. Lyman & Company as the firm through whom the purchase was to be made for him and by whom the shares were to be carried on his account." Not only would this statement have been grossly misleading as to the commercial status of Lyman & Co., if it were made—for they were not members of the New York Stock Exchange—but, more than this, the attempt to substitute a contract with Lyman & Co. for a contract with the defendants cannot in any way be reconciled with Mr. Lamont's examination for discovery or his examination or cross-examination in Court.

I leave out of account a half-hearted attempt to set up this contention on re-examination. It is inconsistent, too, with the terms upon which Lyman & Co. and the defendants dealt with each other; the bought note in each case notifying the defendants: "We have this day on your order and for *your account* and for your risk bought," etc. The meaning of the phrase "for your account" is put beyond controversy by *Gadd* v. *Houghton*, 1 Ex. D. 357.

I accept the plaintiff's evidence as furnishing a substantially accurate account of what took place between him and Mr. Lamont, representing the defendants, when this first order was placed; and the two subsequent orders were upon the same terms. It was the ordinary every-day arrangement with a broker to buy stock upon margin.

The law is clear enough in such a case. It is not necessary that the terms be discussed in detail. Certain incidents follow as to the rights and liabilities of the parties from simply placing the order. The purchaser may re-margin from time to time as called upon, if the value of the shares decline; and he must pay interest and commission. The broker agrees, whether specifically stated or not, to furnish the additional money required to purchase the shares outright, and is obliged to have on hand sufficient stock to enable him to hand over to his customer the stipulated number of shares immediately upon a demand being made for them, accompanied by an offer to pay the balance owing in respect of them: *Conmee* v. *Securities Holding Co.*, 38 Can. S.C.R. 601.

The obligation of the broker is to be ready to deliver the shares. The shares may have become enormously enhanced in value. Manifestly, to return the customer his money with interest would not, in such a case, be a discharge of the broker's obligation; and, conversely, the stock having declined in value in this case, and the defendants—as I find—having carried out

their agreement to purchase, in a recognised way though not in a prudent way, it is equally manifest that what the plaintiff is entitled to have is, not the money back, but the forty shares bargained for or their value at the time they were demanded, less any balance owing upon them and less the stipulated, or a reasonable, charge for commission and interest.

I am satisfied that the plaintiff was not told that the defendants would employ an agent or correspondent, and that he did not know it as a matter of fact, but he is bound by what is usual and necessary in such a case. The brokers may determine their own method of executing the contract, but they are bound to execute it, and, above all, they are bound to be ready at all times to deliver the scrip or certificates upon payment. Here, as in the *Conmee* case (*Conmee* v. *Securities Holding Co.*, 38 Can. S.C.R. 601), they never had it.

I am not satisfied that there was any agreement as to the commission. Mr. Mitchell says that "the 'Consolidated' rate is 1-16 of one per cent. 'each way' "—that is, for buying and for selling. He probably means that the same is also paid the correspondent or agent. Mr. Morrow, of the firm of Æmilius Jarvis & Co., says that they buy through a regular accredited agent in New York, who is responsible to them, and their total commission charge to their client is $\frac{1}{4}$ per cent. for buying and the same for selling. There was no need of two firms of brokers if the defendants had told the plaintiff that Lyman & Co. were in the next block, and if the plaintiff, knowing this, was willing to engage them.

The defendants claim a commission on sale, but are not entitled to it. They had no authority to sell. The plaintiff was entitled to the shares.

I am not sure that it should exceed $\frac{1}{2}$, but I will allow the defendants a total commission of $\frac{1}{4}$ of 1 per cent. This includes anything they have paid or may pay their agents. The plaintiff is liable to pay the defendants $\frac{1}{2}$ per cent. interest over and above the interest the defendants have to pay, but they get this for procuring the money; and, if they left it to their agents to procure the money, and they added a half per cent. in claims made upon the defendants and liquidated by the plaintiff, it must not be charged again.

I am of opinion that the plaintiff has paid the defendants the several sums of money he claims to have paid, amounting to $1,518.45; but, if the parties are still in dispute as to this, I will hear counsel upon this question.

At the time the defendants repudiated their liability and refused to deliver forty shares of the capital stock of the Rock Island Railroad Company to the plaintiff, the shares were worth $28 each, or a total sum of $1,120.

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There will be judgment for the plaintiff for this sum, less such balance as may be owing to the defendants on the purchase-price of the three lots of shares in question, and for interest and commission on the basis aforesaid, after crediting all sums paid by the plaintiff; and there will be interest on the balance of $1,120 from the 14th October, 1912. The plaintiff will have costs.

In case differences arise as to the adjustment of the account, I may be spoken to, and will adjust the items in dispute or give directions as to how it is to be done.

Reference may be made to *Clarke* v. *Baillie*, 45 Can. S.C.R. 50; *Douglas* v. *Carpenter*, 17 App. Div. N.Y. 329, at pp. 333-4; *Rothschild* v. *Allen*, 90 App. Div. N.Y. 233; Dos Passos on Stock Brokers, 2nd ed., pp. 260-7; *Cox* v. *Sutherland*, 24 Can. L.J. 55, Coutlée's S.C. Dig. 215; *Carnegie* v. *Federal Bank*, 5 O.R. 418; *Gruman* v. *Smith*, 81 N.Y. 25; *Gheen* v. *Johnson*, 90 Pa. St. 38.

Judgment for plaintiff.

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1913
April 10.

ROGERS LUMBER CO. v. GRAY and HOSMER.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. April 10, 1913.

1. MECHANICS' LIENS (§ VI—47)—MATERIALMAN—JOINT ORDER BY CONTRACTOR AND OWNER.

Where the property owner joins with the contractor in giving the order for material to be supplied in the erection of the building and it is charged to their joint account, the owner may be held liable for the full price in a mechanics' lien action brought against them both to enforce payment, although only a lesser sum be due by him to the contractor.

Statement

APPEAL by the defendant Gray from judgment at trial in a mechanics' lien action.

The appeal was dismissed.

H. E. Sampson, for appellant.

H. V. Bigelow, for respondents.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This action is for $762.82, balance due on lumber furnished for the erection of a house for the defendant Gray by the defendant Hosmer, and a claim for a mechanics' lien for the amount. The learned trial Judge gave judgment against both of the defendants for the whole amount claimed. The plaintiffs claim that the lumber was furnished to both defendants and charged to both in their books. The defendant Gray claims that the lumber was furnished to the defendant Hosmer, and that he had nothing to do with it, and is therefore only liable for the amount due by him to Hosmer, being the sum of $342.60.

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The defendant Gray claims this amount to be due on the basis that the contract price of the house was $2,740, and that there were no extras; that he paid the defendant Hosmer 80 per cent. of this amount and $180 for labour; leaving the balance, which he claims is the only amount for which he is liable.

The plaintiffs, however, gave evidence that the lumber was ordered by and charged to both defendants, and the defendant Hosmer gave evidence that the contract price of the house was $2,840, and that there were extras to the amount of $64; that the defendant Gray paid only the sum of $2,171, and that there is still due $733, without taking into consideration the 10 per cent. which was added to the price of the lumber because it was not paid within thirty days—there was ample evidence upon which the learned trial Judge could find as he did. His finding should not therefore be interfered with, and the appeal should be dismissed with costs.

Appeal dismissed.

Re STINSON and COLLEGE OF PHYSICIANS AND SURGEONS.

ONT.

D. C.
1912

Dec. 30.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. December 30, 1912.

1. PHYSICIANS AND SURGEONS (§ I A—7)—RIGHT TO PRACTICE—REVOCATION OF LICENSE.

Where statutory authority is conferred upon a medical council to cause an inquiry to be made by a standing committee of a limited number for the purpose of investigating a charge of misconduct against a member upon which it is sought to revoke his license to practise, and the statute further provides that the council shall "ascertain the facts" of the case by such committee and may act upon its written report upon proof of infamous or disgraceful conduct, it is not competent for the council to act upon a mere report of the evidence and proceedings before the committee unless such report be supplemented by a finding, and determination of the essential facts by the committee; nor is it competent for the council to itself determine such facts upon the evidence reported by the committee.

[*Hampson* v. *Price's Patent Candle Co.*, 24 W.R. (Eng.) 754; *York Tramways Co.* v. *Willows*, 8 Q.B.D. 685; *R.* v. *Heyop*, 8 Q.B. 547; *Stephenson* v. *Yokes*, 27 O.R. 691, referred to.]

Statement

AN appeal by Dr. Albert W. Stinson from an order of the Council of the College of Physicians and Surgeons of Ontario, made under sec. 33 of the Ontario Medical Act, R.S.O. 1897, ch. 176, directing that the name of the appellant should be erased from the College register. The appeal was taken under sec. 36 of the Act.

Many of the facts appear in the report of a previous motion and appeal relating to the inquiry which resulted in the order now appealed against: *Re Stinson and College of Physicians and Surgeons of Ontario* (1910-11), 22 O.L.R. 627. The evidence is stated in the judgment of RIDDELL, J., *infra*.

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Argument

I. F. Hellmuth, K.C., *A. B. Armstrong*, and *F. F. Hall*, for the appellant, after presenting again the arguments which had been urged before a Divisional Court against the inquiry proceeding at all, and which are set out in 22 O.L.R. at pp. 637, 638, argued that the Divisional Court now hearing the appeal was a final Court of appeal, and so not bound by the decision of any other Divisional Court, and that the provisions of 2 Geo. V. ch. 17, sec. 10 (4), did not make any difference in that regard. They then submitted that there was no such report before the Council as it could rightly act upon under the provisions of R.S.O. 1897, ch. 176, secs. 33 and 35, and the amending Act, 10 Edw. VII. ch. 77. The committee should have not only presented evidence to the Council; they should have "ascertained," that is, found, the facts and presented them in a written report to the Council; and only on such a report could the Council act. This had not been done. The Council had no power to ascertain the facts. Where a statute gives power to a smaller body to do any particular act for a larger body, the latter is incapable of doing that act: *Hampson* v. *Price's Patent Candle Co.* (1876), 24 W.R. 754; *York Tramways Co.* v. *Willows* (1882), 8 Q.B.D. 685; *Stephenson* v. *Vokes* (1896), 27 O.R. 691. Therefore, the order of the Council that the name of the appellant should be erased from the College register could not be upheld.

D. L. McCarthy, K.C., for the College Council, relied upon the reasons given in the judgments allowing the inquiry to proceed, as reported in 22 O.L.R. 627, and in answer to the argument that the Council had no power to ascertain the facts, he contended that, under a proper reading of the sections of the Acts in question, the Council had that very power, and were fully justified in passing the resolution to erase the appellant's name from the register. Under his reading of the sections in controversy, the Council itself was empowered to ascertain the facts, through the medium of the committee, which committee had done its full duty once it had assembled and taken the evidence.

Hellmuth, in reply.

Riddell, J.

December 30. RIDDELL, J.:—This is an appeal by Dr. Albert Stinson from an order of the Council of the College of Physicians and Surgeons of Ontario, made under sec. 33 of the Ontario Medical Act, R.S.O. 1897, ch. 176—the appeal being taken under sec. 36.

There are many grounds taken in the notice of motion; others were advanced upon the argument which, in view of the very great importance of the case—and counsel for the College not objecting—we permitted to be set up.

Some of the objections are the same as those urged against the inquiry proceeding at all, and these have been disposed of by the judgment of a Divisional Court on a former application in the same matter: 22 O.L.R. 627.

By the provisions of (1912) 2 Geo. V. ch. 17, sec. 10 (4), if it applies, we cannot depart from that decision "without the concurrence of the Divisional Court or the Judges thereof by whom the decision was given." Of course, we should not ask for any such concurrence, unless we could find that the decision was, in our judgment, wrong.

It is argued that the statute just referred to does not alter the law under which we have held that as a final Court of appeal we are not bound by the decision of any other Divisional Court.

The former legislation is to be found in the Ontario Judicature Act, sec. 81 (2), Holmested and Langton's Judicature Act, 3rd ed., p. 140: "It shall not be competent for the High Court or any Judge thereof in any case arising before such Court or Judge to disregard or depart from a prior known decision of any Court or Judge of co-ordinate authority on any question of law or practice without the concurrence of the Judges or Judge who gave the decision. . . ."

This Divisional Court in *Canadian Bank of Commerce* v. *Perram* (1899), 31 O.R. 116, held that this section did not apply to a Divisional Court sitting in appeal from an inferior Court, and, therefore, being the final appellate Court. The decision was followed by us in a number of cases from *Mercier* v. *Campbell* (1907), 14 O.L.R. 639, to *McManus* v. *Rothschild* (1911), 25 O.L.R. 138.

The Legislature interfered and made an express provision in (1912) 2 Geo. V. ch. 17, sec. 10 (4), that "it shall not be competent for any Divisional Court . . . in any case . . . to disregard or depart from any known prior decision of any other Divisional Court . . . whether it arose under section 74 or otherwise . . ." Appeals from County Courts are under sec. 74 of the Ontario Judicature Act; this appeal arises "otherwise."

By reason of the course I pursue, I do not think it necessary now to decide whether we are bound by the new Act to follow the Divisional Court which gave a decision in this matter on a previous occasion, unless that Court or the Judges concur.

In view of the very great importance of this case from more than one point of view, I have thought it proper that I should again consider the points disposed of by myself on the previous motion; and, having given them full and careful consideration, I can see no reason whatever for receding from that decision in any particular—and I have nothing to add to what is contained in the report of the Divisional Court decision and my own.

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Riddell, J.

It follows that the objections raised to the proceedings being taken by the committee fall to the ground.

The committee met on the 16th August, 1910, when, without objection on Dr. Stinson's part, the charge in respect of Mrs. Dale was gone into, but an objection was taken to going into the Johnston charge, and this objection was acceded to—or, at all events, no evidence was taken in respect of that charge. On the 2nd November the committee sat again. Counsel for Dr. Stinson objected (1) that both charges were "criminal offences," and, consequently, the committee had no jurisdiction. (This is the same as objection (3) in the former proceedings: see 22 O.L.R. at pp. 629 *sqq.*) They objected (2) that the Johnston charge should not be proceeded with. (This is the same as objection (2): 22 O.L.R. at p. 629). The committee then most properly adjourned to allow of a motion being made for prohibition; the motion failed. The adjourned meeting was to have been held on the 30th November, by which time the judgment of the Court of first instance had been delivered, but not that of the Divisional Court: 22 O.L.R. at p. 638. The committee sat again on the 17th January, 1911, and the inquiry proceeded, in presence of Dr. Stinson and his counsel, without objection. Upon the Dale case being gone into, Dr. Farley was called and gave evidence of facts and to a limited extent of his professional opinion concerning Mrs. Dale. Then the Johnston case was gone into. Mrs. Johnston herself was examined: then Dr. Hutchison in this case, as Dr. Farley in the other, as to the condition of Mrs. Johnston. Dr. Stinson himself gave evidence in both cases, which, if believed, would shew him innocent. He denies all charges of misconduct. Then Dr. Arthur Jukes Johnson was called; and, as some point was made of his giving evidence, it is as well to see what the circumstances are.

On the 14th December, 1909, Dr. Stinson had been tried before the sessions at Cobourg on a charge of procuring a miscarriage on Mrs. Dale. Dr. Johnson had been a witness for the Crown upon that trial. Upon a verdict of "not guilty" being given, Dr. Johnson joined Drs. Ivy, Elliott, Lapp, Ferris, Irwin, Jones, and McNichol, of Cobourg, and Dr. Farley, of Trenton, all members of the College of Physicians and Surgeons in good standing, in a written request, under sec. 33 (2) of the Act, to make inquiry into "the charge of disgraceful and unprofessional conduct preferred against Dr. A. W. Stinson, viz., of attempting to procure an abortion on Emma Dale." Counsel for the College upon this inquiry thought it wise that Dr. Johnson, having given evidence in the criminal Court, should also give evidence upon the College inquiry, not so much (as he explained to the Council) for the advantage of the Council, as "because the Courts who may have to review

it will have the advantage of sworn evidence in connection with the matter." I can see no possible impropriety in Dr. Johnson giving evidence, under the circumstances, and am wholly confident that, had he not done so, a point would have been made of the omission; his subsequent conduct will be considered later.

He gave his evidence without objection—it was opinion evidence—and he was cross-examined. Dr. Stinson was then called, and gave opinion evidence against Dr. Johnson's opinion—Dr. Johnson's evidence being confined to the Dale case.

It is objected that expert evidence should not be called at all, as the committee itself is composed of medical men; but all medical men are not experts in all branches of medicine, surgery, midwifery; and I cannot see any objection to calling an expert, if necessary, to assist the committee—I should have more doubt whether the committee could proceed without evidence.

The committee made a report on the 27th July, 1911, by the hand of Dr. Klotz, one of its members. I think it well to set it out *verbatim*, as much depends on the contents:—

"To the President and Members of the College of Physicians and Surgeons of Ontario.

"Gentlemen:—Your committee appointed to inquire into the facts *re* the complaint of Charles Rose against Albert W. Stinson, a duly qualified and registered medical practitioner, that he, the said Albert W. Stinson, had been guilty of infamous and disgraceful conduct in a professional respect, and had thereby rendered himself liable to have his name erased from the register of the College of Physicians and Surgeons of Ontario, beg leave to report as follows:—

"Notice of the charges which form the subject-matter of the inquiry to be conducted, and of the day appointed to hear the evidence in support of said charges, was served upon the said Albert W. Stinson; the full legal notice was given in the case referring to Emma Dale, but in respect to a woman named Johnston, the wife of Adam Johnston, sufficient notice for the hearing on Tuesday the 16th day of August, A.D. 1910, had not been given.

"Your committee duly met in pursuance of such notice, and the said Albert W. Stinson appeared personally and by counsel on the 16th day of August, A.D. 1910, at the hour of eleven o'clock in the forenoon, at the council chamber in the town hall in the town of Cobourg, in the county of Northumberland, when objection was taken to proceeding in the Johnston charge (particulars of which have been served), and evidence was taken in the Dale charge, and an adjournment made until Wednesday the 2nd November, A.D. 1910, at eleven o'clock, in the same place.

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"Your committee duly met, in pursuance of such adjournment, on the 2nd day of November, A.D. 1910, at eleven o'clock in the forenoon, in the council chamber in the town hall at the town of Cobourg, for the purpose of proceeding with the evidence in the Johnston charge, when Mr. E. G. Porter, K.C., counsel for Dr. Albert W. Stinson, requested an adjournment and undertook to apply to the Court for a prohibition prohibiting the Discipline Committee and the Medical Council from proceeding to investigate the charges preferred.

"Your committee, upon advice of their counsel and upon the undertaking of Mr. E. G. Porter, counsel for Dr. Albert W. Stinson, to at once proceed with this application by way of prohibition, granted an adjournment, and adjourned until Wednesday the 13th November, A.D. 1910, at the same hour and place.

"In pursuance of said undertaking, counsel for the defendant applied for a writ of prohibition to issue, the same coming on for hearing before His Lordship Mr. Justice Riddell, of the King's Bench Division of the High Court of Justice, and was refused.

"The defendant then appealed to the Divisional Court, the same coming on for hearing before the Common Pleas Division of the High Court of Justice, presided over by His Lordship Chief Justice Sir William R. Meredith, when the appeal was dismissed with costs.

"Your committee met and adjourned from time to time pending the said application for prohibition; and, upon the appeal being dismissed, your committee resumed its sittings at Cobourg on Tuesday the 17th January, A.D. 1911, at one o'clock in the afternoon, when the taking of evidence was completed.

"And your committee adjourned until Monday the 24th July, A.D. 1911, for the purpose of considering the evidence and determining upon the report.

"Your committee met on Monday the 24th July, A.D. 1911, at ten o'clock in the forenoon, at the council chamber in the Medical Council Building, No. 170 University avenue, Toronto, and the evidence was considered, and your committee determined to report the evidence and proceedings to your honourable body.

"Your committee returns with this report a transcript of the official stenographer's report of the evidence taken on the said 16th day of August, A.D. 1910, and on the 17th day of January, A.D. 1911, and also copies of the exhibits referred to and filed, on the taking of the said evidence.

"Your committee beg leave to report the evidence and exhibits for your consideration, and for the determination of the Council, and they have caused the said Albert W. Stinson to be notified to appear before Council on Thursday the 27th day

of July, A.D. 1911, at two o'clock in the afternoon (or so soon thereafter as the case can be heard) to be heard before the said Council and to hear the Council's determination upon the evidence as reported by your committee.

"Dated at Toronto this 24th day of July, A.D. 1911.

"Signed on behalf of the College of Physicians and Surgeons of Ontario.

"J. A. ROBERTSON,
"*Chairman.*"

"Then Dr. Klotz moved, seconded by Dr. Hart, that the report be adopted.

"The President put the motion, which, on a vote having been taken, was declared carried.

"*Dr. Klotz*: It is moved by myself, seconded by Dr. Hart: 'That, whereas the Council of the College of Physicians and Surgeons of Ontario caused an inquiry to be made by the Discipline Committee of the said Council into the case of Albert W. Stinson, a duly qualified and registered medical practitioner, alleged to have been guilty of infamous and disgraceful conduct in a professional respect, and to be liable to have his name erased from the register thereof. And whereas the Council has duly ascertained the facts of the case in reference to the charges against the said Albert W. Stinson, by the action and report of the Discipline Committee of the said Council, duly appointed under the provisions of the Ontario Medical Act. And whereas the said committee has reported the evidence taken on such charges and copies of the exhibits referred to and filed therein, and the same is now before this Council for its consideration and the council has determined to act thereon. Now, therefore, be it resolved that the report of the said Discipline Committee, and the exhibits forwarded with said report in reference to the said Albert W. Stinson, be received, and that this Council is of the opinion that the charges preferred against the said Albert W. Stinson, that he did so act in the practice of his profession as a physician, while attending upon a woman named Emma Dale and while attending upon a woman named Johnston, the wife of Adam Johnston, as to be guilty of infamous and disgraceful conduct in a professional respect, and that he did, in or about the months of August and September, A.D. 1909, at the town of Cobourg, in the county of Northumberland, perform a criminal operation upon a woman named Emma Dale, whereby the said Emma Dale was caused to abort and to be prematurely delivered of a child, and that he did, in the month of April, A.D. 1909, perform a criminal operation upon a woman named Johnston, the wife of Adam Johnston, with intent to procure a miscarriage of said woman, contrary to the form of the statutes in such case made and provided, have been

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proved, and that the name of the said Albert W. Stinson be erased from the register of the College of Physicians and Surgeons, and that the Registrar be and he is hereby directed to erase from the register kept by him pursuant to the provisions of the Ontario Medical Act, the name of the said Albert W. Stinson. And it is further directed, under the provisions of the Ontario Medical Act, that the costs of and incidental to the said erasure be paid to the College of Physicians and Surgeons of Ontario, forthwith after taxation by one of the Taxing Officers of the High Court of Justice of Ontario, and the Registrar of the said Council is hereby directed, after such taxation, to obtain the issue of such execution or executions as may be necessary for the collection of such costs by the said College of Physicians and Surgeons of Ontario. Dated at Toronto this 27th day of July, A.D. 1911.' ''

The following proceedings then took place:—

''*The President*: Gentlemen, you have heard the resolution moved by Dr, Klotz, seconded by Dr. Hart, regarding the matter of Albert W. Stinson, a duly qualified and registered medical practitioner, who is charged with infamous and disgraceful conduct in a professional respect. The matter is open for discussion of the meeting. I understand that Dr. Stinson is himself present; and, if he has anything to say in the matter, I am sure the Council will be glad to hear him briefly on the subject or any one representing him. If Dr. Stinson has anything to say, we would like to hear from him now.''

Counsel for Dr. Stinson was then heard; and thereafter considerable discussion took place on the resolution before the Council; it is plain that the members of the Council considered that they were trying the charges.

Some of the proceedings makes very unpleasant reading: we find that one medical man doubts whether ''a man's living is to be taken away from him—is a man to be put out of the medical business if he commits an error . . .? Will it not give him notoriety in practice if he has been guilty of it to a great extent?'' etc., etc. Quite regardless of the express duty imposed by the statute, sec. 33 (2)—''on proof . . . of such infamous or disgraceful conduct, shall cause the name of such person to be erased from the register''—he argued that suspension for a certain length of time would be better than striking the man's name off the register. An amendment was moved and seconded that the ''Council suspend its verdict in the meantime, and that Dr. Stinson be given a chance to pay the expenses of the investigation and so on.'' Some of the Council most properly protesting against the last clause of the proposed amendment, it was dropped, and it then read ''that the Council suspend action in the case of Dr. Stinson.'' The amendment was lost; and then by eleven to ten the original motion carried.

Thereupon the member who had moved the amendment suggested that eleven was not a majority of the Council; and, as the vote was so close, it would be wise to reconsider the matter. Thereupon a motion was made, seconded, and carried, to reconsider the matter the following morning—and then the motion was carried unanimously.

In the following July, the next meeting of the Council was held. The official report of what then took place begins thus:—

"Dr. Griffin presented and read the report of the Discipline Committee re Dr. Albert W. Stinson, as follows:—

"COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

"IN THE MATTER OF an inquiry directed to be held by the Council of the College of Physicians and Surgeons of Ontario into the case of Albert W. Stinson, a duly qualified and registered medical practitioner, alleged to be liable to have his name erased from the register of the said College, by reason of infamous and disgraceful conduct in a professional respect.

"Moved by Dr. Griffin, seconded by Dr. Klotz: 'That, whereas the Discipline Committee of the College of Physicians and Surgeons, on the 24th day of July, A.D. 1911, made their report to the Council of the College of Physicians and Surgeons in respect to the conduct of the said Albert W. Stinson. And whereas by resolution of the Council, the consideration of the report was deferred until the general meeting of the Council to be held in July, 1912. Now therefore be it resolved that the report of the said Discipline Committee, and the exhibits forwarded with said report in reference to the said Albert W. Stinson, be received, and that this Council is of the opinion that the charges preferred against the said Albert W. Stinson, that he did so act in the practice of his profession as a physician, while attending upon a woman named Emma Dale, and while attending upon a woman named Johnston, the wife of Adam Johnston, as to be guilty of infamous and disgraceful conduct in a professional respect, and that he did, in or about the months of August and September, A.D. 1909, at the town of Cobourg, in the county of Northumberland, perform a criminal operation upon a woman named Emma Dale, whereby the said Emma Dale was caused to abort and to be prematurely delivered of a child, and that he did, in the month of April, A.D. 1909, perform a criminal operation upon a woman named Johnston, the wife of Adam Johnston, with intent to procure a miscarriage of said woman, contrary to the form of the statutes in such case made and provided, have been proved, and that the name of the said Albert W. Stinson be erased from the register of the College of Physicians and Surgeons, and that the Registrar be and is hereby directed to erase from the register kept by him pursuant to the provisions of the Ontario Medical Act, the

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name of the said Albert W. Stinson. And it is further directed, under the provisions of the Ontario Medical Act, that the costs of and incidental to the said erasure be paid to the College of Physicians and Surgeons of Ontario, forthwith after taxation by one of the Taxing Officers of the High Court of Justice of Ontario, and the Registrar of the said Council is hereby directed, after such taxation, to obtain the issue of such execution or executions as may be necessary for the collection of such costs by the said College of Physicians and Surgeons of Ontario. Dated at Toronto this 4th day of July, A.D. 1912.' ''

It is evident that there is an error in this—the only written report of the committee submitted has been already set out—what took place, evidently, is, that Dr. Griffin presented and read that report, and then moved the above as a resolution. For this is what follows:—

"*Dr. Griffin*: This case, if you remember, Mr. President, came up at the last session of the Council, and this resolution carried by a small majority of the Council, and it was then, on reconsideration, directed to be held over for another year. The committee, in considering this case, came to the conclusion that the ends of justice would be best served by having the name of Dr. Stinson stricken from the roll in accordance with the resolution of last year.

"*The President*: You have heard the resolution *re* Dr. Stinson, moved by Dr. Griffin and seconded by Dr. Klotz. Dr. MacColl has drawn my attention to the fact that there are some new members in this Council at the present time who possibly have not read that evidence, and the legality of our action might be thereby affected.

"*Dr. Gibson*: They can abstain from voting.

"*The President*: And that will not affect the legality of our action?

"*Voices*: No.

"The yeas and nays were then taken on the above resolution, and resulted as follows:—

"*Yeas*: Drs. Bascom, Cruickshank, Emmerson, Ferguson, Gibson, Sir James Grant, Griffin, Hart, Jarvis, King, Klotz, MacArthur, MacColl, S. McCallum, Routledge, Ryan, Spankie, Stewart, Vardon, Welford, Wickens—21.

"*Nays*: None.

"The president declared the motion carried and the report adopted."

We have been furnished with one printed copy of the proceedings in the Council. From this it appears that the gentleman who thought—or at least argued—that suspension would be sufficient punishment, voted for suspending action with the minority at the first 1911 meeting, and against the motion to

strike off the register. It was he also who seconded the amendment which, as first proposed, was, "that the Council suspend its verdict for the meantime and that Dr. Stinson be given a chance to pay the expenses of the investigation and so on." He seems to have previously read the evidence; and, when he votes in 1912 for striking the name of Dr. Stinson off the register, it is argued that he must have done so to punish him for not paying the costs. I have read the report of Dr. V.'s speech again and again; and, while he protests against the Council convicting on evidence upon which the criminal Court acquitted, I do not think he can be said to have exhibited any signs of believing in the actual innocence of the accused. No doubt, he is strongly inclined to leniency in punishment, like very many jurors and perhaps some in other positions of responsibility. There is nothing whatever to indicate any corrupt or improper motive or intention, and nothing to indicate that Dr. V. did not honestly and in perfect good faith vote in 1912 against the accused.

Dr. Y., the most prominent advocate in 1911 of Mr. Stinson, did not vote in 1912. Dr. G., at the first meeting in 1911, said he had not been able to arrive at any other conclusion than that the offence, to his mind, had not been sufficiently proved against Dr. Stinson to justify him in voting that he is guilty of the offence. He said he had gone over the mass of evidence and made a very conscientious endeavour to arrive at a decided opinion—and he adds that, possibly, had he heard the evidence, his opinion might have been somewhat different. He voted against the motion to strike off the register in 1911, but for the resolution in 1912.

Dr. G., who moved the amendment in 1911, voted for the motion in 1912, as did Sir J. G., Dr. J., Dr. K., Dr. R., Dr. W., Dr. S. McC.—making eight in all who voted against striking off the register in 1911 but for that course in 1912; and it is urged that these voted thus to punish Dr. Stinson for not paying the costs. This most serious imputation against members of the medical profession there is not the slightest foundation for—and, to me at least, it is a matter of regret that it ever should have been made. Outside of Dr. G., I do not find any intimation of opinion by any of these at the meeting in 1911 that Dr. Stinson had not performed the illegal operation.

Nothing indicates anything like personal feeling against the accused—and the Council seem to have acted with scrupulous fairness.

So, too, with the committee; from a repeated perusal of the evidence, I am convinced that the committee performed a most distasteful duty with perfect fairness—and that the appellant has nothing to complain of in that respect.

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Dr. Johnson is a member of the Council; having been called on the inquiry as a witness, he took no part in the Council in voting or discussion in 1911 or 1912—the only thing he did was, when his conduct was called in question, to explain to the Council how he came to be called as a witness—and his action throughout, to my mind, is wholly unexceptionable.

The evidence upon the inquiry was such, with or without the evidence of Dr. Johnson, that the Council or the committee might well find that Dr. Stinson had been guilty of criminal malpractice in the cases of both Mrs. Dale and of Mrs. Johnston—and might well find that he had been guilty in both cases of infamous and disgraceful conduct in a professional respect. And I cannot find the slightest evidence of want of perfect good faith on the part of either Council or committee.

What I have said disposes, to my mind, of most of the grounds taken in the notice of motion.

Reason (1) was not argued, and no facts are made to appear upon which it could be based; No. 2 is substantially an objection to the supposed finding of the committee, as against evidence. There is nothing in this—and I pass it over for the moment. No. 3 is quite without merit, and was not argued. No. 4 is objection No. 3 referred to in 22 O.L.R. at p. 629 *sqq.*; No. 5 is No. 2 in 22 O.L.R. at p. 629; No. 6 is in part the same as No. 4 above, and in part a confounding of the two classes of cases in sec. 33 (1) and an attempt to make them but one; No. 7 I have dealt with. No. 8 was not argued—it reads thus: "8. That the Council, having dealt with the matter in July, 1911, and having passed upon same without directing the erasure of the appellant's name from the register, had no jurisdiction or power, one year later, to reopen the matter, and, at that date and upon another vote, order the erasure of the appellant's name from the register." This was not pressed—for obvious reasons. If the Council had not the right to open up the vote of the first day of the 1911 meeting and reconsider the matter, the only valid resolution is adverse to the appellant—the resolution now moved against is wholly unnecessary, and the appellant would receive no advantage from its being set aside.

This disposes of the grounds taken on the notice of motion: but the grounds which we allowed to be taken at the hearing (*dehors* the notice) are not so easily disposed of—these involve matters of law.

The Act now in force is R.S.O. 1897, ch. 176, as amended by (1910) 10 Edw. VII. ch. 77—and the sections which require attention are secs. 33, 35, 36. The two former read (so far as important in this inquiry):—

"33.—(1) Where any registered medical practitioner has . . . been guilty of any infamous or disgraceful conduct in

a professional respect, such practitioner shall be liable to have his name erased from the register.

"(2) The Council *or the executive committee* . . . upon the application of any four registered medical practitioners shall cause inquiry to be made into the case of a person alleged to be liable to have his name erased under this section and on proof of such . . . infamous or disgraceful conduct *the Council* shall cause the name of such person to be erased from the register . . ."

"35.—(1) The Council shall, for the purpose of exercising in any case the powers of erasing from and of restoring to the register the name of any person . . . ascertain the facts of such case by a committee of their own body not exceeding five in number, of whom the quorum shall be not less than three, and a written report of the committee may be acted upon for the purpose of the exercise of the said powers by the Council.

"(2) The Council shall from time to time appoint and shall always maintain a committee for the purposes of this section . . ."

The words italicised were introduced by 10 Edw. VII. ch. 77, on the 19th March, 1910. The change will not perhaps affect the present case, and is, for the purposes thereof, wholly immaterial.

It seems to me that there can be no doubt as to the meaning of the statute in most respects. For this case: (1) Upon the application of any four registered medical practitioners, an inquiry is to be made into the case of any person alleged to be liable to have his name erased for infamous or disgraceful conduct in a professional respect. (2) This inquiry is *caused to be made* by the Council, as the Act formerly stood—not *made* by the Council itself. (3) A standing committee is to be maintained to make such inquiries. (4) The Council "shall . . . ascertain the facts of such case by" this committee. (5) And may act upon a written report of the committee. (6) The Council, "on proof of such . . . infamous or disgraceful conduct, shall cause the name of such person to be erased from the register."

There is no doubt that (1), (2), and (3) were duly performed.

But, when we come to the remaining three, there is a great difference. The Council is to cause inquiry to be made into the case and "ascertain the facts of such case" by the committee. The expression "the facts of the case" does not or may not mean an opinion as to the culpability of the conduct of a medical man; but must mean at least the conduct itself—the facts upon which an opinion is to be founded.

It has long been well settled that where a statute gives power

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to a smaller body, a board of directors, etc., to do any particular act for the larger, the company, etc., the larger body, etc., is incapable of doing that act: *Rex* v. *Westwood* (1830), 4 Bli. N.R. 213, 4 B. & C. 781, at p. 799; *Hampson* v. *Price's Patent Candle Co.*, 24 W.R. 754; *York Tramways Co.* v. *Willows*, 8 Q.B.D. 685, at p. 689, *per* Manisty, J.; p. 695, *per* Coleridge, C.J.; *Stephenson* v. *Vokes*, 27 O.R. 691. No body but the committee can "ascertain the facts"—and this does not mean "take the evidence of witnesses from which the facts may be ascertained." "Ascertain" must mean "decide upon:" *Regina* v. *Inhabitants of Heyop* (1846), 8 Q.B. 547, at p. 559; "make certain," "fix," "settle," "determine," "establish."

Brown v. *Lyddy* (1877), 11 Hun 451, at p. 456, *Russell* v. *Hartt* (1881), 87 N.Y. 19, *State ex rel. Thayer* v. *Boyd* (1891), 48 N.W. Repr. 739 (Nebr. S.C.), *Braunstein* v. *Accidental Death Insurance Co.* (1861), 31 L.J. Q.B. 17, at p. 24, may also be looked at.

I search in vain for any finding of fact by the committee; there is a mass of evidence from which a finding may be made. But, as was pointed out in the discussion in the Council, that finding depends on the credit to be attached to the witnesses: "If the evidence of that woman (Mrs. Johnston) is to be believed at all, I believe Dr. Stinson is guilty." "It altogether depends on the doctor's reliability as a witness."

It was, to my mind, the plain duty of the committee to pass upon the credibility of the witnesses, and, upon such evidence as they believed, find, ascertain, the facts. It is quite true that Dr. K., who was a member of the committee, says: "I heard the doctor's evidence and that of the two witnesses principally involved, and I can only form my own judgment from the manner in which the evidence appeals to me; and, in my mind, there is not the slightest question of doubt as to the doctor's guilt." The forming of such a judgment was what Dr. K. and his associates should have done in the committee, not in the Council.

That Dr. S. also was of this opinion appears probable, if not certain, from the fact of his voting with Dr. K. in 1911 to strike off the register—but Dr. R., the third member and chairman of the committee, does not vote at all, either in 1911 or in 1912.

There can be no kind of doubt, I venture to think, that there has been no ascertaining of facts by the statutory body charged with that duty; and there was nothing upon which the Council could validly act.

As to what is to be found, ascertained, by the committee, I think that they should find specifically all the facts which will enable any tribunal charged with that duty to determine whether the conduct complained of and found comes within the statute.

The provision as to a written report is curious—it is not "the Council may act upon a report of the committee," or even the Council may act upon a written report of the committee," but "a written report of the committee may be acted upon by the Council." Of course, no committee possessed of any sense—and there are such—would, in view of the provisions of the statute, think of substituting an oral report for a written report—although what is meant may well be only that the Council need not require a report orally with all the committee present, etc., but may accept and act upon a written report: not wholly unlike the case of a jury, who generally give their verdict orally in open Court, but are sometimes permitted to give a verdict in writing, the Court not sitting. As at present advised, I think that this is the meaning. In view of the mandatory provisions of sec. 33, I do not think that the Council has an option to act or not to act when the committee have ascertained the facts—the "may" does not refer to a discretion left to the Council to act or not to act, but to act, if so inclined, upon a written report, instead of requiring the committee to attend in person and report in that way.

But, a report being made—at least a report in writing—the Council still has duties before the order is made to erase the name of the alleged offender from the register. This can be done only "on proof . . . of such infamous or disgraceful conduct." That—so far as it is a matter of opinion—must, in my view, be a question for the Council. Upon the facts as found by the committee, the Council must decide whether the facts so found—and, therefore, for the Council, proved—are such as to shew that the accused has been guilty of infamous or disgraceful conduct in a professional respect. I see no provision for an appeal from the findings of the committee to the Council on the facts of the case—that is something outside the function of the Council altogether. Their sole duty is to direct their minds to applying the facts—not to disputing them.

Neither an ascertaining of the facts nor a report of the same having been made by the committee, the resolution of the Council cannot stand so as to cause an effective erasure of the name of Dr. Stinson from the register.

We now turn to sec. 36 for guidance as to the course to pursue—and it is, at least in part, to determine the meaning of this section that I have considered the duty of the Council somewhat at length.

On this appeal we may: (1) order restoration of the name of Dr. Stinson to the register; or (2) confirm the erasure; or (3) order further inquiry by the (a) committee or (b) Council into the facts of the case—as well as dispose of the costs.

In the present case, the whole difficulty is, that the Council

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and the committee did not do what the statute calls upon them to do—a more striking example of "how not to do it" is seldom met with—and, if that can now be done, it should be done.

The only "further inquiry by the . . . Council" which the Council could make would be: (1) an inquiry from the committee as to the facts of the case found by them; or (2) an inquiry by the Council by means of a committee, the standing committee: sec. 35 (1), (2). Had the committee which sat to hear the evidence remained in office, I see no difficulty or impropriety in an order that the Council should make further inquiry into the facts of the case by requiring that committee to make a report of the facts of the case upon which the Council could legally act. But the members who sat to hear the case are not now on the committee—they are *functi*—the personnel is entirely changed; and no finding by the members of the former committee would be now a finding by the committee: *D'Arcy* v. *Tamar Kit Hill and Callington R.W. Co.* (1867), L.R. 2 Ex. 158; *In re State of Wyoming Syndicate*, [1901] 2 Ch. 431, 432; *In re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230, 235; *Bosanquet* v. *Shortridge* (1850), 4 Ex. 699; *In re George Newman & Co.*, [1895] 1 Ch. 674, 686.

The committee which heard the evidence cannot now sit at all. The only inquiry that can be ordered to be made by the Council is an inquiry by the Council in the ordinary way, i.e., by the committee—and that should now be ordered.

The power given the Court to order further inquiry by the committee is, I think, intended to cover irregularities or worse at the hearing, the committee having remained intact.

It seems to me that the three courses which this Court may pursue are mutually exclusive—we are not expressly given the power to restore the name during the pendency of further inquiry where further inquiry is directed, as we are (by means of an "and") given the power to deal with the costs, whatever we do. And, even if we had that power, I do not think it should be exercised.

Evidence is given which, if believed, would not only justify but necessitate a finding that this practitioner was guilty of two disgraceful crimes; that one of the three members of the committee believed this evidence, he himself asserts in Council; that another felt the same way is reasonably clear, as he voted for a resolution declaring Dr. Stinson guilty of these crimes; that the third did not agree is not even suggested by the appellant or any of his sympathisers (I do not use the word in any derogatory sense) in the Council. The whole membership of the Council in 1912 (twenty-one in all) thought him guilty. The only reason the action of the Council is not effective is, that the statutory method of proceeding was not strictly complied with.

as it should have been—I think, therefore, that, even if we had the power to restore the name in the interval, we should not do so.

As to costs, all the proceedings in the way of taking evidence, etc., have been rendered useless by the error of the committee—the appellant should have those paid by the Council. The costs of the appeal, I should hold, should also be paid to the appellant but for the manner in which the appeal was brought before us. No possible complaint—rather the contrary—can be laid at the door of counsel; counsel instructed the solicitor to furnish copies of all papers to be relied upon for the use of the members of the Court—this was not done, and much difficulty was experienced in following the argument. Such neglect is inexcusable; and, indeed, no excuse or explanation is offered. Except one counsel fee to leading counsel, I think the appellant should have no costs of the appeal.

These costs directed to be paid to the appellant may be set off against any costs ordered in the previous proceedings to be paid by him, if any remain unpaid.

The order will be that the Council make further inquiry into the facts of the case; costs as above.

FALCONBRIDGE, C.J.:—I agree in the result.

Falconbridge, C.J.

BRITTON, J.:—This is an application by Stinson by way of appeal from the order of the Council of the College of Physicians and Surgeons of Ontario whereby Stinson's name was ordered to be erased from the register of said College as one of the physicians of the Province of Ontario.

Britton, J.

In the notice of motion many grounds of appeal are stated. I do not deem it necessary for me to deal with any of these. Upon the argument Mr. Hellmuth, for the appellant, raised as a specific objection that there was no finding of fact by the committee of the Council, and no report of any findings by that committee.

