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ANNOTATED

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VOL. 57

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TORONTO:

CANADA LAW BOOK CO. LIMITED

84 BAY STREET

1921

CASES REPORTED.

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 57 INCLUSIVE.

Re DOMINION INCOME TAX.

THE KING v. LITHWICK (Defendant) AND COLE, ASSIGNEE OF DEFENDANT'S INSOLVENT ESTATE.

(Annotated.)

Exchequer Court of Canada, Audette, J. January 8, 1921.

TAXES (§ VI—220)—DOMINION INCOME—JUDGMENT AGAINST DEFENDANT WHO HAD ASSIGNED UNDER PROVINCIAL ACT FOR BENEFIT OF CREDITORS—PRIORITY OF DOMINION CROWN—CONSTITUTIONAL LAW.

The Crown, in right of the Dominion of Canada, is entitled to be paid the amount of a judgment for income tax under 10-11 Geo. V. 1920 (Can.) ch. 49, obtained by it against a debtor who has made an assignment under the Ontario Assignments and Preferences Act, R.S.O. 1914, ch. 134, in priority to all other creditors of the same class.

[*The Queen* v. *Bank of Nova Scotia* (1885), 11 Can. S.C.R. 1, and *Liquidator of Maritime Bank* v. *Receiver General of New Brunswick*, [1892] A.C. 437, referred to.]

A provision in a provincial Act relating to assignments for the benefit of creditors cannot, *ex proprio vigore*, take away any privilege of the Crown as a creditor in right of the Dominion.

[*Gauthier* v. *The King* (1917), 40 D.L.R. 353, 56 Can. S.C.R. 176, referred to.]

Statement.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant the sum of $760.66 representing the amount of income war tax due by him for the year 1917; and praying that the said amount be paid by priority.

C. P. Plaxton and *R. B. Law*, for plaintiff.

W. L. Scott, for defendant Cole.

The facts of the case are fully stated in the judgment.

Audette, J.

AUDETTE, J.:—This is an amended information exhibited by the Attorney-General of Canada to recover from the above defendant, by priority, the sum of $760.66 as representing the amount of income war tax due by him for the year 1917.

The defendant, although duly served with the original information has made default in filing any statement in defence but appeared by counsel on the issues raised by the amended information, at the hearing on the 5th instant.

The assignee was added as defendant herein and from his affidavit, to which is attached a copy of the resolution authorising him to contest the Crown's claim to priority, it now appears that the creditors are duly represented in the present proceedings.

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EX. C.

RE DOMINION INCOME TAX.

THE KING v. LITHWICK (DEFENDANT) AND COLE, ASSIGNEE OF DEFENDANT'S INSOLVENT ESTATE.

Audette, J.

The amount for which judgment is asked is not contested, the only controversy arising herein is as to whether the amount of income tax due by defendant is to be paid in full in priority to all other creditors of equal degree who are herein represented by Assignee Cole (sec. 9).

As stated by Lord Watson in *The Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick*, [1892] A.C. 437 at 441:—

The Supreme Court of Canada had previously ruled, in *Reg.* v. *Bank of Nova Scotia* (1885), 11 Can. S.C.R. 1, that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial bank, is entitled to priority over other creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law.

Unless this priority to which the prerogative attaches in favour of the Crown has been taken away by competent statutory authority, I must find it is still good law. Much more so, indeed, where it is not only in connection with an ordinary chirographic claim, but in respect of a claim for taxes—income taxes.

I am unable to follow the contention asserted at Bar on behalf of the assignee that the Assignments and Preferences Act, R.S.O. 1914, ch. 134, established that all creditors must be collocated *pari passu* or on a basis of equality, and that the assignment by the insolvent takes away any priority any claim might have had.

In the first place, this Ontario Act could not, *ex proprio vigore*, take away or abridge any privilege of the Crown in the right of the Dominion. The distribution is made under a provincial statute that cannot affect the rights of the Federal Crown. *Gauthier* v. *The King* (1918), 40 D.L.R. 353, 56 Can. S.C.R. 176, *per* Anglin, J. Then the argument, on behalf of the assignee, seems to confuse an assignment in the nature of a conveyance with the assignment contemplated by the Act, which is for the express benefit of the creditors—the Act itself, by sec. 5, recognising privileges.

What might have given rise to the contention offered on behalf of the assignee in refusing the priority sought by these proceedings is the decision of the Courts of Ontario in *Clarkson* v. *Att'y-Gen'l of Canada* (1888), 15 O.R. 632; (1889), 16 A.R. (Ont.) 202; but the authority of that decision has now been impaired by the decision of His Majesty's Committee of the Privy Council in *Re New South Wales Taxation Commissioners* v. *Palmer*, [1907] A.C. 179 at 185, wherein it is said:—

The attention of their Lordships was called to the case of *Re Baynes* (1898), 9 Queensland L.J., 33, at p. 44, which has already been mentioned, and a case in Ontario, *Clarkson* v. *Att'y-Gen'l of Canada*, 15 O.R. 632; 16 A.R. (Ont.) 202, in both of which the right of the Crown to preferential payment out of assets being administered in bankruptcy was denied. Their Lordships have carefully considered those cases. With every respect to the Courts by which they were decided, their Lordships cannot help thinking that in both cases the Judges have not sufficiently kept distinct the two prerogatives which formed separate grounds of decision in *In re Henley & Co.* (1878), 9 Ch. D. 469. The judgments are devoted in a great measure to a consideration of the prerogative under which the Crown was entitled to peculiar remedies against the debtor and his property, and of the law and the authorities bearing upon it. The principle upon which that prerogative depends is not to be confounded with the principle invoked in the present case. The prerogative, the benefit of which the Crown is now claiming, depends, as explained by Macdonald, C.B., in *The King* v. *Wells* (1807), 16 East 278 note, 104 E.R. 1094, upon a principle "perfectly distinct . . . and far more general determining a preference in favour of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's right concur and so come into competition."

In *Att'y-Gen'l for N.S. Wales* v. *Curator of Intestate Estates*, [1907] A.C. 519, it was held that the Insurance Act therein mentioned did not bind the Crown which was entitled to be paid by virtue of its prerogative in priority to all other creditors of the deceased.

The case of *Sykes* v. *Soper* (1913), 14 D.L.R. 497, 29 O.L.R. 193, was also mentioned at Bar but has no importance here in view of the above decision in the *Palmer* case, [1907] A.C. 179.

The decision in *In re Henley & Co.* (1878), 9 Ch. D. 469, above referred to, decided that when a company is being wound up the Crown has a right to payment in full of a debt due from the company for property tax before commencement of the winding up, in priority to the other creditors. See also *Re Oriental Bank Corp.* (1884), 28 Ch. D. 643.

Then in *In re Laycock*, [1919] 1 Ch. 241, also decided that sec. 33 of the Bankruptcy Act, 4-5 Geo. V. 1914, ch. 59, which after giving statutory priority to certain Crown and other debts in the distribution of a bankrupt's or deceased insolvent's property, provides that subject thereto all debts shall be paid *pari passu*, does not apply to the private administration of a deceased insolvent's estate out of Court, and therefore does not affect the *common law* priority of any Crown debt in such a case.

In *In re Galvin*, [1897] 1 Ir. R. 520, it was held that the Crown was entitled to priority in respect of legacy duties.

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EX. C.

RE DOMINION INCOME TAX.

THE KING v. LITHWICK (DEFENDANT) AND COLE, ASSIGNEE OF DEFENDANT'S INSOLVENT ESTATE.

Audette, J.

A number of authorities in support of this view will also be found in Robertson on Civil Proceedings, 1908 ed., pp. 164 *et seq.*

The Canadian Income War Tax Amendment, 10-11 Geo. V. 1920, ch. 49, sec. 10, sub-sec. 9, further provides that in cases wherein assignees, etc., are administering and distributing estates etc., they shall pay any tax and surtax and penalties assessed and levied in respect thereto *before making any distribution of the said property, business or estate.* The Act thereby recognises and preserves the priority, if the tax has to be paid before distribution is made.

Moreover, statutes made for the benefit of the Crown must be beneficially construed, 27 Hals., p. 166, para. 317.

Income tax owing to the Crown has priority over all other unsecured debts, 16 Hals., p. 684, para. 1394.

The rule of law formulated in the maxim *quando jus domini et subditi concurrunt, jus regis praeferri debet*, cited by Strong, J., in *The Queen* v. *Bank of Nova Scotia*, 11 Can. S.C.R. 15 and approved of in the case of *The Liquidators of the Maritime Bank* v. *Receiver General of N.B.*, [1892] A.C. 437, has still full force and effect and must be followed.