That seems to me decisive that this appeal must be allowed.

Section 33, sub-sec. 1, of ch. 176, R.S.O., is as follows: "Where any registered medical practitioner has either before or after the passing of this Act, and either before or after he is registered, been convicted either in Her Majesty's dominions or elsewhere, of an offence which, if committed in Canada, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register."

Where it is alleged that a practitioner is liable to have his name erased under the section first-cited, then, on proof of such conviction, or on proof of such infamous or disgraceful conduct, the Council shall cause the name of such person to be erased

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from the register. Since the Act of 10 Edw. VII. ch. 77, sec. 2, sub-sec. 1, the executive committee of the Council may cause the name to be erased.

The proof required is to be sought for when any four registered medical practitioners make application for an inquiry; and the Council shall, upon such application, cause inquiry to be made into the case of the person so alleged to be liable to have his name erased.

Section 35 (1): "The Council shall, for the purpose of exercising in any case the powers of erasing from and restoring to the register the name of any person or any entry, ascertain the facts of such case by a committee of their own body . . . and a written report of the committee may be acted upon for the purpose of the exercise of the said powers by the Council."

The Council must appoint and always maintain a committee for the purpose of sec. 35; that is, to ascertain the facts and to make to the Council a written report—a written report of the findings of the committee, not merely the evidence, which might be true or false.

Sub-section 5 of sec. 35 states that the report there mentioned is to be the committee's "report of the facts."

In this case there was no finding of facts by the committee—and, of course, no report of the facts. The evidence only was reported.

The appeal, therefore, should be allowed. The appellant's name was improperly erased and should be restored.

Section 36 provides that the Divisional Court may, upon hearing the appeal, make such order as to the restoration of the name to the register as to the Court shall seem right in the premises.

Section 34 provides that a name erased from the register by the Council may be restored by the order of a Divisional Court of the High Court of Justice. The appellant has not been found guilty by any Court—or by the committee of the Council. It is important that the name of the appellant should not be erased from the register until proof—in the manner prescribed—should be made, and a conviction or finding upon the evidence be made. The legislation was obtained at the instance of the College of Physicians and Surgeons, and for the supposed benefit and protection of the whole profession, as well as the public. The Act requires, and very properly so, the strictest proof, and in the manner prescribed, of infamous or disgraceful conduct in a professional respect, before the name of a person so charged can be erased. That proof has not been made, nor has there been any finding upon the evidence adduced. I do not feel myself at liberty to say that I think the appellant guilty. That is not my province. I am not the trial tribunal. The appellant may

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well say to the Council: "You appeal to the statute—to the statute you must go."

The appeal should be allowed with costs to the appellant. Against such costs should be allowed and set off *pro tanto* any costs owed by the appellant to the respondents. An order should go to restore the name of the appellant to the register. No direction should be given to the Council as to any other or further proceedings in this case—but the judgment should not prejudice the Council as to any other proceedings they may take. The Council should be at liberty to take such further or other proceedings under the statute as they may deem best.

Order remitting case to Medical Council for further enquiry.

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REX v. MITCHELL.

REX v. WEST.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, E. M. Meredith, Magee, and Hodgins, JJ.A. January 15, 1913.

1. PERJURY (§ II D 1—75)—AUTHORITY TO ADMINISTER OATH—REGISTRATION OF VOTERS BY DE FACTO OFFICER—JUDICIAL PROCEEDINGS.

Where a person acted *de facto* as a registrar under the Manhood Suffrage Act, 7 Edw. VII. (Ont.) ch. 5, without objection and under colour of right as having been appointed by the only statutory member of the Board of Registrars then officially acting, the administration of the qualification oath by the registrar so appointed to an applicant applying to be registered as a voter takes place in "judicial proceedings" within the meaning of sec. 171 of the Criminal Code, 1906, so as to found a charge of perjury in respect of wilfully false and misleading statements sworn to by the applicant, whether or not such *de facto* registrar had been regularly appointed.

[*Drew* v. *The King*, 6 Can. Cr. Cas. 424, 33 Can. S.C.R. 228, followed.]

Statement

THE defendants were tried in the County Court Judge's Criminal Court for the County of Kent, on charges of perjury said to have been committed before one W. G. Merritt, acting as Registrar under the Manhood Suffrage Act, 7 Edw. VII. ch. 5 (O.), for the Dominion election of 1911.

The Judge presiding in the Criminal Court, DOWLING, Jun. Co.C.J., found the defendants "not guilty;" adding that, if the Crown's contention as to the law were correct, he would find them "guilty."

The ground upon which the finding was made in favour of the defendants was, that W. G. Merritt was not properly appointed a Registrar under the Act, and that the registration proceedings taken by and before him were invalid.

The learned Judge submitted the following questions for the opinion of the Court of Appeal:—

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Statement

1. Were the actions of Judge Bell and those whom he purported to appoint Registrars, as set out in the evidence, legal and sufficient to constitute a Board of Registrars under the provisions of the Manhood Suffrage Registration Act, 1907, 7 Edw. VII. ch. 5?

2. Was W. G. Merritt a duly appointed Registrar under the provisions of the said Act?

3. If the said W. G. Merritt was a duly appointed Registrar under the provisions of the said Act, in the absence of the proceedings provided for by sec. 10 of the said Act, was he a person authorised by law to administer the oath to the defendants?

4. Were the proceedings before the said W. G. Merritt, as said Registrar, "judicial proceedings," as defined by sec. 171 of the Criminal Code of Canada?

5. If the above questions, or any of them, are answered in the affirmative, then upon the findings of fact of the trial Judge, were the defendants guilty of the offence of perjury under the Criminal Code?

Argument

J. R. Cartwright, K.C., for the Crown, argued that considerable latitude is allowed by the Courts in the case of persons occupying a *de facto* position such as the Registrar held in connection with the proceedings taken before him. The Board might consist of one person, as had been held with regard to a "committee," and a "meeting:" *In re Taurine Co.* (1883), 25 Ch. D. 118; *East* v. *Bennett Brothers Limited*, [1911] 1 Ch. 163, where *Sharp* v. *Dawes* (1876), 2 Q.B.D. 26, is distinguished. Reference was made to secs. 171 and 176 of the Criminal Code, and to 7 Edw. VII. ch. 5, sec. 5, sub-sec. 6.

R. L. Brackin, for the defendants, argued that the County Court Judge had absolutely no power whatever to act in the way he had done; and his action, being illegal from the beginning, should have been undone. He referred to the discussion of the words of sec. 171 of the Criminal Code, "whether duly constituted or not," in *Drew* v. *The King*, 6 Can. Crim. Cas. 424, 33 Can. S.C.R. 228; and said that this was a different case, as Merritt never became a Registrar at all. Reference was also made to secs. 7 and 12 of the Manhood Suffrage Registration Act, and to *Rex* v. *Rulofson* (1908), 14 Can. Crim. Cas. 253.

Cartwright, in reply.

The argument took place before the former Court of Appeal before the constitution of the Appellate Division of the Supreme Court and judgment was accordingly delivered by a Court of the Judges who had heard the argument in the former Court of Appeal.

Maclaren, J.A.

January 15, 1913. MACLAREN, J.A.:—These two defendants were tried in the County Court Judge's Criminal Court for the

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County of Kent, on a charge of perjury committed before one W. G. Merritt, acting as Registrar under the Manhood Suffrage Act, for the Dominion election of 1911.

The learned Junior County Court Judge found them both "not guilty," on the ground of alleged irregularities in the appointment of Mr. Merritt as such Registrar; but, at the request of the prosecution, granted a reserved case and submitted five questions for the consideration of this Court, adding that, if the contention of the Crown as to the law is correct, he would, upon the facts proved, find both the accused guilty.

I am of the opinion that it is not necessary for us to answer any of the first three questions, which relate to the proceedings taken by the County Court Judge for the filling up of the vacancies caused by the absence of three members of the statutory Board of Registrars, and alleged irregularities and non-observance of the Manhood Suffrage Act.

The fourth question is as follows: "Were the proceedings before the said W. G. Merritt, as said Registrar, 'judicial proceedings,' as defined by sec. 171 of the Criminal Code of Canada?"

The "judicial proceeding" in which perjury may be committed is defined in sec. 171 as a proceeding which is held "before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorise it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid."

The words "judicial proceeding," in the foregoing section, were interpreted by the Supreme Court in a case of *Drew* v. *The King*, 33 Can. S.C.R. 228, 6 Can. Cr. Cas. 424, in which a justice of the peace appointed for a group of counties sat in a case which, according to the provincial Act creating the offence, could be tried only by a justice residing in the county in which the offence was committed, whereas the justice who tried the case and administered the oath actually resided in another county of the group. It was admitted that he had no jurisdiction, and was not a tribunal *de jure;* but, because he was a tribunal *de facto*, and was exercising judicial functions, the Court held that it was a "judicial proceeding," and that the accused was rightly convicted of perjury.

Following this decision, as we must do, the fourth question above-quoted should be answered in the affirmative; and the fifth question should be answered in the negative.

Meredith, J.A.

R. M. MEREDITH, J.A.:—It may be that the chairman of the Board took too wide a view of his power, and too loose a method

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of procedure, in the appointment of persons to fill the places of his co-members of the Board; but, if that were so, it would by no means follow that the ruling of the trial Judge, in question here, was right; on the contrary, whatever view may be taken of the action of the chairman, that ruling was, in my judgment, wrong.

Regularly or irregularly, rightly or wrongly, appointed, the persons who were appointed and acted as Registrars were not only in possession of the office, but in possession under colour of right, and performed all the duties pertaining to the offices, during the whole registration, without interference, and without any attempt publicly to question their rights; and so were *de facto* officers, having power to administer the oaths in question, as far as these defendants were concerned.

Beside this, under sec. 171 of the Criminal Code, relating to perjury: "Every proceeding is judicial . . . which is held . . . before . . . any person . . . authorised by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath . . . or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not . . . and although such proceeding was held in a wrong place or was otherwise invalid."

Hodgins, J.A.

HODGINS, J.A.:—Under sec. 171 of the Criminal Code, perjury in a judicial proceeding may be committed if the oath is taken "before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not . . . and although such proceeding . . . was otherwise invalid."

The objection taken is, that W. G. Merritt, a Registrar under the Manhood Suffrage Registration Act, 7 Edw. VII. ch. 5, was not properly appointed as such, and that the registration proceedings taken by and before him were invalid. The learned Judge, His Honour Judge Dowling, has found the following verdict as to each prisoner: "Not guilty; but, if the Crown's contention as to the law is correct, I would find the prisoner guilty."

[The learned Judge then set out the questions submitted.]

In the case of *Drew* v. *The King*, 33 Can. S.C.R. 228, the charge being perjury, the Supreme Court of Canada has held that, although a Justice in hearing a charge for an offence over which he had no jurisdiction, was not a Justice having power to hold such judicial proceeding, yet that, as he was acting as a Justice having power to hold such judicial proceeding, his hearing the said charge was a judicial proceeding, within the meaning of the Criminal Code (then sec. 145, now sec. 171).

In these cases Mr. Merritt acted as Registrar under the Manhood Suffrage Registration Act, and registered the prisoners, who took their oaths before him. In view of *Drew* v. *The King*, and of secs. 14, 18, and 19 of 7 Edw. VII. ch. 5, I am of opinion that the proceeding in which the prisoners took the oath was a judicial one; and that Mr. Merritt would, therefore, be a person acting as a tribunal having power to hold such judicial proceeding. But, as the offence charged is a serious one, it is better that the proceedings taken should be considered. The Board of Registration under the Manhood Suffrage Registration Act is constituted by 7 Edw. VII. ch. 5, sec. 5. Its duties include the division of the electoral district into registration districts, the finding of convenient polling subdivisions, the assignment of a Registrar to each registration district, and the fixing of the time and place for holding the sittings of the court of appeal (7 Edw. VII. ch. 5, sec. 10), the fixing of the times and places for the registration sittings, and the giving of public notice thereof by posters (sec. 16), and the preparation and furnishing for the use of the Registrars of an alphabetical index-book for each polling subdivision, the forms of oaths, etc. (sec. 17). Under sec. 12, the Chairman is, after he has received notice of the dissolution or of the issue of the writ of election, to call the Board together, and the Board is forthwith to take the necessary proceedings for registration. Under sec. 14, the first of the four sittings for registration is to be held seven days after the date of the writ of election. The notice of dissolution was received on the 1st August, 1911, and the election in question was held on the 21st September, 1911, so that these preliminaries, the registration itself and the appeals therefrom, would have to be concluded in time to enable the voters' list to be certified, transmitted, printed, and distributed for use on the latter date.

Judge Bell appears from the evidence to have been the only member of the statutory Board within the Province until the 14th August, 1911, when Judge Dowling returned; it is so asserted, and no evidence to the contrary was produced. Mr. Scullard, the Local Master, got back to the Province on or about the 18th August; and Mr. Houston, the Police Magistrate, was absent, travelling.

Under these circumstances, Judge Bell, while recognising the difficulty of the situation decided to act under sec. 5, sub-sec. 6, which is as follows: "If there is a vacancy on the Board, or if a member is absent from the Province, or is unable to act, the other members of the Board shall appoint a fit and proper person to fill the vacancy."

Judge Bell appears to have acted in entire good faith. He says that he did not know Judge Dowling's or Mr. Scullard's address; that he asked Mr. Houston's partner to telegraph him,

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and was informed that Mr. Houston replied that he could not come back. Judge Bell had a communication by telegraph from the Clerk of the Crown in Chancery advising him of the dissolution of Parliament and to proceed with the registration, and a notice from Toronto to act as Chairman. I refer to these as shewing upon what he acted, though I am unable to see that in a Dominion election either would constitute him Chairman, and he only assumed that office, as he says, "pro tem." If the fact was, as he believed, that the three other members of the Board were absent from the Province, the filling of the vacancies was necessary. Judge Bell consulted Messrs. Stanworth and McCoig, the rival candidates at the election, and explained the difficulty he felt, and they both agreed with him that W. G. Merritt, the city clerk, was a fit and proper person for the position of Registrar. Judge Bell then appointed Mr. Merritt on the 2nd August, 1911, as a member of the Board, and Mr. Merritt thereafter acted as Registrar under secs. 14, 18, and 19 of the Manhood Suffrage Registration Act.

The remaining members of the Board were then appointed. The Board thus constituted performed the duties directed by sec. 10 in fact, though there does not appear to have been any very formal proceeding in regard to the matters specified in that section. The Board adopted the registration districts formerly in use, agreed among themselves as to the district assigned to each Registrar; and there is a resolution recorded fixing the date for the sitting of the court of appeal and designating its members. I cannot see in the proceedings any suggestion of want of good faith, or any unreasonableness. I think that Mr. Merritt acted in the full belief that he was a duly qualified Registrar, and the proceedings before him were, as I have stated, in my opinion, those of a person acting as a tribunal having power to hold such judicial proceeding.

It was argued that under the Interpretation Act, 7 Edw. VII. ch. 2 (O.), the expression "the other members" may be read as including and meaning "the other member." But the application of that Act should be made only when the circumstances require it, or to avoid rendering the principal Act unworkable. See *Regina* v. *Justices of Cambridgeshire* (1838), 7 A. & E. 480, 491; *Conelly* v. *Steer* (1881), 7 Q.B.D. 520; *Re Harding* (1889), 13 P.R. 112; Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, subsecs. 1, 26, 41. The Manhood Suffrage Registration Act (sec. 14) requires the first sitting for registration to be held on the seventh day after a date of the writ for holding the election. No evidence was given as to this date; but, assuming that the statute was observed, the date of the writ must have been the 16th August, 1911, as the first sitting was fixed for the 23rd August, 1911. The earliest date at which any statutory member

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came back was the 14th August. It is a question whether, if action had been deferred until then, there would have been time to fill the other vacancies and to enable the Board to perform the duties cast on it under the sections already mentioned. It might also be pointed out that, if only one member of the statutory Board is on hand when dissolution is announced, then, if none of the three absent members returns in time, or if there are in fact three vacancies in the office named in the statute, and sec. 5, sub-sec. 6, does not enable an appointment to be made, the Board cannot be properly constituted at all. But it is not, I think, necessary to decide this question. Mr. Merritt was acting *de facto* as Registrar; and, for the reason previously given, I think the proper disposition to make of the case is to answer questions 4 and 5 in the affirmative, and to leave questions 1, 2, and 3 unanswered.

GARROW and MAGEE, JJ.A., concurred.

Garrow, J.A.
Magee, J.A.

Crown's appeal allowed.

Re BURRARD INLET TUNNEL & BRIDGE CO.

(File 15732.2.)

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March 31.

Board of Railway Commissioners, March 31, 1913.

1. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—PROVISIONAL DIRECTORS—IRREGULARITIES.

The Board of Railway Commissioners will not pass on any issue arising between provisional directors of a railway company and municipalities in regard to the legality of payments for calls on subscriptions made by the provisional directors, or other issues of such character.

2. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—PARTIALLY ORGANIZED COMPANY, STATUS.

A railway company whose organization has not been completed as required by the provisions of the Railway Act, but which is assuming to carry on business through its provisional directors, has no standing to file detailed plans of its undertaking with the Board of Railway Commissioners, it being necessary, on the part of the company to file evidence with the Board shewing that the provisions of the Railway Act relating to organization have been complied with as a condition precedent to its right to file such plans, or of its right to any recognition by the Board of any such partially organized company.

3. RAILWAYS (§ I—2)—FRANCHISES AND RIGHTS—CONDUCTING BUSINESS THROUGH PROVISIONAL DIRECTORS, LIMITATION.

Under the Railway Act, provisional directors of a railway company have no right to carry on the business of the undertaking, their powers being limited to those specifically defined by sec. 81, sub-sec. 3 of that Act, to merely opening stock books, receiving and safely depositing stock subscriptions, making plans and surveys.

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4. RAILWAYS (§ I—2)—FRANCHISES AND RIGHTS—PROTECTION OF PUBLIC—STATUTORY PROVISIONS.

The provisions of the Railway Act as to the organization of railway companies and the amount of stock subscriptions are provisions made for the protection of the public and must be strictly followed.

THE CHIEF COMMISSIONER:—Mr. Hanes, the mayor of North Vancouver, by his complaint of the 18th inst., draws the Board's attention to the fact that the Burrard Inlet Tunnel & Bridge Co. has as yet not been organized under the provisions of the Railway Act, and that the business of the undertaking is being carried on entirely by the provisional directors. Accompanying this complaint is a statement of the company, being revenue account to December 31, 1912, from which it appears that the provisional directors have paid for calls of 25% on stock subscriptions $3,000, while the municipality of North Vancouver has paid $25,000, the city of Vancouver $20,000, and the city of North Vancouver $10,000 for calls of 10% on their subscriptions; and that of the resultant total of $58,000, only $11,783.27 remains in the hands of the provisional directors.

The legality of some of the payments made by the provisional directors is attacked. The Board will not deal one way or the other with issues of this character, the complaining subscribers having their appropriate remedy, if any, in an action in the provincial Court. This Board has never interfered, and should not interfere, in such issues.

Complaint is also made as to the action of the provisional directors in making agreements under which 5% or $105,000 of the estimated cost of the bridge is to be paid to certain engineers, and also in providing for the payment of resident engineers and assistant inspectors, increasing the liability by some $30,000 or $40,000. The complaint has been answered by Mr. Guthrie, counsel for the company in Ottawa, who has filed a statement of facts in connection with the matter. This statement shews that the petitioners to the Act of incorporation, and who are the present provisional directors, acted from the first as trustees for the municipalities subscribing stock; that the undertaking of the company is public; and that the moneys for carrying it on are to be provided by the municipalities and by subsidies from the Dominion and provincial governments. The statement further shews that the whole of the subscriptions of stock amount to only $562,000, and agrees with the complaint of the mayor of North Vancouver as to the amount paid thereon.

It is also shewn that arrangements have been made for additional subscriptions by North Vancouver and by the city of North Vancouver; that necessary by-laws have been passed;

but that, owing to difficulties arising under the provisions of the Municipal Act, the completion of the work of securing subscriptions has been held in abeyance, pending remedial legislation.

Mr. Guthrie likewise points out that proper minutes of the meetings of the provisional directors have been kept, and that these minutes shew throughout that whatever was done by the provisional directors of any importance was with the co-operation and approval of the municipalities. Other matters are also covered by the memorandum which it is unnecessary to go into, because, as has already been stated, the Board will not pass on any issue arising between the municipalities and provisional directors.

The main object of the incorporation of this company is the building of the bridge, and necessary approaches thereto, over the second narrows of Burrard Inlet for foot passengers, carriages, and street railway traffic, the construction of one or more short lines of railway being perhaps a subsidiary consideration. The provisional directors have, notwithstanding the fact that no organization has taken place, already obtained the Board's consent to the location of their bridge and the approval of the general plan. They have since filed detailed plans, which have been checked and as reported to me by the engineer are satisfactory and ample for their purposes; and the application is now pending before the Board for the approval of approaches to the bridge.

The question of the right of provisional directors to obtain approval of plans and of locations of rights-of-way, etc., does not yet seem to have been considered by the Board; probably, I would imagine, because that question has never been called to its attention, and that the Board either assumed, or the fact was, organization had in all instances taken place before action looking towards construction was ratified by the Board. I think it is clear that, under the Railway Act, it is not open for provisional directors to carry on the business of the undertaking. The powers of provisional directors are not even as great as those under the Ontario Statutes, where provisional directors enjoy the powers of directors until organization. The provisional directors, under the Railway Act, have no such authority, their powers being specifically defined by section 81, sub-section 3, as follows:—

3. The provisional directors may,—(*a*) forthwith open stock books and procure subscriptions of stock for the undertaking; (*b*) receive payments on account of stock subscribed; (*c*) cause plans and surveys to be made; and (*d*) deposit in any chartered bank of Canada moneys received by them on account of stock subscribed.

Before this company can be organized and empowered by the Board to carry on business, stock to the extent of at least

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$750,000 must be subscribed, and at least $75,000 paid into some chartered bank to the credit of the company. Railway companies have powers of great plenitude. The filing of plans and the approval of locations, apart entirely from the rights of expropriation, affect private interests. The provisions as to the organizations and stock subscriptions are provisions made for the protection of the public and must be strictly adhered to. For the purpose of disposing of this matter, I credit the promoters with the best of faith; but their entire *bona fides* is no answer to the complaint of the mayor of North Vancouver. The company has not been organized; and, until it is organized, all applications of the company, under the provisions of the Railway Act, for approval of plans, locations, or otherwise, will be refused.

The approval already granted was made in July last by a section of the Board presided over by the Assistant Chief Commissioner, who tells me that if the fact of the lack of organization had been brought to his notice, no Order would have been made.

With a view of preventing in the future the recognition of any unorganized company, evidence must be filed with the Board shewing that the provisions of the Act relating to organization have been complied with, as a necessary part of the material of the first application of newly incorporated companies.

Assistant Chief Commissioner. Com. Mills.

The ASSISTANT CHIEF COMMISSIONER and COMMISSIONER MILLS concurred.

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Dec. 30.

WOOD v. GRAND VALLEY R. CO.

(Decision No. 2.)

Ontario Divisional Court, Boyd, C., Latchford, and Kelly, JJ. December 30, 1912.

1. CORPORATIONS AND COMPANIES (§ IV G 2—111)—POWERS OF PRESIDENT —CONTRACT SIGNED BY CORPORATE NAME FOLLOWED BY SIGNATURE OF PRESIDENT AS SUCH.

The name of an incorporated company at the foot of an agreement, followed, as part of the same signature, by the name of its president and the word "president," is the signature of the company and not of the president personally.

[*Wood* v. *Grand Valley R. Co.* (No. 1), 5 D.L.R. 428, affirmed in part.]

2. CORPORATIONS AND COMPANIES (§ IV G 2—111)—LIABILITY OF PRESIDENT ON AGREEMENT EXPRESSLY ENTERED INTO ON HIS OWN BEHALF AND THAT OF THE COMPANY—SIGNATURE OF COMPANY.

Where by an agreement which is in writing, but which it would have been competent to the parties to make without any writing, the president of an incorporated company enters into an undertaking expressly upon his own behalf and upon behalf of the company, but signs the agreement in the name of the company only, the written

document will be regarded merely as a record of the agreement and not as the agreement itself, and the president will be held personally bound by his undertaking.

[*Wood* v. *Grand Valley R. Co.* (No. 1), 5 D.L.R. 428, affirmed in part.]

3. DAMAGES (§ III A 1—45)—MEASURE OF COMPENSATION FOR BREACH OF CONTRACT TO COMPLETE RAILWAY.

The loss of benefits which would ordinarily accrue to merchants in the transaction of their business from the construction of a line of railway connecting with another railway the place where their respective businesses were being carried on, is not too remote to be considered in assessing damages to such merchants who purchased bonds of the railway under an agreement by the railway company to complete and operate the line in respect of the company's failure so to do.

[*Wood* v. *Grand Valley R. Co.* (No. 1), 5 D.L.R. 428, varied; *Candy* v. *Midland R. Co.*, 38 L.T. 226; *Simpson* v. *London and North Western R. Co.*, 1 Q.B.D. 274, 277, and *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, specially referred to.]

Statement

APPEAL by the defendants from the judgment of Middleton, J., *Wood* v. *Grand Valley R. Co.* (No. 1), 5 D.L.R. 428, 26 O.L.R. 441.

The judgment below was varied.

Argument

C. J. Holman, K.C., and *T. H. Peine*, for the defendant Pattison, argued that Pattison did not sign the memorandum individually, but merely as president of the railway company, and he should, therefore not be held liable personally. The plaintiffs should be confined to the four corners of the agreement: *Inglis* v. *Buttery* (1878), 3 App. Cas. 552, at p. 572. As to the damages, substantial damages should not be awarded where they are uncertain, as in this case. The true rule was laid down by Mr. Justice Burton in *Corbet* v. *Johnson* (1884), 10 A.R. 564, at p. 575, as follows: "2. The damages must be certain both in their nature and in respect to the cause from which they proceed." This rule was adopted in *Pullan* v. *Jones* (1911), 3 O.W.N. 361. On the same subject he referred to Am. and Eng. Encyc. of Law, 2nd ed., vol. 8, p. 614; *Taylor* v. *Bradley* (1868), 4 Abb. App. Dec. (N.Y.) 363; *Simpson* v. *London and North Western R.W. Co.* (1876), 1 Q.B.D. 274; *Corporation of Whitby* v. *Grand Trunk R.W. Co.* (1901-2), 1 O.L.R. 480, 3 O.L.R. 536; *Dullea* v. *Taylor* (1874), 35 U.C.R. 395; *Adams Express Co.* v. *Egbert* (1860), 36 Pa. St. 360; Mayne on Damages, 8th ed., pp. 13, 70; *Western Union Telegraph Co.* v. *Crall* (1888), 39 Kan. 580; *Sapwell* v. *Bass*, [1910] 2 K.B. 486; *Fitzsimmons* v. *Chapman* (1877), 37 Mich. 139. The damages here were not the certain result of the breach. As to the case of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, referred to by the learned trial Judge, it was not like this case; but *Sapwell* v. *Bass* (*supra*), referred to there, was a similar case to the present.

S. C. Smoke, K.C., for the defendant railway company, on the question of damages, contended that the case of *Chaplin* v.

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Hicks was so different that it could form no basis for the judgment here.

G. F. Shepley, K.C., and *J. Harley*, K.C., for the plaintiff, said they would not trouble the Court further with the cases. The damages were estimated by the trial Judge sitting as a jury, and regarding all the contingencies; and the substantial sum at which he arrived should not be questioned by a Court of review. If Pattison was not bound by the writing, he was bound by the original agreement made with the plaintiff, which did not require to be in writing. The agreement was, in fact, signed both by the company and by Pattison individually. By the letter of the 15th June, Pattison had recognised his personal responsibility.

Holman, in reply.

Boyd, C.

December 30. BOYD, C.:—Of all the defences upon the record, two only were brought before us on this appeal.

It was contended, first, that as to the defendant Pattison there was no personal liability; and, second, as to both defendants, that the plaintiff had no right to more than nominal damages, and that, therefore, the $10 brought into Court was ample satisfaction, even if there had been a breach for which both defendants were liable.

The judgment in appeal is to be upheld on both heads, though it should be reduced in extent, and though the lines of support may be somewhat different from those of my brother Middleton.

The action is based on an agreement made on the 29th June, 1906, set out in the pleadings. By it, Mr. A. J. Pattison, president of the Grand Valley Railway Company, undertakes and agrees, on his own behalf and on behalf of the said Grand Valley Railway Company, that he will make or cause to be made a through traffic arrangement with the Canadian Pacific Railway Company by means of an extension of the Grand Valley Railway to St. George; this he undertakes in consideration of the purchase of bonds of the Grand Valley Railway Company by certain manufacturers and other citizens of St. George. These latter parties were then well-known, and they had in fact already made applications for bonds up to the extent of $10,000, which was the amount stipulated for by Mr. Pattison in his negotiations which ended in the agreement. The applications were in escrow and not to be operative till a personal guarantee from the president of the Grand Valley Railway Company had been secured. These applications, according to date, were: one for $2,000 of bonds, on the 6th June, 1906, on behalf of the Jackson Waggon Company; another of the same date, for $2,000, signed by Dr. E. E. Kitchen; one on the 7th June for $2,000, by the Bell Foundry Company; and one on the 15th June for $4,000, signed

by Dr. Kitchen, J. P. Laurason, S. G. Kitchen, F. K. Bell, and W. B. Wood. These make up $10,000; but, by some adjustment not very clear on the evidence, there was a further application by W. B. Wood for $2,000 on behalf of the Brant Milling Company.

The action is now brought by these plaintiffs, W. B. Wood, the Jackson Waggon Company, J. P. Laurason, S. G. Kitchen, E. E. Kitchen, W. B. Wood and A. J. Wood, the latter carrying on business as the Brant Milling Company. The three companies, all doing business at St. George and elsewhere, who took stock on the faith of the undertaking embodied in the agreement of the 29th June, were the Jackson Waggon Company, the Brant Milling Company, and the Bell Foundry Company. The latter became insolvent and were not able to meet the payments for the bonds, and were relieved by the others—but no transfer was taken of any rights under the agreement, although the bonds were, as I understand, delivered to some of the plaintiffs. The plaintiffs, individually named, W. B. Wood, S. G. Kitchen, E. E. Kitchen, and J. P. Laurason, were more or less interested in the said companies, but they individually held some of the bonds.

The relative interest of the parties is somewhat cleared up by the delivery of particulars pursuant to an order made for that purpose. By these, all the individual plaintiffs claim no more than nominal damages, but substantial damages are claimed by the Jackson Waggon Company to the extent of $5,000 and by the Brant Milling Company to the extent of $8,000. The order of the 13th November for these particulars provided that all evidence should be barred as to other damages. The particulars furnished should have been added to and made a part of the record. Perhaps by reason of the omission so to make them, the effect of that order and the response thereto by the individual plaintiffs has been overlooked in the judgment.

What the St. George people desired was to have freight connection by means of the Grand Valley Railway with the Canadian Pacific Railway at Galt, and all the profits expected to result appealed to the business men and the manufacturers by reason of competitive rates and easier methods of carriage and shipment of goods. The appeal was specially and substantially to the manufacturers who are the plaintiffs, and not to the individual plaintiffs, who could not expect any tangible benefits except those which would be common to the whole community. Wood lives at Montreal, Laurason at Toronto, the two Kitchens at St. George—one a retired farmer and the other a physician. Therefore, the failure to construct the road may not have sounded in damages as to them in any way commensurable in a Court; and so their claim for nominal damages merely is not improvident.

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Hence, as it seems to me, the inquiry should be as to what damages have been sustained by the two plaintiff companies, each holding $2,000 in bonds of the defendants. Both parties agreed to the damages being disposed of by the Judge upon the evidence as taken at the trial.

The agreement contemplated a speedy completion of the work. Laurason gives the language of Mr. Pattison, saying that he would bring the road into St. George before the snow flies if they bought the bonds.

The first and immediate thing to be done was to extend the railway to St. George, and then to make a through traffic arrangement with the Canadian Pacific Railway Company at Galt, the Grand Valley Railway Company supplying the necessary sidings and switches. The failure to construct this intermediate piece of the road was the breach of the contract, and involved the loss of all the expected advantages. For this connection the plaintiffs were willing to buy and pay for the bonds, and these were regarded as merely a collateral security for the performance of the undertaking. The very construction of a road operative up to St. George would have brought advantages to the merchants and manufacturers. This feature of the bargain was in the minds of both parties, and is the benefit referred to in the writing of the 6th June as being the establishment of freight connection with the Canadian Pacific Railway at Galt (words used by the defendant Pattison). The proximate consequence of the breach complained of was within the contemplation of the parties —a loss of benefits in the transaction of business at St. George.

I do not feel pressed by any difficulty raised on the ground of remoteness of damage; nor is there any on the ground of directness. To use the words of Cleasby, B., in *Candy* v. *Midland R.W. Co.* (1878), 38 L.T.R. 226, 227; "Where there is the common knowledge of a particular object, then damages may be recovered for the natural consequences of the failure of that object." It does not become the defendant, who has broken the contract, to say that, had he done the preliminary work of extending the line, there might have been all sorts of difficulties and contingencies in carrying out and completing the work subsequently to be done. That is all besides the question as to whether there was an actionable wrong and a right to recover actual damages resulting from the failure of the defendant to do his part. The language used in *Simpson* v. *London and North Western R.W. Co.* (1876), 1 Q.B.D. 274, 277, seems appropriate here, *i.e.:* it is to be assumed that the plaintiff would get some benefit; and, though there may be some speculation as to the amount, it is not impossible to award more than nominal damages. Had the defendant done his part, it is to be assumed that all the rest would have followed in due course, but yet the ap-

praisal of damages is not to be made nor can it be made absolutely and certainly, but, as said by Mathew, J., in *Faulkner* v. *Cooper & Co. Limited* (1899), 4 Com. Cas. 213, 215, the tribunal "must take into account the chances of human life, the vicissitudes of trade, the probability of the plaintiff's customers ceasing to deal with the defendant company, and various other considerations"—many of which are set out by Mr. Holman in his reasons of appeal.

It may be that the English Courts have taken a distinct step in advance in the case relied on by the Judge of trial, *Chaplin* v. *Hicks*, [1911] 2 K.B. 786; but it marks only a point in the evolution of the law relating to damages. In a commercial country, the obligations of contracts are strenuously enforced, and a man is not to be allowed to escape the penal consequences of a broken contract by saying that the damages are too remote. Against this the Courts are setting themselves; and this latest decision has been commended by the law magazines as a neat illustration of the difference between the mere violation of a legal right without measurable damages and a breach which, though the result be contingent and speculative, is enough to be left to the appreciation of a jury. The intervention of a third person's judgment or discretion makes no difference in principle: 27 Law Quarterly Review, p. 383. The doctrine laid down in the case is spoken of as a valuable guide in 37 Law Magazine, pp. 223, 224.

Each company paid $1,940 for the $2,000 bonds. This affords some approximation of the amount of damages sustained, as representing the amount practically lost by relying on the word of Pattison. I would not discard the method of getting at figures adopted by my brother Middleton, but I would reduce the damages to both the company plaintiffs to the sum of $3,880; giving to the other plaintiffs the $10 paid into Court, as nominal damages.

It remains to place the liability of Pattison as it appears to me on the evidence. When the paper of the 6th June was proffered to the plaintiffs, it was refused on the ground that it did not provide for personal liability. That paper was written out and signed by Pattison thus: "The Grand Valley Ry., Prest." The agreement sued on was prepared by Wood to provide for the omitted factor of personal liability on the part of the president, as the plaintiffs found out that he was a person of financial responsibility, and they regarded the railway as of little worth as a security. This was drawn providing for the purchase of the bonds on the terms of Mr. A. J. Pattison, president of the Grand Valley Railway Company, agreeing "on his own behalf" to make or cause to be made the through traffic arrangement which involved the extension of the road at once; and, at the

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end, the terms of the agreement were to be binding upon the heirs, executors, and assigns of Pattison. He signed this, as in the former paper: "The Grand Valley Ry. Co., Prest." And, before the "Prest.," signed his own name at length, "A. J. Pattison." I think that he thus gave the other parties to understand that he was signing not only as president but as an individual. A dual character was attached to the signature, from which he should not be allowed to recede because he now says he did not intend to bind himself; and that, if he had been going to bind himself, he would not have signed without more time for consideration. He had time for consideration: it was known from the outset that his own personal liability was a *sine quâ non;* and I agree with the trial Judge as to his estimate of the evidence. No satisfactory explanation is given by Mr. Pattison of the words "on his own behalf," and the clause as to heirs and executors; and there is no other explanation except that referable to his becoming personally liable. The defendant asks for a reformation of the contract if, in its construction, he is found to be so personally implicated. If reformation were needed, it should rather be the other way, by declaring that the true bargain was that he should be bound, and so declaring if the writing is to be read as halting in this respect. But, I think, sufficient appears as it stands to uphold the plaintiffs' claim. Having taken the benefit of what was done, though it may be for the primary benefit of his company, he cannot avoid giving effect to all the terms, though as a formal thing he has not affixed an individual and independent signature to the writing, in addition to the words and names he has used in authentication and verification of it.

With the reduction of amount, the judgment should be affirmed with costs.

It may be a proper term of the judgment to direct the delivery up of the $4,000 bonds held by the two companies as originally subscribed by them.

Latchford, J.

LATCHFORD, J.:—The writing subscribed "The Grand Valley Railway Company, A. J. Pattison, president," did not cover all that was agreed upon between Mr. Pattison and certain of the plaintiffs before the document was signed. The trial Judge so finds, and there is evidence to warrant his finding. It was open to the plaintiffs, with whom the agreement was made, to shew—and they did shew—that the written instrument was not a complete record of what had in fact been agreed.

"It should be borne in mind that a written contract, not under seal, is not the contract itself, but only evidence—the record of the contract:" Bramwell, B., in *Wake* v. *Harrop* (1861), 6 H. & N. 768, at p. 774; affirmed, 1 H. & C. 202.

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Here the record, though incomplete, is—as the trial Judge determined—conclusive that Pattison is personally bound. Pattison seeks to take advantage of the fact that he did not sign the writing otherwise than as president of the Grand Valley Railway Company. The company, acting through him and only through him, subscribes to a document declaring that he has undertaken and agreed "on his own behalf" to make certain traffic arrangements; that is, as several of the plaintiffs desired, he personally would make such arrangements. The evidence outside the document—apart from Pattison's, which is not credited—is overwhelming that what such plaintiffs insisted on was the undertaking of Pattison himself, not only as to the rates to be charged by another railway but as to the all-important prerequisite—the construction of the link connecting the town of St. St. George with that railway.

The manufacturers of the town desired to have competition with the existing line for their inward and outward freight, because of the cheaper rates and consequently greater profits that such competition would insure. When Mr. Wood prepared the written agreement, he manifested an intention to bind Pattison to all that Pattison had promised in return for the $10,000. Manifestly, the construction of the line had been promised; otherwise, traffic arrangements for direct connection with the Canadian Pacific Railway at Galt would be absolutely futile.

I think the writing itself—considered apart from the testimony at the trial—is evidence that Pattison contracted, "on his own behalf and on behalf of the Grand Valley Railway Company, to proceed at once with the extension of his railway to St. George." Otherwise the proviso is meaningless that the terms, etc., of the agreement are to be "binding upon the heirs, executors, and assigns of the said Pattison."

I do not regard as tenable the contention of Mr. Pattison that, as he did not sign the document in his personal capacity, its provisions are not binding upon him. When he subscribed his name to it as part of the signature of his company, he attested the truth of what the document states when it declares that it is made on his behalf and is binding in all its terms upon his legal representatives.

When a person signs a writing in a particular capacity—as an officer of the defendant company, in this case—he cannot, in my opinion, be allowed to disclaim an obligation stated in that writing to have been assumed by him, on the ground that he did not sign his name a second time, in his personal and individual capacity. This is clear when Lord Bramwell's words in the case cited are recalled. There the point for decision arose upon demurrer to the defendant's plea in answer to a declaration upon a charterparty drawn in a form which bound the defend-

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ants at law. Their signature was: "For A. Davidson and Co., Messina, T. W. & J. C. Harrop and Co., agents." They pleaded that when the contract was signed it was agreed that the defendants were to sign only as agents to bind Davidson and Co., and were not to make themselves liable as principals for the performance of the charter—and that the plaintiff was inequitably taking advantage of the mistake in drawing the contract. The plea was held good in equity; and, according to Lord Bramwell, it seemed good also in law.

In the present case, Pattison intended to bind himself, as the writing states; and upon the faith of his agreement that he was so bound the plaintiffs paid their money. I do not think there is any avenue of escape open to Pattison. The damages, however, as found by the trial Judge, after the parties by their counsel concurred in requesting that he should make the assessment, must be limited as stated in the judgment of my Lord the Chancellor—in the result of which I agree.

Kelly, J.

KELLY, J.:—I agree in the result.

Judgment below varied.

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(Decision No. 2.)

Judicial Committee of the Privy Council. Present: Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, and Lord Moulton. February 19, 1913.

1. TRUSTS (§ I D—23)—SALE OF LAND BY TRUSTEE OF PARTNERSHIP REAL ESTATE—SECRET TRUST—RIGHTS OF PARTNERS.

Where persons purchased land in partnership and had the conveyance made to one of their number who was afterwards judicially declared a trustee thereof for the partnership, a sale made by him of the land ostensibly to a stranger, who was an innocent purchaser, but in reality to the stranger and one of the other partners jointly, a non-assenting partner would still be entitled to claim out of the interest of the partner who so acquired title, the same share as such non-assenting partner would otherwise have held under the partnership agreement.

[*Gordon* v. *Holland*, 2 D.L.R. 327, affirmed in part.]

2. PARTNERSHIP (§ II—8)—RIGHTS AND POWERS OF PARTNERS—DISPOSAL OF PROPERTY—CONSENT.

Where a partnership for the speculative purchase in block and the sale in parcels of certain lands rapidly rising in value subsists; and where one of the terms of the partnership agreement is that none of the land in question shall be sold without the consent of each of the partners; the provision of sub-sec. 8 of sec. 27 of the Partnership Act, R.S.B.C. 1911, ch. 175, that any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, is not applicable.

[*Gordon* v. *Holland*, 2 D.L.R. 327, varied.]

3. PARTNERSHIP (§ II—8)—POWERS OF PARTNERS—SELLING PARTNERSHIP PROPERTY—PERSONAL SCHEME.

Where a partnership for a speculative purchase in block and sale

in parcels of certain partnership lands rapidly rising in value subsists; and where one of the terms of the partnership agreement is that none of the land in question shall be sold without the consent of each of the partners; and where one of the partners, who holds the legal estate in trust for himself and his co-partners, acting in collusion with another of his partners as a co-adventurer in a transaction for their sole benefit to speculate in such partnership lands, effects a so-called sale without the unanimous consent of the partners, the transaction is illegal and wrongful from its inception.

[*Gordon* v. *Holland*, 2 D.L.R. 327, varied.]