Therefore there will be judgment condemning the defendant Lithwick to pay, as prayed, the sum of $760.66 with interest and costs, and ordering the added defendant Cole, in his capacity of assignee, as aforesaid, to pay the same to the plaintiff in full priority to all creditors of equal degree of the said defendant Lithwick. *Judgment accordingly.*

Annotation.

ANNOTATION.

DUTIES IMPOSED BY DOMINION INCOME TAX.

The duties imposed by the Income War Tax Act, 7-8 Geo. V. 1917 (Can.), ch. 28, upon persons acting in a fiduciary or representative capacity, may be grouped under six heads:

1. Sub-sec. 6 of sec. 3, as amended by 10-11 Geo. V. 1920, ch. 49, provides that: "Income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity as if such income were the income of an unmarried person." This is interpreted by the Department of Finance to mean that where the whole or any portion of the income of an estate received by a trustee is not payable in the year of receipt to any beneficiary, as for example, where there is a direction in the will to accumulate the income until the happening of some future event or until some one is born or definitely ascertained, the trustee must deliver a return of the portion of

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the income not distributable on what is known as Form T.1. The trustee must pay the tax due in respect of the income in the same manner as is required in the case of a personal return. As the trustee as such can have no relatives, the maintenance of which gives an unmarried person an exemption of $2,000, the exemption from normal tax to which the trustee is entitled is $1,000. It has to be noted that this sub-section is retrospective in its operation to the commencement of the 1917 taxation period. As the Act provided no penalties for delay in delivering returns for 1917 or 1918, returns for these years may still be filed without penalty. Where returns for 1919 are filed after May 31, 1920 (the time for delivering of returns having been enlarged by the Minister from April 30, to May 31), the taxpayer is subject to a penalty of 25% of the amount of the tax payable. This penalty, however, was reduced by Order in Council to a penalty of 5% of the amount of the tax payable, the penalty in any case not to exceed $500.

Where a trustee has discretion as to the amount which he may pay to a beneficiary out of the income of an estate, the amount retained by the trustee has to be returned as income under this sub-section. While there may be cases where the income of an estate is not payable to any beneficiary during the taxation year nor accumulated in trust for the benefit of "unascertained persons" or of "persons with contingent interest," it was apparently the intention of Parliament to provide that all incomes should be taxed regardless of the disposition made of them and if any part of the income of an estate is not taxable as part of the income of a beneficiary, the trustee is only safe if he makes a return of such income himself. The amounts received by beneficiaries, or amounts which they are entitled to receive whether they actually withdraw them or not are of course part of the income of the beneficiaries and must be shewn by them in their personal returns. The residence of the probable or possible beneficiary is immaterial in determining whether the trustee is liable to taxation. The tests which would be applied to ordinary residents or non-residents would be applicable to the trustee. Where there are two trustees of an estate, one resident in Canada and the other resident outside of Canada, the question as to whether the income of the estate, taxable in the hands of the trustees, should be taxed as the income of a resident or of a non-resident, may present some difficulty. Probably such facts as the residence of the managing trustee and the place of receipt of the income would be taken into consideration by the Department. Cases where the beneficiaries voluntarily allow income, to which they are entitled, to accumulate in the hands of the trustee either for their own benefit or for some other purpose, have to be distinguished from those cases where the income accumulates under the direction of the testator or under the discretionary power of the trustee. In the former case it is income of the beneficiary.

2. Sub-sec. 9 of sec. 7, as enacted by 10-11 Geo. V. 1920, ch. 49, sec. 10, provides: "In cases where trustees in bankruptcy, assignees, liquidators, curators, receivers, administrators, heirs, executors and such other like persons or legal representatives are administering, managing, winding up, controlling, or otherwise dealing with the property, business or estate of any person who has not made a return for any taxable period or for any portion of the taxable period for which such person was required to make a return in accordance with the provisions of this Act, they shall make such return and shall pay any tax and surtax and interest and penalties, assessed and levied with respect thereto before making any distribution of the said property, business or estate."

Annotation.