4. VENDOR AND PURCHASER (§ III—39)—ASSIGNEE OF BONA FIDE PURCHASER—FRAUD VITIATING SHELTER.

The rule which protects a purchaser with notice taking from a purchaser without notice, and thereby sheltering himself under the latter's title, is never applied (*a*) to enable a trustee to buy back trust property which he has sold, (*b*) to enable a man who has acquired property by fraud to plead that he sold it to a *bonâ fide* purchaser without notice and has got it back again; and where a partner, holding the legal estate in trust for all the partners, so acts with another partner in a scheme as co-adventurers in a transaction amounting to a clear breach of such trust on the trustee partner's part and to a fraud against the remaining partners on the part of both participants in such scheme, the general rule of protection of *bonâ fide* purchaser cannot be invoked by either of the wrongdoers.

[*Gordon* v. *Holland*, 2 D.L.R. 327, varied; *Lowther* v. *Carlton*, 2 Atk. 242, reconciled; *Re Stapleford Colliery Co., Barrow's Case*, 14 Ch.D. 432, 445; Lewin on Trusts, 12th ed., pp. 1102, 1103; *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch.D. 954, 962, 963, applied.]

5. TRUSTS (§ I D—22)—CONSTRUCTIVE—"PERSONS ACTING IN A FIDUCIARY CAPACITY"—PARTNERS.

Where two partners of a firm assume to sell certain partnership lands, without the required consent of all of the partners, in a transaction obviously designed and resorted to in order to enable one or both of the designing partners to realize, and (as against the remaining partners) to keep for themselves all the profits which could be gained in a rapidly rising land market; such designing partners are both in a fiduciary relationship toward their remaining co-partners, and may be treated as "persons acting in a fiduciary capacity," and a full accounting may be decreed.

[*Gordon* v. *Holland*, 2 D.L.R. 327, varied; *Marris* v. *Ingram*, 13 Ch.D. 338, applied; *Knox* v. *Gye*, L.R. 5 H.L. 656; *Piddocke* v. *Burt*, [1894] 1 Ch. 343, distinguished.]

6. TRUSTS (§ I D—22)—"PERSON ACTING IN A FIDUCIARY CAPACITY"—DUTY.

A "person acting in a fiduciary capacity" means a person who stands in a fiduciary relation toward any other person who may be entitled to call upon him to pay.

[*Gordon* v. *Holland*, 2 D.L.R. 327, varied; *Marris* v. *Ingram*, 13 Ch.D. 338, applied.]

Statement

APPEALS by the plaintiff and one of the defendants from the judgment of the Court of Appeal of British Columbia, *Gordon* v. *Holland*, 2 D.L.R. 327, 20 W.L.R. 887, varying the judgment of Gregory, J., at the trial.

The appeals were allowed.

Buckmaster, K.C., and *Hon. M. Macnaghten*, for Gordon.

E. P. Davis, K.C., of the British Columbia Bar, *Atkin*, K.C., and *C. H. Sargeant*, for Holland.

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The judgment of the Board was delivered by

LORD ATKINSON:—There has been much litigation between the parties interested in the several transactions out of which these appeals arise, and the facts of the case are, in consequence, somewhat complicated.

So far as material for the purposes of this judgment, they are as follows: The appellant, the respondent, and one Richard W. Holland carried on in partnership, in the year 1906, the business of real estate agents at Vancouver, in the province of British Columbia, under the style of "The Holland Realty Company."

On the 15th May in that year, they entered into agreements with two separate vendors to purchase (with a view to resale) two separate plots or blocks of land in Vancouver, at the price of $125 per acre. Of these, the block called lot 2, purchased from the Grandview Trust Company, comprised 18.13 acres, and the block called lots 10 and 11, purchased from the Messrs. Nelson, comprised 25 acres, making 43.13 acres in all. The purchase-money of the first block was, therefore, $2,266.25, and that of the second $3,125—$5,391.25 in all. The name of the bookkeeper of this firm, one Garling, was inserted in these contracts as purchaser, but his was a mere *prête-nom;* and, of course, he contracted on behalf of his employers. According to the terms of the contract, a sum of $1,800 was to be paid on their execution, and the balance of the purchase-money by four instalments of named amounts, at intervals of six months. The firm, being unable to pay this sum of $1,800, applied to a friend of William Sowden Holland, one Thomas Horne by name, to come to their assistance. He did so, and advanced $1,506 in part discharge of the first payment, the firm providing the balance of $294. By two several indentures, bearing date May 29, 1906, Garling purported to assign to Horne both contracts of purchase, and the lands the subject of them. These instruments, however, do not appear to have ever been delivered to Horne, but he was subsequently registered in the land registry as the legal owner of the lands. A dispute soon arose between the appellant on the one side, and the respondent and Horne, on the other, as to the precise terms of the arrangement on the faith of which he, Horne, had provided the sum of $1,506. The present appellant contended that the terms were that Horne was to come into the adventure as a partner with the three members of the firm, or so-called company; that he was to provide 85 per cent. of the purchase-money, the company providing the remaining 15 per cent.; that any profits made upon the resale of the land were to be divided between Horne and the company in equal shares, the company guaranteeing, however, that Horne's share of the profits should not be less than 15 per cent. upon his

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outlay; that the land was to be conveyed to and vested in Horne as trustee for himself and his three co-adventurers; and, lastly, that none of the lands were to be sold without the consent of all the parties concerned. According to this contention, Gordon substantially became beneficially entitled to one-sixth of the property.

The respondent and Horne, on the other hand, contended that the terms were: that Horne was to pay all the accruing instalments of the purchase-money when due; that, in consideration of this, the lands were to be conveyed to and be held by him as absolute beneficial owner, with power to sell and alienate them at his own discretion, subject only to this, that, if they should be sold at a profit, 15 per cent. of this profit should be retained by him, Horne, as his own, and the remaining 85 per cent. of it divided between him and the company in equal shares. These were the respective positions taken up by the parties from the first, and through all the vicissitudes of the litigation in the Canadian Courts resolutely maintained by them, until the controversy was set at rest by the judgment of this Board of July 29, 1910, upholding Gordon's contention. The partnership styled the Holland Realty Company was subsequently dissolved.

Towards the latter end of February, 1907, Horne and his friend and adherent in the dispute, William S. Holland, joined in an enterprise to sell the entire 43.13 acres to one R. S. Ewing, of St. John, New Brunswick, for a sum which worked out at $325 per acre. The device adopted to attain this end was this. Horne gave to the respondent an option ending on March 12, 1907, to purchase the lands, and the respondent, who was the active mover in the business, in the exercise, or pretended exercise, of the power he thus acquired, opened negotiations with Ewing by letter dated February 26, 1907. In this letter he dwelt in glowing terms upon the value of the property, and the vast profits likely to be realised upon its subdivision and resale, but did not then mention that he had himself any interest in it, or in the profits to be realised upon its resale other than what the option gave him. Ewing replied by telegram on the 9th March offering to buy half the property. To this telegram the respondent, on the 14th March, wired in reply:—

> Land deal closed as per your wire. Will pass draft with agreement attached. Writing fully.

The letter alluded to in this latter telegram duly arrived. It was dated March 18, 1907, and contained the two passages following:—

> This appeared to me to be such a good proposition that I induced the original holder, Mr. Horne, to retain one-quarter interest, myself taking the other quarter, giving you that half, as suggested in your wire. You can see by this that we have absolute confidence in the transaction. The

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papers are being drawn out now, putting the property in the name of R. S. Ewing and Thos. Horne, on exactly the basis laid down in your letter of the 26th ult. Now to clean this proposition up and to do it quickly, we are subdividing lots 10 and 11, and No. 2 in 320, in parcels comprising practically half acres, and we are putting them on the market at a given date, which date you will be advised of, and which will be some time about the middle of April, I imagine, at prices which will average $600 an acre over the entire 43 acres.

The other party interested in this proposition with us is a personal friend of mine; I, therefore, can vouch for him as an interested party. We have, however, between you and myself, controlling interest in this property. Although my name does not appear in the agreement of sale, I hold a letter from Mr. Horne assigning to me one-quarter interest in his half, with all the privileges as an owner, so that you can, therefore, see exactly the position in which this deal lies. I am going, as you may depend, to make a special effort in connection with this particular deal, as I realise, if I can make Mr. Ewing clear $1,000 in a month or six weeks on a small investment like $1,500, and should I have another good proposition to put up, I will be able to induce him with more capital, and his friends, to swing a deal of this kind in this territory. I feel that we will be able to pull this off in a hurry.

The statements contained in these extracts as to the alleged assignments by Horne to the respondent of a quarter of his interest in this land are now admitted to be false. They were obviously made to win Ewing's confidence, and induce him to buy. They were successful, not to the extent designed, but to the extent of the sale of an undivided moiety of the lands, at a profit of $200 per acre.

It was held by this Board that it was one of the express terms of the partnership agreement entered into between Horne and the partners in the Holland Realty Company that, as Gordon asserted, none of this land should be sold without the consent of each of the four partners. It is now admitted that he, Gordon, never consented to this sale to Ewing.

The contention put forward in argument before their Lordships on the respondent's behalf, that Gordon, though not giving any antecedent consent to this transaction, acquiesced in it or adopted it, and is now bound by it, cannot, having regard to the latter's attitude from the first, be, in their opinion, sustained.

The sale, therefore, being a violation of the express terms of the partnership agreement, was illegal and wrongful from the first, and Horne, the trustee for himself and his co-partners, and William S. Holland, one of those co-partners, were in truth co-adventurers in a transaction amounting to a clear breach of trust. William S. Holland was not examined as a witness at the trial of the present action. Having regard to the deliberate falsehood which he resorted to, he naturally recoiled from a cross-examination.

The sale was entirely contrived and carried out by him, and was effected, or at least attempted to be effected, by his false representations. Ewing knew nothing of the true state of affairs. He obviously trusted William S. Holland, and stood towards the transaction, no doubt, in the position of a bonâ fide purchaser for value without notice.

In this state of things the appellant Gordon, on November 9, 1907, instituted an action in the Supreme Court of British Columbia against Horne and the two Hollands, claiming: (1) a dissolution of the partnership; (2) a partition of the lands, or a sale of them and a distribution of the proceeds amongst the parties interested according to their respective rights; (3) that all necessary inquiries should be made and accounts be taken; and (4) further relief.

The fourth paragraph of the statement of claim set forth in detail what Gordon alleged to be, it must now be assumed truthfully, the more important terms of the partnership agreement, and in the fifth paragraph it was averred that the "defendant Thomas Horne has attempted and is still attempting to make a disadvantageous sale of the said property against the will and without the consent of the said plaintiff."

The sale here alluded to was apparently an abortive sale to one Ford. Gordon was kept altogether in the dark as to the sale to Ewing. Both Horne and William S. Holland filed separate defences. In paragraph 19 of the former's defence, he admitted that Ewing had paid him directly $1,500, half the purchase-money, and had applied the other half towards the discharge *pro tanto* of the original purchase-money of the land.

The action came on for trial before Mr. Justice Morrison in the month of December, 1907. That learned Judge held that the alleged verbal partnership agreement had not been proved, and dismissed the action. On appeal to the Supreme Court of British Columbia, this judgment was reversed, and it was on December 11, 1908, declared that a partnership had, since the 29th May, 1906, existed between the said Thomas Horne, the appellant, the respondent, and the said Richard William Holland, in respect of the said 43.13 acres of land; that the appellant was entitled to a one-sixth share of the same; that it was a term of the partnership that no sale or dealing with the lands should take place without the consent of all the four partners; and that the said Thomas Horne held the land as trustee for the partnership. It was accordingly ordered that the partnership should be dissolved as from the said 11th December, 1908, and that the following accounts should be taken:—

(1) An account of all dealings and transactions by and between the plaintiff and the defendants or any of them as co-partners, including all dealings with the partnership property and assets.

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(2) An account of the credits, property, and effects then belonging to the partnership.

(3) An account of the one-sixth interest of the plaintiff in the partnership business and estate.

A sale, however, of the partnership lands was not directed. It now appears that the partnership did not owe any debts. On appeal to the Supreme Court of Canada, this judgment and decree was, on May 28, 1909, reversed, and on appeal to His Majesty-in-council this last-mentioned judgment was, by order-in-council of the 2nd August, 1910, reversed, and the judgment of the Supreme Court of British Columbia restored.

Immediately on the reversal of the judgment of the Supreme Court of British Columbia, namely, on the 8th June, 1909, William Holland recommenced trafficking in these lands. He entered into an agreement with Ewing to repurchase from him the undivided half interest in the lands which Ewing himself shortly before acquired; and, on the 21st of the same month, he assigned to one Joseph Victor Norman Spencer this undivided half interest, which he had purchased from Ewing only 13 days before. The assignment to Spencer was duly registered in the land registry on the same day. By this sale, Spencer, a stranger to the previous litigation, became interested in the partnership assets, to the extent apparently of one undivided half.

It has been urged, on grounds to be presently considered, that, owing to the intervention of Ewing, a bonâ fide purchaser for value without notice, the undivided half interest in the lands purchased from him, which subsequently vested in Spencer, stands in a position different from that of the other undivided half interest remaining in Horne, and dealt with by him almost concurrently. On the 21st September, this same Mr. Spencer, with the aid of the respondent, entered into an agreement with Horne to purchase from him direct the remaining undivided half interest claimed to be vested in him, for the sum of $25,872. A conveyance of this land to Spencer was accordingly duly executed and registered on the 22nd September in the land registry. Though Horne has paid almost the entire of the original purchase-money, he has realised vast profits by his breach of trust. Spencer, aided and assisted by William S. Holland, has divided lot 2 into small building lots and sold them, at what appear to be almost fabulous prices, to bonâ fide purchasers for value without notice, in whom they have been vested by several conveyances duly registered. It is now admitted on both sides that the lands comprised in lot 2 cannot, as against these purchasers, be recovered in specie. Spencer remains, however, the registered owner in fee of lots 10 and 11, subject to a mortgage for $10,000 in favour of one A. C. Flummerfelt.

On November 15, 1910, Gordon took out a summons against

Thomas Horne, William S. Holland, and Richard W. Holland, to take directions as to the accounts to be lodged and the inquiries to be instituted in the suit, in accordance with the decree so restored, and he obtained thereon an order that Horne and William S. Holland, the respondent, should file, and verify by affidavit, the accounts therein specified. The accounts, duly verified, were, accordingly, filed on December 2, 1910.

The appellant Gordon, thereupon, took the necessary steps to have Horne and William S. Holland cross-examined on their affidavits. On January 14, 1911, Horne and William S. Holland obtained an order postponing their cross-examination, on the terms that they should pay into Court the sum of $4,275.25, the same being the amount to which, as shewn in their accounts, the plaintiff Gordon would be entitled in respect of his one-sixth share of the partnership assets, with liberty to him to accept this sum on or before February 4, 1911, in full satisfaction of his claim. This the plaintiff declined to do; and, on February 22, 1911, instituted against William S. Holland, Horne, and Spencer the action out of which the present appeals have arisen.

His statement of claim is very voluminous, and in it he claims relief on many different grounds. In its sixth paragraph the plaintiff charges that William S. Holland has always been joint owner with Spencer, both of the undivided moiety of the lands purchased from Ewing, and also of that purchased by Spencer from Horne. Both the defendants, Horne and Holland, filed lengthy and elaborate defences, but both avoided dealing specifically with this charge. In the statement of defence filed by Spencer, however, he, like an honest man, admits that both sales were made to him for the use and on the account of William S. Holland and himself in equal shares. The truth of this admission was not questioned on argument before their Lordships.

The case came on for trial before Mr. Justice Gregory in the month of December, 1911. It lasted for many days. Spencer was examined as a witness. He repeated his admission, but positively denied that he had any notice or knowledge of Gordon's claim to an interest in the lands till after the service of the writ in this, the second action. His evidence is not contradicted; and, if it be true, he was in the position of a bonâ fide purchaser for value of these lands without notice.

The view taken by Mr. Justice Gregory of the result of these dealings with the partnership assets is set forth in the following passage from his judgment:—

He (Holland) stayed out of the box because he was afraid, if he submitted himself to cross-examination, it would become apparent to everybody that he was— as expressed by counsel—practically trying to do everybody with whom he came in contact, in connection with this whole transaction. Now, he is the man who actually has the property, which at one

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time, according to the decision of the Privy Council, was the partnership property of Gordon, Horne, and the two Hollands. He has that property in his possession to-day. At least as to one-half of it, it would seem to me to be unjust if he were allowed to retain that, when he has been guilty of fraud and deception throughout the whole transaction, from beginning to end, with almost everybody with whom he came in contact. It would be wrong to allow him to profit by his own wrong-doing. The Privy Council say unquestionably that the property was partnership property, and should not have been sold without Gordon's consent. Now, it has been sold by Horne. Horne thought he had the right, but he had not the right. It was bought by Holland really. He induced Horne to sell it to him, and seeks to retain it under the protection of the judgment of the Supreme Court of Canada, which has since been reversed. That might possibly protect him if a bonâ fide sale had been made to a stranger, but it is still in his hands, and to allow him to retain it would be to deprive the plaintiff of the fruits of the judgment of the Privy Council, and permit Holland to profit by his own wrongful act.

During the cross-examination of Spencer, the learned Judge asked him the question if he, Spencer, considered that an injury would be done to him if the land should be fairly divided; and what was equivalent to the plaintiff's one-sixth of it should be awarded to him (the plaintiff) out of the portion of lots 10 and 11 to which William Holland was still entitled? To this question Spencer answered "No." The learned Judge apparently embodied this idea in the decree he made on the 19th September, 1911, by which it is declared that Gordon is entitled to an undivided interest in blocks 10 and 11, equal to seven acres and .7926 of an acre, free from all charges and incumbrances; that Spencer is a trustee of this interest for him, and should convey it to him; that the remainder of lots 10 and 11 should be divided between Spencer and William S. Holland in certain proportions, which are named, and the interest awarded to William S. Holland is charged with the plaintiff's costs.

The Court of Appeal for British Columbia, by its decree bearing date April 2, 1912, varied the decree of Mr. Justice Gregory, substantially only to this extent, however, that it declared that the plaintiff was entitled only to an undivided interest in 3.8963 (half of the 7.7926 acres awarded by the former), but was also in addition entitled to one-sixth of the profits on the sale made to Ewing. Both Gordon and William S. Holland have appealed against this decree.

Two objections to the decree were urged before their Lordships on behalf of William S. Holland, in addition to that against the division of the lands in specie: the first, to the effect that Horne, though now admittedly an express trustee of these lands, was not made answerable for any of the purchase-money received by him on the occasion of the sales in breach of his trust of the partnership assets; second, to the effect that, inasmuch as William S. Holland had, through Spencer, purchased jointly

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an undivided moiety of the lands from Ewing, a bonâ fide purchaser for value, without notice, he was, on the principle laid down by Lord Hardwicke in *Lowther* v. *Carlton*, 2 Atk. 242, entitled as to this moiety to shelter himself under Ewing's title, and was not, therefore, accountable to the plaintiff in respect of it; and that, accordingly, the plaintiff's remedy as against him was confined to the half of the undivided moiety purchased direct from Horne.

The market-value of the lands comprised in lots 10 and 11 has been, and now is, rapidly rising. A very large profit was realised on the resale in building plots of lot 2; and the plaintiff, accordingly, refuses to be contented with a one-sixth share of the purchase-money received by Horne, less all due credits, and insists that he is entitled to receive one-sixth of the profit realised on the resale of lot 2, together with one-sixth of the value of lots 10 and 11 at the date of the taking of the account, less, of course, all proper deductions.

Subject to the second of the above-mentioned points, their Lordships are of opinion that the plaintiff is right in this contention. The principle laid down in *Lowther* v. *Carlton*, 2 Atk. 241, though undoubted, has long been held inapplicable to two classes of cases, namely, first to the case of trustees re-purchasing the trust property which they had previously sold, and secondly to the case of fraudulent and dishonest persons who seek by means of it to take advantage of their own wrong.

The law upon this point is succinctly stated by Sir G. Jessel in his judgment in *Re Stapleford Colliery Co., Barrow's Case*, 14 Ch. D. 432, 445. He said:—

> The only exception and the well-known exception to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a bonâ fide purchaser without notice and has got it back again. Those are cases to shew that a person shall not take advantage of his own wrong. But the present appellant has not done wrong. The shares had been sold for value.

See also Lewin on Trusts, 12th ed., pp. 1102, 1103, and *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. D. 954, 962-3.

The question for decision in the present case is, whether William S. Holland comes within both or either of these classes. He was a partner in this venture. At his suggestion, and by his procurement, the express trustee, Horne, sold the partnership property in violation of the express terms of the partnership agreement. He, Holland, resorted deliberately to false representations in order to induce Ewing to buy. He concealed from his co-purchaser, Spencer, the existence of the plaintiff's claim. He has shrunk from entering the witness-box to justify

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or excuse his action. The legal estate in lots 10 and 11 is vested in Spencer, but William S. Holland seeks to retain to his own gain—and, therefore, to the plaintiff's loss—the equitable interest he has, by these discreditable means, acquired in the undivided moiety sold by Ewing. It is difficult to see how that action falls short of seeking to take advantage of his own wrong.

Then as to his fiduciary position. In *Knox* v. *Gye*, L.R. 5 H.L. 656, it was decided that in an action for an account of the partnership assets, brought by the representatives of a deceased partner against a surviving partner after the lapse of six years from the dissolution of the partnership by the death of the deceased, the defendant could rely upon the provision of sec. 9 of 19 & 20 Vict. ch. 97, as a complete defence to the action; and that, if, during this time, the latter should be paid a debt due to the partnership, the statutory period would not recommence to run from the date of the payment. Lord Westbury, at 675 and 676 of the report, laid it down broadly that to describe the surviving partner as a trustee for the representative of a deceased partner was a misapplication of language; that there was no fiduciary relation between them; and that the right of the deceased partner's representative

> consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership.

The then Lord Chancellor, Lord Hatherley, dissented strongly from this doctrine, and, at 678 and 679, seems to lay it down that, as all the property of a partnership vests by survivorship in a surviving partner, he, as to the share of that property to which the deceased partner would have been entitled, stands to the representative of the deceased in the relation of a trustee. The point was not dealt with by the other noble Lords who took part in the hearing, and it was not necessary to rule it for the purposes of the decision of the case, which turned entirely on the section of the statute.

In *Piddocke* v. *Burt*, [1894] 1 Ch. 343, Chitty, J., decided that a partner who receives assets of the partnershhip on behalf of himself and his co-partners, does not in respect of those assets come within the words of sec. 4, sub-sec. 3, of the Debtors' Act, 1869, "as a trustee or person acting in a fiduciary capacity." From the observation of the learned Judge at p. 346 of the report, it would appear, their Lordships think, that he based his decision on the legal right of one partner—as a joint creditor with his fellow-partners—to receive the whole of any debt due to the partnership, though, no doubt, liable to account for the sums received, and on this ground to have distinguished the case from that of *Marris* v. *Ingram*, 13 Ch. D. 338, where a manager of a farm who sold part of the stock and retained the proceeds was held by Sir G. Jessel to come within the words of

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the sub-section as a person in "a fiduciary relation, the object of the section being to render liable to imprisonment persons in that position who acted dishonestly."

The facts of the present case, in their Lordships' view, distinguish it fundamentally from both *Knox* v. *Gye*, L.R. 5 H.L. 656, and *Piddocke* v. *Burt*, [1894] 1 Ch. 343. Here the sales of these lands without Gordon's consent were from the first illegal and wrongful, and were obviously designed and resorted to in order to enable certainly Holland, and possibly Horne, to realise, and, as against Gordon, keep for themselves, all the profits which could be gained by sales in a rapidly rising market.

Their Lordships are, therefore, of opinion that William S. Holland cannot be permitted to avail himself of the purchase from Ewing to secure for his own benefit what may be not inaptly described as his ill-gotten gains. The decree appealed from, however just in its results it may be towards the plaintiff and Spencer, cannot be allowed to stand in its present shape.

The plaintiff is quite willing to accept his share of the value of the partnership assets in money, not land. To that relief he is entitled. The decree appealed from, as well as that of Mr. Justice Gregory, dated the 19th September, 1911, must, accordingly, in their Lordships' opinion, be reversed, the accounts directed by the decree of the Supreme Court of British Columbia, dated the 11th December, 1908, must be taken, and the plaintiff declared entitled to have an inquiry instituted forthwith to ascertain the profits realised by the resale of lot 2, and also to ascertain the market-value of lots 10 and 11 at the date of the commencement of the inquiry, and further entitled to recover from the said Thomas Horne and William S. Holland one-sixth of the said profits so realised on the resale of lot 2, and one-sixth in money of the value of the said lots 10 and 11 so ascertained as aforesaid, subject, in both cases, to all just credits and allowances (which, however, shall not include any part of the sums paid by William S. Holland or Spencer for the repurchase of the said lands), together with costs in the present action, including those of the appeal to the Supreme Court of British Columbia, and also the costs of this appeal. And, further, that the interest of the said William S. Holland in the said lots 10 and 11 shall stand charged, in priority to the mortgage to A. C. Flummerfelt, as a security for the aforesaid sums, to which the appellant is declared to be entitled in respect of his share of the partnership assets, and also in respect of the amount of the above-mentioned costs when taxed and ascertained.

The judgment and decree appealed against by William S. Holland having been reversed, his appeal must be allowed, but he is not, in their Lordships' view, entitled to any costs.

Their Lordships will humbly advise His Majesty accordingly.

Appeals allowed.

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DRAPER v. BIELBY.

Saskatchewan Supreme Court, Brown, J., in Chambers, February 21, 1913.

1. VENDOR AND PURCHASER (§ I E—28)—RESCISSION—FAILURE TO MAKE PAYMENTS.

The usual practice in an action to annul the contract of sale for the purchaser's default in payment is for the Court exercising its equitable jurisdiction to fix a time within which the defaulting purchaser may redeem and to decree cancellation only in case the default continues for that time.

Statement

BY agreement dated July 18, 1912, the plaintiff sold to the defendant lot 3 in block 112, Regina, for $1,450 payable "as soon as the purchaser is able to obtain a loan on the said property after building a cottage thereon." Defendant paid nothing to the plaintiff who on October 3, 1912, sent him a notice in the usual form declaring time to be of the essence of the contract and notifying him that at the end of thirty days the agreement would be declared null and void. On November 28 following a writ was issued claiming an order of the Court declaring the agreement void for uncertainty and for cancellation of the contract and for delivery of possession to the plaintiff. The defendant appeared in the action, but delivered no defence, and the matter subsequently came before the Master in Chambers on motion for judgment. The Master granted the relief prayed for and from his order the defendant now appealed.

The appeal was allowed.

W. B. Scott, for plaintiff.

W. A. Adams, for defendant.

Brown, J.

BROWN, J.:—I am of opinion that the Master erred in this matter in making the order which he did. The agreement cannot be treated as void for uncertainty by the plaintiff as he by his notice made certain whatever uncertainty there was. The defendant filed no defence thereby admitting the allegations of the statement of claim; he did, however, enter his appearance and further appeared by counsel in Chambers and asked for the usual privilege of redeeming. Even supposing defendant had not appeared at all, as the plaintiff seeks the aid of the Court in having his agreement cancelled, I see no reason why there should be any departure from the well settled practice: see *McAuley* v. *Dick*, 1 W.L.R. 381. The appeal is allowed with costs. The order of the Master is set aside. There will be the usual reference to ascertain the amount due and this amount with costs of action, less the defendant's costs of appeal, must be paid within thirty days from date of certificate as to amount due. In default the agreement will be cancelled.

Appeal allowed.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell and Drysdale, JJ. March 3, 1913.

1. EMINENT DOMAIN (§ III E—165)—CONSEQUENTIAL INJURIES—COMMERCIAL BASIS MERGES RESIDENTIAL BASIS, WHEN.

In estimating the damages incurred by reason of an expropriation of land by a city where it became necessary to cut away part of a residence, leaving the rest of the house and the remaining land of little value for residential purposes, but it appears that the locality having become a business district, the remaining land with the house entirely removed was worth more for business purposes than the value of the remaining land for residential purposes, plus the value of the house, it is error on the part of the arbitrators in making an award on the basis of the value of the land for commercial purposes to also allow damages for injury to the house because of the severance of part of it, since the value of the portion of the house removed is merged in the valuation allowed to the claimant on the basis of the greater valuation given to the property by reason of its adaptability for commercial purposes.

[*Ossalinsky* v. *City of Manchester*, cited in Brown & Allen on Compensation, appendix, p. 659, followed.]

2. ARBITRATION (§ III—17)—REVIEW OF AWARD—DELAY.

The statute of 9 and 10 William III. (Imp.) ch. 15 (repealed by the Arbitration Act (Imp.) of 1889), limiting the time within which a claimant may ask for a review of an award made for expropriation to the last day of the next term after the arbitration is made and published, would not and never did apply to such a statutory award as may be made under the Nova Scotia Arbitration Act (R.S.N.S. 1900, ch. 176), read with a city charter; and under the Nova Scotia practice such an application is not too late where there has been no unreasonable delay.

[English Judicature Rules, Order 64, rule 14; Nova Scotia Jud. Rules, Order 70, rule 2; Land Clauses Consolidation Act of 1845, sec. 36, specially referred to: *Re Harper and Great Eastern R. Co.*, L.R. 20 Eq. 39, distinguished.]

Statement

APPLICATION to the Full Bench to remit to the arbitrators an award made in favour of plaintiff by two of the arbitrators, the third arbitrator dissenting, for land expropriated by the defendant for the purpose of widening one of the streets of the city.

The application was granted.

The land taken consisted of a strip 20 feet in width extending from the front to the rear of plaintiff's premises, the effect being to cut away a large part of the south side of plaintiff's house, practically destroying what was left. The main point of difference between the arbitrators was as to the amount to be allowed plaintiff for the injury to the portion of his premises not taken by the city.

F. H. Bell, K.C., City Recorder, for defendant, in support of application.

W. E. Roscoe, K.C., for plaintiff, *contra*.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J., concurred with Graham, E.J.

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GRAHAM, E.J.:—This is an application to remit back to the arbitrators an award made awarding compensation for land damages under the Arbitration Act, R.S.N.S. ch. 176, sec. 13, incorporated by reference under the expropriation provision of the City Charter:—

> In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

The city charter has a sub-title (secs. 619-640): "Expropriation of lands." Section 630 provides, if the owner, after notice of payment of the compensation into Court, objects to the amount, and notifies the city that the amount is insufficient and names a person as arbitrator, the city shall appoint an arbitrator, and the two so named shall appoint a third, or if they are unable to agree upon another a Judge may appoint him.

Section 635: "If the amount of the award exceeds the amount paid into Court the city must pay the excess into Court."

The three arbitrators appointed in this case proceeded with the work of assessing the damages. Two of them joined in the making of an award, which is in part as follows:—

> And whereas, after the conclusion of the said examination of witnesses, the Board met several times to consider its award, but found it impossible to come to a unanimous decision, the said John T. Ross, Esq., having decided the limit of the amount of compensation to which he could agree to be $11,000 and the other arbitrators having agreed upon $13,500;
>
> Now know ye, that we, the said Robert T. Macilreith and W. Ernest Thompson, arbitrators as aforesaid, after having carefully considered the evidence adduced by the respective parties, do determine and award that the sum of $13,500 is the amount of purchase money and compensation to be paid by the said of Halifax to the said Dr. A. C. Hawkins for the land and hereditaments expropriated, which sum includes an amount for all damage sustained or to be sustained by the said Dr. A. C. Hawkins by reason of the severance of the land taken from his other land and the severance of that portion of his residence on the land so taken from that portion on the land not taken.
>
> The chief point of difference between the view taken by the said John T. Ross, Esq., and ourselves being as to whether, after determining to award Dr. Hawkins compensation for his land on the basis of its adaptability for commercial purposes, any compensation should be allowed for the destruction of his house, the said John T. Ross taking the view that by giving the land its commercial value, which is greater than its residential, is merged, and no compensation should be given for the damage to the residence, while we, the undersigned, upon the authority of *The King* v. *Murphy*, 12 Can. R. 401; *The King* v. *Condon*, 12 Can. Ex. R. 275, and other cases, are of the opinion that, even after giving the land its greater value from its adaptability for commercial purposes, the destruction of anything found on that land which represents actual money to the owner must also be paid for.

I will refer later to the ground upon which the third arbitrator based his decision for a smaller amount, in which I concur. The property of Dr. Hawkins measured in front 54 feet on Gottingen street, running north and south, and 150 feet on Cunard street, crossing the former street, it being on the corner of those streets. The building on it was a large house which he had occupied as a residence and for professional purposes; I suppose as an office. The city took compulsorily a strip of land on the southern side of this property, measuring 20 feet on Gottingen street by the whole depth (150 feet) on Cunard street. This took 15 feet off the southern part of the house, including the best part of the house, and so greatly injuring it as practically to destroy its value in the opinion of some of the witnesses. This left the property but 34 feet on Gottingen street. The evidence tends to shew that in recent years the locality has become almost entirely a business district, and that this property was well adapted for business purposes for a corner shop, and for such purposes would have a higher value than the value for residential purposes plus the value of the house; in fact, that to use it for business purposes the house would necessarily be removed. (The learned Judge here referred at length to the evidence of the witnesses examined before the arbitrators, which would support that conclusion.)

It is clear that the whole area was not wide enough for the site of a building to be used for commercial purposes together with a residence on the remaining part. As will be seen by the face of the award, the arbitrators have given the land its greater value in consequence of its adaptability for commercial purposes, allowing damages for the strip of land taken and for the injury to the property by the severance on that basis, and they have allowed in addition the money value of the house injured or destroyed by the severance on the basis of the property being continued as a residential lot. This is inadmissible. A man would buy it for one or the other purpose. This was the point taken by the dissenting arbitrator, Mr. Ross, and he cited for it a case, *Ossalinsky* v. *City of Manchester*, cited in Brown & Allen on Compensation, appendix, p. 659. In that case the arbitrator, inasmuch as he thought that certain farm lands always used for agricultural purposes had a special adaptability for a reservoir, increasing its value, allowed damages on that basis. There was an appeal, and it came up for review before Grove and Stephen, JJ.

Grove, J. (p. 663), said:—

> Of course, an arbitrator cannot give it both ways. If he gives the enhanced value in that particular, he must deduct the agricultural value of the ground, which is rendered useless for agricultural purposes by water which is impounded and made to flow on or lie over it. That he has done.

He had just held that the arbitrator could give an enhanced value:—

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by reason of the water that may be collected, diverted and impounded upon the said lands . . . of the said owner, and also by reason of its natural and peculiar adaptation for the construction of a reservoir.

In my opinion the view expressed by Mr. Ross as to the principle on which the compensation should be estimated was correct, and that the other arbitrators were wrong and the cases cited by them do not support their view. The counsel for Dr. Hawkins took a further point. He says that the application of the city to remit the award back is too late. It appears that the award was filed with the city engineer on the 9th day of November, 1912. Now, there was no laches in making this application. There were a number of other awards in the cases of other proprietors on this street (and this one was one of the earliest) which were not completed until the 27th of November. Then the committee of works met to consider them all. The city solicitor was instructed to examine the validity of the various awards so as to be ready for the coming meeting of the city council. Dr. Hawkins was present at the meeting of the committee, and, at his request, the city solicitor furnished the solicitor who had appeared before the arbitrators for Dr. Hawkins with a copy of his opinion in advance of the meeting of the council. The affidavit of the city solicitor shews what occurred subsequently.

> The next meeting of the council was held on the 7th December, at which meeting the several awards were laid before the council, together with my opinion on the legality of the same, and a resolution was passed instructing me to make this application. The next morning I called upon Mr. Power, and informed him of the resolution of council, and told him that I intended, in order to save my rights and to expedite the disposition of the matter as much as possible, to mention the matter to the Court on the next day, that being Saturday, and the last day (as I was informed by the prothonotary) of the term, and to ask to be allowed to enter the matter for argument at the next term of the Court. I understood him to say something to the effect that he supposed that was all right, but that he would think about it and be present at my motion. He also said that he was leaving for Ottawa the next day, and was very busy, and would not have time to attend to the matter until his return. I said in that case I would not serve him with a formal notice until he returned, and he agreed to accept my verbal notice for the present. I was present at the opening of the Court next day. Mr. Power was not. I stated what had taken place, and asked leave to enter the case for the next term, which was done. Subsequently, on the same day, I met Mr. Power, and told him what had taken place. He said he had been too busy to attend at Court, and that he was not to be understood as consenting, as he thought my procedure was wrong, and I was out of time. To this I said he would not be prejudiced, as I had only moved to save my rights, and any objections he had would still be open to him.
>
> Subsequent to his return, in the week between Christmas and New Year, I offered to serve him with the formal notice of this application. He declined to receive it, saying that he did not know whether

Dr. Hawkins wished him to act. I accordingly, on the 31st December, caused a copy of the notice to be served on Dr. Hawkins personally, together with an explanatory letter. I did not change the date of the notice, as it was intended to be in place of the verbal notice of the 6th, and thought the accompanying letter would be a sufficient explanation. To this notice and letter I received a reply enclosing back the notice and an accompanying letter, which I herewith produce. Owing to the letter being addressed to me at the city hall, instead of my own office, from which my letter was addressed, it did not come to my attention until the 9th instant. I thereupon, on Friday, the 10th instant, caused Dr. Hawkins to be served with a fresh notice for Tuesday, the 14th.

The contention is that the city solicitor should, under the hard and fast rule of the English statute 9 and 10 William III. ch. 15, sec. 2, have moved to remit the award before the last day of the term next after the publication of the award. This is the provision:—

> That any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published by the parties, anything in this Act to the contrary notwithstanding.

This obliged the party to take out at least his rule *nisi* to set aside the award before the close of the next term. This Act was repealed in England by the Arbitration Act of 1889, and our Arbitration Act was copied from that Act. But in England there is this rule in the Judicature rules, Order 64, rule 14:—

> An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties.

Our Judicature rules follow the English rules very closely, but omit that one. There is this rule on which the counsel relies—Order 70, rule 2:—

> Where no other provision is made by the Judicature Act or these rules, the existing procedure and practice remain in force.

This, he contends, takes us back to 9 and 10 William III. ch. 15, sec. 2, for a time limit. Then there is Order 65, rule 5:—

> The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules as fixed. Any order enlarging time for doing any act or taking any proceeding upon such terms, if any, as the justice of the case requires, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

First, the statute of 9 and 10 William III. ch. 15, would not and never did apply to this kind of an award, under a statute. This was not a submission to a reference by agreement out of

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Court that could be made a rule of Court, or with a provision in the submission that it was to be made a rule of Court. That was the kind of case contemplated by 9 and 10 William III. ch. 15. Also there is no provision in the city charter that the statutory arbitration or award should become a rule of Court. That provision does exist in the Land Clauses Consolidation Act of 1845, sec. 36, as follows:—

> The submission to any such arbitration may be made a rule of any of the superior Courts on the application of either of the parties.

I call attention to that provision in order to distinguish the case of *In re Harper and Great Eastern R. Co.*, L.R. 20 Eq. 39. Under the city charter it was not enforced in that way at all. In this case we have but the city charter and the Arbitration Act, which is incorporated, and nothing else is incorporated, and there is no time limit fixed as to when the motion is to be made. But, of course, while this is a provision that the Court may "from time to time" remit, etc., this is subject to the provision of practice that the application must be made within a reasonable time and the applicant may be barred by laches.

There is this answer to the argument also. If the Order 70, rule 2, takes it back to the statute 9 and 10 William III. ch. 15, for a time limit, I think it does not incorporate the procedure and the practice as to submissions out of Court by the expression "procedure and practice" in that rule, as that subject was dealt with by arbitration Acts, apart from procedure and practice as to actions, but if it does, then there is power to enlarge the time under Order 65, rule 5. What the rules incorporate by reference is as much a part of the rules as the express rules themselves. For these reasons I think that application ought to be entertained, and the award and the amount of compensation be remitted back to the arbitrators to be corrected, and the amount to be dealt with on the principle indicated in the opinion. The city will have the costs of the hearing before us.

Russell, J.

RUSSELL, J.:—The merits as to the point at issue between the majority of the arbitrators and Mr. Ross, who dissented from the award as that point was stated by the former, are so clearly with Mr. Ross that I am persuaded there has been some mistake in the form in which it has been stated. The property of Dr. Hawkins was a lot on the corner of Gottingen and Cunard streets; 54 feet on Gottingen street and 150 feet on Cunard street. Of this property a strip 20 feet wide has been taken by the city. In taking this strip of land it will become necessary to shear off 15 feet of the house fronting on Cunard street, leaving the remainder of the house standing, which will be practically worthless. I am quite satisfied that Mr. Ross is right in saying that as the land has been valued on the basis of its value as a business stand the owner cannot be allowed for the portion of the residence that has been removed, that value being merged in the commercial valuation allowed to him, just as the agricultural value of the land taken in

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the *Ossalinsky* case was merged in the higher value allowed for its adaptability to the purposes of a reservoir. But it does not at all follow that the claimant should not be allowed for the injury done to the residential value of the property that has not been taken. This would be very clear to the apprehension of anybody if the lot taken by the city had been 50 or 100 feet wide instead of only 20 feet. Suppose a lot 50 feet wide had been taken out of a block fronting 100 feet on Gottingen street. Assume it to be appraised at its value as a business stand and that it left the residence intact on the remaining 50 feet. It would have, let us assume, a value of $10,000. Now, let us suppose that by taking an additional foot of width the whole front of the house is taken out and the value of the house as a residence destroyed, as it possibly might be. The argument of Mr. Bell drives us to the conclusion that the award should in such a case be increased by only one-fiftieth part, say $200. If the building left on the remaining portion had been damaged to the extent of $10,000, as it well might be, will anybody say that no allowance should be made for that detriment? Surely not. The owner would certainly be entitled to compensation. Not for the portion of the residence removed from the land taken by the expropriation; that has been merged in the valuation awarded; but he would be entitled to compensation for the injury done to the property that was not taken but was left with the owner, and for which no compensation whatever had been awarded.

The majority of the arbitrators have concluded their award by saying that they are of opinion that even after giving the land its greater value, from its adaptability for commercial purposes, the destruction of anything found on that land which represents actual money to the owner must also be paid for. If they had said that the destruction of anything found on the land left in the hands of the owner must be paid for I think their award would have been unassailable. It certainly would be unless it is still left in doubt whether they did not intend to cover this element of damage in their allowance for "the severance of that portion of the residence on the land so taken from that portion on the land not taken." I do not think the words used would cover such an element of damage as I have referred to, and therefore, if the arbitrators had changed three words in their award I should have thought it would have to be upheld. If, instead of allowing for the destruction of anything found on that land, meaning the land expropriated, they had allowed for the destruction of anything on the land remaining, I think it would have been within their power to do so. It is probable that this is what they really did allow, but as it is not so expressed in the award I agree that the motion to remit the award must succeed.

Drysdale, J.

DRYSDALE, J., concurred with GRAHAM, E.J.

Award remitted.

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April 18.

MYERS v. TORONTO R. CO.

Ontario Supreme Court, Middleton, J. April 18, 1913.

1. CARRIERS (§ II G 2—124)—CONTRIBUTORY NEGLIGENCE—CROSSING TRACK —NOT CONTINUING TO LOOK, EFFECT.

A railway company is not liable for injuries sustained by a person who crosses a street in front of a moving street car without keeping the car in sight until he has crossed the street, and trusts blindly to an opinion formed on leaving the sidewalk that there was ample time to cross.

Statement

ACTION for damages for injuries sustained by the plaintiff by being struck by a street car of the defendants, while she was attempting to cross Queen street, in the city of Toronto, on foot, by reason, as she alleged, of the negligence of the defendants' motorman.

The action was dismissed.

W. E. Raney, K.C., for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

Middleton, J.

MIDDLETON, J.:—The plaintiff is a woman, fifty years of age, who maintains herself by her own exertions. On the 15th January, 1912, walking down Simcoe street, she was struck by a street car travelling east along Queen street. She was seriously injured, and, if entitled to recover, should receive a considerable sum.

The plaintiff's case was supported by the evidence of one Robert Sinclair, who said that he was a passenger on the car, and, intending to get off at University avenue, rose and went to the vestibule so that he could ascertain how near he was to the corner, as the windows of the car were frosted. On opening the vestibule door, the first thing that attracted his attention was this woman crossing the street. The car was then three hundred feet west of her. He said to the motorman, "You are going to hit that woman." The motorman responded, "Let her get out of the way;" and did not slow the car at all until after the woman was struck, nor did he sound the gong to warn her of his approach. The car was then travelling, according to this witness, at from 20 to 27 miles an hour.

If I could accept this evidence, there could be no doubt as to the result of the action. The motorman was not present at the trial. His evidence was afterwards taken by commission, the trial being adjourned for that purpose. He contradicts Sinclair. At the time the evidence was given, I found myself unable to believe Sinclair. I cannot account for his giving the evidence he did, but it did not impress me as being a true story.

Other evidence was given, which I did not find of much assistance; and the case ultimately falls to be determined upon the plaintiff's own story. I am satisfied that the plaintiff gave

her evidence with perfect honesty and fairness. At about half-past eight in the evening, she went down the east side of the street on her way home. The night was clear and very cold. There was little traffic upon the street, and the car in question was the only vehicle in sight. The plaintiff, at Simcoe street, saw the car, as she thought, west of Duncan street. She bases the latter part of this statement upon the fact that she could see the Duncan street lights; but these would be visible even if the car were east of Duncan street. She says she realised that the car was getting close, yet she thought it was far enough away to enable her to cross safely. Before she succeeded in getting across, the car had struck her. She did not hurry, because she thought the car was so far away that she would be safe. She did not look a second time, as she did not think that there was any occasion to do so. She did not hear the gong, and is sure that it was not rung. Just as she was almost clear of the car-track, she was struck and thrown to the south. She says, "If I had looked again I would not have been caught."

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I think the plaintiff was guilty of negligence, and that her negligence was the proximate cause of the accident. When one ventures to cross in front of a moving car, rapidly approaching as this was, I think it is incumbent on the person to keep the car in sight, and not to trust blindly to the opinion formed on leaving the sidewalk that there is ample time to cross. If the plaintiff had exercised any kind of care, she could readily have escaped the disaster which overtook her.

I think it my duty to assess damages; and, in the event of the plaintiff being held entitled to recover, I assess them at $2,500.

As I understand the defendants not to ask for costs, the action will be dismissed without costs.

Action dismissed.

WILBUR v. WILDMAN.

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Alberta Supreme Court, Stuart, Simmons, and Walsh, JJ. March 31, 1913.

1. APPEAL (§ VII J 4—417)—HEARING—POINT NOT PLEADED BELOW.

On appeal the appellant will not ordinarily be allowed to raise a defence which he has not pleaded in the Court below.

APPEAL from judgment of Lees, District Court Judge, in favour of the plaintiff.

The appeal was dismissed, after allowing slight variation in judgment below.

John Barnett, for defendant.

W. E. Payne, for plaintiff.

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v.
WILDMAN.

Stuart, J.

The judgment of the Court was delivered by

STUART, J.:—I think, that with a slight variation, the judgment of the trial Judge in this case should not be disturbed.

The defendant ordered a piano from the plaintiff by a written order dated at Innisfail, July 18th, 1910, which contained a clause indicating, beyond question, that the intention of the parties was that the piano should be shipped on 15th November.

For some reason or other the plaintiff shipped the piano at an earlier date, namely October 14th. On the pleadings the only defence raised is that the plaintiff himself signed a copy of the order which contained a promise to cancel the order if notified; that such a notification was given in time, notwithstanding which the plaintiff still forwarded the piano, and that the defendant therefore refused it.

The case was tried by His Honour Judge Lees, and the alleged copy of the order was not produced at the trial. The defendant was allowed to attempt to prove a copy, but the trial Judge was so dissatisfied with his evidence that he intimated that he thought it his duty to report the matter to the Attorney-General with a view to a possible prosecution for perjury. He therefore gave judgment for the plaintiff for the agreed price and costs.

No other contention on behalf of the defendant is mentioned by the trial Judge. No other contention is raised by the statement of defence. Counsel for the appellant defendant does indeed state that he did raise other questions at the trial, but there is no trace of any application to amend the defence and none was made on the appeal.

Notwithstanding this it was argued that we should allow the appeal because the goods were shipped a month earlier than agreed upon and that for that reason the defendant was justified in refusing to accept them. The trouble is that he says in his defence that his reason for refusal was because of the cancellation which he claimed he had a right to give. It seems that he actually went and bought another piano, relying apparently on his attempted cancellation. I think this purchase is the real reason why he does not want to pay for the one he ordered and that the defendant should not be allowed to raise a defence which is quite apparently a mere afterthought. I would, however, vary the judgment by allowing the defendant one month's demurrage charges on the piano. I assume that it arrived a month earlier than it should have arrived, though the exact date of arrival is not shewn. If this sum cannot be agreed upon by the parties there should be a reference to the District Court to ascertain it, but I think the costs of this should be upon the defendant.

With this allowance on the judgment the appeal should be dismissed with costs.

Judgment varied and appeal dismissed.

NORMAN v. McMURRAY.

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May 5.

Ontario Supreme Court. Trial before Lennox, J. May 5, 1913.

1. SPECIFIC PERFORMANCE (§ I A—13)—RIGHT TO REMEDY—TENDER—OFFER TO PERFORM.

Tender of a deed of land to be given by the vendee in exchange as part of the purchase money and of the balance of the adjustment money, is waived by the vendor's unwarranted notice to the vendee that the vendor considered the contract off, and the purchaser's action for specific performance is not barred by the failure to make the tender.

[*Cudney* v. *Gives*, 20 O.R. 500, applied.]

2. CONTRACTS (§ IV F—371)—FAILURE AS TO TIME—TIME OF ESSENCE—WAIVER.

Where the time limited for completion of a sale contract has passed, but the vendor thereafter by his conduct recognized the contract as subsisting and continued the negotiations for completing the same, he cannot set up the stipulation of the contract that time shall be of the essence thereof, but must give notice to the other party and allow a reasonable time thereafter for completion before he is enabled to declare the contract off for the other's default.

[*Webb* v. *Hughes*, L.R. 10 Eq. 281, applied; *Foster* v. *Anderson*, 16 O.L.R. 565; and *Upperton* v. *Nickolson*, L.R. 6 Ch. 436, referred to.]

Statement

ACTION for specific performance of a contract for the exchange of lands and for damages.

Judgment was given for the plaintiff.

Joseph Montgomery, for the plaintiffs.

G. R. Roach, for the defendant.

Lennox, J.

LENNOX, J.:—Through the default of a third party with whom one of the plaintiffs was dealing, the plaintiffs, although active in trying to close the transaction, were not ready to complete the contract upon their part on the day agreed upon, the 14th December, 1912; but upon that date their deed was duly executed and the adjustment-money ready to be handed over, as the defendant knew.

The agreement contained this clause: "Time shall be the essence of this agreement." The defendant recognised the agreement as an existing contract, and continued to negotiate after the 14th December. The plaintiffs had reason to believe from the telephone communication between Mr. Charleton, the agent of both parties, and the defendant's solicitors, on the day fixed for closing, and subsequent negotiations, that it would be satisfactory if closed by the following Saturday; and the plaintiffs were ready and anxious to close the transaction with the defendant on that day. On the 17th December, the defendant's solicitors wrote the plaintiffs' solicitor saying, "The transaction is now considered at an end."

There is no evidence that either party actually tendered an executed deed of the land he was conveying to the other, and

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there was no priority of obligation—their obligations were reciprocal in this respect. Until one acted, the other was not in default. In Halsbury's Laws of England, vol. 7, p. 434, it is said: "Where a contract consists of mutual promises . . . they may be dependent upon one another so that the due performance by one party of his promise is a condition precedent to the liability of the other." There either party could preserve the vitality of the time-clause by doing everything to be done upon his part within the time limited, and refusing negotiations of any kind after that day. But the defendant did not complete his part of the contract; and, as held in *Foster* v. *Anderson*, 15 O.L.R. 362, 16 O.L.R. 565, a person who has not, himself, within the time, fully performed his part of the contract, cannot make this condition a ground of defence against the other party; and, as shewn in *Upperton* v. *Nickolson*, L.R. 6 Ch. 436, once the time has thus gone by, the subsequent rights of the parties are governed by the general principles of the Court. See also *Snell* v. *Brickles*, 4 O.W.N. 707, 951.

Does it follow, on the other hand, that the plaintiff, not having actually tendered the deed and adjustment-money, cannot maintain this action? I do not think so, in the circumstances of this case. The defendant wholly repudiated the contract and agreed to sell to another within four or five days of the day fixed for closing; and, when the plaintiff was ready, although the total delay was only a week, he was told by the defendant's solicitors that the defendant would not do anything. The defence on the pleadings and in Court is in line with this attitude; and tender is dispensed with where it would be a mere idle formality: *Cudney* v. *Gives*, 20 O.R. 500.

Again, on the broader question as the effect of the subsequent negotiations, the defendant is prevented from setting up the condition as to time: *Webb* v. *Hughes*, L.R. 10 Eq. 281; and, once allowed to pass, he must give notice and allow a reasonable time: judgment of Malins, V.-C., at pp. 286, 287.

The plaintiffs are entitled to specific performance of the agreement with costs.

It is not a case for damages in addition to specific performance.

Judgment for plaintiff.

Re WOODHOUSE.

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May 5.

Ontario Supreme Court, Latchford, J. May 5, 1913.

1. ACTION (§ I A—1)—DEFINITION—STATUTORY PROCEEDINGS UNDER LAND TITLES ACT.

An objection filed by a person claiming an adverse interest upon an application under the Land Titles Act (Ont.) to bring the lands under that Act by registering the ownership of the applicant, is not an "action" against the latter within the Ontario Judicature Act, R.S.O. 1897, ch. 51.

Statement

AN appeal by Christie Brown & Co., Limited, under sec. 140 of the Land Titles Act, from an order of the Master of Titles declaring the appellants precluded from bringing any action against John Woodhouse to recover possession of certain lands, and debarred from objecting to the registration of Woodhouse and his wife as the absolute owners of the lands.

Appeal allowed and the matter remitted to the Master of Titles.

W. B. Milliken, for the appellants.

Edward Meek, K.C., for Woodhouse and wife.

Latchford, J.

LATCHFORD, J.:—The appellants are, by the terms of the order, precluded from bringing any action against John Woodhouse for possession of the lands in question. They are also thereby debarred, in the opinion of the learned Master, from objecting to the registration of Woodhouse and his wife as the absolute owners of the lands.

It seems clear to me that, in filing the objection, the appellants were not "bringing an action." Unless a contrary intention appears, the word "action" shall be construed "to include suit, and shall mean a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court:" Judicature Act, sec. 2, sub-sec. 2. No contrary intention appears; and the objection filed is not a suit or a civil proceeding begun by writ, or as prescribed by any of the Rules. "Action," as the term is used in the order, has, in my opinion, the meaning attributed to the word by the Judicature Act, and not any other.

While the appellants cannot sue Woodhouse to recover possession of the property, they can, I think, be heard when they object that he and his wife should not be registered as owners of the land under the provisions of the Land Titles Act. With the shield provided by that Act the appellants can, in my opinion, defend their paper title against aggressors using the weapons forged by the same statute. It may well be that the applicants (Woodhouse and wife) can establish the right which they assert, but Christie Brown & Co. are not precluded from

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questioning that right by the prohibition expressed in the order referred to. It is still open to the company to object that the Woodhouses are not entitled to the registration sought. The objection made should be considered on its merits.

The appeal is, therefore, allowed with costs, and the matter remitted to the Master of Titles.

Appeal allowed.

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May 10.

MARTIN v. HOWARD.

Ontario Supreme Court, Middleton, J. May 10, 1913.

1. LIVERY STABLE (§ I—5)—LIEN FOR STABLING—STATUTORY NOTICE OF SALE.

The statutory right of sale of a horse in enforcement of the lien of innkeepers, livery stable keepers and others, for stabling charges under the Innkeepers Act, 1 Geo. V. (Ont.) ch. 49, requiring two weeks' notice by newspaper advertisement, is not complied with by advertisement in the successive weekly issues of the newspaper where the last publication took place only the day prior to the sale.

2. LIVERY STABLE (§ I—5)—SALE TO REALIZE LIEN FOR CHARGES—INCAPACITY OF LIENOR TO BECOME PURCHASER.

The party exercising the statutory right to sell a horse under an innkeeper's or livery stable keeper's lien for stabling charges under the authority of the Innkeepers Act, 1 Geo. V. (Ont.) ch. 49, cannot himself become the purchaser at the sale.

Statement

ACTION for damages for the wrongful sale of a stallion.

J. T. Mulcahy, for the plaintiff.

W. H. Kennedy, for the defendant.

Middleton, J.

MIDDLETON, J.:—The plaintiff had purchased a stallion from one Armstrong, but apparently had paid very little on account of the purchase. This, however, is not material; as, upon the evidence, the title had passed to him. The horse was boarded by the plaintiff at the defendant's stable, and it is admitted that the defendant was entitled to a lien for its keep. The question as to whether the lien was affected by the horse being from time to time taken way from the stable was not raised nor discussed.

Under the Innkeepers Act, 1 Geo. V. ch. 49, sec. 3, sub-sec. 6, the defendant would have the right, after the board was unpaid for two weeks, to sell the horse "on giving two weeks' notice by advertisement in a newspaper published in the municipality."

An advertisement was published in the issues of the Gravenhurst *Banner* of the 5th and 13th December, of a sale to be held on the 14th December. This was not two weeks' notice; and, as the notice is a statutory condition of the right to sell, there was no right to sell at that time.

At the sale the defendant himself bought the horse in, and thereafter claimed to own him.

The right given by the statute is a right to sell. Manifestly this must be a sale to some third person, and the vendor cannot himself be the purchaser.

At the trial I gave leave to amend by alleging conversion, and left to the jury only the questions of the value and of the amount due for board.

There will, therefore, be judgment for the net sum of $300 and costs.

There was no evidence whatever given in respect of the allegation in the statement of claim as to discouraging bidding at the sale; nor was any evidence tendered on the part of the defendant to support the allegation contained in the fourth paragraph of the defence.

I do not think it is a case in which I should interfere as to the scale of costs.

Judgment for plaintiff.

REX ex rel. MARTIN v. JACQUES.

Ontario Supreme Court, Middleton, J., in Chambers. April 18, 1913.

1. ELECTIONS (§ II D—76)—MUNICIPAL—DISQUALIFICATION—OFFICER—SCHOOL CONTRACT, EFFECT.

A school board is an administrative body charged with the care of a department of municipal affairs, and a contract with a school board is a contract with or on behalf of a municipal corporation, and is a disqualification for the holding of a municipal office, under sec. 80 of the Municipal Act, 3 Edw. VII. (Ont.) ch. 19.

2. ELECTIONS (§ II A—24)—MUNICIPAL—WATER COMMISSIONERS—STATUS—DISQUALIFICATION—NEW ELECTION, WHEN.

Where, by a private Act, the water commissioners of a city are elected by a general vote, and all the provisions and remedies by the Municipal Act, at any time in force with respect to councillors, are to apply in all particulars (not inconsistent with the private Act) to such water commissioners as to election, unseating, filling vacancies, grounds of disqualification, and otherwise, while the aldermen of the city are elected by wards; it is the duty of a County Judge, finding a commissioner disqualified by reason of having a contract with or on behalf of the municipal corporation, to order a new election, and sec. 215*a*, providing that the unsuccessful candidate who received the highest number of votes at the last municipal election shall be entitled to the office, does not apply in this case.

Statement

APPEALS by both the relator and the respondent from the judgment of the Judge of the County Court of the County of Essex, unseating the respondent as a water commissioner for the City of Windsor and directing a new election.

F. D. Davis, for the relator.

Featherston Aylesworth, for the respondent.

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Middleton, J.

MIDDLETON, J.:—It will be convenient to deal with the appeal of the respondent first. The Windsor waterworks is governed by private Acts—37 Viet. ch. 79, 57 Viet. ch. 87, 61 Viet. ch. 58. By sec. 39 of the first-named Act, provision is made for the election of commissioners at the same time and in the same manner as the mayor and reeve; "and all the provisions and remedies by the Municipal Act at any time in force with respect to councillors shall apply, in all particulars not inconsistent with this Act, to the said commissioners, as to election, unseating, filling vacancies, grounds of disqualification, and otherwise."

By section 24 of the last-named Act, a commissioner who has been elected "may resign his office and shall cease to hold office for the same cause as by municipal law the seat of a member of the city council becomes vacant; and, in the case of a vacancy in the office of water commissioner, during the term of his office, the vacancy shall be filled in the same manner as provided by the Act in force respecting municipal institutions at the time of such vacancy, as to vacancies in the council of a city;" but, if the vacancy occurs by death or removal within six months from the expiration of the term of office, the council may appoint a successor.

The election of the respondent was attacked on two grounds: first, by reason of the fact that he had a contract with the Public School Board of the town for the erection of a schoolhouse; secondly, because, at the time of his nomination, he owed taxes to the municipality, and untruly made a declaration that there were no arrears of taxes against the lands in respect of which he qualified.

There is no doubt as to the facts. The contract existed; the taxes were in arrear; and a declaration was made as stated.

The Municipal Act does not lay down any general principle governing disqualification; and the case must be determined upon the letter of the law. Section 80 of the Municipal Act disqualifies any person having "an interest in any contract with or on behalf of the corporation, or having a contract for the supply of goods or materials to a contractor for work for which the corporation pays or is liable directly or indirectly to pay." I think the school board must be taken to contract on behalf of the corporation, within the meaning of the section. The words "for which the corporation pays or is liable directly or indirectly to pay" are not grammatically connected with the words which here apply, as they relate only to work done for contractors; but they indicate the meaning of the statute, and that a wide meaning should be attached to the words "a contract with or on behalf of the corporation." The municipal council and the school board are two administrative bodies charged with the

care of different departments of municipal affairs; but the school board is, after all, one of the governing bodies of the municipality.

This renders it unnecessary for me to consider the second alleged ground of disqualification.

The relator's appeal is based upon the contention that, under the law applicable to this matter, a new election should not have been ordered, but the candidate having the next largest number of votes should have been declared elected.

It would, perhaps, be sufficient to say that the application before the County Court Judge did not ask for this relief. I prefer, however, to deal with the matter upon the law. Section 215a provides that, in the case of a vacancy in the office of aldermen in a city, occasioned by death or resignation or by any cause, where the aldermen are elected by a general vote, the unsuccessful candidate who received the highest number of votes at the last municipal election shall be entitled to the office. It is argued that, although the aldermen in Windsor are elected by wards, the water commissioners are elected by general vote.

The learned Judge has taken the view that the section applies only to a city where aldermen are elected by a general vote, and has no application to the case in hand. I prefer to base my judgment upon the view that the section in question applies to a vacancy arising under sec. 207 of the Act, or for some cognate reason, and does not apply to a vacancy created by quo warranto proceedings, which is governed by sec. 233, giving a discretion to the Judge either to declare a claimant duly elected or to order a new election.

I agree with the result arrived at by the learned County Court Judge; and both appeals will be dismissed. As both fail, there will be no costs.

Appeals dismissed.

LANE v. CRANDELL.

(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Scott and Stuart, JJ. March 31, 1913.

1. AUTOMOBILES (§ III C—315)—RESPONSIBILITY OF OWNER—CAR OPERATED BY BORROWER.

The owner of an automobile is not liable for the negligence of his brother to whom the car was loaned for the latter's own purposes, although at the time of the accident in question the brother was engaged in driving home the owner's wife at the request of the owner's daughter, it not appearing that the owner was aware that the car was being used for that purpose, nor that the daughter had any authority from the owner to request or direct his brother to use the car for the purpose for which it was actually used.

[*B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, referred to; *Lane* v. *Crandell* (No. 1), 5 D.L.R. 580, affirmed.]

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APPEAL by the plaintiff from the judgment of Simmons, J., dismissing action, *Lane* v. *Crandell* (No. 1), 5 D.L.R. 580, 21 W.L.R. 793.

The appeal was dismissed.

F. E. Eaton, for plaintiff.

A. H. Clarke, for defendant.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—Appeal by the plaintiff from the judgment of the trial Judge. The plaintiff's claim is for damages for injuries sustained by her resulting from her being struck by the defendant's automobile. She claims that the accident was caused by the negligence of the defendant's servant or agent.

At the time of the accident the defendant's automobile was being driven by his brother Albert who, although he was residing with the defendant, was not in his employment as a servant or in any other capacity. The defendant permitted him to use the car for his own purposes and at times at the request of the defendant or the members of his family he drove it for their purposes.

On the day of the accident Albert had driven the defendant home in the car and while there he was requested by the defendant's daughter to bring her mother home, and it was while he was engaged in doing so that the accident happened. There is nothing in the evidence to shew that the defendant was aware that his daughter had made the request or that his car was to be used for that purpose.

The learned trial Judge found that there was gross negligence on the part of Albert Crandell, but dismissed the action on the ground that, as he was neither the servant nor agent of the defendant, the latter was not liable.

I am of opinion that the learned trial Judge was right in the conclusion he reached. It is clear that the relationship of master and servant did not exist between the defendant and his brother, and I think it is equally clear that there is nothing in the evidence to support the contention that his brother was his agent in using the car for the purpose referred to. He did not direct its use for that purpose nor, so far as appears by the evidence, was he aware that it was to be used for that purpose, neither does it appear that his daughter had any authority from him to request or direct it to be so used. See *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, 22 W.L.R. 274.

Appeal dismissed.

FRITH v. ALLIANCE INVESTMENT CO., Limited.

(Decision No. 2.)

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Alberta Supreme Court, Stuart, Simmons, and Walsh, JJ. March 31, 1913.

1. SPECIFIC PERFORMANCE (§ I B—15)—ORAL AGREEMENT OF VENDOR TO REPURCHASE—STATUTE OF FRAUDS AS A DEFENCE—ACTION BY VENDEE FOR SPECIFIC PERFORMANCE.

An agreement of a vendor to repurchase the land he had agreed to sell, notwithstanding it is unenforceable by action because within the Statute of Frauds, constitutes a good defence to an action by the vendee for specific performance of the agreement for the sale.

[*Frith* v. *Alliance Investment Co.* (No. 1), 5 D.L.R. 491, affirmed.]

2. CONTRACTS (§ V C—390)—SALE OF LAND—ORAL AGREEMENT TO RESCIND —SUFFICIENCY OF.

An agreement for the sale of lands may be rescinded by the parties by an agreement not in writing, notwithstanding an action could not be maintained thereon because the agreement is within the Statute of Frauds.

[*Frith* v. *Alliance Investment Co.* (No. 1), 5 D.L.R. 491, affirmed.]

3. CONTRACTS (§ IV E—367)—BREACH OF AGREEMENT TO REPURCHASE—STATUTE OF FRAUDS—DEFENCE IN ACTION FOR DAMAGE FOR VENDOR'S REFUSAL TO CONVEY.

An agreement of a vendor to repurchase land he had agreed to sell the plaintiff, although unenforceable because within the Statute of Frauds, will constitute a good defence to an action by the vendee for damages for the vendor's refusal to convey.

[*Frith* v. *Alliance Investment Co.* (No. 1), 5 D.L.R. 491, affirmed.]

Statement

APPEAL by the plaintiff from judgment of Harvey, C.J., at trial dismissing action and counterclaim, *Frith* v. *Alliance Investment Co.* (No. 1), 5 D.L.R. 491.

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

J. L. Jennison, for the plaintiff.

A. H. Clarke, and *W. T. D. Lathwell*, for the defendants.

Stuart, J.

STUART, J. (dissenting):—On April 14th, 1910, the plaintiff and the defendants entered into a written contract under seal whereby the defendants agreed to sell to the plaintiff and the plaintiff agreed to buy from the defendants certain property in or near Calgary for the sum of $641.25, payable as to $213.75 in cash and as to the balance in three quarterly instalments of $142.50 each, on August 14, 1910, December 14, 1910, and April 14, 1911.

The plaintiff paid the cash as agreed and also paid the August instalment, though not until early in December, 1910. The plaintiff desired to re-sell and make a profit. Finally in January or February of 1911, the plaintiff asked the defendants to procure a purchaser for him by listing the property with them as his agents for sale. He put the price at $900 net and the terms at one-third cash and the balance in three equal payments in three, six and nine months.

Shortly after this the defendants for some reason decided

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to buy the property back themselves. They drew up a cheque for $50 in favour of the plaintiff and a receipt for him to sign and sent an employee out to look for the plaintiff to give him the cheque and to ask him to sign a receipt which was intended as a memorandum of an agreement of sale. The defendants seem to have been under the impression that they had a right to do this, which is only another illustration of the fact that the ways of real estate agents, like those of the heathen Chinee, are peculiar. The plaintiff returned with the messenger to the office of the defendants and made some demur. The defendants' president, one McLean, took the position that the plaintiff simply had to sell to them. When McCausland, the secretary-treasurer of the defendants, said to McLean, "He (meaning the plaintiff) claims he isn't going to sell," McLean replied, "Well, he is going to sell." The plaintiff, acting possibly under the mistaken belief that he was really bound to sell to the defendants, finally agreed to do so, as the trial Judge found, at $900, on the terms of one-third cash and the balance in three and six months. The receipt had, however, been drawn to read, "balance in three equal quarterly instalments due in three, six and nine months from date of agreement." Instead of altering this receipt to conform with the verbal agreement all that the plaintiff did was to run his pen through the words "and nine," which, of course, left the receipt insensible, because it spoke of "*three* equal instalments payable in three and six months." The plaintiff signed the receipt and took the $50 cheque. Some days afterwards he became dissatisfied and ultimately decided to repudiate the bargain on the ground that the defendants did not inform him that they were the purchasers themselves. The defendants sent Frith a cheque for $97, which was computed as the difference between the December instalment overdue on the sale from the defendants to the plaintiff amounting with interest to $153 or $154, and the $250, the balance of the one-third cash payment payable by the defendants to the plaintiff on the re-sale. On March 17, 1911, the plaintiff through his solicitor returned the $50 and the $97 and sent a cheque for $154 as payment of the December instalment on the original agreement. This latter cheque was refused by the defendants. The plaintiff later on tendered the final payment also.

The plaintiff then brought action for specific performance of the first agreement. The defendants in their defence pleaded the re-sale agreement of February 18th as a defence and also by counterclaim sought against the plaintiff specific performance of the second agreement of re-sale.

At the close of the hearing the learned trial Judge dismissed the counterclaim on the ground that the receipt was not a sufficient memorandum to satisfy the Statute of Frauds, and

gave the plaintiff judgment. On a re-argument, however, the point was raised that the agreement of the 18th of February, while not evidenced by a sufficient memorandum to satisfy the statute could be used as a defence to the original action and to this contention the trial Judge finally acceded and ultimately gave judgment dismissing the counterclaim without costs and dismissing the action with costs.

From this judgment the plaintiff alone appeals. The judgment dismissing the counterclaim is not appealed against, it being admitted that the memorandum of February 18th was insufficient to satisfy the statute.

The first question in the appeal is whether the verbal agreement of February 18th furnished a sufficient defence to the plaintiff's claim.

The common law rule was that a contract under seal could only be discharged or varied by a document under seal, but, in equity, the rule is this, as stated in Halsbury, vol. 7, p. 422:—

> If the original contract is one which is required by law to be made in writing it cannot be varied by a new verbal agreement even if the variation relates only to a part of the contract which, if it stood by itself, would not be required to be in writing. But in such a case the contract can be rescinded altogether by a verbal agreement.

The real question therefore is: Was the agreement of February 18th, 1911, a total rescission of the agreement sued upon. If it was, then it furnished a defence to the plaintiff's action; but if it is to be treated as a variation of that agreement then it would appear as if the plaintiff could not succeed.

On the other hand if the second agreement is neither a variation nor a rescission of the first the position is not so clear.

In *Vezey* v. *Rashleigh*, [1904] 1 Ch.D. 634, Byrne, J., cited cases which I think have a bearing upon the question in issue here. He said:—

> It appears to me that the decisions in *Price* v. *Dyer* (1810), 17 Ves. 356, 364, and *Robinson* v. *Page* (1826), 3 Russ. 114, 121, shew that, although to prove rescission of a written contract, I can admit parol evidence of a subsequent agreement, that means evidence of an agreement for rescission only, and I cannot admit parol evidence of an agreement to vary the terms of the contract.

In *Price* v. *Dyer* (1810), 17 Ves. 356, the Master of the Rolls said:—

> It is then said, that the agreement was waived; and that a written agreement may be so far waived by parol, that the Court will refuse the interposition of its equitable jurisdiction to enforce it. Not conceiving that there was in this case any waiver, within the meaning of the dicta, or decisions, upon this subject, it is not necessary for me to give a precise opinion upon the point; but, as at present advised, I incline to think that upon the doctrine of this Court such would be the effect of a parol waiver,

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clearly and satisfactorily proved; but here was no such waiver. The waiver spoken of in the cases is an entire abandonment and dissolution of the contract; restoring the parties to their former situation. No such thing was for a moment in the contemplation of these parties. From the history of the transaction, in the answer and the evidence of the solicitor, all they, at any time, meant was to add to or modify the terms of the original agreement. Here I may say that although there is a contradiction between the parties, there is no contradiction on this point that all that was intended at the interview was a variation in the terms of the first agreement.

In *Robinson* v. *Page* (1826), 3 Russ. 114, the Master of the Rolls said:—

> Now, in the whole of this transaction, it does not appear to me, that, when the treaty was entered into for this variation, there was any intention in the minds of the parties to abandon the original contract. It is laid down in the authority I have referred to, that, where parties have entered into a binding agreement in writing and variations are afterwards introduced by parol, or by an instrument not signed according to the Statute of Frauds, these variations are not sufficient to prevent the execution of the agreement, and are no answer to a bill for specific performance. Therefore, even on the case stated by the defendant as to this part of the transaction, the plaintiff would be entitled to the relief he prays.

In the case before us I think rescission would have taken place if the parties had agreed simply to do away with the contract of April 14, 1910, and to put themselves back in their original position, as stated in *Price* v. *Dyer* (1810), 17 Ves. 356. This would have been by the defendants agreeing to return to the plaintiff the money he paid and by the plaintiff agreeing to let the defendants keep the property. But that is not what occurred at all, as I view the matter. The parties plainly intended that both agreements should stand together, as indeed there was no reason why they should not. The agreement of February 18th was quite obviously a re-sale. It was so treated by the defendants. They recognized the continued existence of the first contract by striking a balance between the instalment overdue on the first sale and the cash payable on the re-sale. The payments on the re-sale were to continue long after the final payment on the first sale.

The subject is discussed in Cyc. vol. 9, at pp. 595-599.

I can see nothing in the second contract which was inconsistent with the first. In fact, the second contract really assumed the continued existence of the first.

With regard to the case of *Eaton* v. *Crook*, 12 W.L.R. 658, it seems to me to be clearly distinguishable. That was not a case at all of a long subsequent contract which seemed to vary or rescind a prior one. It was a question of a single contract. It was a contract which, as the plaintiff contended it to be, did not need to be in writing at all as it was only for the erection of a

house for a stipulated sum. The point which the Court had to decide was whether oral evidence was admissible, not to shew a subsequent agreement varying or discharging the contract made, but to shew an additional term to the effect that part of the contract price was to be paid by the transfer of certain lots to the contractor. What Mr. Justice Beck, who delivered the judgment of the Court, said was this:—

> I think the Statute of Frauds does not prevent the defendant from setting up *the real agreement* by way of defence.

In the present case there is no dispute as to the first agreement. The question is whether that first agreement being required by law (it happens to be the Statute of Frauds, but it might well be any law at all) to be in writing, can be varied or discharged by a subsequent one which is not in writing. In *Eaton* v. *Crook*, 12 W.L.R. 658, the defendant said:—

> That document you produce is not the real agreement. The real agreement was that you should take a part of your pay in land. You cannot therefore sue me for the money because I am ready to convey the lots as I agreed if you will only take them.

Here the defendant admits the real original agreement to be as contained in the contract of April 24, 1910, and the plaintiff contends that as *that* agreement is required by law to be in writing you cannot defeat an action on that agreement by setting up a subsequent verbal one, not discharging it and putting us back in our original position, but shewing a new independent contract which can quite plainly stand, and which was obviously intended to stand, along with and concurrent with, the first one.

I could understand the argument that we have here an agreement for rescission if it were possible to find that what was agreed upon was this, that the defendants agreed to pay the plaintiff a certain sum of money arrived at by a sort of balance in consideration of his waiving his rights under his original agreement. I say I could understand that view, although it seems to me the real idea of rescission is always a *restitutio in integrum*, a restoring of the parties to their original position. This at any rate seems to be the principle of rescission where it is decreed by a Court. See the article on Rescission and Cancellation in American and English Encyclopædia of Law, vol. 24.

But, however that may be, I find myself unable to interpret the contract of February 18, 1911, as anything else than a sale of an interest in land. The receipt given by Frith which, though defective, and admittedly so, for the purpose of the statute, contains all the terms of the agreement made except the use of the words "three" instead of the word "two" is a common memorandum often used now-a-days in evidencing a sale of land. The very reason why the counterclaim was dismissed was because it was sought to enforce "an agreement for the sale of

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an interest in land" without the necessary memorandum being forthcoming. How the agreement can be treated for the purpose of the counterclaim as an agreement for the sale of an interest in land and then for the purpose of the defence, not as such an agreement, but as an agreement to rescind a former sale is somewhat difficult for me, at any rate, to see. The suggestion that, when A agrees on one date to sell to B certain land for $600 on deferred payments and when on a later date before all these payments have fallen due B agrees to re-sell the land to A for $900 on certain distinct terms as to deferred payments which do not correspond in any way as to date with the deferred payments on the first sale, we have a rescission of the first agreement, does not, I confess, appeal to me for another reason. Suppose, for the sake of argument, that the agreement of February 18th had been satisfactorily evidenced by writing and there had been no trouble on other grounds between the parties, what would have been the position if Frith had made his payments and completed his last one as agreed on April 14, 1911? Could he not have called for a conveyance? Surely he could have done so. He himself was not bound to give the defendants title till August 18, 1911. Could he not have said, "These two agreements are both on foot. Your time has come to convey to me because I have paid you. When the date of final payment from you to me comes around I will convey to you as I agreed. But until then I want title to the property"? I do not think he would be bound to acknowledge that conveyance was useless because a reconveyance was shortly to be made. No doubt a reasonable man who had no use for the property in the meantime would agree to that arrangement, but it is conceivable that he might wish to enjoy possession in the meantime and for some purpose might want to be clothed with the title as well.

It therefore does seem to me that we have not here a rescission and that much must depend upon the real intention of the parties as evidenced by what they said and did. The suggestion made in *Noble* v. *Ward*, L.R. 2 Ex. 35, and referred to by the Chief Justice, that a clear intention that the oral agreement should be considered a rescission would be sufficient to allow it to be set up as a defence is quite pertinent, but, in my view, no such intention ever entered the minds of the parties here concerned.

Upon the authorities which I have quoted it seems to me to be also clear that a contract required by law to be in writing cannot be varied by an oral agreement. If I were satisfied that the contract of February 18th could be treated as a variation of the former one I think my consideration of the case might end at once.

But it seems to me that the arguments which I have used to repel the suggestion that it is a case of rescission are of practically equal force to shew that it is not a case of subsequent parol variation either and it is, I think, useless to attempt to rely upon the law against subsequent parol variations of a contract required by law to be in writing to defeat the contentions set up by the defendants.

It seems to me to be impossible to dispute the conclusion arrived at by the learned Chief Justice to the effect that the mere fact that a contract is one within the Statute of Frauds does not *of itself* prevent that contract being raised as a defence. But my difficulty is one that I raised on the argument and one that follows logically from what I said above, viz.: That I cannot see how the contract of February 18, 1911, even if it had been in complete legal form, could be treated as matter of defence to an action on the contract of April 14, 1910, which the plaintiff sues upon. The plaintiff has a valid contract in writing for the sale of certain land under which his final payment was due on April 14, 1911. He tendered that payment and all arrears as is admitted. He was entitled to possession pending the currency of the agreement and to conveyance and possession thereafter. Supposing he had entered into a contract quite properly evidenced to sell the land to the defendants again, it is yet the case that their final payment was not due until August 18, 1911. Not until then was he in turn bound to convey to them. Their contract did not even call for possession and they were not entitled to possession in the absence of agreement to that effect until they acquired the right to get title by their final payment. From April 14, 1911, to August 18, 1911, it seems to me to be beyond dispute that, even if the defendants' agreement had been in writing under the statute, the plaintiff was entitled to enjoy his title and his possession. He brought his action on July 25, 1911, before the defendants had any right to tender their last payment and it seems to me that it is also beyond dispute that at that date the plaintiff was entitled to sue for specific performance and to a decree for the same. To put the matter concisely, I cannot see how the fact that A has agreed to convey certain land to B on August 18th is any reason why B should refuse to fulfil an agreement made by him to convey the same land to A on the previous April 14th.

If it be suggested that it was never the intention of the parties that there should be an actual conveyance on April 14th, when Frith made his last payment, all that needs to be said is that such is quite clearly the intention disclosed in the first contract and that intention cannot be varied, as shewn by the authorities cited above by any mere oral agreement.

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I repeat, therefore, that Frith was completely entitled to the use of the land and of the title after April 14th. He might have desired to mortgage it as security for a short loan and aside from his own refusal to recognize the contract of February 18th, I can see no reason why he would not be entitled to demand the title for that purpose.

It may be said that the defendants having a contract for the re-sale to them were in equity the owners of the land, but that principle has I think been often too widely stated. The purchaser is only the owner of an interest to the extent to which he has made payments: *Rose* v. *Watson*, 10 H.L.C. 672, 679. They had, of course, paid some of the purchase money. But were they, in the face of their own covenant to convey, justified in retaining the title to protect their interest? To say this seems to me tantamount in this case to saying that the written contract may be varied or partially avoided by a verbal one. And would a Court of equity refuse specific performance against the defendants merely because, under a contract of re-sale, they had a purchaser's lien? Surely a Court of equity could quite sufficiently protect the rights of the parties by ordering the defendants to specifically perform their own solemn contract and by declaring the existence of a lien in their favour for any moneys paid under the contract of re-sale. Why should the Court assume that the contract of re-sale would not be faithfully carried out?

Of course, after August 18, 1911, which was after this action was begun, the defendants would be entitled to reconveyance, but if they wrongfully refused to convey before action brought I do not think they would be allowed under rule 146 to raise a defence which their own wrong had alone made available to them.

I am of opinion, therefore, that the mere existence of the contract of February 18, 1911, was no defence to an action for specific performance of the contract of April 14, 1910.

But the crux of the case is this, that Frith did *not* express his willingness to carry out his contract as I, for the purpose of argument, assumed above for a moment. On the contrary he indicated his refusal to carry it out. If the two separate contracts had been about different subject-matters I think his refusal would still be no defence. But they both related to the same land. The defendants were under contract to convey to Frith on April 14th. Frith was under contract to reconvey to them on August 18th, and the contracts were running concurrently. If Frith wrongfully indicated his intention not to reconvey as he agreed, then, I think, the defendants were justified in retaining the title in their own name to protect their interests. They were not bound to convey and then rely

merely upon a caveat. They had something better by way of security and were entitled to retain it when danger appeared in the plaintiff's actions.

It was, therefore, not the existence of the contract of February 18th, but Frith's refusal to be bound by it, that furnished the defendants with a defence if his refusal was wrongful.

This brings me practically, perhaps, by a long and unnecessary route, to the question whether there are not circumstances shewn here which entitled us to say that Frith was justified in refusing to be bound by the contract of February 18th. In the first place, I do not think we ought to overlook the fact that had that contract stood by itself and had Frith been the registered owner himself he could not have been forced to fulfil it by an action. Time and time again Courts have dismissed, and dismissed with costs, actions for the specific performance of agreements for the sale of lands simply because the agreement was not evidenced by a sufficient memorandum under the statute. *Rogers* v. *Hewer*, 1 D.L.R. 747, 19 W.L.R. 368, as well as the counterclaim in this very action, are examples. Even if there were nothing else involved, was it therefore so grave a wrong for Frith to refuse to carry out an unenforceable contract? But besides this the defendants were admittedly his agents. He had listed the property with them for sale. Suddenly one day they took a notion to buy it from him themselves and without more ado they sent out their man with a cheque for $50 and a receipt for him to sign. It seems to me they had become strangely anxious to get their own principal into an agreement to sell to them. And when he demurred at first they took the high and imperious position that he just had to sell to them and they told him so. They were evidently under the impression that he was bound to sell to them if they saw fit to say they were the purchasers. I am strongly of the opinion that they conveyed that impression to Frith and that he was influenced by it to some extent. Then there is evidence that by some means or other some neighbouring real estate agents immediately announced the property for sale at $2,000, over twice what Frith was getting for it; and there is evidence that the officers of the defendant company with whom Frith dealt as his agents confessed that they had made a good deal for the company and had made $1,000 for the company. As to the question of Frith's action in troubling the company and complaining or "grousing" so much, as they called it, this may, I think, be offset by their own peculiar complaint of having "worked on" the deal when all they did was to list the property with some other agents.

In these circumstances I am unable to say that Frith was wrong in refusing to be bound by the contract and I do not think the company should be allowed to set up as a defence a

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contract obtained in that way. The defendants should be left to their remedy by affirmative action of their own, which is admittedly not available to them.

The appeal should be allowed, the judgment below set aside, and judgment entered for the plaintiff directing specific performance of the agreement of April 14, 1910. The plaintiff should have the costs of the appeal and of the action. The plaintiff has not appealed against the trial Judge's disposition of the costs of the counterclaim which, therefore, will stand.

Simmons, J.

SIMMONS, J.:—This is an action for specific performance of an agreement between the plaintiff and defendant for sale by the former to the latter of lot 15, block B, plan of Calgary 7287 A.C. for the price of $641.25, payable $213.75 cash and balance in three deferred instalments. The defendant pleads as a defence to plaintiff's action a subsequent purchase of the same lands by it from the plaintiff for the sum of $900, payable one-third cash and balance in two equal payments in three and six months. The defendants also set up a tender to the plaintiff of $250, being the balance of cash payment agreed to be paid by the defendants to the plaintiff under the last agreement.

The defendants, by way of counterclaim, set up the last-mentioned agreement and ask for specific performance of the same.

At the trial it was conceded that the memorandum of sale set up by the defendants was not enforceable, as it was not a sufficient memorandum to take the agreement out of the 4th section of the Statute of Frauds, and the learned Chief Justice who tried the action decided against the defendants on this ground. He was then asked to give effect to the defence that the defendants' agreement, although not enforceable if standing alone on account of the Statute of Frauds, yet might properly be set up in the way of an oral agreement by way of counterclaim. The case was re-argued and judgment went in favour of the defendants on this ground.

I think the question is narrowed down to the decision as to whether there was an abandonment by the plaintiff of his original agreement when he re-sold. It seems to me quite inconsistent for the plaintiff to assert that he, the plaintiff, had an interest as purchaser in the said lands where his only interest just prior to the second sale was the right to obtain title if he made the deferred payments which were still due under the original sale to him. To maintain his position he has to assert that he and the defendants are in the relation of vendor and purchaser and likewise in the relation of purchaser and vendor of one and the same property at one and the same time.

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There may not have been an abandonment of the first contract in the sense of divesting himself of the obligation to the defendants of the balance due them, but there must have been a rescission to this extent that the relation of vendor and purchaser no longer existed between them. This it seems to me would quite bring the case within the rule of *Price* v. *Dyer*, 17 Ves. 356, where it is held that a parol variation amounting to a complete abandonment clearly proved would be a bar to specific performance.

In the reply the plaintiff alleges failure to disclose the fact that defendants were buying for themselves, but represented they were selling agents of the plaintiff. The learned Chief Justice has found against the plaintiff in regard to unfair dealing or misrepresentation and I cannot discern any ground for interfering in this finding.

In my opinion then the defendants can properly set up the parol agreement of sale to them as an abandonment by the plaintiff of his right to enforce the original agreement.

Walsh, J.

WALSH, J.:—I concur in the opinion expressed by the Chief Justice in the judgment under appeal that the one contract of re-purchase made between the parties may be set up and given effect to as a defence to the plaintiff's action.

In addition I think that this Court might, perhaps, in its discretion, very properly refuse to exercise its equitable jurisdiction in aid of the plaintiff. He undoubtedly re-sold this land to the defendants and entered into an agreement in writing with it for the same which both parties thought binding. He accepted payment of a part of the purchase money on this re-sale which he kept for a month. It is only by the narrowest kind of a technical objection to the sufficiency of the evidence of this agreement to satisfy the Statute of Frauds that he is able to say and to insist upon it that there is no agreement within that statute. The Chief Justice has found upon conflicting evidence that it has

> been established to my entire satisfaction that the plaintiff knew he was dealing with the defendant as purchaser and that no advantage whatever had been taken of him.

I must confess that there is at least one incident in connection with the dealings between the parties upon this re-sale which I do not like. The conduct of the president and secretary of the defendant company in insisting upon the plaintiff selling this land to the company when he expressed his unwillingness to do so hardly measures up to the standard of fairness which should exist between principal and agent. They did this, I think, because of their belief that as he had listed the land with the company for sale they could compel him to sell at the listed

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price to any purchaser whom they found, even to their own company, but it would have been fairer if, when he objected, they had been less insistent upon the point. He was, however, a free agent. He was under no compulsion of any kind, and I think that he quite understood that he need not sell unless he wanted to. He was getting the price which he himself had but a few days earlier set upon it. By his insistence he got better terms than those he originally dictated. He knew within a day or two everything that he now alleges in support of his charge of unfair dealing and yet a full month elapsed before he repudiated the agreement. Upon the findings of fact adverse to him which the trial Judge has made upon evidence which justifies them I do not see how, if this agreement was properly evidenced by writing, he could hope to escape the obligation to perform it.

The case stands, therefore, in this way. There is a binding agreement on the part of the defendant to sell to the plaintiff. There is admittedly an agreement of re-sale between the parties at an agreed price and upon agreed terms which is evidenced by a writing which both parties thought embodied these terms, but which in one essential does not. I think that the Court's jurisdiction, which is purely equitable, might be equitably exercised under these circumstances by refusing the relief which the plaintiff seeks. I do not, however, put my judgment on that ground as I have not considered it at all in the light of the authorities, I merely suggest it, preferring to rest my reason upon the ground taken by the Chief Justice. I would dismiss the appeal with costs.

Appeal dismissed, STUART, J., *dissenting*.

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WISHART v. BOND.

Ontario Supreme Court, Lennox, J. March 10, 1913.

1. VENDOR AND PURCHASER (§ I D—20)—RIGHTS OF PARTIES—DEFICIENCY IN QUANTITY—DISCREPANCY.

Where a specific lot of land is pointed out by the vendor's agent to the vendee at the time of making the sale and the depth of the lot is measured by the parties and its limit pointed out to the purchaser as fixed by a certain disclosed boundary, the purchaser is entitled to a depth up to that boundary, although the agreement of sale recited that the depth was "about ninety feet, more or less" and the actual depth was, as a matter of fact, ninety-one feet seven inches; and such right is not waived by the purchaser's relying on the vendor's good faith, and inadvertently accepting a deed conveying only a seventy-five foot depth.

[*Wilson Lumber Co.* v. *Simpson*, 23 O.L.R. 253, referred to.]

2. VENDOR AND PURCHASER (§ I B—7)—DEDUCTION FOR DEFICIENCY IN QUANTITY—FALSE REPRESENTATION.

A purchaser of land who is induced to enter into the contract by the false representation of the vendor that the lot in question has a

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certain depth, is not bound to exercise diligence to detect a discrepancy in the depth between the contract of purchase and the deed, but on discovering the fraud he is entitled to demand the depth called for in the contract or damages for the breach if the part in question has passed to an innocent third party.

[*Redgrave* v. *Hurd*, 20 Ch. D. 1, and *Rawlins* v. *Wickham*, 3 DeG. & J. 304, referred to.]

Statement

ACTION for specific performance of an agreement for the sale of a house and lot in the city of Toronto by the defendant to the plaintiff, or for damages.

Judgment was given for the plaintiff.

A. F. Lobb, K.C., for the plaintiff.

A. R. Clute, for the defendant.

Lennox, J

LENNOX, J.:—In the evidence, a Mrs. Coutts is spoken of as being the owner of or in occupation of lot 20 on the west side of Condor avenue, Toronto. On the 1st May, 1912, the defendant procured a conveyance of all the land between the southerly boundary of the Coutts property and Hunter street, that is to say, lots 21, 22, and 23, and the part north of Hunter street of 24, west of Condor avenue—a block of land having a depth from south to north, that is, from Hunter street to the Coutts property, of 91 feet and 7 inches.

Before and at the time of the negotiations and agreement between the plaintiff and defendant, the boundary line between the property of the defendant and the Coutts property was fairly well defined upon the ground by the Coutts building—a workshop at the north-west corner of the defendant's property—and, if not by a boundary fence, at all events by a line of old fence posts.

The defendant subdivided the western portion of lots 21, 22, 23, and 24 into four narrow lots, running north and south, having a frontage of about 18 feet each on Hunter street. These lots, if run north to the northern boundary of the defendant's land, would have a depth of 90 feet—or, to be exact, 91 feet 7 inches. On these lots the defendant erected two pairs of semi-detached dwelling-houses, the street numbers being 50, 52, 54, and 56. No. 56 is the one in question in this suit.

The defendant employed Woolgar and Atchison to sell No. 56 for him. He instructed them as to its location and boundaries; and, amongst other things, that it had a depth of 90 feet from south to north. Manifestly he also pointed out to them that the northern boundary would be the southern boundary of the Coutts lot.

The defendant's agents, in pursuance of these instructions, negotiated for the sale of this property to the plaintiff. They represented to the plaintiff that it was a good deep lot; shewed

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him where the northern boundary ran; and, to assure him that he would have a depth of 90 feet, they paced it off from Hunter street to the northern boundary of the defendant's land as hereinbefore described. Upon this representation and upon this basis, the plaintiff agreed to purchase this specific parcel of land for $2,500. There was then an uncompleted building upon the property, which the defendant was to complete.

On the 31st July, 1912, the defendant's agents drew up an offer for purchase of "street number 56, having a frontage of about 17.6 feet more or less by a depth of about 90 feet more or less," on Hunter street; and this offer having, before the plaintiff signed it, been submitted to the defendant by his agent, H. E. Woolgar, was read over, approved of, and accepted in writing under seal by the defendant; and the offer was thereupon executed under seal by the plaintiff.

The defendant conveyed to the plaintiff a lot or parcel of land having a depth of 75 feet only; and a mortgage was given back for a balance of purchase-money. The plaintiff, at the time his solicitor closed the transaction, knew nothing whatever of the shortage. The plaintiff's solicitor, by the exercise of diligence, could have detected the discrepancy.

The defendant has sold and assigned the mortgage taken from the plaintiff, and has conveyed to his son the northern 16 feet 7 inches of lot 21, pointed out to the plaintiff, which he expected to get, and which he was to get under the written agreement.

The defendant cannot, and practically does not, dispute the facts. He in effect says, "You cannot make me and I won't do anything." . . . The evidence of the defendant in Court was not calculated to leave a good impression. . . .

"More or less" tied the purchaser to skimp measurement in *Wilson Lumber Co.* v. *Simpson*, 22 O.L.R. 452, 23 O.L.R. 253. Why? Because the purchaser bargained for a specific lot, with boundaries visible as pointed out, and he took his chances as to how it would measure out—and so did the vendor. Here, too, the contract is for "about ninety feet, more or less;" and the plaintiff had a right to get 91 feet 7 inches. Why? On the same principle as in the Simpson case; because there was a specific plot pointed out, with a northern boundary pointed out, and stepped off as well. Up to that boundary, be it more or less than 90 feet, is what the plaintiff was entitled to call for, and what the defendant was bound to give, under the agreement. . . .

I accept the plaintiff's evidence that he did not actually perceive that he was being cut down to 75 feet until the time when he began a vigorous protest; and he was not bound to be on the alert, to suspect the defendant, or to find out all he might have found out by vigilance—*Redgrave* v. *Hurd*, 20 Ch. D. 1,

at pp. 14 and 21—if by the defendant's fraudulently false statements he was, in fact, induced to enter into the contract, believing the representations to be true. And it is no answer that by diligence he might have discovered the fraud earlier: *Rawlins* v. *Wickham*, 3 DeG. & J. 304.

It is not disputed that there was a representation by the defendant through his agents, and again by the defendant when he signed the contract and sent it to the plaintiff to be signed, that this house number 56 was on a 90-foot lot and that the northern boundary was the northern boundary of 21 Condor avenue. That the depth was material is manifest; and that it was material to the plaintiff, and induced him to contract, is distinctly sworn. That the conditions of to-day were the conditions at the time of the contract, as to the actual subdivision of this property, is shewn by the plans, abstract, and mortgages referred to. That the representations were false is also beyond dispute; in fact, there is neither a denial nor an explanation.

Was the representation fraudulently, that is, knowingly or consciously, made, and without believing it to be true? I have no doubt of it. There is no explanation attempted; but, if there were, it would invite rigorous scrutiny. The man who cut and carved the original lots, and had already mortgaged the parcels separately, must be taken to know what he was doing when he instructed the agents and signed the agreement. It would be dangerous if men could easily explain away an act such as this.

What motive could he have? Gain, I suppose; but motive is immaterial: *Derry* v. *Peek*, 14 App. Cas. 337, at 365; *Foster* v. *Charles*, 7 Bing. 105. I do not know the motive, or rather the method, by which the defendant hoped to succeed. The house was not nearly finished, but the deed was ready the day after the contract was signed. Difficulties arose which kept the matter open for some time. In the end the defendant stood behind the convenient bulwark of "executed contract" and the two-edged sword of "more or less."

The rights of third parties have intervened, so that the plaintiff's relief will be in the way of damages; and on this branch of the case, I think, $200 will be a fair award. The house has not been finished according to agreement. I will allow the plaintiff $25 under this heading.

There will be judgment for the plaintiff for $225, with costs according to the tariff of the Ontario Supreme Court.

Judgment for plaintiff.

ONT.

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Mar. 4.

Re SUGDEN.

Ontario Supreme Court, Meredith, C.J.C.P., in Chambers. March 4, 1913.

1. INFANTS (§ II—37)—SALE OF LAND—JURISDICTION.

On an application on petition for an order for the sale of land belonging to an infant, under the power conferred by the Infants Act, 1 Geo. V. (Ont.) ch. 35, the merits of the application cannot be taken into account until the court is satisfied that the mode of procedure prescribed by Ont. Cons. Rules 960 to 970 and 1308 has been complied with.

2. INFANTS (§ II—37)—SALE OF LANDS—ORDER FOR—DEVOLUTION OF ESTATES ACT.

The provisions of the Devolution of Estates Act, 10 Edw. VII. (Ont.) ch. 56, are not applicable on an application on petition for an order for the sale of land of an infant, where the estate has been wound up by the executors and the land has been conveyed by them to the infant or to some one in trust for her, and where the executors are not in any way parties to or represented on the application.

3. INFANTS (§ II—37)—SALE OF LANDS—EXAMINATION OF WITNESSES.

An application on petition for an order for the sale of the land of an infant will not be heard under the Ontario practice, where the procedure prescribed by Cons. Rules 960 to 970 has not been followed in that one of the guardians of the infant has not been made a party to the application and no explanation of such absence is given, and neither the witnesses to the petition nor the infant herself (being over the age of 14 years) have been examined *viva voce* as to the consent of the infant to the sale as the practice rules require.

Statement

APPLICATION on petition for an order for the sale of the land of Vera Gladys Sugden, an infant.

The application was heard by Meredith, C.J.C.P., at London, on the 1st March, 1913.

J. Macpherson, for the petitioners.
Coleridge, for the Official Guardian.

Meredith, C.J.

MEREDITH, C.J.C.P.:—The proper mode of procedure, in such a case as this, is the only question for consideration on this application now: the merits cannot be taken into account before it is first considered whether they are before the Court in the manner prescribed by law.

The application is for the sale of the land of an infant, under the power now conferred on this Court by the Infants Act, 1 Geo. V. ch. 35(O.); see also 2 Geo. V. ch. 17, sec. 31(O.); the mode of procedure in such a case being provided for in Con. Rules 960 to 970 and 1308. The provisions of the Devolution of Estates Act, 10 Edw. VII. ch. 56, are not applicable: the estate has been wound up by the executors; and the land has been conveyed by them to the infant, or to some one in trust for her: and the executors are not in any way parties to, or represented on, this application.

The application is supported by affidavits and by a written consent of the infant, a girl of nearly fifteen years of age; and

it was said that applications had been granted in recent years upon such material; but that can hardly be, in the face of the procedure plainly prescribed in the Rules and enactment; notwithstanding the assent of the Official Guardian is given.

The statute, sec. 6, provides that the application shall be made in the name of the infant by her next friend or guardian. Con. Rule 963 provides that the petition shall be presented in the name of the infant by her guardian, or by a person applying by the same petition to be appointed guardian as thereinafter provided. If there be any conflict in these provisions, the later enactment, the statute, prevails. The mother of the infant is one of her guardians appointed by the Surrogate Court, according to the affidavits filed; but she is not a party to the application in any way: and no explanation of her absence and silence is given.

Under the Rules, the consent of the infant, if of the age of fourteen years or upwards, to the application, is necessary, "unless the Court otherwise directs or allows."

Con. Rule 965 requires that the infant shall be produced before the Judge, or a Master, unless otherwise directed by the Judge.

Con. Rule 966 provides that, if the infant be above the age of fourteen years, he or she "shall be examined apart, by the Judge or officer before whom" he or she "is produced, upon the matter of the petition and as to" his or her "consent thereto."

There is no reason why the infant cannot very well attend before the Judge as the Rules provide; and there would be no excuse, that I can imagine, in this case, for dispensing with any part of the procedure so provided for. The wishes of the infant may have much weight; and in any case there ought to be an opportunity given to express them; none but weighty reasons should ever prevent, or indeed excuse, it.

Then, under Con. Rule 968, "the witnesses to verify the petition shall be examined viva voce before the Judge making the order, or before a Master of the Supreme Court, as to the matter of the petition, and the depositions so taken shall be stated to have been taken under this Rule." This, as I have intimated, has not been done, and is sought to be avoided.

The applicants must conform to the Rules in these respects; I know of no authority for absolving them; and, if there were, there is no good reason why there should be absolution in this case.

The application must stand over until the next sitting of the Court—London Weekly Court—and then the application must be proceeded with, in all respects, in conformity with the practice I have pointed out.

Direction accordingly.

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Re EMPIRE ACCIDENT AND SURETY CO. FAILL'S CASE. BARTON'S CASE.

Ontario Supreme Court, Meredith, C.J.C.P. March 4, 1913.

1. CORPORATIONS AND COMPANIES (§ V F 1—236)—LIABILITY OF SHAREHOLDERS—EXEMPTION—ONUS.

In a winding-up proceeding, where it is shewn that a person subscribed for a certain number of shares of stock in a company subject to the Companies Clauses Act (Can.), and that his subscription had not been entirely paid-up, the onus is upon him to shew that he is discharged from the liability which usually flows from the ownership of such shares, *ex. gr.*, where the contention is that he held the stock as a trustee or in a representative capacity only, and consequently that the trust fund only is liable for the amount unpaid under the Companies Clauses Act, 3 Edw. VII. (Can.) ch. 118, sec. 32.

Statement

APPEAL by Faill against the ruling of Macbeth, Co.C.J., as Referee in a winding-up proceeding, that the appellant was liable as a shareholder of the company and properly on the list of contributories as such.

The appeal was heard by MEREDITH, C.J.C.P., at the London Weekly Court, on the 1st March, 1913.

G. G. McPherson, K.C., for the appellant.

J. O. Dromgole, for the liquidator.

Meredith, C.J.

MEREDITH, C.J.C.P.:—The grounds of the appeal are: (1) that the appellant never was a shareholder; and (2) that, if he were, it was in such a capacity that he was not personally liable to pay for the shares.

The evidence adduced before the Referee was not as full as it might have been, and as, under ordinary circumstances, it should have been. The appellant's testimony, perhaps from lack of memory, left much to be desired in the way of light upon the real circumstances of the case: and I cannot but think that more light might have been thrown upon the subject of the missing books and papers of the company. Leitch, who seems to have been practically the company, was not examined as a witness. There can be little doubt that, if he would, he could make quite plain all that is left in doubt as to the stock in question in this appeal. But he is said to be now living in Alberta: and it is added that the amounts in dispute are really so small, though nominally large, that, whatever the result, it might be unprofitable to go to any further expense, such as would be needed in procuring the further evidence I have alluded to; that a call of five per cent. is likely to be all that shall be needed for the satisfactory and complete winding-up of the company.

In support of the first ground of the appellant's contention, he testified, but only in the half-hearted manner in which all

of his testimony was given, that he never signed an application; never made an application for shares in the company; and that he never was a shareholder of the company; never became one.

Boles, the secretary-treasurer of the company, testified that he had spoken to the appellant about taking stock; and that, though he did not subscribe for him, there was an application on the usual form for 200 shares with the appellant's name signed to it; that it was pasted in the application-book of the company; that a certificate of ownership of the stock was issued by him to the appellant in accordance with the application; and that the appellant's name thereafter appeared, as holder of 200 shares, in the lists of the stockholders made under the requirements of the law.

It is objected that secondary evidence of the application was inadmissible. Though, as I have intimated, I should have preferred better evidence of the loss of the books and papers of the company, I am not prepared to say that the learned Referee erred in admitting the evidence; but, in truth, little turns upon the question, because the fact that the appellant was a holder of the 200 shares of stock is abundantly proved otherwise.

During the inquiry before the Referee, the certificate in the appellant's favour testified to by Boles was found among his papers in the hands of his banker: that might, of course, have happened without his knowledge, though when it was issued it was enclosed by Boles with a letter, addressed to the appellant, in these words: "I enclose herewith stock certificate No. 180, shewing $6,000 paid thereon." But, however that may be, the appellant, nearly two years after the date of his certificate, and over six weeks after the date of the letter with which the certificate was enclosed, signed a paper purporting to assign to Leitch the 200 shares of the company standing in his name in the books of the company; a fact which is quite conclusive against his contention, and his defective memory, that he never was a shareholder of the company.

Nor is that all: the assignment was not acted upon; and, a month after its date, the appellant gave to Leitch a power of attorney and proxy to vote for him upon his shares in the company; and the same thing was done again, about nine months later.

So that I can have no manner of doubt that the appellant was a shareholder of the company for the number of shares in respect of which he appears upon the list of contributories; and that the onus of discharging himself from the liability which usually flows from the ownership of such shares rests upon him.

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The company was created by ch. 118 of 3 Edw. VII. (D.), and by that enactment, sec. 11, the Companies Clauses Act, with some exceptions, is made applicable to it.

Under sec. 30 of that (latter) enactment, every shareholder of the company is liable, individually, to the creditors of the company, until the whole of his stock has been paid-up. But, under sec. 32, no person holding stock as an executor, administrator, curator, guardian, or trustee, is personally liable; the estate and funds in the hands of such persons are. And no person holding stock as collateral security is personally liable, but the person pledging the stock is: sec. 32.

Whilst it is quite clear that there must have been some secret agreement or understanding between the appellant and Leitch as to the stock in question, there is no sufficient evidence to bring the appellant within any of the exceptions from individual liability to which I have referred; and so he has not satisfied the onus of proof which, I have said, rests upon him.

His own testimony is quite too shadowy and uncertain to be the foundation of any legal rights in his favour; he might have made the situation quite clear by the evidence of Leitch, but he did not see fit to adduce it; and so it may fairly be taken that a disclosure of all the facts connected with the shares in question would not have helped him.

There is no evidence upon which it could rightly be found that Leitch is in any way liable to the company, or its creditors, upon the stock in question: there is no sufficient evidence that he ever had any legal or equitable right or title to it, except that which the assignment from the appellant to him may have given; and that assignment was never carried into effect, as the evidence shews, and the appellant's subsequent proxies make plain: proxies which make strongly against the appellant's contention and testimony that he never was a shareholder, as well as against his contention that he was a pledgee only, because it is the pledgor not the pledgee who has the right to represent the stock, and vote as shareholder: sec. 33.

The learned Referee was, I find, right in his conclusion. The appeal is dismissed with costs.

BARTON'S CASE.

Appeal by Barton's executors from the ruling of the Referee as in the previous case, argued at the same time and by the same counsel.

MEREDITH, C.J.C.P.:—The appeal in this case was argued with that in Faill's case, the evidence in the two cases having been taken together, and some of the facts being applicable alike to each case.

The appellant's contention is, that there was not sufficient

evidence to warrant the finding of the Referee that Barton was a shareholder of the company; but, upon the evidence adduced before the Referee, it is impossible for me to give effect to that contention.

A certificate, dated the 1st June, 1905, that Barton was the holder of one hundred shares of the capital stock of the company, upon which $2,500 had been paid, was issued, and was produced by Barton's executors upon a subpœna, on the reference: and it was proved, upon the reference, that the executors had received two dividends from the company upon that one hundred shares of stock in the company: so that a case for putting the executors upon the list was quite made out, without taking into consideration the evidence of Boles, and the fact that Barton's name appears upon the copy of the list of shareholders as the owner of 75 and 25 shares; and that case was not contradicted or met in any way in evidence by the respondents.

The appeal must be dismissed; the respondent is entitled to his costs of it from the appellants.

Both appeals dismissed.

LECKIE v. MARSHALL.

(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 6, 1913.

1. JUDICIAL SALE (§ I A—2)—TIME—OPPORTUNITY FOR CONTEMPLATING PURCHASERS TO INSPECT, NECESSITY OF.

In fixing a date for the judicial sale of property by a Master in Ordinary, regard should be had to the nature of the property, and where it appears that the property in question cannot properly be inspected by prospective purchasers before the date set for the sale, the court should order the date of sale postponed to such later time as would afford an opportunity for inspection to contemplating buyers.

[*Leckie* v. *Marshall*, 9 D.L.R. 383, reversed.]

2. JUDICIAL SALE (§ I A—4)—BIDS AND BIDDING—RESERVED BIDS—PRACTICE.

A judicial sale under the practice should be subject to a reserved bid, in order to protect the parties from having their interests sacrificed, and this principle is especially applicable where the security is of a variable nature, for instance, mining properties involving some hundreds of thousands of dollars, and this although there may already have been abortive efforts to sell under reserved bid conditions.

[*Leckie* v. *Marshall*, 9 D.L.R. 383, reversed.]

Statement

APPEAL by the defendants William Marshall and Gray's Siding Development, Limited, from the order of Britton, J., allowing a postponed judicial sale without reserve and fixing an early date for such sale.

The appeal was allowed.

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George Bell, K.C., for the appellants.
Glyn Osler, for the plaintiffs.

The judgment of the Court was delivered by

MULOCK, C.J.:—In this case an order was made directing the sale of the property in question, with the approbation of the Master in Ordinary; and the Master, in settling the advertisement, gave two directions: one fixing the date of sale, the 16th June, 1913; and the other, that the property be offered for sale subject to a reserved bid.

The respondents, who had a lien on the property, appealed from these two directions to Mr. Justice Britton; and he allowed the appeal in part, dispensing with a reserved bid, and changing the date of sale from the 16th June to a date not earlier than the 5th nor later than the 12th May, 1913.

The defendants appeal from the order of Mr. Justice Britton, and ask to have the two directions of the learned Master restored.

As to the proper date to fix for the sale, regard should be had to the nature of the property. In this case it consists of some five hundred acres of land in the Temagami Forest Reserve, said to contain valuable minerals, such as gold, copper, and arsenic. The defendants, we are told, have expended a large sum of money, in the vicinity of $50,000, in improving the property, examining and testing, sinking of shafts, etc.

At this moment, it may be assumed, that there is a blanket of snow over the whole 500 acres of land, and that the shafts, which we were told in the argument were sunk in different portions of the land, are at this moment filled with water and ice.

This is the kind of property which is directed to be sold not later than the 12th May.

Certain materials (evidence) not used before Mr. Justice Britton were before us; in their absence we might perhaps have been led to rule as did that learned Judge.

It is the duty of the Court to endeavour to promote a sale to the best advantage of all the parties concerned, and for such end to select a date of sale and prescribe such other proper terms and conditions as are likely to realise the desired results.

During the argument of counsel for the plaintiffs, the respondents, before us, he was asked whether this particular property would not, in all probability, realise a better price if an opportunity were given to contemplating purchasers to examine it, and he admitted that it was much more likely to realise a good price if such an opportunity were given for an inspection. That admission, in our judgment, disposes of the case that went

before Mr. Justice Britton. Perhaps the material before him would have led us to the same conclusion that he has reached. But, certainly, all doubt of the wisdom of the course we are taking is removed when counsel opposing this motion tells us that a better price will, in all likelihood, be obtained if an opportunity be given for an inspection by prospective purchasers.

What opportunity would there be to ascertain the mineral value of the land, if there is a blanket of snow over it up to nearly the date of sale, and the test pits are filled with water and ice?

On this point we entertain no doubt that the sale should not take place as early as the 12th May; and we doubt if it should take place as early as the 16th June.

The examination will, naturally, occupy a considerable period of time after the snow disappears; and, thereafter, must follow a period to enable contemplating buyers to arrange for the financing of the amount required in such a proposition as this, involving some hundreds of thousands of dollars.

We, therefore, think that, in addition to restoring the direction of the Master as to the date of sale, there should be included in the order the right to him to postpone the date of sale to a day not later than the 16th July, if he thinks it expedient to do so.

As to the other direction of the learned Master, we are of opinion that this is a property which particularly calls for protection by means of a reserved bid. It is the practice of the Court to sell subject to a reserved bid. It is a means to protect parties in such matters from having their interests sacrificed; and experience tells us that conditions surrounding a case like the present—a property like this—particularly call for a reasonable date for sale; and it is particularly desirable that the best terms be realised upon such peculiar property as this, inasmuch as the security is of such variable nature; and the more variable the security the more is the need of the protection of the Court to prevent the sacrifice of the property.

We have reason to be aware of the advantage of adopting the policy of protection by the Court, in a recent case that was satisfactorily disposed of in this way, viz, Re Imperial Pulp Mills Co., where a stay of proceedings was asked for until an inspection could be made by contemplating purchasers, and where reserved bids were fixed. On, I think, two occasions at least, the sale was advertised; but the course taken by the Court, of maintaining the reserved bid and giving ample opportunity for it being reached, resulted ultimately in the reserved bid being reached, and there was a successful sale of the property.

It may be that if, at the sale, the reserved bid should prove

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abortive, later on, if circumstances should so demand, another policy may be prescribed.

Mr. Osler, for the respondents, offered, as an argument against a reserved bid, to give to the Court an undertaking, an unconditional undertaking, that the respondents would, when this property was offered for sale, bid a sum equal to $210,000 and interest; but we are of opinion that we could not accept that undertaking in lieu of the adoption of the safeguard provided by the practice of the Court—a reserved bid. That undertaking, however, may prove of service to the parties concerned. It will also be incorporated in the order.

We think that the appellants are entitled to the costs of this appeal and of the motion below before Mr. Justice Britton.

Appeal allowed.

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CALDWELL v. HUGHES.

Ontario Supreme Court, Middleton, J., in Chambers. April 30, 1913.

1. COURTS (§ II A 3—164)—JURISDICTION AS DEPENDENT ON AMOUNT—SET-OFF OR COUNTERCLAIM.

A plaintiff cannot, by voluntarily admitting the right of the defendant to a set-off so as to reduce the balance of his claim to an amount within the competency of an inferior Court, confer jurisdiction on the inferior Court; and if the plaintiff has a claim not within the jurisdiction of the County Court, but against which the defendant may set up a set-off not agreed to by both parties, so as to constitute a payment in effect, the plaintiff must sue in the superior Court, as he is not entitled to compel the defendant to plead the set-off or counterclaim.

[*Osterhout* v. *Fox*, 14 O.L.R. 599, applied; *Gates* v. *Seagram*, 19 O.L.R. 216, distinguished; see also *Cox* v. *Canadian Bank of Commerce*, 8 D.L.R. 30.]

2. SET-OFF AND COUNTERCLAIM (§ I—1)—OF WHAT DEMANDS—EQUIVALENT TO PAYMENT, WHEN.

A set-off, agreed to by both parties before action brought, is equivalent in law to a payment. (Dictum *per* Middleton, J.)

Statement

AN appeal by the defendant from the ruling of the Local Master at Belleville that the plaintiff was entitled to tax High Court costs against the defendant.

The appeal was dismissed.

D. Inglis Grant, for the defendant.

H. E. Rose, K.C., for the plaintiff.

Middleton, J.

MIDDLETON, J.:—At the trial, the case was referred to the Master, under sec. 121(b) of the Judicature Act; and the costs of the action and reference were directed to be in the discretion of the Master.

By his report, the Master found the plaintiff to be entitled to $3,699.22, and the defendant, under the various items in

his set-off and counterclaim, to be entitled to $3,013.62; leaving a balance due to the plaintiff of $685.50, which the plaintiff is entitled to recover, "together with full costs of action."

It is now contended that, the claim of the defendant being, at any rate in part, a set-off, and not a counterclaim, the action might have been brought in the County Court; and that the plaintiff is, therefore, entitled to County Court costs only, with a set-off. The Master has allowed High Court costs, and certifies, quantum valeat, that, if any question had been raised before him as to the scale of costs, he would have awarded High Court costs without set-off.

I think the learned Master is right in the conclusion at which he has arrived. There is nothing to suggest that a set-off had been assented to or agreed upon so as to amount to payment and reducing the plaintiff's claim to a sum below $800. This being so, the case falls within the decisions of *Re Miron* v. *McCabe* (1867), 4 P.R. (Ont.) 171; *Furnival* v. *Saunders* (1866), 26 U.C.R. 119; *Sherwood* v. *Cline* (1888), 17 O.R. 30, and *Osterhout* v. *Fox*, 14 O.L.R. 599. These cases establish that the inferior Court has not jurisdiction merely by reason of the existence of a set-off, unless the set-off has been assented to by both parties, so that it in law constitutes a payment. In the absence of such an agreement, a plaintiff, having a claim against which a defendant may, if he pleases, set up a set-off, must sue in the superior Court; for he cannot compel the defendant to set up his claim by way of set-off, and he cannot, by voluntarily admitting a right to set-off, confer jurisdiction upon the inferior Court.

The case relied upon by Mr. Grant—*Gates* v. *Seagram*, 19 O.L.R. 216—turns upon an entirely different point. There a plaintiff was met by a set-off which exceeded the amount of his claim. As set-off constitutes a defence, it was held that the plaintiff had failed in his action and must pay the costs through out, even though all the expense of the litigation was incurred with reference to the claim set up by the plaintiff. There was no discussion there as to the forum to which resort should have been had.

The appeal, therefore, fails, and must be dismissed with costs.

Appeal dismissed.

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Mar. 10.

Re NICHOLLS; HALL v. WILDMAN.

Ontario Supreme Court, Latchford, J. March 10, 1913.

1. LIMITATION OF ACTIONS (§ II J—80)—EXECUTORS AND ADMINISTRATORS —ADMINISTRATION ORDER ON EXECUTOR'S APPLICATION.

The limitations provided by sec. 47 of the Limitations Act, 10 Edw. VII. (Ont.) ch. 34, apply only to proceedings by *action against* a trustee or executor, and have no application to a case where an executor himself has obtained from the court an order for the administration under the direction of the court of the estate in his hands; and, if it be found on the reference in the administration action that the administrator had, even thirty years before, retained to answer possible contingencies of the executorship, a part of the estate coming to a beneficiary, the Limitations Act will not bar the claim of the beneficiary to have the money accounted for in the administration action.

Statement

APPEAL by the defendant Marianna Wildman, a devisee under the will of the late Ann Nicholls, from the report of the Local Master at Peterborough, upon a reference under an order for administration taken out by the executors, Hall and Innes, declaring that the executors were not liable to indemnify the appellant against a judgment obtained by the Royal Trust Company as liquidators of the Ontario Bank, and dismissing her claim that the executors should account to her for $200 which they retained from her in 1881 to meet possible contingencies, and as to which the learned Master held her claim barred by sec. 47, sub-sec. 2, of 10 Edw. VII. (Ont.) ch. 34. The appellant also asked that the commission and disbursements of the executors' solicitors as fixed by the report should be disallowed.

H. T. Beck, for the appellant.

G. H. Watson, K.C., and *L. M. Hayes*, K.C., for the executors.

G. B. Strathy, for the Royal Trust Company.

Latchford, J.

LATCHFORD, J.:—The appeal upon the first point fails. In everything relating to the Ontario Bank shares which came into their hands as an investment made by their testatrix, the executors acted "honestly and reasonably," in the exercise of the discretion expressly conferred upon them by the will, and "ought fairly to be excused." They are, therefore, relieved from personal liability for the loss which the appellant has suffered: 62 Viet. ch. 15 (Ont.), sec. 1.

I do not wish to be understood as concurring in the opinion that they are also relieved under 1 Geo. V. (Ont.) ch. 26, sec. 33. The latter enactment has, I think, no application to the present case.

Nor can I agree that the right of the appellant to call the executors to account for money admittedly held by them in 1881, for her, is barred by 10 Edw. VII. (Ont.) ch. 34, sec. 47. The

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limitations provided by that enactment apply only to an *action* against a trustee. They have, in my opinion, no application to a case like this, where the trustees themselves come into Court, obtain an order for the administration of the estate in their hands, and upon the reference file an account establishing that at one time they held moneys to which a devisee of their testatrix was entitled. It may well be, as suggested upon the argument, that not only the $200 to which the appellant was apparently entitled, but much more, was properly expended by the executors. They are, however, under the order which they themselves obtained, liable, in my opinion, to account to her for the $200 and for her share as a residuary legatee in so much of the items of $600 and $348.48 as may not have been expended in administering the estate. On these matters, the appellant may have the reference reopened at her risk. In that event, the executors, who have made no charge for their administration, should be at liberty to claim a reasonable commission. If any moneys are found payable to the appellant, she is to have her costs of the reference back; otherwise she is to pay such costs.

In other respects the report appealed from is confirmed. The direction as to commission and disbursements made by the Master is quite proper under Con. Rule 1146.

The only order I make as to costs is, that the executors are to have their costs of this application—including the costs of the trust company, which I fix at $10 and direct the executors to pay—out of the fund in their hands, after payment of the judgment of the trust company.

Order accordingly.

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Feb. 5.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, Drysdale and Ritchie, JJ. February 5, 1913.

1. FIRES (§ I—1)—NEGLIGENT USE OF—COMMON LAW—STATUTE—FAILURE TO WATCH.

Where a contractor built a fire for the purpose of clearing land for building operations, he is guilty of negligence, both at common law and under the provision of sec. 2 of ch. 91, R.S.N.S. 1900, in failing to watch such fire for the purpose of preventing it from spreading, where as the result of such failure the fire damaged lumber belonging to another contractor on the same land. (*Per* Graham, E.J., and Russell, J.)

[*Rylands* v. *Fletcher*, L.R. 3 H.L. 330, applied.]

2. FIRES (§ I—1)—NEGLIGENT USE OF—STATUTE—CONTRIBUTORY NEGLIGENCE NO DEFENCE, WHEN.

The doctrine of contributory negligence does not apply where there is a violation of the provisions of sec. 2 of R.S.N.S. 1900, ch. 91, placing a duty on one who starts a fire for the purpose of clearing land

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to exercise "every reasonable care and precaution in the making and starting of such fire, and in the managing of and caring for and controlling the same." (*Per* Graham, E.J., and Russell, J.)

3. FIRES (§ I—1)—NEGLIGENT USE OF — COMMON LAW AND STATUTORY DUTIES, ONUS.

A contractor who is engaged in building operations on land is under no duty to watch a fire which has been started by another contractor on the land for the purpose of clearing it, although such fire necessarily endangers his lumber, since the duty to watch the fire at his peril is put upon the person starting it, both by the common law and under the provisions of sec. 2 of ch. 91, R.S.N.S. 1900. (*Per* Ritchie, and Meagher, JJ.)

[*Rylands* v. *Fletcher*, L.R. 3 H.L. 330, referred to; *Dean* v. *McCarthy*, 2 U.C.Q.B. 448; *Gillson* v. *North Grey R. Co.*, 33 U.C.Q.B. 128, criticized.]

Statement

APPEAL from the judgment of Finlayson, County Court Judge, in favour of plaintiff in an action for goods sold and delivered. Plaintiff's claim was admitted, but defendant counterclaimed damages for negligence on the part of plaintiff, his servants, etc., in setting fires whereby a large quantity of building material, the property of defendant, was destroyed or injured. Plaintiff had a contract with the Dominion Coal Co. for clearing and stumping the site for the company's houses at New Waterford, in the county of Cape Breton, and for grading streets on lands belonging to the company. Defendant was a contractor with the company for the erection of houses for the company. The counterclaim alleged that while plaintiff with his workmen, etc., was engaged in removing the wood from the lands in question, he negligently and unlawfully, and contrary to the provisions of ch. 91 of the Revised Statutes of Nova Scotia, started fires for the purpose of clearing the lands near the houses then being erected by defendant on said lands, and near the lumber and material placed on said lands by defendant for the purpose of the erection of the said houses, and did not exercise reasonable care and precaution in the making of said fires or in caring for and controlling the same, and by reason of such negligence the said fires spread and burned a large quantity of lumber and building material belonging to defendant, etc.

The judgment appealed from proceeded on the ground that defendant could have avoided the damage by the use of ordinary diligence or ordinary precautions but did nothing.

The appeal was allowed, and judgment given for the defendant on their counterclaim.

H. Mellish, K.C., for appellant.

C. J. Burchell, K.C., and *J. L. Ralston*, contra.

Graham, E.J.

GRAHAM, E.J.:—Rhodes, Curry & Co. are claiming damages in a counterclaim against McLean, a contractor clearing land for the Dominion Coal Co., because he set out fires to burn piles of wood, which fires spread to lumber of Rhodes, Curry & Co., who were contractors building houses for the same company. The

fire had spread and destroyed shingles on August 2, 1911, and for this the learned County Court Judge has given damages. Again it spread on the 13th of August and burned some lumber, and for this the Judge has refused to give damages. McLean, or Clarke under him, had set the fires on Friday, the 11th of August, and the fires were burning on Saturday, and it was on Sunday that the injury was caused. No one was watching on his behalf on Saturday or Sunday to prevent the fire spreading; and it is clear that the very slightest care in this respect would have prevented the fire extending as it did. The wood was being burned within one or two hundred feet of the lumber near a house which Rhodes, Curry & Co. were then building. McLellan, their foreman, says:—

> On Saturday none of McLean's men were to be seen watching these fires. I spoke to John Clarke about leaving a man. He said not to leave any, were McLean's instructions. Mr. Clarke did not leave any man to watch the fires.

There had been fires before, and the foreman of Rhodes, Curry & Co. had complained of the danger. There was the greatest necessity for care on the part of McLean. The locality was one which called for care, and fire is always a thing which requires care. I do not agree with the learned County Court Judge. I am of opinion, whether under the provisions of the statute or at common law, there was negligence. He seems to think because McLean personally did not know about there being fire there on Sunday that this exculpated him. Then the learned County Court Judge sets up contributory negligence. He says:—

> I consider that, even if this case was within the class of cases of which *Fletcher and Rylands* is a type, the plaintiff (McLean) would be within the exception that the loss was due to the negligence of the defendants (Rhodes, Curry & Co.), first, in not putting out the fire or in not sending word to plaintiff (McLean) that the fire was burning; and, lastly, by bringing material and placing it on the track of the fire. The defendants' negligence in these respects was the proximate cause of the loss.

And he cites the three old leading cases on contributory negligence.

Now, there was no placing materials designedly in the track of the fire. It was the fire which was misplaced. The learned Judge relies upon something elicited in cross-examination from M. W. Purdy, a workman of Rhodes, Curry & Co., to establish this idea of contributory negligence. Purdy was not in any position of responsibility—a man under a foreman, and not one for whose act or omission they would be responsible; and it was Sunday and he was off duty, and on this Sunday he saw the fire in the turf eating its way to the lumber. He was not there when the lumber was burned, and he says he thought McLean would look after it. As a fact, it was Rhodes, Curry & Co.'s men who did extinguish the fire ultimately. Now this contributory negligence is not pleaded. If this case is within *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, that case does not proceed on the ground of

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negligence, as Lord Cranworth, in the four opening sentences of his judgment, and the case of *Jones* v. *Festiniog R. Co.*, L.R. 3 Q.B. 733 shew, and the answer of contributory negligence is quite irrelevant. Lord Cranworth says:—

> If it (the dangerous thing) does escape and cause damage, he is responsible, however careful he may have been and whatever cautions he may have taken to prevent the damage.

Graham, E.J.

True, Lord Cairns, p. 340, quoting Blackburn, J., says, "he can excuse himself by shewing that the escape was owing to the plaintiff's default," but that is not by way of contributory negligence, but because the plaintiff himself let loose the dangerous thing. Moreover, as there was a violation of the statute in respect to "observing even reasonable care and precaution in caring for and controlling the fire" after he had started it, I think that the doctrine of contributory negligence does not apply.

But take it as an ordinary case of negligence. I suppose we are not to have two opponents each saying to the other, you should have extinguished the fire—McLean saying, "True, I started it, but you should have watched it." McLean having started the fire, the duty to watch it and prevent it spreading remained on him and was in force throughout. The alleged passivity on the part of Rhodes, Curry & Co. in this case would not constitute an intervening cause between that agency which McLean had started and its consequence. Rhodes, Curry & Co. had notified Clarke to watch the fires, and they had complained of previous fires. I think there was no contributory negligence.

The appeal should be allowed with costs, and the judgment on the defendants' counterclaim should be increased from $8.93 to $110.55, with costs of the counterclaim.

Meagher, J.

MEAGHER, J., read an opinion to the effect that plaintiff knew defendants had inflammable material there in connection with the houses that they were erecting, and that defendants were not put upon their guard. The law did not impose upon defendants the duty of having a staff there to perform the duty that was by law imposed upon plaintiff. The necessity to rescue the property did not arise until Sunday, and it was not necessary for defendants to keep men there to anticipate danger. He was in favour of allowing the appeal and of directing judgment to be entered in favour of defendants for the amount of damages shewn to have been sustained by the fire in question.

Russell, J.

RUSSELL, J.:—I agree with Graham, E.J.

Drysdale, J.

DRYSDALE, J., stated his agreement with the result, and that he preferred to put his judgment upon the ground of negligence.

Ritchie, J.

RITCHIE, J.:—The plaintiff's claim for goods sold and delivered is not in dispute. The contention is in respect of the counterclaim.

Quoting from the judgment appealed from:—

> The plaintiff had a contract from the Dominion Coal Company for clearing and stumping the site for the company's houses at New Waterford, as well as for grading the streets. The defendant had a contract from the same company for erecting a number of houses on the land so cleared by the plaintiff.

The counterclaim is for damages in respect of two fires started by the plaintiff. The loss by the fire first started occurred on the 2nd of August, and the loss by the second fire on the 13th of August. The learned County Court Judge finds in favour of the defendant in respect of the loss occurring on the 2nd of August. From this finding there is no appeal, and therefore the sole question for adjudication is as to the loss which occurred on the 13th of August. Mr. Mellish, for the defendant, contends that the case comes within sub-sec. (*e*) of sec. 2 of R.S.N.S. 1900, ch. 91, intituled "Of the Protection of Woods against Fires," and that the fire was started in violation of this sub-section. If this contention is sound the defendant is entitled to recover, because by sec. 8 of ch. 1 of the Acts of 1904 it is enacted that proof that a defendant started a fire in violation of sec. 2 shall be conclusive evidence of negligence on the part of the defendant in starting such fire. Sub-section (*e*) provides that—

> Every person who, between the 15th day of April and the 1st day of December, makes or starts or causes to be made or started a fire in or near the woods or upon any island for cooking or obtaining warmth, or for any industrial purpose, without observing the following precautions.

Then follow a number of things which the person starting the fire is to do by way of precautions, and the imposition of the penalty. It is not contended that the plaintiff observed the required precautions. Mr. Burchell, for the plaintiff, contended that the case comes not within sub-sec. (*e*), but within sub-sec. (*b*) of sec. 2, which is as follows:—

> Every person who makes or starts or causes to be made or started a fire for the purpose of clearing land without exercising and observing every reasonable care and precaution in the making and starting of such fire, and in the managing of and caring for and controlling the same after it has been made and started in order to prevent the same from spreading and burning up the trees, shrubs or plants surrounding, adjoining or in the neighbourhood of the place where it has been so made or started

shall be liable to the prescribed penalty. I am of opinion that the facts bring this case within sub-sec. (*b*) and not within sub-sec. (*e*). The fires were started "for the purposes of clearing the land" so that dwelling houses might be erected on the land. I do not think that sub-sec. (*b*) makes the standard of negligence any higher than it is at common law, and therefore this case may properly be disposed of by deciding as to whether or not the plain-

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tiff was guilty of negligence at common law. The accident which caused the injury to the defendant occurred through a dangerous agency which it was the duty of the plaintiff to control, and the question is, was there an absence of care on the part of the plaintiff according to the circumstances? I agree with the learned County Court Judge that there was no negligence on the part of the plaintiff in starting the fire. The question is, was there negligence in not watching the fire? In the case of *Scott* v. *London and St. Katharine Docks*, 3 H. & C. 596, 13 L.T. 148, so often cited, Earle, C.J., states the principle:—

> There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

In this case an additional element is present, namely, that the thing under the plaintiff's control was a dangerous thing, and that, therefore, the plaintiff, having started it, was bound to control it at his peril. The principle laid down in the House of Lords in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, is that

> Where the owner of land without wilfulness or negligence, uses his land in the ordinary manner for its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

There is nothing a man can start going on land more dangerous than fire. The principle of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, was applied to the case of fire in *Jones* v. *Festiniog R. Co.*, L.R. 3 Q.B. 733, where Blackburn, J., at 736, says:—

> The general rule of law is correctly given in *Rylands* v. *Fletcher* that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his own peril, and is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shewn on their part.

In this connection I also refer to the case of *Creaser* v. *Creaser*, 41 U.S. 480. It is true that the land where the fire was started was not the land of the plaintiff and the damage was not done on the land of the defendant, but the fire was started on land in which the plaintiff had an interest to the extent of having the right to start the fire there under his contract with the coal company, and the fire spread to a part of the land in which the

defendant had an interest to the extent of having the right to place his lumber there in pursuance of his contract with the coal company to build the houses. I see no reason why the principle of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, is not applicable to this case, and in that view it is of no consequence whether the plaintiff was negligent or not. He started the dangerous thing going at his peril, and therefore must make good the defendants' loss. So far as the Ontario cases referred to in the judgment—*Dean* v. *McCarthy*, 2 U.C.Q.B. 448, and *Gillson* v. *The North Grey R. Co.*, 33 U.C.Q.B. 128 (affirmed 35 U.C.Q.B. 475)—are inconsistent with the principles laid down in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, and *Jones* v. *Festiniog R. Co.*, L.R. 3 Q.B. 733, I decline to follow them. I cannot agree with some of the reasoning in *Dean* v. *McCarthy*, 2 U.C.Q.B. 448, but, apart from this, clearing land for purposes of husbandry sixty-six years ago, a time when, as Chief Justice Robinson said, "It is not very long since this country was altogether a wilderness, as by far the greater part is still," strikes me as a very different thing from clearing land at the present time for the purpose of building dwelling-houses. I do not think it is contended that if the plaintiff had caused this fire to be watched, the defendants' lumber would have been destroyed.

Chief Justice Richards, in *Gillson* v. *The North Grey R. Co.*, 33 U.C.Q.B. 128, decided in 1872, suggests that fire is not a dangerous agency. However, he goes on to say:—

> Much of the reasoning in the case of *Fletcher* v. *Rylands* would apply to fire as one of the things which, if a man brings on to his land, he is bound to see that it does no harm to his neighbour,

and the best the learned Chief Justice can say for *Dean* v. *McCarthy*, 2 U.C.Q.B. 448, is

> The case of *Dean* v. *McCarthy*, in our own Court, already referred to, takes the view that it is a question of negligence, and the declaration in this case is framed in that view. I do not think we can here properly over-rule *Dean* v. *McCarthy*.

He does not say the case is right, but, "I do not think we can here properly over-rule it." *Dean* v. *McCarthy*, 2 U.C.Q.B. 448, had then been law in Ontario for twenty-six years, but if the question had come before the Chief Justice apart from the earlier decision, which had been so long the law in Ontario, I do not think he would have gone contrary to the House of Lords in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330. Apart from the principle laid down in *Fletcher* v. *Rylands*, and dealing with the case on the principle of *Scott* v. *London and St. Katharine Docks*, 3 H. & C. 596, 13 L.T. 148, I also think the defendants must recover on their counterclaim. The fire was under the management of the plaintiff in ordinary course; the damage would not have happened if the plaintiff had used proper care. I think that

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proper care involved watching the fire, not going away and leaving it burning over Sunday. The lumber was destroyed on Sunday, the 13th of August. John McLellan says:—

> On Saturday fires burning. On Saturday none of McLean's men were to be seen watching these fires. I spoke to John Clarke about leaving a man; he said not to leave any, were McLean's instructions. Mr. Clarke did not leave any men to watch the fire.

John Clarke was in the employ of plaintiff and in charge of the burning. The fire was burning on Saturday and Sunday. Daniel Floyd says:—

> Saturday and Sunday was fine weather; did not stop work; saw fires set on Friday and burning all day; his men burning piles Friday evening. They did not return on Saturday; did not see them. Friday the fire was spreading; on Friday the ground around the piles was burning; Saturday the fire was still burning; the ground was burning.

The plaintiff says he was on the ground three times on Saturday and saw no trace of fire. If this is true, it must have been because he did not look to see, and I think he was bound to look. The learned County Court Judge has found, and the evidence supports the finding, that the defendants made no attempt to fight the fire, and that if they had the damage would not have been done, and he holds that this is a defence to the counterclaim. I think the answer to this is that an absolute duty, under the principle of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, rested upon the plaintiff to control at his peril the dangerous thing which he had set going, and that the defendants were not in default within the exception in *Rylands* v. *Fletcher*. They simply left the responsibility where it properly belonged. The damage was done on Sunday. The defendants were under no obligation to hire men to watch the fire over Sunday; that duty was, as I have said, on the plaintiff. Looking at the case from the standpoint of negligence only, the defence of contributory negligence is not raised on the pleadings, but treating the question as open I am of opinion there was no contributory negligence. The defendants did no negligent act contributing to the injurious result. It was not contributory negligence for them to refrain from hiring men to do the Sunday watching the plaintiff was bound to do.

I would allow the appeal with costs, and order judgment for the defendants with costs on their counterclaim for $101.62, the amount claimed in the notice of appeal.

Appeal allowed with costs.

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May 14.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. May 14, 1913.

1. JUDGMENT (§ I F—46)—APPLICATION TO COURT FOR SUMMARY JUDGMENT AFTER WRIT.

Judgment may be granted on a motion made to the court on notice under rule 608 (Ont. Jud. Rules 1897) by leave granted after the issue of the writ, where the defendant is an insolvent trader admittedly having no defence to the action brought against him on overdue promissory notes to wholesale merchants, and it is shewn on affidavits that he has been selling off his stock without replacing the same or paying the proceeds of sales to the wholesalers who supplied the goods, and is in arrears for rent and taxes.

Statement

APPEAL by the defendant from a summary judgment granted by Latchford, J., on the 8th May, 1913, upon an application in the Weekly Court at Toronto, under Con. Rule 608.

The action was brought by wholesale merchants against a retail merchant upon nine promissory notes.

The appeal was dismissed.

R. G. Smythe, for the defendant.

A. T. Davidson, for the plaintiffs.

Argument

The following authorities were referred to: *Kinloch* v. *Morton*, 9 P.R. 38; *Francis* v. *Francis*, 9 P.R. 209; *Greene* v. *Wright*, 12 P.R. 426; *Leslie* v. *Poulton*, 15 P.R. 332; *Molsons Bank* v. *Cooper*, 16 P.R. 195; *Lake of the Woods Milling Co.* v. *Apps*, 17 P.R. 496.

Mulock, C.J.

At the conclusion of the argument, the judgment of the Court was delivered by MULOCK, C.J.:—The affidavits shew that the notes made by the defendant are overdue and unpaid; that many demands for payment have been made, but none complied with. The defendant has been selling goods without replacing them or accounting for the proceeds. Nor has the defendant insured the goods or paid his rent or taxes. Admittedly he has no defence to this action, and he is insolvent.

We think the case comes within the authorities under Con. Rule 608 shewing that injury and injustice would result to the plaintiffs unless they are granted immediate relief. There are special circumstances entitling the plaintiffs to the application of the Rule; and we think the appeal should be dismissed with costs.

Appeal dismissed.

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Mar. 26.

CHWAYKA v. CANADIAN BRIDGE CO.

Ontario Supreme Court, Britton, J., in Chambers. March 26, 1913.

1. VENUE (§ II A—15)—MOTION TO CHANGE—SPEEDING THE TRIAL.

Where a plaintiff has named a venue of his own selection in his statement of claim, a change of venue will not be directed merely to speed the trial on his application; the onus is upon the applicant to shew a preponderance of convenience.

Statement

APPEAL by the plaintiff from the order of the Master in Chambers, 4 O.W.N. 980, dismissing the application of the plaintiff to change the place of trial from that named by the plaintiff to either Sarnia or Chatham.

E. C. Cattanach, for the plaintiff.

Featherston Aylesworth, for the defendants.

Britton, J.

BRITTON, J.:—Changing the place of trial from that named by the plaintiff is largely in the discretion of the Court or a Judge; but the exercise of that discretion is, in almost every case, subject to this, "Where can the action most conveniently be tried?" And the onus is upon the applicant to shew the preponderance of convenience. Generally the application is by the defendant, and the change will not be made on account of a trifling difference of expense. See Holmested and Langton's Judicature Act, 3rd ed., pp. 738, 739. But, even when the application is by the plaintiff, and notwithstanding the plaintiff's right to name the place, having named it, the onus is upon him to shew reasons for change, if he seeks a change. The reason here is not one of balance of convenience, not as to fair trial, but is solely for the benefit of the plaintiff by speeding the trial. The fact that, if there is no change, the trial will be delayed is a circumstance to be considered—not sufficient of itself to warrant the change. The convenience of witnesses or of counsel is not a sufficient reason for a change. The learned Judge said that he was bound by the authorities to give effect to the objection that the onus upon the plaintiff had not been satisfied. It might well be supposed that, in the present case, it could not be a matter of moment to the defendants to delay the plaintiff in getting to trial. Whether the plaintiff had a good cause of action or not, it was of considerable importance to him to have his claim disposed of without unnecessary delay; and it was to be regretted that the defendants did not see their way to consenting to a change that apparently would do no more than expedite the trial. Appeal dismissed; costs in the cause to the defendants.

Appeal dismissed.

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May 1.

ROYAL BANK OF CANADA v. McPHEE; McQuaid, third party.

Alberta Supreme Court, Harvey, C.J. May 1, 1913.

1. STATUTES (§ II C—120)—ADOPTED STATUTORY RULES AND ORDERS—ENGLISH PRACTICE RULES IN ALBERTA.

The effect of the Alberta statute of 1910, ch. 2, sec. 3, amending the Judicature Ordinance C.O. ch. 21 (Alta.), sec. 21, is to introduce the English Practice Rules thereafter passed from time to time so far as they can be applied subject to the provisions of that ordinance and the Alberta Rules of Court.

2. PARTIES (§ III—124)—BRINGING IN—INDEMNITY AND RELIEF OVER THIRD PARTY AGAINST FOURTH PARTY.

A third party brought in by the defendant under a "third party notice" upon a claim for indemnity or relief over may in turn bring in a fourth party by a similar notice to answer a claim for indemnity or relief over made by the third party against him, by virtue of Order 16, rule 54*a* of the English Practice Rules as amended July, 1911, made applicable in Alberta by the Alberta Judicature Ordinance and its amendments.

Statement

APPEAL from a Master's order granting leave to the third party to serve a third party notice upon one against whom he claimed indemnity.

The appeal was dismissed without costs.

S. W. Field, for plaintiff.

Wm. P. Paul, for third party.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from an order of the Master granting leave to the third party to serve a third party notice upon one Allan, against whom he claims indemnity.

No directions for trial as between the defendant and the third party have been given and it is contended that there is under our rules no authority, therefore, for the third party notice by him. The practice appears to have been established for some time under the English rules of permitting a third party to serve a third party notice upon another party, but this appears to have been authorized under rule 48, order 16, which, for the present purpose, is in practically the same terms as our rule 60, the definition of defendant under the English rules and our rules being the same, and a third party being treated as defendant for the purpose of giving such notice. In most of the cases, it does not appear at what stage the leave has been granted to the third party, but on the authority of *Eden* v. *Weardale Iron & Coal Co.*, 28 Ch. D. 333, 35 Ch.D. 287, it would appear doubtful whether the third party could be considered a defendant so as to be able to get the benefit of the rule until directions have been given whereby he is at liberty to oppose the plaintiff's claim.

In July, 1911, the English rules were amended by adding a new rule, 54(*a*) to order 16, to make it clear that such notice may be given. This rule gives the right to any person who has

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been served with a third party notice, upon leave of the Court, to serve similar notice upon any other party against whom he claims contribution or indemnity. The rule makes no such distinction as is suggested by the case referred to, and it appears to me clear, therefore, that under the present practice since the promulgation of that rule any person served with a third party notice may at any stage obtain such an order as has been obtained in this case. It seems to have been assumed by both counsel on the argument of this appeal that the rule I have just referred to is not part of our practice. But this view is, I think, incorrect. Section 21 of our Judicature Ordinance provided that,

> subject to the provisions of this Ordinance and the rules of Court, the practice and procedure existing in the Supreme Court of Judicature in England on the 1st day of January, 1898, shall as nearly as possible, be followed in all causes, matters and proceedings.

By sec. 3 of ch. 2 of 1910, the words "on the 1st day of January, 1898," were struck out of the section, so that as it now stands subject to our own rules, the English practice is in force in this province. There is nothing in our rules which would in any way interfere with the practice under the English rule 54(*a*) and it consequently declares the practice here as well as in England upon this point. Such being the case, I am of opinion that the order was properly made and the appeal is therefore dismissed.

As the ground on which I base my conclusion, was not raised on the argument, and as but for it, I should probably have been forced to allow the appeal, there will be no costs of the appeal.

Appeal dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

STANZEL v. J. I. CASE THRESHING MACHINE CO.

Ontario Supreme Court, Britton, J., in Chambers. March 26, 1913.

[*Bissett* v. *Knights of the Maccabees*, 3 D.L.R. 714, approved.]

JURY (§ I D—31)—*Jury Notice—Motion to Strike out—Claim and Counterclaim—Proper Case for Trial without a Jury.*]—Motion by the defendants, under Con. Rule 1322, to strike out a jury notice filed and served by the plaintiffs.

BRITTON, J.:—Upon the pleadings it is plain that the issues tendered by the plaintiffs, and by the defendants in their defence and counterclaim, were such as should be tried by a Judge, and not by a jury. The action was a complicated one involving important questions of law and fact. It would be very inconvenient, to say the least of it, to have the plaintiffs' claim tried by a jury and the defendants' counterclaim tried by a Judge—and the counterclaim was one that, in the learned Judge's opinion, a Judge would not submit to a jury. He agreed with the decision in *Bissett* v. *Knights of the Maccabees*, 3 D.L.R. 714, 3 O.W.N. 1280. Order made striking out the jury notice and directing that the action be tried without a jury. Costs in the cause, unless otherwise ordered by the trial Judge. *J. D. Falconbridge*, for the defendants. *Grayson Smith*, for the plaintiffs.

GRIP Limited v. DRAKE.

Ontario Supreme Court, Cartwright, M.C. March 26, 1913.

ACTION (§ II D—60)—*Joinder of Separate Claims—Conspiracy to Commit Breaches of Several Agreements — Separate Breaches by Different Defendants—Separate Trials.*]—The plaintiff company claimed $5,000 damages from the eight defendants, who, in paragraphs 3 to 10 inclusive of the statement of claim, were said to have agreed in writing to serve the plaintiff company for terms, none of which have as yet expired. In paragraphs 11 and 12 it was stated that the above agreements were

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observed by the several defendants until on or about the 27th January, 1913; when the defendants induced each other and conspired together to refuse to continue to work for the plaintiff company, and have accordingly absented themselves from the plaintiff company's premises. The defendants moved, before pleading, for an order directing separate trials of the actions against the several defendants, and that the writ of summons and statement of claim be amended, or to strike out paragraphs 4 to 12 inclusive as embarrassing.

CARTWRIGHT, M.C.:—The allegations as to the separate engagements of the defendants stated material facts which were relevant to the conspiracy charged and in respect of which the plaintiff company claimed damages. If the plaintiff company were content to limit the claim to the alleged conspiracy, there could be no possible objection to the statement of claim as it stood—as was conceded on the argument. Unless the conspiracy is proved, the action must fail. But the plaintiff company were entitled to have the case laid before the Court in the shape which their advisers thought most beneficial, unless there was something in the Rules which prevented this being done. Here there did not seem to be any bar of that kind. Paragraph 12 concluded with these words: "By reason of the premises the plaintiff has sustained great loss and damages and has been put to heavy charges and expenses." The judgment in *Walters* v. *Green*, [1897] 2 Ch. 696, at p. 791, seemed to shew that the whole matter must be left to the trial Judge when the evidence is given on both sides. This was allowed in *Devaney* v. *World Newspaper Co.*, 1 O.W.N. 547, in reliance on *Walters* v. *Green*, *supra*—which went very much further than the present statement of claim. Here the plaintiff company alleged a conspiracy to commit a breach of the several agreements, and those breaches were alleged as acts done as part of the conspiracy and in pursuance thereof—and, very likely, were relied on by the plaintiff company as being the most cogent evidence of the conspiracy. In view of the authorities, the motion must be dismissed with costs to the plaintiff company in the cause. J. G. O'Donoughue, for the defendants. George Wilkie, for the plaintiffs.

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CHRISTNER v. FISHER.

Saskatchewan Supreme Court, Parker, M.C. February 26, 1913.

EVIDENCE (§ IV G—423)—*Affidavits—Non-resident Plaintiff—Cross-examination by Defendant.*]—This is an application by the plaintiff under rule 361 for leave to prove certain facts at the trial by affidavit. The plaintiff resides in Los Angeles, California, and the facts sought to be proved are alleged to be

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the only facts in connection with the case which are within his own knowledge.

Bruce T. Graham, for the applicant (plaintiff).
C. W. Hoffman, for the defendant.

PARKER, M.C.:—The facts which the plaintiff wishes to prove are as follows:—

That the two promissory notes referred to in that statement of claim were, before action brought, duly endorsed by Christner & Fisher, the payees, to the plaintiff, and that the plaintiff was, at the time of action brought, has been ever since, and is now the holder of the said notes.

These facts are denied in the statement of defence, and the defendant's solicitor files an affidavit stating that in his opinion cross-examination of the plaintiff is necessary for the defendant's case. It is well settled that the Court has not the power to order facts to be proved by affidavit when the opposite party desires *bonâ fide* to cross-examine the deponent, and the deponent can be produced: *Blackburn Guardians* v. *Brooks*, 47 L.J. Ch. 156; Annual Practice, 1913, page 609.

I have no sufficient reason to doubt the *bona fides* of the defendant, and there is nothing in the material to shew that the plaintiff cannot be produced at the trial. The motion will therefore be dismissed with costs in the cause.

COXALL v. PARSONS BUILDING CO.

Saskatchewan Supreme Court, Parker, M.C. February 6, 1913.

DISCOVERY AND INSPECTION (§ IV—20)—*Depositions — Examination before Trial—Discretion of Court.*]—This is an application under rule 279 (2) for the examination of one Adam Musta, a servant of the defendant company.

R. E. Turnbull, for the applicant (plaintiff).
J. N. Fish, for the defendants.

PARKER, M.C.:—The plaintiff is suing for damages for injuries caused by the alleged negligence of the defendant company, its servants or agents, in the operation of a hoist used by the defendant company in the construction of a building, in the city of Regina, in February, 1912. Plaintiff has already examined Mr. Parsons, the secretary-treasurer and superintendent of construction of the company, for the purpose of ascertaining the method of operating the hoist, and other necessary information incidental thereto, but it appears from Mr. Parson's examination that he was able to supply but very little information in connection with the particular matters in question in this action. It was disclosed, however, that the engineer

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in charge of the hoist was the above-named Adam Musta, and the plaintiff now seeks to examine him. It is within the discretion of the Court as to whether or not another officer or servant should be examined: *Dawson* v. *London Street Railway*, 18 P.R. (Ont.) 223. And after carefully considering the circumstances connected with this application I will make an order for the examination of the said Adam Musta before the local registrar at a time and place to be fixed by him. As the plaintiff has been rather late in making this application, I think the costs of the motion should be costs in the cause.

Order accordingly.

McKAY v. JOHNSTON.

Saskatchewan Supreme Court, Parker, M.C. March 3, 1913.

JUDGMENT (§ I A—2)—*Default—Affidavit of Merits—Disclosing Defence.*]—This is a motion to open up judgment by default, and for leave to file a defence.

R. L. Hanbidge, for the applicant (defendant).

C. W. Hoffman, for the plaintiff.

PARKER, M.C.:—I am of the opinion, from the material before me, that the judgment herein has been entered regularly. In fact no irregularity in the entering of same is alleged by the defendant. This being the case, the authorities are numerous that the judgment can only be opened up when it is shewn that the defendant has a good defence on the merits, and further, that the affidavit of merits must be made by a person having a knowledge of the facts, *i.e.*, generally by the defendant himself. In this case the only affidavit of merits is that of the defendant's solicitor, which merely states that the defendant has a good defence to the action on the merits. No grounds of defence whatever are disclosed: *Hanson* v. *Pearson*, 3 Terr. L.R. 197; *Perry* v. *Hunter*, 3 Terr. L.R. 266; *Sandhoff* v. *Metzer*, 4 W.L.R. 18; *Moyie Lumber Co.* v. *May*, 1 W.L.R. 152; *Stewart* v. *MacMahon*, 1 Sask. L.R. 209; *Jones* v. *Murray*, 9 W.L.R. 204; *Miller* v. *Ross*, 12 W.L.R. 315. The motion will, therefore, be dismissed with costs.

Motion dismissed.

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LECKIE v. MARSHALL.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 8, 1913.

[*Leckie* v. *Marshall*, 4 O.W.N. 826, reversed.]

VENDOR'S LIEN (§ II—33)—*Enforcement—Sale—Postponement of.*]—Appeal by the defendants William Marshall and

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Gray's Siding Development Limited from the order of Britton, J., 4 O.W.N. 826.

The appeal was allowed.

THE COURT allowed the appeal, and referred the case back to the Master in Ordinary, with a direction to postpone the sale, but not to a day later than the 16th July, 1913, and to fix a reserved bid. The appellants to have the costs of this appeal and of the motion before Britton, J. *George Bell*, K.C., for the appellants. *Glyn Osler*, for the plaintiffs.

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CLARK v. LAING.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. March 17, 1913.

JURY (§ I B—6)—*Referee's Order for—Negligence Action—When Granted.*]—Plaintiff brought this action to recover damages for personal injuries and damage to his motorcycle caused, as he alleged, by the negligence of the defendant running into him when defendant was driving his automobile on the wrong side of the road. The defence set up was that the plaintiff was himself on the wrong side of the road. A doctor's report shewed that the plaintiff had sustained injuries, a fractured wrist, a bruised knee and a broken rib and was in the hospital altogether one month. The referee made an order for trial of the action by a jury. On appeal to Macdonald, J., the appeal was dismissed. The defendant then appealed to the Court of Appeal.

The appeal was dismissed.

H. J. Symington, for defendant.

B. L. Deacon, for plaintiff.

The judgment of the Court was delivered by

HOWELL, C.J.M.:—On the argument of this case the judgment of Mr. Justice Galt in the case of *Jocelyn* v. *Sutherland*, 9 D.L.R. 457, was referred to. I gather from the learned Judge's remarks that he took a view of the case of *Navarro* v. *Radford-Wright Co.*, 8 D.L.R. 253, 22 W.L.R. 665, not intended by the Court. In the latter case, Mr. Justice Metcalfe, who made the order therein appealed from, thought the case one in which an order should be made for a jury if in addition to the facts set forth the plaintiff had shewn a case of serious injury.

This Court thought that in the material put in the plaintiff had set forth such facts from which it might reasonably be found that the plaintiff had been seriously injured, and hav-

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ing come to this conclusion and agreeing with Mr. Justice Metcalfe that in other respects a case had been made out for the order the case was disposed of as reported.

The appeal is dismissed with costs to the plaintiff in the cause.

Appeal dismissed.

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SMITH v. BENOR.

(Decision No. 1.)

Ontario Supreme Court. Trial before Kelly, J. January 31, 1913.

TRUST (§ I D—24)—*Resulting Trust—Conveyance of Land—Consideration—Establishment of Trust—Oral Evidence—Statute of Frauds—Finding of Fact—Setting aside Conveyance.*]—Action to set aside a conveyance of land and other property made by the plaintiff to the defendant on the 23rd March, 1912. The consideration mentioned was $500; and the defendant paid that sum to the plaintiff. The property conveyed was of much greater value. The plaintiff alleged that the conveyance was made for a particular purpose, with reference to a scheme or business venture which was never carried out, and that, by the agreement and understanding between the plaintiff and defendant, the defendant was to reconvey the property to the plaintiff. This the defendant refused to do, contending that the conveyance was intended to carry out an actual bonâ fide sale for the consideration of $500. The learned Judge, in a written opinion, reviewed the evidence, and stated his conclusion that the conveyance was given for the purpose stated by the plaintiff; that the defendant deliberately evaded giving a letter, which the plaintiff asked for, declaring in effect that the defendant was only a trustee for the plaintiff; and that the defendant was improperly withholding the property from the plaintiff.—At the opening of the trial, an application was made by the defendant for leave to amend the statement of defence by pleading the Statute of Frauds; and that application was granted. But, the learned Judge said, the defendant could not protect himself behind that statute: *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *McMillan* v. *Barton*, 20 Can. S.C.R. 404. Judgment for the plaintiff declaring the conveyance void and directing that it be delivered up to be cancelled; that the registration thereof be vacated; that the defendant reconvey to the plaintiff the property and assets transferred; and that the plaintiff recover from the defendant $5 as damages for his refusal to reconvey. As the plaintiff was willing to compensate the defendant to the extent of $200 for any services he performed, the defendant should now be paid

that sum by the plaintiff. Costs of the action to be paid by the defendant. If the parties cannot agree as to whether the sum of $500 paid to the plaintiff is now in his hands, or whether it or any part of it was returned to and retained by the defendant, there will be a reference to the Local Master at Belleville to ascertain and report what the fact is; and the defendant will be entitled to such part of it as may be found not to have been so returned and retained; the amount so found, if any, and the $200, to be set off pro tanto against the plaintiff's costs. Costs of the reference reserved until after the report. *McGregor Young*, K.C., for the plaintiff. *W. C. Chisholm*, K.C., for the defendant.

BINGHAM v. MILLICAN.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 3, 1913.

CONTRACTS (§ I E 2—70) — *Debts of Others, Guaranty — Money paid for Defendant's Use.*]—Appeal by the defendant from the judgment of Winchester, Senior Judge of the County Court of the County of York, in favour of the plaintiff, for the recovery of $572.78, in an action in that Court for money paid by the plaintiff for the defendant.

The judgment of the Court was delivered by SUTHERLAND, J.:—The action is based on a written guaranty given by the plaintiff to the Imperial Bank of Canada with reference to premiums payable by the defendant under policies of insurance assigned to the said bank.

The plaintiff alleged that, under the said guaranty, he "had been obliged to pay certain premiums, and, the policy having matured and the prior liens thereof, including the indebtedness to the Imperial Bank of Canada, having been deducted therefrom, the balance was paid to him, but was insufficient to repay his advances and interest."

During the argument of the appeal it was determined that the proper way to take the account between the parties was to ascertain what payments the plaintiff had made under his written guaranty and allow interest thereon at the rate of seven per cent., being the rate payable by the defendant to the bank.

At p. 5 of his evidence at the trial, the plaintiff said that exhibit 3 contained a statement of such payments. It shews a total of $5,954.58; but, upon the argument of the appeal, it was directed that two items should be struck out, namely, $3,668.69, the amount of a loan obtained by the plaintiff on one of the policies, and $17.94 interest: in all $3,686.63. Deducting this, the balance would be $2,267.95.

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The matter was referred to Mr. Holmested, Registrar of the Court, to take the account and figure the interest upon the advances. He did this. It was agreed by counsel that the sum of $540.18, found by him to be the interest up to the 8th November, 1909, was correctly computed. Adding this sum to the $2,267.95 would make a total of $2,808.13.

The plaintiff, in a statement prepared by his solicitor, exhibit 10, admits that he received a cheque on account of the insurance policy, under date of the 8th November, 1909, for $2,675.42. Deducting this amount, the net balance is $132.71. Subsequent interest on this has been figured by Mr. Holmested at $28.50. Balance due to the plaintiff, $161.21.

The judgment in favour of the plaintiff will, therefore, be reduced to this sum, with County Court costs of trial. The costs of the appeal will be to the defendant, who has succeeded to a substantial extent.

The judgment will be stayed for the remainder of the six months mentioned in the judgment of the trial Judge, to enable the defendant to proceed on his counterclaim; and, in the event of his not doing so, it will then be dismissed. *A. C. Heighington*, for the defendant. *J. W. Bain*, K.C., for the plaintiff.

VANDEWATER v. MARSH.

Ontario Supreme Court. Trial before Kelly, J. February 26, 1913.

CONTRACTS (§ IV B 3—355)—*Waiver of Objections—Mistake in Construction of Foundations—Duty as to Laying out Ground—Authority of Clerk of Works—Powers of Architect — Withholding of Certificate of Architect — Absence of Fraud or Collusion — Premature Action — Extras — Sanction of Architect—Evidence.*]—Action to recover the contract-price and payment for extras for the excavation and concrete work in the erection of certain buildings for the defendants Marsh & Henthorn Limited, in the city of Belleville. The defendant Herbert was the architect for the buildings. The contract was dated the 10th May, 1912; the price to be paid for the work contracted for was $2,400; and, in addition thereto, the plaintiff claimed $761.65 as extras for additions and alterations made, as he alleged, at the request of the defendants. At the time of the trial, nothing had been paid to the plaintiff, but the work was not then fully completed. The contract provided that the buildings should be rectangular, and difficulties arose because the plaintiff had deviated from rectangular. This error in construction resulted from an improper locating of the lines of the buildings. The plaintiff contended that it was the duty of the defendants to lay out the ground, and that he was misled by

stakes placed there, as he said, by the defendants. KELLY, J., said that no such duty devolved upon the defendants, either by contract or usage.—The plaintiff further contended that John Marsh designated to him the location of the buildings; but the learned Judge said that there was no evidence that John Marsh was authorised by the defendants to locate the buildings or to instruct the plaintiff where to place them; and, even if John Marsh were the clerk of the works, his power as such was only to disapprove of material and work, and not to bind the owner of the building by approving of them: Halsbury's Laws of England, vol. 3, p. 163. The proper location could without difficulty have been ascertained from the plans and data which the defendants furnished.—The defendants, to avoid loss and delay, allowed the buildings to proceed, relying for their remedy upon a term of the contract by which the architect should assess the damage for any inferior work, instead of having it removed. The learned Judge was of opinion that what the defendants had done did not operate as a waiver of any of their rights under the contract, or constitute a new contract with the plaintiff; the parties were still bound by the terms of the written contract. —The plaintiff admitted that part of the work under his contract was not completed at the time of the trial. The written contract made the production of the architect's certificate a condition of the plaintiff's being entitled to payment; and no certificate was issued. The learned Judge finds that the certificates were not withheld either through fraud or collusion on the part of the defendant, or with any intent to injure the plaintiff; but rather in an effort to bring the whole matter to as satisfactory a conclusion as possible. The plaintiff had shewn no right of action against the defendant Herbert; and the action as against the other defendants was premature.—The extras claimed for were largely for labour and material in carrying some of the foundations to a greater depth than the plaintiff originally contemplated, and for increased depth of concrete work consequent thereon; a charge of $85.75 was made for extra excavation and $603.90 for increased depth of concrete. The learned Judge said that the evidence convinced him that the plaintiff went to no greater depth than the contract called for, and that, therefore, the two items were not chargeable as extras. Moreover, clause 6 of the contract was fatal to the claim for extras, the sanction in writing of the architect not having been obtained. The remaining item of $72 in the account for extras, though not sanctioned by the architect, was admitted by the defendants, and must be taken into account in a settlement between the parties.—The effect of the judgment was not to disentitle the plaintiff to payment of whatever might be found due to him under the terms of the contract when the work should

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be completed and when the architect should have performed his duties under the contract and dealt with the matter fairly between the contractor and the owners. *E. G. Porter*, K.C., and *W. Carnew*, for the plaintiff. *W. S. Morden*, K.C., and *W. D. M. Shorey*, for the defendant company. *W. H. Tilley*, for the defendant Herbert.

BURROWS v. CAMPBELL.

(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 7, 1913.

[*Burrows v. Campbell* (No. 1), 6 D.L.R. 887, affirmed.]

TAXES (§ III F—148*a*)—*Setting aside Tax Sale—Irregularities.*]—Appeal by the plaintiff from the judgment of Falconbridge, C.J.K.B., 6 D.L.R. 877, 4 O.W.N. 249.

THE COURT dismissed the appeal with costs, agreeing with the judgment below.

L. C. Raymond, K.C., for the plaintiff.

F. W. Carey, for the defendant.

LEVITT v. WEBSTER.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 7, 1913.

[*Levitt v. Webster*, 4 O.W.N. 554, affirmed.]

PRINCIPAL AND AGENT (§ II A—8)—*Agent's Authority—Sale of Lands—Specific Performance.*]—Appeal by the plaintiff from the judgment of Kelly, J., 4 O.W.N. 554.

F. F. Treleaven, for the plaintiff.

H. E. Rose, K.C., and *T. Hobson*, K.C., for the defendant, were not called upon.

MULOCK, C.J., said that the members of the Court were unanimously of opinion that the judgment appealed from was right.

RIDDELL, J., in concurring with the judgment, remarked that, in his opinion, the dictum of Eve, J., in *Bromet v. Neville* (1908), 53 Sol. J. 321 (cited on behalf of the appellant and referred to in Fry on Specific Performance, 5th ed., para. 525, p. 269), to this effect (as stated in the head-note), that "it is not every excess of authority by an agent that will vitiate a contract, and where such excess is not unreasonable, it will not operate to prevent specific performance of the contract," was not a binding authority, as it was obiter and not necessary to the decision arrived at.

Appeal dismissed with costs.

STRONG v. LONDON MACHINE TOOL CO.

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Ontario Supreme Court. Trial before Middleton, J. January 8, 1913.

PRINCIPAL AND AGENT (§ III—36)—*Compensation—Agent's Commission on Sale of Assets of Company—Employment of Agent — Introduction of Purchaser — Dependent Commission Agreement — Termination —Quantum Meruit.*]—Action by an agent to recover commission upon the sale of the assets of the defendant company to the Canada Machinery Corporation, called "the merger." The defendant company was a family concern, one Yates and his sons holding the bulk of the shares. On the 14th July, 1911 (after negotiations had been proceeding for some time and a tentative agreement had been arrived at), a memorandum of agreement between the plaintiff and Yates was drawn up and signed, whereby Yates agreed with the plaintiff "to pay him the following commission: In the event of the London Machine Tool Company being merged with the Canada Machinery Corporation, and the London Machine Tool Company getting in preference shares the amount of their surplus and a bonus of $50,000 worth of common stock, . . . F. T. Strong is to receive $10,000 worth of common stock as commission, and also, in the event of the London Machine Tool Company receiving preference shares in excess of $112,000 worth, twenty per cent. of such excess is to be delivered to F. T. Strong. This agreement is contingent upon E. G. Yates being able to retain the control of the London Machine Tool Company, and also contingent upon the deal going through." Thereafter, a formal agreement was executed between the company and "the merger," dated the 29th July, 1911; this was upon the lines of the tentative agreement and in accord with the expectation of the parties when the agreement of the 14th July was executed; but the "merger" refused to carry out the agreement of the 29th July; and the defendants were advised that they could not enforce it. The defendants, after further negotiations with the "merger," in the absence of the plaintiff abroad, sold out to the merger at the best price that could be obtained. Instead of there being a surplus over the $112,000 of stock, the defendants received only $55,000 in bonds and $40,000 in cash; and out of this $95,000 had to pay $18,000 as being the excess of actual over scheduled liabilities. The plaintiff contended that he should receive the commission which the agreement of the 24th July called for, because it was the defendants' own fault if the agreement of the 29th July turned out to be unenforceable. The defendants contended that Strong was entitled to nothing—there being no surplus but a deficit. MIDDLETON, J., said that when the defendants accepted the plaintiff's services as intermediary in promoting the sale to the "merger," he be-

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came entitled to receive a commission. No rate was stipulated at the time; but from what took place subsequently it was clear that he was ready to accept and did accept the position that his compensation should be—to some extent at any rate—dependent upon the result of his labours. When he thought a sale had been arranged, the memorandum of the 14th July was executed. That sale falling through, this dependent agreement also came to an end. Although the plaintiff thereafter did nothing towards the making of the agreement which was subsequently carried out, he was, nevertheless, entitled to something, because be set on foot the negotiations which ultimately resulted in the transaction actually carried out. Although the plaintiff did not actually "introduce" the contracting parties, he did that for which he was employed—he induced the "merger" to enter upon serious negotiations for sale. Judgment for the plaintiff for $5,000 and costs, with leave to amend as advised. *J. W. Bain*, K.C., for the plaintiff. *M. K. Cowan*, K.C., and *T. Hobson*, K.C., for the defendants.

Re CAMERON.

Ontario Supreme Court, Middleton, J., in Chambers. March 1, 1913.

PARENT AND CHILD (§ IV—40) — *Custody of — Right of Father.*]—Motion by the father of Grace Cameron, a child of seven years, on the return of a habeas corpus, for an order awarding him the custody of the child.

W. A. Henderson, for the applicant.

H. S. White, for the infant's aunt.

MIDDLETON, J.:—The child is seven years of age. The mother died in January, 1906, three weeks after the birth, and the husband married again in April, 1907; but this marriage did not turn out well, and Cameron and his second wife separated in less than six months.

At the time of the death of the mother of this child, Cameron placed it and another child, a boy of a few years older, with his sister, Mrs. Lang, who has had it ever since.

Cameron resumed custody of the boy some three years ago, since which time the boy has been for some considerable part of the time in the Boys' Home.

Cameron has now a house, which is kept for him by a Mrs. Waterman, who acts as his housekeeper. Nothing is said against her in any way, but she is an elderly woman employed as a domestic in charge of the house. Cameron's own affidavit indicates her position: "I believe Mrs. Waterman is well able to look after my house, and is now doing so, and that the said Grace

Cameron would receive good care and attention from her. If it should happen that Mrs. Waterman is not the proper person to look after the said Grace Cameron, I will see that some other person is employed who will give her proper care and attention."

The case has given me much anxiety, as I realise the extent of the father's right to the custody of his children, and the responsibility of depriving him of the duty and privilege incident to this right; and I have also present to my mind the disadvantage of separating the two children. Yet the facts of this case, which I refrain from setting forth at greater length, convince me that the welfare of this little girl requires that she should be left in the custody of the aunt, who has stood in the place of her mother almost from the day of her birth, rather than in the custody of the father, who will have to be away from home during most of her waking hours earning his livelihood, so that the real custody and training will devolve upon a hired housekeeper.

It may be the father's misfortune that he has not a better established home to which he can take his child, but he has voluntarily left her with his sister, until now any change must be prejudicial to the child, who has been well cared for so far, and whose present custodians are at least as well off financially as the father.

The aunt must allow all reasonable access to the father and must undertake to do nothing to prejudice the child against the father, who should have liberty to renew this motion if circumstances change.

I do not think costs should be awarded.

SWALE v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court. Trial before Lennox, J. February 27, 1913.

TROVER (§ II—27)—*Common Carrier—Sale of Goods to Pay Charges—Negligence and Default of Auctioneers—Conversion of Goods—Loss—Failure to Deliver Surplus Goods—Third Parties—Remedy over—Limitation of Amount to be Recovered—Bill of Lading—Endorsement—Judgment—Costs—Set-off.*]—Action for an account of goods sold by the defendants or for damages for conversion. The goods were contained in 97 cases of settlers' effects delivered to the defendants in Liverpool, England, to be carried to Toronto, Ontario. The defendants claimed relief over against W. J. Suckling & Co., third parties, the auctioneers who sold the goods for the defendants to pay the charges the latter had against the goods. See the report of the case upon an interlocutory motion and appeals: *Swale* v. *Canadian Pacific R. Co.*, 2 D.L.R. 84, 25 O.L.R. 492, 3 O.W.N. 601, 633, 664.

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LENNOX, J., said that the liability of the defendants arose out of the conduct of the third parties, the auctioneers employed to dispose of the plaintiff's goods; and that the auctioneers' method of handling, caring for, keeping track of, and accounting for the goods intrusted to them by the defendants was negligent and unbusinesslike to a marked degree. —A number of technical objections were raised on behalf of the third parties. One was that recovery was limited by the bill of lading to $5 a package. Held, that this did not apply here. This was a sale under sec. 345 of the Railway Act; and, under sub-sec. 3, "the company shall pay or deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto." The defendants did not take the objection; and it is not an objection that the third parties can set up against their employers.—The third parties also said that the bill of lading had never been properly endorsed. The learned Judge said that this objection was not open to the third parties; and, even if it was, the facts were against them.—The defendants were paid in full when the sale was discontinued on the 21st October, 1909, and the plaintiff was entitled to immediate delivery of the goods now sued for, and would have got them at that time if the third parties had exercised reasonable care and kept a proper record. The transit was completed, the bailment was at an end, the money owing to the defendants was in the hands of their agents; and the plaintiff thereupon became entitled to an immediate delivery of her goods and payment of the surplus moneys or damages to the extent of their value.—Judgment for the plaintiff against the defendants for $1,066.40 with costs. Judgment for the defendants against the third parties for $1,066.40 and the costs the defendants are to pay the plaintiff, including the costs to be paid to the plaintiff under the order of the 4th March, 1912, but not including the costs payable under the order of Britton, J., of the 13th March, 1911, together with the defendants' costs of defence. Judgment for the defendants against the plaintiff for $152.16, without costs as between these parties, to be set off against the plaintiff's judgment against the defendants. *W. M. Hall*, for the plaintiff. *Shirley Denison*, K.C., for the defendants. *W. Laidlaw*, K.C., for the third parties.

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THE KING v. McINTYRE.

County Court Judge's Criminal Court of Carleton, New Brunswick. Judge Carleton. January 27, 1913.

CRIMINAL LAW (§ II G 1—71a) — *Previous Conviction as Bar.*]—Trial of a charge of assault occasioning actual bodily harm.

W. M. Connell, and *J. C. Hartley*, for the prosecution.
Marvin L. Hayward, for defendant.

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JUDGE CARLETON:—On the evening of December 24, 1912, the defendant, Lemuel McIntyre, on a public street in the town of Woodstock, apparently without justification, assaulted, by striking in the face with his fist, one J. Harold Hayden. The chief of police of the town of Woodstock did not witness the assault but, from information he received, he arrested McIntyre for a breach of the town's by-law in creating a disturbance on the public streets. On December 26, McIntyre was brought before the sitting magistrate and, on this charge being read to him, pleaded guilty and was fined $4 and costs, and in default of payment ordered to be imprisoned in the common gaol for a period of fifteen days. McIntyre served out the sentence.

On December 27, subsequent to the aforesaid proceedings, Hayden appeared in person before the same magistrate and made information against McIntyre for an assault on him, the informant occasioning actual bodily harm; a preliminary examination was held and McIntyre committed for trial at the present January sitting of the Carleton County Court, at which Court the grand jury found a true bill on two counts: (1) assault occasioning actual bodily harm; (2) common assault.

The depositions do not disclose any actual bodily harm. I told this to the grand jury, but they, acting within their province, thought otherwise and returned a bill as aforementioned. The defendant at first elected for a trial by jury, but, subsequent to the finding of the bill, and with the consent of the prosecuting officer, he re-elected to be tried by me without a jury; and is now properly before this tribunal.

On arraignment the defendant pleads his previous conviction as a bar to these proceedings. The same set of facts that constituted the breach of the peace on the public streets are now relied on to support the present charge or charges.

Nemo debet bis vexari pro una et eadem causa. It is a rule of law, that a man shall not be twice vexed for one and the same cause. To such an extent is this maxim followed, that on the civil side of the Court you may not twice arrest a defendant for the same cause of action; not even when the nature of the action is changed to one of higher degree, as where a contract in debt is merged in a contract of record. And this rule was frequently applied in practice prior to the abolition of arrest on mesne process.

Autrefois convict, which the defendant here pleads, is a special plea in bar which goes to the merits of the indictment, and gives a reason why the prisoner ought not to answer at all, nor put himself on his trial for the alleged crime. No man shall be placed in peril of legal penalties more than once on the same accusation—*nemo debet bis punini pro uno delicto*—and, it appears to me, that if a man is once fairly tried before a

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Court of competent jurisdiction he may answer all subsequent proceedings for the same offence, or involving the same circumstances, the former prosecutions, resulting as it may in acquittal or conviction; and a difference in colour or degree, does not alter the rule of law, for it is not one of mere designation, but of substantial fact.

If a jury was trying out this plea—and I now occupy a jury's position—it would have to determine as a fact that which is a mixed question of law and fact: Has the defendant been already in jeopardy? Was he, in this instance, convicted in fact for his assault on Hayden?

To support the plea *autrefois acquit*, the defendant must have been in actual peril. A quashed indictment, a *nolle prosequi*, or a mistrial will not entitle a defendant to so plead, nor will it sustain such a plea. *Reg.* v. *Mulholland*, 4 P. & B. 512; *Reg.* v. *Sirois*, 27 N.B.R. 610.

> When we talk of a man being twice tried, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict; and when we speak of a man twice put in jeopardy, we mean put in jeopardy by the verdict of a jury; and he is not tried or put in jeopardy until a verdict is given: Cockburn, C.J., *Reg.* v. *Charlesworth*, 1 B. & S. 507.

It has been laid down, that the true test by which to decide whether a plea of *autrefois acquit* is a sufficient bar in a particular case is, whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction on the first. Conversely, it appears to me, the test for the plea *autrefois convict* is, whether the evidence that was used to convict in the first prosecution is now relied on to support the second charge. One must admit that on this subject there is sometimes an apparent conflict of authority which, without having the cases to consult, it is hard to reconcile. Of course, there is the rule that an acquittal on an indictment for felony is no bar to an indictment for a misdemeanour, and *è converso*. But the arbitrary distinction between felony and misdemeanour no longer exists in our criminal jurisprudence. In *Wemyss* v. *Hopkins*, L.R. 10 Q.B. 378, it was held that the defence of *autrefois convict* is a common law defence available in every case where a man is put in peril more than once for the same act, whether the charges are made before magistrates or tried before a jury.

In *Reg.* v. *Walker*, 2 M. & Rob. 446, a plea of *autrefois convict* of an assault before justices under 9 Geo. IV. ch. 31, sec. 27, was held to be a bar to an indictment for feloniously stabbing in the same transaction.

I conclude that McIntyre was in jeopardy; (*a*) by the finding and sentence of a Court of competent jurisdiction; (*b*) that the act now complained of was involved—was, in fact, the act

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that constituted the offence for which he was then tried and convicted; (c) that he was tried for the assault on Hayden and nothing else; if he did not assault Hayden, he did not commit a breach of the peace.

If McIntyre had been tried, summarily, or otherwise, for an assault on Hayden, could he have been now tried for a breach of the city by-law? I think the negative answer is obvious. But the learned counsel for the prosecution, while practically admitting the correctness of these findings, contends, that, under the provisions of secs. 733 and 734 of the Crim. Code, the common law rule no longer applies unless the first proceedings were laid "by and on behalf of the person aggrieved." In other words, to extend this argument to its logical effect, a man might be prosecuted and imprisoned many times and could not plead a previous conviction if there were several independent informants not acting on behalf of the aggrieved person—or, at least, there might always be two prosecutions if the complainant in the first case acted without the knowledge of the person assaulted. To admit this construction would mean that one might be convicted for an assault on the complaint of an eye-witness and be again convicted on the complaint of the assaulted.

If McIntyre had not pleaded guilty to the breach of the peace, on whose evidence would he have been convicted? Perhaps on the oath of a bystander who viewed the incident. Was Hayden present before the magistrate to testify against the accused? On this there is no evidence and we are left to speculate. But if Hayden was present for that purpose, or, if the case had proceeded to an actual trial, he had testified against the accused, could it have been successfully maintained that the prosecution was not, at least, on his behalf?

I do not concur in the prosecutor's view. I think that the object sought by these sections is to give to a person aggrieved an alternative. When he has chosen it, he shall not have an additional remedy or recourse against the accused. It must be borne in mind that secs. 733 and 734 are not original to our Code. They were copied from the Imperial Act, 24 & 25 Vict. ch. 100, secs. 44 and 45, which in its turn was a substitution for the Act of 9 Geo. IV. ch. 31, sec. 27, under which the above cited case of *Reg.* v. *Walker*, 2 M. & Rob. 446, was decided.

Under this very section, or sections, it has been decided that even if a second charge be differently framed, but based on the same facts, it will be answered by the defence of *autrefois acquit* or *autrefois convict*. See *R.* v. *Erlington*, 31 L.J.M. C. 14.

Does sec. 909 of the Code throw any light on the subject?

When an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge

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on a former trial, but adds an 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.

In all the circumstances, I find the plea of previous conviction proved, and a verdict, accordingly, is to be entered for the defendant.

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REX v. McKAY.

Saskatchewan, District Court, Saskatoon, Judge McLorg.
February 18, 1913.

APPEAL (§ III E—91)—*Notice of Appeal—Service—Appeal from Summary Conviction.*]—Appeal from a summary conviction.

Lynd, for defendant, appellant.
C. R. Morse, for plaintiff, respondent.

JUDGE MCLORG:—The first objection to the notice of appeal herein is that the notice of appeal is not addressed both to the magistrate and the informant, which, it was contended, was necessary when it was served on the magistrate only for the informant, and the case of *Society* v. *Lauzon,* 4 Can. Cr. Cas. 354, was relied on. That case does not support this contention. The notice in that instance was directed to the justice alone, and served on him only. The case of *Rex* v. *Jordan,* 5 Can. Cr. Cas. 438, a decision of the Supreme Court of British Columbia, is a distinct authority against this proposition.

It was then objected that the notice of appeal did not state in terms that the party appealing was aggrieved under sec. 749 of the Criminal Code, "any person who thinks himself aggrieved" may appeal. I should have thought that the fact that a person does serve a notice of appeal in itself indicated that he was the person aggrieved, but reference was made to the case of *The King* v. *Justices of Essex,* 5 B. & C. 431. That was an appeal against an order made by two justices for diverting a public footway, and it was stated in the notice of appeal that a rated inhabitant of the parish intended to appeal, but it was not stated that he was aggrieved by the order. In giving judgment, Abbott, C.J., held:—

> The matter in question, the stopping up or diverting of a public highway, affects, in a certain degree, all His Majesty's subjects, and therefore, as the statute has not given a right of appeal to all persons, but merely to the party aggrieved, we must suppose that the Legislature intended to confer that privilege upon those persons alone who have sustained some special and peculiar injury, and not to extend the power of appealing to any captious person whomsoever.

That case is a very different one to the present one. In this instance there are only two parties, the prosecutor and de-

fendant, and the cases are by no means parallel. The public are in no way concerned. It is merely a matter between the parties, as I have above stated, and I am of opinion, therefore, that the notice is not bad, because of the fact that it does not state explicitly that the party appealing is the party aggrieved. I know that for the past fifteen years, notices of appeal without this allegation, have continually been held sufficient, and I think it is too late now to entertain this objection, which is of the most technical character.

It is objected, however, that I have no jurisdiction, inasmuch as a recognizance that the applicant had entered into was not filed in the office of the clerk of the Court within ten days of the date of the conviction, and the judgment of Hannon, D.C.J., *Re McNeill and Saskatchewan Hotel Co.*, 17 W.L.R. 7, is relied on. Certainly the learned Judge there has gone exhaustively into the authorities, which I have not had an opportunity of doing as fully as I could wish. Now, this conviction adjudges imprisonment. Consequently, if the defendant wished to appeal, one of two courses was open to him: either to remain in custody until the holding of the Court to which the appeal is given, or enter into a recognizance. What is there before me to shew which course this man elected? It is true that at the hearing a recognizance was produced, apparently, as was stated by counsel fresh from the hands of the magistrate before whom it was taken, but does it necessarily follow that it was by virtue of this recognizance that this appeal was taken? I do not think that it can so necessarily follow. In the first place, it was the magistrate's duty to return the recognizance to the files of the Court if he accepted it. In the second place, the recognizance must be entered into with two sufficient sureties, and the sufficiency of these sureties is entirely for the magistrate. Did he accept this recognizance as sufficient? There is nothing before me to shew that he did.

There is another view of the case. The facts are that the recognizance must be handed to the magistrate. The appellant, when he has entered into it, has done all he can do. He has no control whatever over the magistrate. He cannot compel him to file it, and if the magistrate is indifferent, or for any reason biassed or careless and neglects or refuses to do it, the logical conclusion is that the appellant's right of appeal is gone. Surely the appellant's right of appeal cannot depend upon circumstances over which he has no control. Such a conclusion seems to me most unjust, and I cannot believe that it was ever intended. However that may be, I am of opinion that if I am to assume that this man did not remain in custody, and was at liberty by virtue of this recognizance, of which, as I say, there is no evidence before me, I think he has done all he can do in

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the matter, and I draw attention to what is laid down by the Court of Appeal in *Wills* v. *McSherry*, [1913] 1 K.B. 20. There it was held that where every effort had been made to serve the notice in writing of the appeal on the respondents, but the appellant was unable to do so, the Court still had jurisdiction to hear the appeal, and, though I am not forgetting what is laid down by Channell, J., at the commencement of his judgment, I think by analogy the reasoning in that case applies to this one. In each case the appellant had done all that he could possibly do. He has complied strictly with the section giving him his right of appeal, and it is through no fault of his that the recognizance was not filed. I think, therefore, that the statute has been sufficiently complied with, and that I have jurisdiction to entertain this appeal.

I was requested by counsel on both sides, in the event of my coming to the conclusion that the preliminary objections were not fatal, to read the evidence given before the magistrate and base my verdict according to it. I have done this, and I am of opinion that the evidence of William O. Hunt is inadmissible. I cannot say what weight this may have had in the magistrate's mind, but notwithstanding this, I see no sufficient ground for reversing his finding. If he believed the wife's story there was evidence of an assault. He is a better judge of the credibility to be attached to the evidence than I am, and the result will be that the conviction will be affirmed.

The appellant will pay the respondent's costs in this appeal.

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BLOMQUIST v. TYMCHORAK.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. March 18, 1913.

[*Blomquist* v. *Tymchorak*, 6 D.L.R. 337, affirmed.]

SALE (§ I A—2)—*What Constitutes—Hotel and Contents—Appurtenant Chattels—Food Supplies.*]—Appeal from decisions of Mathers, C.J.K.B., 6 D.L.R. 337.

W. H. Trueman, for plaintiff.

C. H. Locke, for defendant.

The appeal was dismissed without calling upon respondent's counsel.

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REX v. JOHNSON.

Alberta Supreme Court. Trial before Stuart, J. February 28, 1913.

CRIMINAL LAW (§ IV C—117)—*Excessive Fine—Statutory Limitation of Fine.*]

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STUART, J.:—The Code imposes a punishment for common assault, namely, one year's imprisonment or a penalty not exceeding one hundred dollars, that is, upon indictment, and this was, of course, to be treated as an indictment, and I acted on sec. 1035, which says that where imprisonment is imposed, the Judge may impose a fine in lieu of the imprisonment and I assumed there was no limitation there as to the amount of the fine, also that it was unlimited, but I think that only applies to the section imposing the penalty of imprisonment alone and which does not state anything in the alternative, and in case of common assault the section itself imposes an alternative of one hundred dollars. I thought 1035 gave no liberty to exceed that and thinking it over since I do not think it does so and I will have to direct the clerk to reduce the fine to one hundred dollars.

Re CLUB LAURIER.

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Manitoba Court of Appeal, Perdue, Cameron, and Haggart, JJ.A. February 11, 1913.

MANDAMUS (§ I H—71)—*To Board of License Commissioners—To Compel Grant of License.*]—By special leave granted to proceed by motion instead of by action, a motion was made on behalf of Club Laurier for an order for a mandamus commanding the License Commissioners of License District No. 4, according to the Liquor License Act to grant to Club Laurier the permission in writing to keep liquor on the club premises for the use of the members thereof, mentioned in section 10 of ch. 31 of 9 Edw. VII. on the ground, amongst others, that the License Commissioners were bound by law to grant such permission, and that they had acted unfairly, unjudicially, discriminately and arbitrarily in refusing such permission to said Club Laurier, and that they had neglected and refused to do their duty contrary to said section 10.

A. Dubec, for appellant. *H. W. Whitla*, K.C., for License Commissioners.

METCALFE, J., dismissed the motion with costs holding that the matter was one in which certain powers had been given to the License Commissioners by the Legislature; that the Commissioners having exercised their discretion, the Court ought not to interfere, except under special circumstances. No special circumstances having been proved in the present case the application was dismissed. Club Laurier appealed.

THE COURT dismissed the appeal.

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Re GRAND TRUNK R. CO. and ASH.
Re GRAND TRUNK R. CO. and ANDERSON.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Sutherland, J. March 27, 1913.

COSTS (§ I—8)—*Eminent Domain—Expropriation by Railway—Costs of Arbitrator.*]—Appeals by the railway company from the orders of Britton, J., 9 D.L.R. 453, 4 O.W.N. 810.

D. O'Connell, for the appellants. *Grayson Smith*, for the respondents.

THE COURT dismissed the appeals with costs.

SMITH v. BENOR.
(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Latchford, J. March 27, 1913.

[*Smith* v. *Benor* (No. 1), 9 D.L.R. 881, modified.]

CANCELLATION OF INSTRUMENTS (§ I—5)—*Deed — Trust — Findings of Facts—Variation of Judgment.*]—Appeal by the defendant from the judgment of Kelly, J., 9 D.L.R. 881, 4 O.W.N. 734.

I. F. Hellmuth, K.C., for the defendant. *McGregor Young*, K.C., for the plaintiff.

THE COURT modified the judgment below by directing that, instead of an account being taken, the $500 referred to in the judgment be paid by the plaintiff to the defendant, in addition to the $200 ordered to be paid. With this modification, the judgment was affirmed. The defendant to pay the plaintiff's costs up to and including the judgment below. No costs of the appeal to or against either party.

YORK PUBLISHING CO. v. COULTER.

Ontario Supreme Court, Lennox, J. April 8, 1913.

INJUNCTION (§ I M—121)—*Trade Name—Infringement—Soliciting Customers—Information Obtained by Former Officer of Company—Grounds for Injunction—Relative Convenience or Inconvenience—Terms.*]—Motion by the plaintiffs for an interim injunction restraining the defendant from in any way using the mailing list of subscribers to the plaintiffs' publication, from canvassing for subscribers or customers of the plaintiffs for any journal published by the defendant, from using any information

which the defendant obtained as an officer or servant of the plaintiffs in regard to advertisers, and from printing any journal under the name of "The Journal of Health Administration and Sociology," or under any other name similar to that of the plaintiffs' journal. LENNOX, J., said that where there is serious doubt as to the rights of the plaintiff, and the inconvenience appears to be equally divided between the parties, the Court should not grant an injunction pending the trial: *Sexton* v. *Brockenshire*, 18 O.R. 640; *Dwyre* v. *Ottawa*, 25 A.R. 121. In this case he was satisfied that greater inconvenience would result from withholding an injunction than from granting it; and, although, of course, the rights of the parties could be determined only at the trial, enough had been shewn to enable him to form an opinion of the plaintiffs' title and rights, within the meaning of the cases. It was a case, too, in which damages would probably not prove to be an adequate remedy. He referred to *Edge* v. *Nicolls*, [1911] A.C. 693, to shew how astute the Courts are to prevent methods which are calculated to deceive or mislead customers or the public. As to what is covered by "goodwill," he referred to *Mossop* v. *Mason*, 18 Gr. 453; *Curl* v. *Webster*, [1904] 1 Ch. 685; and *Trego* v. *Hunt*, [1896] A.C. 7. The plaintiffs should be at liberty to amend so as to include the Wayside Publishers Limited as defendants; and the order to be issued would restrain these defendants as well. Injunction granted restraining the defendants to the extent and in the manner set out in the notice of motion; but the plaintiffs must proceed to trial promptly, must deliver the statement of claim within two days after notice of this order, join issue promptly, and proceed to trial without delay. The costs of and incidental to this application to be costs in the cause, unless the trial Judge should otherwise order. *E. E. A. DuVernet*, K.C., for the plaintiffs. *Grayson Smith*, for the defendants.

J. J. GIBBONS Limited v. BERLINER GRAMAPHONE CO. Limited.
(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 7, 1913.

COURTS (§ I B—10)—*Jurisdiction—Service of Writ out of—Assets within.*]—An appeal by the plaintiffs from the order of Middleton, J., 8 D.L.R. 471, 4 O.W.N. 381, 27 O.L.R. 402.

R. C. H. Cassels, for the defendants, took the preliminary objection that the order appealed against was not one "which finally disposed of the action," within the meaning of Con. Rule 777 (1278); and, therefore, leave to appeal was necessary.

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Leave had not been obtained. The order stayed proceedings in the action until after the conclusion of any action which the plaintiff might bring in the Province of Quebec. He cited *Gibson* v. *Hawes*, 24 O.L.R. 543.

J. F. Boland, for the plaintiffs.

THE COURT, after consideration, overruled the objection and decided to hear the appeal.

CLARK v. ROBINET.

Ontario Supreme Court, Middleton, J., in Chambers. April 9, 1913.

DISCOVERY AND INSPECTION (§ IV—20)—*Refusal to Answer Questions—Irrelevancy—Notice of Motion to Dismiss Action—Failure to Specify Questions.*]—Motion by the defendant to dismiss the action because of the refusal of the plaintiff to answer certain questions on examination for discovery. The learned Judge said that since the argument he had read the pleadings and examination; and could not see that the questions which the plaintiff refused to answer were relevant to any of the issues raised on the pleadings. The motion, therefore, failed, and must be dismissed, with costs to the plaintiff in any event. The learned Judge called attention to the extremely inconvenient practice followed in this case, of omitting to specify in the notice of motion the questions which the defendant sought to compel the plaintiff to answer. *F. D. Davis*, for the defendant. *Frank McCarthy*, for the plaintiff.

GRAYDON v. GORRIE.

Ontario Supreme Court. Trial before Kelly, J. January 28, 1913.

CONTRACTS (§ I D 2—52)—*Mutuality in Contract for the Sale of Land—Alteration in Terms—Specific Performance.*]—Action for specific performance of an agreement for the sale of land by the defendant to the plaintiff.

Judgment was given for the plaintiff.

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

J. A. Rowland, for the defendant.

KELLY, J.:—The only point in dispute is as to the length of the term of the mortgage which was to be given to the vendor for part of the purchase-money; and, by reason of this, the defendant contends, a valid contract was not entered into.

The plaintiff signed, and delivered to the agents with whom the property had been listed for sale, an offer to the defendant to

purchase; and McLaren, a clerk from the agents' office, submitted it to the defendant, who returned it on the following day and gave instructions for changes in the price, the amount of cash payment, the amount of the mortgage, and as to making the instalments of principal and interest payable yearly instead of half-yearly.

These alterations were made by McLaren, and the offer was again taken by him to the plaintiff, who initialled the alterations. All this took place about the 26th and 27th April. The plaintiff and McLaren both say that the defendant signed the acceptance after these changes were made, and before they were initialled by the plaintiff, and McLaren adds that the defendant initialled them at the time he signed the acceptance. The plaintiff also says that, when the offer was brought back to him to have the alterations initialled, they had been initialled by the defendant. The defendant, on the other hand, says that he did not sign the acceptance until after the plaintiff had initialled the alterations; and that, just before signing, he himself further altered the offer by making the term of the mortgage three years instead of five years.

His contention now is, that at no time did he agree to a five-year term; and that, not having signed the acceptance until after he made the alteration from five years to three years, which alteration, he maintained, was made after the plaintiff had initialled the other changes, he and the plaintiff were never agreed upon that term.

In this I think he is mistaken. My view is, that the change from five to three was made after both parties had signed. It may be that the defendant afterwards wished to have a three-year term, and he may have made the alteration in that respect with a view to having the plaintiff agree to it; but that, under the circumstances, could not have assisted him, for the alteration was so indistinctly made as to render it almost, if not altogether, impossible for any one, on the closest examination of the document, to determine whether in its present condition it reads five or three years—it can as readily be read one way as the other.

But, whatever question there may have been of the defendant's right to object on the ground of want of agreement on the term of the mortgage, that was set at rest by what followed the signing.

About the 30th April, the defendant called at the agents' office and stated that a copy of the original offer, supplied to his solicitor, drew his attention to the five-year term, to which he objected; and, later on, he again referred to this and expressed his unwillingness to complete the sale with that term. By that time he appears to have come to the conclusion that the property was worth more than he had sold it for, and he was anxious

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to be released from the contract. The plaintiff then offered to make the term of the mortgage three years, but the defendant refused. I have some doubt as to whether he had much faith in his objection; for, notwithstanding that he did so object, the usual procedure for completing the transaction was gone on with by the solicitors for both parties. Requisitions on title were delivered by the plaintiff's solicitors, and correspondence passed between them and the defendant's solicitor about these requisitions and the inspection of the defendant's title deeds. A draft deed was prepared by the defendant's solicitor and submitted to the plaintiff's solicitors for approval; it was approved and returned, and was then engrossed and signed by the defendant and his wife. A draft mortgage was also prepared by the plaintiff's solicitors and sent to the defendant's solicitor for approval. The deed was made to the plaintiff's wife, and the mortgage was drawn as from her. This would indicate that something must have passed between the solicitors by which this change in the parties was brought about, and that there was then no question of not carrying out the agreement. The draft mortgage was returned to the plaintiff's solicitors on Saturday the 11th May, with the statement that it was neither approved nor disapproved. At the time of its return, a clerk from the office of the defendant's solicitor tendered the deed to the plaintiff's solicitors; and, the mortgage being immediately engrossed and executed, and the plaintiff's solicitors having with them the mortgage and the money to make the cash payment, again met the defendant's representative. Again something was said about the term of the mortgage, the defendant's representative saying that his instructions were to close the transaction only on the mortgage being made to mature at three years instead of five. The plaintiff's solicitors then offered to make the term three years if the original contract so stated it, and they and the defendant's representative and the defendant went to the registry office to examine the original. It was then agreed to defer completing the transaction until the following Monday, and there was no question of its not then being carried out; but, when that time arrived, the defendant's solicitor refused to complete it.

My view is, that the contract is enforceable and that it should be enforced; but, as the purchaser, both on the day on which the deed was tendered and before that date and also at the close of the trial, offered to make the term of the mortgage three years, that, instead of five years, will be its term if the defendant now so desires it.

Judgment will be that the contract be so enforced, with costs payable by the defendant.

If any question arise as to the adjustment or settling the details, it can be referred to the Master in Ordinary; the costs of any such reference being reserved until after the Master has made his report.

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McNAIR v. McNAIR.

Ontario Supreme Court, Cartwright, M.C. April 11, 1913.

DIVORCE AND SEPARATION (§ V B—50)—*Interim Order—Husband without Means.*]—Motion by the plaintiff for interim alimony and disbursements. The plaintiff made affidavit that the defendant once said that he was worth $90,000; but no particulars were given, nor was any specific asset mentioned. The defendant, at the time of the application, was at Reno, in Nevada, where he was engaged in procuring a divorce. His affidavit stated that he was wholly without means and without employment and was living on loans from his friends; and that, though daily seeking employment, he was unable to obtain any. The Master said that, in these circumstances, the case did not differ from *Pherrill* v. *Pherrill*, 6 O.L.R. 642, where it was said: "It would be useless to make an order against a man who has no property on which it could operate, and where there is no evidence as to his earning power." Where, as here, the defendant is out of the jurisdiction, this principle seemed even more applicable. Motion dismissed, leaving the plaintiff to take the matter higher or proceed to trial as might be thought best. *A. J. Russell Snow*, K.C., for the plaintiff. *R. McKay*, K.C., for the defendant.

TUCKER v. BANK OF OTTAWA.

Ontario Supreme Court, Cartwright, M.C. April 5, 1913.

COSTS (§ I—14)—*Action for Benefit of Plaintiff's Creditors—Assignment for Benefit of Creditors—10 Edw. VII. ch. 64, secs. 8, 9, 14 (O.)—Interest of Assignor—Con. Rule 440—Assignee Acting as Solicitor.*]—Motion by the defendants to stay the plaintiff's action, or for security for costs, on the ground that the action was in reality for the benefit of the plaintiff's creditors. It was admitted that the plaintiff, on the 21st March, 1911, made an assignment for the benefit of his creditors, under R.S.O. 1897 ch. 124, of all his estate, real and personal. Any surplus after payment of debts and charges was to be repaid to the assignor. The affidavit of the defendants' solicitor was the only material filed in support of the motion. In it he stated that he had made careful inquiries and believed that the plaintiff had never obtained any release or discharge from his creditors, and that he was insolvent and without means or assets exigible under execution, and that up to the present time his creditors had only been paid a dividend of eleven cents on the dollar. This was answered by an affidavit of the plaintiff's solicitor, apparently the same person as the assignee under the assignment

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above-mentioned. He confined himself to a denial of the plaintiff's insolvency, and said that the plaintiff was carrying on his business of buying and selling live stock, and was able and willing to advance to the deponent the sum he asked as a deposit before commencing this action. He made the affidavit because the plaintiff was quarantined for small-pox, and was out of communication with his solicitor. The Master referred to *Pritchard* v. *Pattison*, 1 O.L.R. 37, where it was said that very clear proof must be given that the plaintiff has no substantial interest in the action before such an order can be made; and to *Stow* v. *Currie*, 14 O.W.R. 61, and cases cited there. Giving the widest scope possible to the effect of the assignment, as set out in 10 Edw. VII. ch. 64, secs. 8, 9, and 14 (O.), it was by no means clear that the plaintiff had no substantial interest. The contrary would seem to be the fact. In any case, that was a matter that could not be decided on the present material. It was clearly for the benefit of the plaintiff that he should recover anything possible, and so reduce or extinguish the claims against him. For all that appeared these claims might have now been paid or released or barred by the Statute of Limitations. The necessary inquiry to determine these questions would be foreign to such an application as the present. In any case, the motion must fail, under the principle of the decisions under Con. Rule 440. In the last of these, *Garland* v. *Clarkson*, 9 O.L.R. 281, a Divisional Court decided that, in such a case as the present, the assignor was a person for whose immediate benefit the action was brought, approving *Macdonald* v. *Norwich Union Insurance Co.*, 10 P.R. (Ont.) 462. See, too, *Major* v. *Mackenzie*, 17 P.R. (Ont.) 18. No point was raised at present as to the right of the plaintiff to bring the action. That could, however, be taken by way of defence, if tenable. As the assignee was apparently acting as the plaintiff's solicitor, he must be taken to have given his consent to the action in its present form, assuming that any consent was necessary, and have satisfied himself of the plaintiff being *rectus in curiâ*. Motion dismissed, but, upon the peculiar facts, the costs to be in the cause to the successful party. *Grayson Smith*, for the defendants. *Featherston Aylesworth*, for the plaintiff.

ROGERS v. NATIONAL PORTLAND CEMENT CO.

Ontario Supreme Court, Cartwright, M.C. April 7, 1913.
Ontario Supreme Court, Middleton, J. April 11, 1913.

PLEADING (§ I N—113)—*Amendment—Addition of Claim for Reformation of Agreement — Conformity of Amendment to Order Giving Leave to Amend—Sufficiency of Allegations.*]—The plaintiff obtained an order for leave "to amend his

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statement of claim by adding thereto a claim that the agreement in question in this action be reformed." In pursuance of this leave, paragraph 4A was inserted, in the words following: "The defendants allege that they are justified in refusing to continue the plaintiff's agency, upon the ground that the plaintiff was unable to sell their cement at the price of $1.30 per barrel, as provided by clause 4 of the said agreement; and the plaintiff says that, under the proper construction of the said agreement, the defendants were bound to reduce their price to meet the ruling market-prices, or to hold their cement in stock until the same could be disposed of at not less than $1.30 per barrel; that, if the agreement does not bear this construction, the same was executed by the parties under a mutual mistake of the true intent and meaning thereof, and that the said agreement should be reformed to express the true intention of the parties." The defendants moved to strike this out as not being a compliance with the order, and also as not being properly pleaded. The Master said that the whole issue between the parties was as to the terms of the written agreement. It had been expressly pleaded by the amended statement of defence that the plaintiff was, under that agreement, obliged to sell at $1.30 per barrel. The amendment to the statement of claim now made met this in a way that did not seem objectionable. It was suggested that the desired reformation should be more distinctly set out; but that would, no doubt, be done in the judgment, if the plaintiff's contention should prevail. At present, the plaintiff's view was indicated sufficiently to let the defendants know what case they had to meet, which is the main requisite in pleading. In *Ontario and Minnesota Power Co.* v. *Rat Portage Lumber Co.*, 3 D.L.R. 331, 3 O.W.N. 1182, it was held permissible to introduce an allegation in the statement of defence by the statement "the plaintiffs claim."

The same rule must apply to the present case. Motion be dismissed, with costs to the plaintiff in the cause. The defendants to have 8 days to amend, if desired. *Grayson Smith*, for the defendants.

The Master's order was affirmed by MIDDLETON, J., on the 11th April, 1913.

JEANNOTTE v. JEANNOTTE.

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Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. October 31, 1912.

WILLS (§ I D—36)—*Testamentary capacity—Mental sanity—Casual and temporary derangement—Sanity at the time of making the will—Whether disposal was a prudent one.*]—THE COURT dismissed the appeal from the judgment of the

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Superior Court maintaining the will in question. A will cannot, on the ground of the testator's mental insanity, be adjudged void, simply because certain acts, resulting from intermittent fits in a disease from which he is suffering, indicate a temporary derangement of his mental faculties; provided he is, at the time of making his will, of sound intellect and reasoning capacity.

When there is a question as to the testator's mental sanity, the manner in which he has disposed of his property in the will itself is given weight in determining the question of sanity. When the will was such as a just and prudent man would make, it is easier to believe that the testator was in possession of his full mental faculties.

Lamothe and Saint-Jacques, for plaintiffs (appellant).

Geoffrion, Geoffrion & Casson, for defendants (respondent).

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HESSELTINE v. NELLES.

(Decision No. 5.)

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. December 10, 1912.

APPEAL (§ II A—35)—*Final Judgment—Further Directions—Master's Report.*]—On the trial before the Chancellor of Ontario of an action claiming damages for breach of contract, judgment was given for the plaintiffs with a reference to the Master to ascertain the amount of damages, further directions being reserved. This judgment was affirmed by the Court of Appeal. The Master then made his report which, on appeal to the Chief Justice of the common pleas, was varied by reduction of the amount awarded. The Chancellor then pronounced a formal judgment on further directions in favour of the plaintiffs for the damages as reduced. The defendants appealed from the judgments of the Chief Justice and the Chancellor and the two appeals were, by order, heard together but not formally consolidated. Both judgments were affirmed by the Court of Appeal and the defendants sought to appeal from the judgment affirming them and also from the original judgment sustaining the decision at the trial, having applied without success to the Court below for an extension of time to appeal from the latter judgment: see *Nelles* v. *Hesseltine* (No. 4), 6 D.L.R. 541, 27 O.L.R. 97.

THE COURT held, BRODEUR, J., dissenting, that the only judgment from which an appeal would lie was that affirming the judgment of the Chancellor on further directions; that the Chancellor could not review the original judgment of the Court of Appeal nor that varying the Master's report, and the Court

of Appeal was equally unable to review them on the appeal from the Chancellor's decision; and the Supreme Court being able to give only the judgment that the Court of Appeal should have given, was likewise debarred from reviewing these earlier decisions.

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The appeal was dismissed with costs.

Nesbitt, K.C., and *Matthew Wilson*, K.C., for appellants.
Holman, K.C., for respondents.

RAT PORTAGE LUMBER CO. v. WATSON.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 19, 1912.

MECHANICS' LIENS (§ VI—46)—*Right to Lien by Materialman.*]—Appeal by plaintiffs from the judgment of Judge McInnes, County Court Judge, in a mechanics' lien action. By the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, no lien for material supplied "shall attach or be enforced unless the person placing or furnishing the same shall, before delivery, or within ten days thereafter, give notice in writing of his intention to claim such lien; such notice shall be given to the owner or his agent, or to such person and in such manner as the Judge may, on summary application, order; such notice may be given in respect of any specific delivery, or in respect of all deliveries of material made within ten days prior to such notice, and all deliveries subsequent thereto."

THE COURT OF APPEAL held, affirming the judgment appealed from, that the word "delivery" in the statute means actual physical delivery and that a lien does not attach under the above proviso of sec. 6 for material furnished more than ten days before the notice, although other material also included in the notice was supplied within the ten days for the same work.

A. H. MacNeill, K.C., for appellants.
MacGill, for respondent.

SWIFT CANADIAN CO. v. ISLAND CREAMERY ASSOCIATION.

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British Columbia Supreme Court, Gregory, J. September 20, 1912.

GARNISHMENT (§ II E—55) — *Priorities — Precedence of Winding-up Order against Debtor Corporation.*]—Motion by plaintiff for payment out of Court of money paid in by the garnishee as due to the debtor corporation. A winding-up order had been made in respect of the debtor corporation, although

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the order and proceedings therefor had intituled the corporation with the word "Limited" after its true name which did not include the word "Limited" (the incorporation having taken place under the Agricultural Associations Act, R.S.B.C. 1911, ch. 6). The claim of the liquidator was resisted by the attaching creditor on the ground that the winding-up order had no priority when made irregularly with an erroneous name. It was shewn, however, by the liquidator's affidavit that the company had traded under the adopted name under which the winding-up order had been taken and had used the same in its own records and upon its corporate seal.

GREGORY, J., ordered that the money be paid out to the liquidator; and upon a subsequent application by the petitioner having the carriage of the winding-up order directed, the amendment of the petition and of the winding-up proceedings by striking out the word "Limited" in the name of the company therein.

McDiarmid, and *Copeman*, for the liquidator.
Langley, for the attaching creditor.

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Re McNUTT.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. December 10, 1912.

APPEAL (§ II A—35)—*Supreme Court of Canada—Habeas Corpus—Criminal Charge—Prosecution under Provincial Act—Application for Writ—Judge's Order.*]—Appeal from the decision of the Supreme Court of Nova Scotia, affirming the judgment of a Judge who refused to discharge the appellant from imprisonment on a conviction for keeping liquor for sale in violation of the Nova Scotia Temperance Act.

The appellant having been convicted and sentenced to three months' imprisonment in gaol applied to a Judge for a writ of *habeas corpus* on the ground that the magistrate at the trial had inquired into a previous conviction before the offence he was trying had been established. It appeared that on the trial, a witness had been asked as to previous convictions, and had stated that there were several, and it was alleged that the accused had been interrogated on the same matter. The Judge, instead of granting the writ, made an order under the Liberty of the Subject Act, calling upon the gaol keeper to return the date and cause of the detention. On return of this order he refused to discharge the prisoner and his refusal was affirmed by the full Court: *R.* v. *McNutt*, 7 D.L.R. 651, 20 Can. Cr. Cas. 174, 46 N.S.R. 209. The prisoner then appealed to the Supreme Court of Canada.

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Ralston, in opposing the appeal, claimed that this was not a proceeding for or upon a writ of *habeas corpus* and that the Court was without jurisdiction, citing *Re Harris*, 26 N.S.R. 508, and *Ex parte Byrne*, 22 N.B.R. 427.

Power, K.C., and *Vernon*, for the appellant:—The proceedings were for, if not upon, a writ of *habeas corpus*. See *Rex* v. *Cook*, 18 O.L.R. 415.

(The objection was taken from the Bench that the proceedings arose out of a criminal charge which would deprive the Court of jurisdiction.)

On the merits, counsel cited *Rex* v. *Coote*, 22 O.L.R. 269; *Rex* v. *Reid*, 17 O.L.R. 578; *Rex* v. *Vanzyl*, 15 Can. Cr. Cas. 212.

By sec. 39 (*c*), of the Supreme Court Act an appeal is given from the judgment in any case of proceedings for or upon a writ of *habeas corpus* . . . not arising out of a criminal charge.

FITZPATRICK, C.J., DAVIES, J., and ANGLIN, J., held, that a trial and conviction for keeping liquor for sale contrary to the provisions of the Nova Scotia Temperance Act, are proceedings on a criminal charge and no appeal lies to the Supreme Court of Canada from the refusal of a writ of *habeas corpus* to discharge the accused from imprisonment on such conviction (Duff, J., *contra;* Brodeur, J., *hesitante*).

IDINGTON and BRODEUR, JJ., held, that such order under the Liberty of the Subject Act, R.S.N.S. 1900, ch. 181, is not a proceeding for or upon a writ of *habeas corpus* from which an appeal lies under said sec. 39 (*c*).

DUFF, J.:—That the judgment of the full Court was given in a case of proceedings for a writ of *habeas corpus* within the meaning of sec. 39 (*c*), and that the proceedings did not arise out of a "criminal charge" within the meaning of that provision; but that, on the merits, the appeal ought to be dismissed.

MALCOLM v. TOWN OF BLAIRMORE.

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Alberta Supreme Court. Trial before Scott, J. November 22, 1912.

MUNICIPAL CORPORATIONS (§ II D—143)—*Execution of contracts—When by-law and seal unnecessary.*

Trial of action brought by the vendor against the defendant municipality for specific performance of an alleged agreement by the municipality to purchase plaintiff's land for a fire-hall site. The plaintiff had made a proposition of sale to the municipal council by letter and after a favourable report thereon by a committee of the council, the council passed a motion that the land "be secured if possible subject to the passing of the by-law,"

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i.e., a by-law voted upon by the electors for raising the money by debentures. The by-law was submitted to the electors and the vote was in favour of it, whereupon notice was sent to the plaintiff by letter signed by the secretary-treasurer of the municipality that the by-law had been approved by the people and stating that "as soon as we can get the money for the debentures we will be in a position to complete the purchase of your lots as per your offer to the council." The former signature and sealing of the by-law was, however, withheld by the mayor on the alleged ground that a member of the council had a personal interest in the sale. The municipal corporation had not entered into possession of the property.

J. C. Brokovski, for plaintiff.

E. P. McNeill and *W. G. Gray*, for defendant municipality.

SCOTT, J. (oral):—I have no doubt that the mayor had reasonable grounds for believing that Sinclair was interested in that sale to the city. The circumstances are such that would reasonably lead him to suspect and to have a very strong suspicion that he was interested. The evidence, to my mind, has cleared that up in this way—it shews that he and his partner were practically mortgagees of the property. Now the owner of the land selling to the corporation must make a clear title. The fact that a member of the council has a mortgage on the property does not amount to a dealing by the mortgagee with the council. It is merely a matter of conveyancing. He has a lien on the property and the portion of the purchase money may be applied on the lien.

I have no doubt that the mayor's mind was affected by these circumstances and that he was justified in entertaining a very strong suspicion in the transaction, but having resisted the claim of the plaintiff on that ground, he must take the responsibility for his acts if he were not able to shew that there was anything wrong in purchasing this property. Upon the authority of the case cited, *Bernardin* v. *North Dufferin*, 19 Can. S.C.R. 581, and of *Dinner* v. *Humberstone*, 26 Can. S.C.R. 252, I think I must hold that a by-law was unnecessary in order to constitute a valid acceptance of the plaintiff's offer, and I must therefore hold that the plaintiff is entitled to specific performance.

Mr. McNeill: Does your Lordship hold that a seal was unnecessary?

THE COURT: No, it was not.

Mr. McNeill: Neither a by-law nor a seal?

THE COURT: Neither a by-law nor a seal. I must say that there was something in the transaction which seemed to be entirely against the interests of the corporation when they were getting from the West Canadian people a free site and a nuisance ground, but that is only a suspicion. I cannot find that that

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was the case, that there was anything dishonest in the acts of those particular councillors or that they were actuated by ulterior motives; and that being the case, I must find in favour of the plaintiff and decree the specific performance of the contract.

The defendant has my sympathy. I think he was perfectly justified in resisting the acts of the members of the council who favoured this purchase, until he had made full enquiry about it. Whether he did make full enquiry or not, or whether it was possible for him to obtain the information does not enter into the question at all, because when the action starts he is under the onus to shew that he was justified in taking the course he did. I am satisfied he was acting in the interests of the corporation and yet I must give judgment against him: that is how I feel about it.

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McILVENNA v. GOSS.

(Decision No. 2.)

Saskatchewan Supreme Court, Brown, J. January 8, 1913.

VENDOR AND PURCHASER (§ I C—10)—*Reference as to title—Failure to deliver abstract.*]—Motion by the plaintiff for judgment on the report of a local registrar upon a reference directed by Wetmore, C.J., *McIlvenna* v. *Goss* (No. 1), 3 D.L.R. 690.

BROWN, J.:—I find the amount remaining unpaid under the agreement of sale in question to be $7,953.12 and interest thereon from the 31st May, 1912, made up as follows:—

3rd June, 1910. To balance of purchase price	$7,000 00
By unpaid taxes	53 34
	$6,946 66
31st May, 1911. To interest at 7 per cent	486 22
	$7,432 88
31st May, 1912. To interest at 7 per cent	520 24
	$7,953 12

Mr. Dunn has expressed a willingness, on behalf of his client, that this amount should be ordered to be paid forthwith; and I think the following order will do justice between the parties under the circumstances of this case:—

The defendant will pay into Court to the credit of this cause the said sum of $7,953.12, and interest thereon at 7 per cent. to the date of payment, such payment to be made within sixty days from the date hereof.

The plaintiff shall, within thirty days from the date of such payment, deliver to the defendant or his solicitors a good and

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sufficient transfer of the property in question. Upon the filing of a receipt of such transfer, duly verified, the money so paid into Court shall be paid out to the plaintiff. In the event of the defendant failing to make payment as aforesaid, the plaintiff to have judgment cancelling the said agreement of sale with costs of action; and the counterclaim to be dismissed with costs.

In the event of the defendant making payment as aforesaid, and the plaintiff failing to deliver the transfer as aforesaid, the action to be dismissed with costs, and the defendant to have specific performance of the agreement of sale, and costs of his counterclaim. Each party to pay his own costs, and either party to have leave to apply to a Judge in Chambers for further directions. *C. E. Armstrong*, for the plaintiff. *W. F. Dunn*, for the defendant.

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SAINT JOHN RIVER STEAMSHIP COMPANY, Limited v. **CRYSTAL STREAM STEAMSHIP COMPANY, LIMITED**, et al.

(Decision No. 2.)

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. September 20, 1912.

COSTS (§ I—19)—*Apportionment on partial success—Setting off costs.*]

REFERENCE by McLeod, J., of an application by the Crystal Stream Steamship Company, Limited, one of the defendants, for a review of taxation of costs.

M. G. Teed, K.C., and *W. A. Ewing*, K.C., for the defendant the Crystal Stream Steamship Company, Limited.

L. A. Currey, K.C., for the plaintiff.

The judgment of the Court was delivered by

BARKER, C.J.:—On an application for a review of taxation of costs this matter was referred to this Court by Mr. Justice McLeod, with consent of the parties. The costs under the decree made in this matter were made up by the parties and submitted to the deputy registrar for taxation, and after some discussion he announced the principle upon which, as he construed the decree, the costs should be allowed. There was no question as to the costs of the defendant Austin, nor as to the defendant company being allowed the general costs of the Chancery Division action. The only question as between the solicitor of the plaintiff company and the solicitor of the defendant company was as to the principle upon which the costs in the King's Bench Division action should be taxed. The deputy registrar construed the decree as giving the plaintiff the general costs of the King's Bench Division suit, down to the consolidation at all events, the

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solicitor for the defendant company, however, contending that by the specific terms of the decree the defendant was entitled to general costs of that cause as well as the general costs of the Chancery suit, as both suits were consolidated.

The decree which was made (and about which no question can arise here, because it has not been appealed) makes this disposal of costs:—

> And that the plaintiff company do pay to the defendant Marshall D. Austin, or his solicitor, his costs of these consolidated actions as taxed by the registrar, and do pay to the defendant the Crystal Stream Steamship Company, Limited, or its solicitor, its general costs of these consolidated actions, including the costs of establishing its counterclaim as taxed by the registrar; less the plaintiff company's costs of establishing its claim of eleven dollars and fifty cents for wharfage as taxed by the registrar.

On considering this language we think the deputy registrar did not give the weight to the precise language to which it is entitled. As to the order, we think it was, if not the intention, certainly the effect of the order made by the Court to give the defendant company the general costs in both actions, and that they were to be paid by the plaintiff company to the defendant company, after deducting the costs of the plaintiff company occasioned in establishing its claim of $11.50 for wharfage.

The costs will be taxed on this basis.

Judgment accordingly.

LUEN ON CHONG v. LUNG FOOK.

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British Columbia Court of Appeal, Macdonald, Irving, Martin and Galliher, JJ.A. January 30, 1913.

ASSOCIATIONS (§ I—2)—*Property rights.*]—Appeal in an action upon a promissory note.

The opinion of the Court was delivered by

MARTIN, J.A.:—During the argument we informed counsel that we were unanimously of the opinion that these transactions of borrowing and lending were by the society, or association of fourteen members, as such, acting through and by the treasurer or "leader," and not as between the members thereof personally, and a further consideration of the matter and perusal of the evidence confirm me in that view. The plaintiffs have no right to the possession of the note, and it was improperly endorsed over to them in the absence of the absconding treasurer. Even one of the plaintiffs' witnesses admits that "if the leader goes away everything is wound up." As the case was presented below and comes before us I can only take the view that the order which should have been made by the learned trial Judge

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was to dismiss the action and the counterclaim as well. It is difficult to know exactly what the learned Judge did do, as the form of the order is unprecedented and partially inconclusive, and it is hard to understand how the parties took out such a document which is satisfactory to neither, but it was properly treated by the appellants in their notice of appeal as being directly contrary to their contention and interests, because otherwise judgment should have been entered for them on the note, and the said notice asked "that the said order be reversed and that judgment be entered for the plaintiffs for the amount claimed," etc. This at all events it is impossible to do, and the appeal to that principal extent should be dismissed,, but it should be allowed as regards the direction to take an account, as the proper parties were not before the Court, and the counterclaim must also fail for the like reason. At the trial no request was made to add parties, nor was it made before us.

Appeal allowed in part.

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HINES v. PARK REALTY CO.

Quebec Court of Review, Davidson, C.J., Tellier, and DeLorimier, JJ. April 21, 1913.

HUSBAND AND WIFE (§ II F 2—96)—*Wife's Contract to Purchase Property—Husband's Consent.*]—Action by a married woman separate as to property for the enforcement of a contract of sale of lands. It was pleaded in defence, *inter alia*, that the contract had not been authorized by the husband of the plaintiff. The plaintiff's husband had been an agent of the defendant company and had participated in the negotiations resulting in the contract and was a subscribing witness to the contract in question.

The Court of Review held that the husband's authorization is not required to have been formally expressed to satisfy the terms of article 177, C.C. (Que.). All that the article requires is that the husband become a party to the deed or that he give his consent in writing. There was a tacit authorization by his concurring in the making of the contract. The judgment of the Superior Court in favour of the plaintiff was affirmed. *E. Languedoc*, K.C., for defendants, appellants. *G. Lamothe*, K.C., for plaintiff, respondent.

STUART v. BANK OF MONTREAL.

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Ontario Supreme Court. Trial before Latchford, J. February 22, 1913. Appeal before Appellate Division, May 14, 1913.

MORTGAGE (§ I B—8)—*What constitutes—Conveyance absolute in form.*]—

Action by a son of the late John Jacques Stuart, of Hamilton, for a declaration that a conveyance of the 30th October, 1900, of an interest on certain lands in Hamilton, known to the parties as "the north end property," for the expressed consideration of $12,000, though absolute in form, was given to the plaintiff's grandfather, John Stuart, by John Jacques Stuart, merely as security for the repayment of moneys advanced upon account of the said lands by the father to the son; and that the defendants Braithwaite, Alexander Bruce, Wilgress, and R. R. Bruce, to whom the lands were subsequently transferred in trust for the defendant bank, took with notice that John Stuart was merely a trustee of the interest in the lands for his son, and not their absolute owner. The plaintiff asked that, upon payment to the bank of what John Jacques Stuart owed to John Stuart upon the said lands, the plaintiff should be allowed in to redeem. Shortly, the plaintiff's contention was, that the conveyance was in fact a mortgage, and not a deed; and that the defendants, because aware of the fact, were in no better position than the assignees of a mortgage would be in the circumstances.

The questions for determination were: (1) Was the deed taken as security only? (2) If so, were the defendants aware that it was so taken? To entitle the plaintiff to succeed, both questions—if the defendants were purchasers for value—must be answered in the affirmative.

The plaintiff, under the will of his late father and various assignments and transfers, had the same rights against the defendants that his father would have had if he had lived.

The action was dismissed.

W. M. Douglas, K.C., and *W. J. Elliott*, for the plaintiff.

Wallace Nesbitt, K.C., and *H. A. Burbidge*, for the defendants.

LATCHFORD, J. (after setting out the facts at length and quoting portions of the testimony of witnesses):—I find the deed of the 30th October, 1900, to be what it purports to be—an absolute conveyance. I credit the evidence of Mr. Bruce that he had no knowledge that Mr. Stuart ever pretended that his half interest in the property was held merely as security from his son. That the trustees for the bank were purchasers for value, is clear. In consideration of the transfer,

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the bank abandoned their claim against the Nelson property and the household furniture of "Inglewood" (the Stuart homestead), and gave Mr. Stuart a release.

I find that John Stuart acquired by the conveyance of the 30th October, 1900, all his son's interest in the north end property, subject to no right or limitation whatever; that not only was there no interest reserved to the son, either expressly or by implication, but that no pretence was ever made to the defendants, or any of them, that John Stuart's interest was limited in the way the plaintiff asserts; that none of the defendants had at any time notice or knowledge of the alleged limitation. If there was in fact any such limitation, the defendants, as purchasers for value without notice, are unaffected by it. The Registry Act, I may mention, was, at the trial, allowed to be pleaded in amendment by the defendants.

When, in 1905 and 1906, Mr. John Stuart, personally and by the late Mr. Walter Barwick and his firm, protested against the finality of the settlement (with the bank), no claim was made that an absolute interest in the north end property had not been conveyed to the trustees for the bank; and when, in 1906, application was made for letters of administration with the will annexed to the estate of the plaintiff's father, the schedules filed disclose in the deceased no interest in the north end property.

It is difficult to avoid the inference that the present action is based on an afterthought following on the successful termination of *Stuart* v. *Bank of Montreal*, 17 O.L.R. 436, 41 Can. S.C.R. 516, *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, against the defendant bank. The reason of the decision in that case has, however, no application to this.

The action fails and is dismissed with costs.

An appeal from the above decision was dismissed May 14, 1913, by the Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Leitch, JJ., the same counsel appearing.

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JOCELYN v. SUTHERLAND.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. March 27, 1913.

JURY (§ I B 1—10)—*Trial by—Personal injuries.*]—Appeal from decision of Galt, J., *Jocelyn* v. *Sutherland*, 9 D.L.R. 457.

J. B. Coyne, for defendant.

W. H. Curle, for plaintiff.

THE COURT dismissed the appeal.

HOLSTEIN (plaintiff) v. **KNOPF** (defendant) and **NEW YORK SILK WAIST CO.** (intervenant). QUE.

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Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. April 23, 1913.

LANDLORD AND TENANT (§ III D 2—105)—*Landlord's Lien for Rent—C.C.* (*Que.*), *article* 1623.]—Appeal from the judgment of the Superior Court maintaining an intervention.

L. Garneau, K.C., for plaintiff, appellant.

R. Genest, for intervenant, respondent.

GREENSHIELDS, J.:—The landlord's privilege is not created by the agreement of the parties, but is created by the operation of law, and if by law, something must be done to conserve that privilege within a certain time. I take it that it is fatal to the privilege if the thing is not done within the time specified by law. Now, I admit that the matter is not free from difficulty. Art. 1623 of the Code reads as follows:—

> In the exercise of the privileged right the lessor may seize the things which are subject to it upon the premises, or within eight days after they are taken away. If the things consist of merchandise they can be seized only while they continue to be the property of the lessee.

It might be urged that the article contemplated or intended, that the privilege would exist until such time as there was an actual physical moving, even though a third party had become the lessee of the premises, and had bought the goods in good faith, and paid for them; but I cannot believe that where a sub-tenant has a lease from the principal tenant which expires on April 30, as did this lease, and where a third party leases the premises from the proprietor, his lease to take effect from May 1, and he does enter upon and take possession of the premises, and at the same time, or previous to that, buys some of the goods of the sub-tenant, that the privilege in favour of the principal tenant as against his sub-tenant extends beyond the eight days as against the purchaser in good faith, legally in possession of the premises in virtue of a lease with the proprietor. I believe that it is a constructive taking away, as contemplated by the law, and I believe the lapse of the eight days is a complete destruction of the privilege. If it is necessary that the purchaser should cause an actual physical removal of the goods from the leased premises, then no person who had leased, say a factory, and taken possession, could buy any machinery or tools in that factory and ever escape or be relieved from the privilege until the debt was paid or extinguished by prescription. This I cannot believe was the intention of the law, nor is it the spirit of our law, and I should confirm the judgment: *Emmans* v. *Savage*,

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24 Que. S.C. 1904, Mathieu, J. In this case the tenant placed his goods in store with his landlord, to guarantee rent due. The lessee was not the owner of the goods; it was held that there was no valid pledging, the pledger not being the owner, and it was further held that though the landlord was in possession of the goods yet he lost his privilege by not issuing *saisie gagerie* in eight days.

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REX ex rel. GARDHOUSE v. IRWIN.

York County Court, Ontario, Judge Winchester. April 2, 1913.

Ontario Supreme Court, Middleton, J. April 14, 1913.

QUO WARRANTO (§ II C—30)—*Municipal Elections—Disqualification.*]—Application in the nature of *quo warranto* to set aside the election of E. F. Irwin as commissioner of water and light for the Village of Weston, on the ground that he was disqualified to sit as such, as he was a member of the High School Board of Trustees of the Village of Weston at the time of his election as such commissioner.

C. W. Plaxton, for the relator.

James S. Fullerton, K.C., for the respondent.

JUDGE WINCHESTER:—Counsel admitted that Dr. E. F. Irwin was elected over Sydney Macklem as commissioner of water and light for the Village of Weston at the election held on the 6th January, 1913. It was also admitted that Dr. Irwin was High School trustee for the Village of Weston at that time, and still is, and that the relator was duly qualified to vote at such election and was a proper relator. Counsel for the relator contended that Dr. Irwin, being a High School trustee, was disqualified to become a commissioner of water and light under the statutes. He referred to the Municipal Waterworks Act, R.S.O. 1897 ch. 235, secs. 40 and 54, and the Municipal Act, 1903, secs. 80 and 207.

By sec. 54 of the Municipal Waterworks Act, it is provided that that Act shall be read and construed as part of the Municipal Act. Section 40 of the Waterworks Act provides for the election of commissioners as therein set forth. Section 41, subsec. 5, provides that "the place of a commissioner shall become vacant from the same causes as the seat of a member of the council of the corporation." The Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 80, sets out a list of persons disqualified from being members of councils. In the list High School trustee is included.

Section 207 of the Consolidated Municipal Act provides as to when the seat of a councillor may become vacant after his eleva-

tion, as follows: "If, after the election of a person as a member of council, he is convicted of felony or infamous crime, or becomes insolvent within the meaning of any Insolvent Act in force in this Province, or applies for relief as an indigent debtor, or remains in close custody, or assigns his property for the benefit of the creditors, or absents himself from the meetings of the council for three months without being authorised so to do by a resolution of the council entered upon its minutes, his seat in the council shall thereby become vacant, and the council shall forthwith declare the seat vacant and order a new election."

Section 208 provides for the taking of certain proceedings to unseat a member of the council, as follows: "In the event of a member of council forfeiting his seat at the council or his right thereto, or becoming disqualified to hold his seat, or of his seat becoming vacant by disqualification or otherwise, he shall forthwith resign his seat, and in the event of his omitting to do so within ten days thereafter, proceedings may be taken to unseat such member, as provided by sections 219 to 244, both inclusive, of this Act, and the said section shall, for the purpose of such proceedings, apply to any such forfeiture, disqualification or vacancy."

Sections 219 to 244 provide for the procedure in setting aside the election of a member of the council.

Counsel for the respondent contends that, while sec. 207 provides for the vacancy referred to in sec. 41(5) of the Waterworks Act, the subsequent sections of the Municipal Act do not apply, as the commissioner of waterworks is not named in any of these sections, and that there are no clauses in the Consolidated Municipal Act or Waterworks Act which make procedure under sec. 219 of the Consolidated Municipal Act applicable to a commissioner under the Waterworks Act, it being specifically applied to mayor, warden, reeve, deputy-reeve, etc. (naming them), and that there are no sections of the Act made applicable to a waterworks commissioner; and he submits that being a High School trustee is not a disqualification under the Waterworks Act; and that, if it be a disqualification, the procedure taken herein is not the proper procedure and cannot avail the relator, as the Waterworks Act provides that the place of a commissioner shall become vacant from the same causes as the seat of a member of the council of the corporation.

The question to decide is, what are the causes which will render the seat of a member of the council of the corporation vacant?

Section 80 of the Consolidated Municipal Act provides that a High School trustee is disqualified from being a member of the council of the corporation.

Section 207 states some of the causes by which a member of the council renders his seat in the council vacant.

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It appears to me that sec. 208 refers, not only to the causes rendering the seat of the member of the council vacant, after he becomes a member of the council, but also to his disqualification under sec. 80.

In my opinion, the causes which would render the seat of a member of the council vacant are set out in these sections, 207 and 208. In sec. 208 the words are, "or of his seat becoming vacant by disqualification or otherwise." What is the disqualification referred to in this section? The disqualifications referred to in the Act are those set forth in sec. 80: "No Judge . . . no High School trustee . . . shall be qualified to be a member of the council of any municipal corporation." These are disqualifications which affect a member of the council prior to his election, and which would render his seat vacant. If the commissioner of water and light must have the same qualifications as the member of the council, and his seat becomes vacant from the same causes as the seat of a member of the council of the corporation, then it appears to me that, under sec. 80, he is disqualified from becoming a waterworks commissioner, as well as for the causes set forth in sec. 207.

It was argued by the relator that there were reasons why a High School trustee should not become a commissioner of water and light, and it may very well be that conflicting interests might arise. The question of disqualification on similar ground, and reasons therefor, were set forth in Regina ex rel. Boyes v. Detlor, 4 P.R. 195. The case of a county councillor and a member of a school board came up in Rex ex rel. Zimmerman v. Steele, 5 O.L.R. 565, and Rex ex rel. O'Donnell v. Bloomfield, 5 O.L.R. 596, where it was held that it was incompatible for a school trustee to qualify as a county councillor.

In my opinion, the words of sec. 41, sub-sec. 5, of the Waterworks Act provide for the disqualification of a commissioner, and refer to the causes for which his seat may become vacant, and these causes are those set forth in secs. 80, 207, and 208 of the Consolidated Municipal Act; and "commissioner" may be read and construed as referring to a member of council in the Consolidated Municipal Act, under sec. 54 of the Waterworks Act.

I hold, therefore, that Dr. Irwin, being a High School trustee, is disqualified from becoming a commissioner of water and light for the same municipality.

I, therefore, declare vacant the seat of Dr. Irwin as commissioner of water and light for the Village of Weston.

An appeal was taken by E. F. Irwin, the respondent, from the above order of Judge Winchester, and was heard by Middleton, J., in Chambers.

H. H. Dewart, K.C., for the appellant.

C. W. Plaxton, for the relator.

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MIDDLETON, J.:—The respondent was elected to the office of commissioner of light and water in the Village of Weston, and was unseated because at the time of his election he was a member of the High School Board of that village.

The Municipal Waterworks Act, R.S.O. 1897 ch. 235, sec. 41, as amended by 3 Edw. VII. ch. 24, sec. 5, and 6 Edw. VII. ch. 40, sec. 2, provides for the constitution of the Board; and sub-sec. 5 provides that the place of a commissioner—that is, of a commissioner who has been appointed— "shall become vacant from the same causes as the seat of a member of the council of the corporation:" and sec. 43 provides that no commissioner shall be interested, directly or indirectly, in any contract. There are no sections expressly providing for the disqualification of commissioners. Elections are to be held in a manner similar to other municipal elections; and certain provisions are made by which the commissioners retire in rotation.

Section 207 of the Municipal Act provides that certain things shall cause a municipal councillor to vacate his seat in the council, and that a new election may thereupon be ordered. This provision is quite apart from sec. 80 of the Municipal Act, disqualifying certain persons from holding office in the municipal council. Section 80 provides, inter alia, that no High School trustee shall be qualified to act as a councillor; but it contains no provision preventing him from holding the position of water commissioner.

Section 54 of the Municipal Waterworks Act provides that "this Act shall be read and construed as part of the Municipal Act," and the learned Judge has held that the effect of this section is to make applicable to water commissioners all provisions found in the Municipal Act with reference to the disqualification of councillors, mutatis mutandis.

I cannot follow him in this reasoning. Assumed that the 53 sections of the Municipal Waterworks Act had been embodied in the Municipal Act; I do not see how that would enable the sections dealing with the qualification and disqualification of municipal councillors to be read as applicable to water commissioners. It is significant that sec. 53 makes applicable to the election of commissioners the sections of the Municipal Act relating to "elections." These sections, if regard is had to the divisions of the Municipal Act, commence with sec. 95, and are quite independent of the sections relating to qualification and disqualification of councillors.

In my view, the appeal must be allowed, and the original application dismissed with costs.

Both parties proceeded upon the assumption that the quo warranto sections of the Municipal Act applied to this case. I have not investigated that matter.

Appeal allowed and application dismissed.

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SOPER v. PULOS.

Ontario Supreme Court, His Honour Judge Reynolds, Local Master. May 7, 1913.

ASSIGNMENTS FOR CREDITORS (§ II—5)—*Effect of assignment—Interpleader proceedings—Preference.*]—The plaintiff, having a judgment against the defendants for the recovery of money, issued execution, under which the Sheriff seized certain goods in the possession of the defendants, which were claimed by a chattel mortgagee. The Sheriff interpleaded; and the usual order was made, directing a sale of the goods if security should not be given by the claimant, and the trial of an issue as to the claim, with a provision for other creditors coming in and taking part. No security being given, the Sheriff advertised the goods for sale, and the issue was delivered, but had not been tried when, on the 3rd May, 1913, the execution debtors made a general assignment for the benefit of creditors, and the assignee claimed the goods from the Sheriff.

The Sheriff applied for directions.

H. A. Stewart, K.C., for the Sheriff.

J. A. Hutcheson, for the execution creditors.

M. M. Brown, for the assignee.

C. C. Fulford, for the claimant.

THE LOCAL MASTER was of opinion that the assignee was not entitled to receive the goods on paying or securing the preferential costs; and that the Sheriff's sale should proceed.

As soon as the interpleader order was made and the contesting execution creditors took upon themeselves the burden of the issue, they obtained a right of preference, of which the assignment did not take precedence under sec. 14 of the Assignments Act. The sale, when held, would be under the order of the Court: *Reid* v. *Murphy*, 12 P.R. (Ont.) 338. The interpleader clauses of the Creditors' Relief Act, sec. 6, sub-secs. 4 and 5, governed.

The principle of *Re Henderson Roller Bearings, Limited*, 22 O.L.R. 306, 24 O.L.R. 356, affirmed in the Supreme Court of Canada, *Martin* v. *Fowler*, 46 Can. S.C.R. 119, was applicable, although the issue had not been tried. The execution debtors, by making an assignment at this stage, could not overrule the order of the Court and change the rights of the parties.

WARREN GZOWSKI & CO. v. FORST & CO.

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

[*Warren v. Forst*, 9 D.L.R. 879, affirmed.]

CONTRACTS (§ IV E—366)—*Breach—Tender of Shares.*]—Appeal by the defendants from the judgment of Middleton, J., 9 D.L.R. 879, 4 O.W.N. 770.

I. F. Hellmuth, K.C., and *A. McLean Macdonell*, K.C., for the defendants.

F. Arnoldi, K.C., and *D. D. Grierson*, for the defendants.

THE COURT dismissed the appeal with costs.

CITY OF MONTREAL (defendant, appellant) v. **JOHN LAYTON & CO., Limited** (plaintiffs, respondents).

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(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. April 1, 1912.

APPEAL (§ I D—32)—*Alternative rights of appeal—Effect of proceedings begun in exercise of alternative remedy—Abandonment.*]—Appeal from the judgment of the Court of King's Bench, appeal side, *City of Montreal* v. *Layton*, 1 D.L.R. 160, affirming, with some variation, the judgment of Weir, J., at the trial in the Superior Court, District of Montreal, *Layton* v. *City of Montreal*, Q.R. 39 S.C. 520, in favour of the respondents.

The respondents, plaintiffs, commenced the present action by a petition for an interim injunction to restrain the appellant, defendant, from interference with the quantity of frozen canned eggs, the property of the respondents, which the municipal health officials were about to destroy, after an alleged condemnation of the eggs as deleterious to the public health and unfit for human food and an alleged seizure thereof by some of said officials. The petition also asked that the appellant should be summoned before the Superior Court, at Montreal, to shew cause why the injunction should not be declared absolute, and also that their right to recover damages sustained in consequence of the action of the municipal officials with regard to the eggs might be expressly reserved for consideration and adjudication in such other suit or action as they might be advised to institute in that respect. An interim injunction issued and the respondent's petition was contested by the appellant. The principal grounds of the contestation were that the eggs in question were unfit for human food, of a nature generally detrimental to the public health, and that they had been duly condemned, after

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inspection and analysis by the provincial and municipal health authorities, under the provisions of the Quebec Public Health Act, R.S.Q. 1909, arts. 3867 *et seq.*, and duly placed under seizure and ordered by them to be disposed of in the manner necessary to prevent them being sold or delivered for consumption as human food.

At the trial, Weir, J., found that the proceedings taken by the municipal health officials in regard to the eggs were illegal and irregular; that the alleged seizure was invalid and should be set aside, and that the eggs were the property of the respondents and both wholesome and suitable for human food. It was, therefore, ordered, that the Gould Cold Storage Company, the *mis-en-cause*, in whose warehouse the eggs were stored, should deliver them up to the respondents and that the injunction should be made absolute against the defendant corporation interfering with the eggs in so far as might relate to acts or proceedings theretofore taken or conditions theretofore existing with respect to such eggs. On an appeal to the Court of King's Bench, this judgment was affirmed on the ground that the alleged seizure was illegal and ineffective, and the injunction was declared absolute against interference with the eggs by the defendant "otherwise than by due process of law."

Upon the 25th March, 1912, pursuant to notice, a motion was made on behalf of the respondent to quash the appeal on the grounds that there was no pecuniary amount in controversy, as shewn by the pleadings, which involved a sum or value of $2,000 as provided by the Supreme Court Act; that the appeal had not been entered within sixty days from the date of the decision appealed from, as provided by the Act; and that, as there was *lis pendens* in regard to another appeal from the same judgment taken *de plano* to the Judicial Committee of the Privy Council, there was no jurisdiction in any of the Judges of the Court of King's Bench to extend the time for appealing to the Supreme Court of Canada.

It was shewn that, upon the delivery of the judgment now appealed from, the defendant had given security, in the Court below, for an appeal to the Judicial Committee of the Privy Council and obtained the approval thereof by a Judge of the Court of King's Bench; that, within the sixty days limited for appeals to the Supreme Court of Canada, the defendant had filed in the office of the Court of King's Bench a notice that the proceedings on the proposed appeal to the Privy Council had been discontinued, and, within the time so limited, had obtained an order from a Judge of the Court of King's Bench extending the time and approving security filed for an appeal to the Supreme Court of Canada. In these circumstances it was contended that the Supreme Court of Canada had no juris-

diction to entertain the appeal and that no such appeal could lie.

S. L. Dale-Harris, on behalf of the respondents, contended that it did not appear from the record that there was a pecuniary amount of the value of $2,000 in issue on the controversy involved on the present appeal; that there was *lis pendens* in regard to the proceedings instituted for an appeal to the Privy Council, and that, therefore, the Judge of the Court of King's Bench had erred in acting upon the *désistement* filed in that Court, that, in the circumstances, no appeal could lie to the Supreme Court of Canada, and that it was not now competent to the latter Court to entertain the present appeal.

Hon. A. W. Atwater, K.C., on behalf of the appellant, shewed cause to the motion. He contended that the injunction, made absolute by the judgment appealed from, was merely an incident in a cause, matter or proceeding for the recovery of goods which were shewn, in the record, to be valued at about $100,000, and that the usual practice of the Courts in the Province of Quebec had been followed in regard to the abandonment of the proposed appeal to the Privy Council. He consequently argued that the effect of the filing of the *désistement* was to restore jurisdiction in the Court of King's Bench, and that the order made by the Judge of that Court approving the security filed for the appeal to the Supreme Court of Canada had been validly made.

It was then suggested by the Court that the appellant should now be allowed to give the notice of the withdrawal of the appeal to the Privy Council, under P.C. Rule 32, and this was done accordingly. In reply to the notice the registrar of the Judicial Committee of the Privy Council intimated that, as nothing had been received in his office indicating that such an appeal was pending, it could not properly be considered as a case requiring a notice to be given in accordance with that rule.

THE COURT, having been informed of these circumstances, reserved judgment upon the motion to quash the appeal and, on the 1st of April, 1912, there being an equal division of opinion in regard to jurisdiction among the judges, the motion stood dismissed, without costs.

Preliminary motion dismissed on an equal division.

BAKER v. MacGREGOR.

British Columbia Supreme Court. Trial before Clement, J. April 16, 1913.

PRINCIPAL AND AGENT (§ II A—12)—*Rights of undisclosed principal—Sale through stock broker.*]—Action for the price of

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shares sold by plaintiff through a stock broker, to which the defendant counterclaimed for a set-off of the broker's indebtedness to him, alleging that he dealt with the broker as a principal. Judgment was given for the plaintiff.

C. M. Woodworth, for the plaintiff.

A. M. Whiteside, for the defendant.

CLEMENT, J.:—I am not able to find that the defendant MacGregor knew on April 28, 1911, that Robertson was acting as agent for the plaintiff in taking defendant's bought-note. But he dealt with him as a broker, and I can see nothing in the plaintiff's conduct to induce a belief on defendant's part that Robertson was selling as a principal.

Cooke v. *Eshelby*, 12 A.C. 271, 56 L.J.Q.B. 505, therefore applies, and the plaintiff is entitled to judgment for $1,000 (with interest at 5 per cent. from June 27, 1911) with costs. None of the costs occasioned by making Robertson a defendant should be taxed against defendant MacGregor. The shares, the subject-matter of the "deal," are said to be worthless, but defendant MacGregor is entitled to them.

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CITY OF MONTREAL (defendant, appellant) v. JOHN LAYTON & CO., Limited (plaintiffs, respondents).
(Decision No. 3.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. February 18, 1913.

[*City of Montreal* v. *Layton*, 1 D.L.R. 160, affirmed.]

HEALTH (§ IV—20)—*Duty of health officers—Quality of food—Condemnation—Seizure — Notice — Controlling power of Courts.*]—In the Province of Quebec, in order to constitute a valid seizure of movable property there must be something done by competent authority which has the effect of dispossessing the person proceeded against of the property; notice thereof must be given; an inventory made, and a guardian appointed. Where these formalities have not been observed there can be no valid seizure: *Per* Fitzpatrick, C.J.

Extraordinary powers, conferred by statute, authorizing interference with private property, must be exercised in such a manner that the rights of the owners may not be disregarded: *Per* Fitzpatrick, C.J.

The authority conferred upon health officers by the Quebec Public Health Act respecting the condemnation, seizure and disposal of food, as being deleterious to the public health, is not final and conclusive in its effect, but it is to be exercised subject to the superintending power, orders and control of the Superior Court and the Judges thereof: *Per* Fitzpatrick, C.J., and Davies, and Idington, JJ.

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KENNEDY v. KENNEDY.

Ontario Supreme Court, Cartwright, M.C. May 20, 1913.

LIS PENDENS (§ II—10)—*Motion to Vacate—Speedy Trial of Action—Terms.*]—Motion by the defendants to vacate the registry of a certificate of lis pendens in part, and to expedite the trial.

THE MASTER said that the lands in question were wholly unimproved, and at the present time must be of a more or less speculative value. The action was by a judgment creditor to set aside a transfer made by the judgment debtor to his wife, on the ground that it was fraudulent and designed to defeat and delay the realisation of the plaintiff's judgment. It was clearly for the interest of the plaintiff, as much as for that of the defendants, that the action should proceed with expedition, and that no chance of a sale, in the present condition of activity in the real estate market, should be lost. This view was emphasised by the plaintiff's counsel, and he offered and still was ready and willing to allow any sales to be made if the purchase-money were paid into Court, or retained by the defendants' solicitors to abide the result of this action. This seemed to be a fair and reasonable arrangement, and one which it was in the interest of both parties to carry out. It would give the defendants all that the Court could properly require the plaintiff to accept. The statement of claim having been delivered on the 24th April, there was no reason why the action should not be tried some time in June. If there should be any delay, the defendants could set it down. The motion was, therefore, dismissed; costs in the cause. *O. H. King*, for the defendants. *E. D. Armour*, K.C., for the plaintiff.

STAUFFER v. LONDON AND WESTERN TRUST CO.

Ontario Supreme Court, Cartwright, M.C. May 20, 1913.

VENUE (§ II A—15)—*Action for Dower—Local Venue—Rule 529(c)—Security for Costs—Next Friend—Temporary Residence in Jurisdiction.*]—In this action, to recover dower in land in the county of Bruce, the venue was laid at Toronto. The plaintiff, a person of unsound mind not so found by inquisition, sued by her son as next friend. The defendant company moved to change the venue to Walkerton, and for security for costs, on the ground that the next friend was not resident in Ontario and had no property therein. The Master said that Con. Rule 529 (c) applied, and no ground was shewn for having a trial else-

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where than at Walkerton.—As to security for costs. The next friend was cross-examined and said that he intended to remain in Ontario during his mother's life—though for the past twenty-one years he had been in the western provinces. The Master said that the next friend came within the protection of the judgment in *Gagné* v. *Canadian Pacific R. Co.*, 3 O.W.R. 624. In that case, the action was the plaintiff's own. Here, perhaps, the remarks in *Scott* v. *Niagara Navigation Co.*, 15 P.R. 409, at p. 411, might have some application. But the facts of this case were similar to those in the *Gagné* case. The next friend was a labouring man and unmarried. It was only right and natural that he should return to his aged mother on hearing of his father's death last December, and resolve to stay here as long as she lived to look after her. Order accordingly. Costs in the cause. *W. Proudfoot*, K.C., for the defendant company. *Stanley Beatty* (*Kilmer & Irving*), for the defendant Geddes. *C. M. Garvey*, for the plaintiff.

DAVISON v. THOMPSON.

Ontario Supreme Court, Cartwright, M.C. May 22, 1913.

PLEADING (§ I S—149)—*Defence and Counterclaim—Action for Return of Bonds—Disclaimer—Interest of Third Person not a Party—Principal and Agent.*]—In this action the plaintiff asked for the return of certain bonds deposited with the defendant as security for a payment by him of $10,000 for a half share in a contemplated venture, which bonds were to be returned on a division of profits of such joint venture, which the plaintiff alleged has been made. This division apparently was not denied. The defendant, by the statement of defence, alleged that this $10,000 was only a loan to the plaintiff, and that the bonds were deposited as security for the sum lent. This loan, it was said, was made by one Charlton, who thereupon became entitled to the bonds, and the defendant disclaimed any interest in them (paragraph 7). In paragraph 11, the defendant submitted that the bonds should be delivered to him as agent for Charlton; and, in paragraph 12, the defendant counterclaimed for payment of $6,000 and interest to Charlton or to himself as Charlton's agent. It was not shewn how this $6,000 was arrived at. The plaintiff moved to strike out paragraphs 7, 11, and 12 as embarrassing. The Master said that there was nothing objectionable in paragraph 7, as it informed the plaintiff of the defendant's contention. But the other two paragraphs could not stand. There was no way in which the relief asked for in them could be granted to Charlton, who was not a party to the

action. If the defendant had a power of attorney, he could bring an action in Charlton's name; or, if he had an assignment of the cause of action, he could sue in that capacity. Here, however, he did not set up either position. On the contrary, he asserted that Charlton was the person entitled to the bonds, and the one against whom the plaintiff should proceed to recover them. Since the argument, a telegram from Charlton, dated the 19th May, was produced, in which he spoke of these as "my bonds," and asked to have them sent to him. Paragraphs 11 and 12 should be struck out, with leave to the defendant to amend in a week as he might be advised—and the plaintiff to have further time to reply, if desired. Costs of the motion to the plaintiff in the cause. *J. T. White*, for the plaintiff. *W. M. Hall*, for the defendant.

RE FERGUSON AND HILL.

Ontario Supreme Court, Cartwright, M.C. May 23, 1913.

MORTGAGE (§ VI H—131)—*Surplus Proceeds of Mortgage Sale — Execution Creditors of Mortgagor — Payment out to Sheriff—Creditors' Relief Act.*]—Hill, a mortgagee, sold the mortgaged land under the power of sale in his mortgage from Ferguson; and, on the 18th April, the surplus proceeds of the sale were paid into Court, being $550.38. There were certain execution creditors of the mortgagor; one of them had in the Sheriff's hands execution against the mortgagor alone; two had executions against the mortgagor and his wife; and two had executions against the mortgagor and his wife and another. One of these execution creditors, Purse, moved to have the money in Court paid out to the execution creditors as their rights should appear. The Master said that this could not be done. An order must go as in *Campbell* v. *Croil*, 8 O.W.R. 67, for payment out to the Sheriff of Toronto; the money paid out to be deemed to be money levied under executions against the Fergusons, and to be dealt with by the Sheriff as the Creditors' Relief Act directs. As this motion was necessary, the costs of the applicant and of those appearing on the motion might be added to their claims. *R. F. Segsworth*, for the applicant. *A. E. Knox*, for the Home Bank of Canada.

WIDELL CO. & JOHNSON v. FOLEY BROS.

Ontario Supreme Court, Cartwright, M.C. May 23, 1913.

PARTNERSHIP (§ VI—27)—*Action in Name of, after Dissolution—Absence of Authority of one Partner to Use Partnership Name—Stay of Proceedings.*]—Motion by the defendants for an

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order striking out the name of the plaintiffs and staying all proceedings. The action, according to the endorsement on the writ of summons, was by "a partnership, of whom one partner, the Widell Co., is a corporation, having its head-office in Mankato, in the State of Minnesota, one of the United States of America, and the other partner, Frank W. Johnson, resides at the city of Toronto." It appeared that the partnership had terminated. The motion was made on grounds similar to those in *Barrie Public School Board* v. *Town of Barrie*, 19 P.R. 33, where all the authorities are cited. It was supported by an affidavit of the solicitor for the defendants, to which were annexed as exhibits copies of a letter and telegram from the Widell Co., sent before action, to the plaintiffs' solicitors, disclaiming any right of action against the defendants, and notifying the solicitors that Johnson had no authority to represent the Widell Co. & Johnson partnership, for the purpose of bringing such an action. The writ was issued on the 18th April, the letter above-mentioned being dated the 7th April, and the telegram the following day. No affidavit was put in by the plaintiffs, and there had not been any cross-examination on the affidavit in support of the motion. The Master said that the motion was entitled to prevail—leaving the plaintiff Johnson to proceed as pointed out in *Whitehead* v. *Hughes*, 2 Cr. & M. 318, and in the very recent case of *Seal & Edgelow* v. *Kingston*, [1908] A.C. 579. As the Widell Co. was a foreign corporation, there might be some difficulty in carrying the suit to a successful or any conclusion, if that company was unwilling to assist, by accepting indemnity or otherwise. This, however, could be left for the consideration of the plaintiff Johnson. On the existing material, the order should go as asked staying the action until the consent of the Widell Co. is obtained. If this is not given, the plaintiff Johnson must take such steps as he may be advised to enforce this alleged claim of the partnership. Costs of the motion to the defendants in any event. *R. McKay*, K.C., for the defendants. *G. S. Hodgson*, for the plaintiffs.

ARMSTRONG v. ARMSTRONG.

Ontario Supreme Court, Cartwright, M.C. May 23, 1913.

CONTINUANCE (§ II—5) — *Grounds — Terms—Powers of Master in Chambers—Pleading—Amendment.*]—Motion by the defendant for leave to amend the statement of defence, and to postpone the trial, on the ground of the absence in Europe of her daughter, who was sworn to be a necessary and material witness in her behalf. No objection was made by the plaintiff to the amendment asked for; but the postponement was strongly

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opposed. The reason of this was, that the relations of the plaintiff and defendant, who were husband and wife, were such that they made, as the plaintiff, the husband, said, "a continual living together almost unbearable." His counsel stated it as his firm conviction that, unless the parties separated, it was by no means unlikely that one of them might lose his or her life at the hands of the other in a fit of passion. The Master said that such a condition of affairs might, no doubt, justify unusual remedies. But it was to be observed that the plaintiff was a commercial traveller, and as such was for the greater part of his time absent from the city where his wife lived. One great point in dispute was as to the custody of the young boy who was the only offspring of the marriage. Both parents were anxious to have the custody of this child; and counsel for the plaintiff was willing, on the plaintiff's behalf, to consent to the postponement if the plaintiff was given the custody meantime. This, however, the Master said, he had no power to direct or to impose as a term of postponement. The defendant seemed to be entitled to a postponement—and the trial must be postponed until the first week of the Toronto non-jury sittings after vacation. If there should be no probability of the return of the witness by that time, her evidence should be taken on commission, if the plaintiff so required. But it would be more satisfactory to have her evidence as to the conduct and habits of the plaintiff given at the trial. The witness was the step-daughter of the plaintiff. At present engaged as a trained nurse in attendance on a patient, she could not be expected to give this up and break her engagement to expedite the trial. She was clearly not in any way under the defendant's control. Order as above; costs in the cause. See *Maclean* v. *James Bay R. Co.*, 5 O.W.R. 495. *W. G. Thurston*, K.C., for the defendant. *J. W. McCullough*, for the plaintiff.

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