Sub-sec. 10 of sec. 10, immediately following the above, provides that: "Trustees in bankruptcy, assignees, administrators, executors and other like persons before distributing any assets under their control shall obtain a certificate from the Minister certifying that no unpaid assessment of income tax, surtax, interest and penalties properly chargeable against the person, property, business or estate as the case may be, remains outstanding. Distribution without such certificate shall render the trustees in bankruptcy, assignees, administrators, executors and other like persons personally liable for the tax, surtax, interest and penalties."

It is understood that the Department allows the representatives of a deceased person a reasonable time within which to make returns without penalty, but that a penalty accrued at the date of death of the deceased continues in force. For example, if a person dies towards the end of April, it would be improbable that the executors or administrators could obtain probate or administration by April 30, the last day for the delivery of the return. It is not likely that the Department would claim any penalty provided the executors or personal representatives observe all due expedition in filing a return after obtaining probate or administration. On the other hand, if the deceased before his death had allowed the prescribed time to elapse and the penalty for failure to file the return within the time limited by the Act had consequently accrued before his death, it would be payable by the personal representative along with any tax found due. Once the representative makes a return he must pay the tax and is subject to interest and penalties as in the case of a personal return.

Sub-sec. 9 provides for the case where a deceased or insolvent person has neglected to file returns at the proper time. Sub-sec. 10 covers the case where a deceased or insolvent person has made proper returns, but has not paid the tax due in respect thereof. These sub-sections impose no duty upon the trustee to see to it that beneficiaries of the estate made proper returns. His duties are confined to carrying out the obligations of the deceased insolvent.

On a question of priority, see the *King* v. *Lithwick*, *ante* p. 1. Trustees, assignees, etc., to protect themselves, should make enquiry of the Commissioner of Taxation as to what returns have been made by the deceased or insolvent person and what taxes, if any, are in arrears. There may be cases where an executor or administrator is satisfied beyond a doubt that the deceased was not liable to tax, but he can not be certain that the deceased has not been called upon to make a return. It is questionable whether the duty imposed upon trustees, etc., by sub-sec. 9, 10-11 Geo. V. 1920, ch. 49, sec. 10, extends to the delivery of returns other than personal returns. Returns on what are known as Forms T.3, T.4 and T.5 are returns required "in accordance with the provisions" of the Act, and this sub-section states that trustees, etc., shall make such returns. It is probable that by this sub-section it was intended to make the legal representatives responsible for the delivery of returns, in respect of which taxes might be payable, and in practice this is all that is required by the Department. See note under head 4.

3. Sub-sec. 11 of sec. 7, as enacted by sec. 10, 10-11 Geo. V., 1920, ch. 49, provides that: "Every agent, trustee or person who collects or receives or is in any way in possession or control of income for or on behalf of a person who is resident outside of Canada, shall make a return of such income, and

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in case of default by such non-resident of the payment of any tax payable, shall, on being so notified by the Minister, deduct the amount of such tax from either the income or other assets of such non-resident in his hands, and pay the same to the Minister."

This sub-section specifies no time within which the return referred to must be made by the agent or trustee, nor the form in which the return must be made. The form required is presumably Form T.1 and is in practice only required to be delivered upon demand by the Minister. With the introduction of the system of payment of the tax by instalments, a literal fulfilment of the provisions of this sub-section seems impracticable.

4. Sub-sec. 3 of sec. 7, 7-8 Geo. V. 1917, ch. 28 (amendments 9-10 Geo. V. 1919, ch. 55, sec. 5), provides: "If a person is unable for any reason to make the return required by this section, such return shall be made by the guardian, curator, tutor or other legal representative of such person, or if there is no such legal representative, by some one acting as agent for such person, and, in the case of the estate of any deceased person, by the executor, administrator or heir of such deceased person, and if there is no person to make a return under the provisions of this sub-section, then such person as may be required by the Minister to make such return."

This sub-section was contained in the original Act of 1917, 7-8 Geo. V. ch. 28, and refers to the personal return on Forms T.1, T.1a or T.2, and also to the returns required from trustees, employers or corporations giving information as to the income of the trust, salaries paid to employees or dividends paid to shareholders respectively (Forms T.3, T.4 and T.5).

Sub-sec. 9 of sec. 10 referred to under head 2 above, appears to be in part a repetition of this sub-section, both apparently imposing a duty upon the representative of deceased persons to file returns not delivered by the persons they represent. The penalty contained in sub-sec. 6 of sec. 7, as enacted by 9-10 Geo. V. 1919, ch. 55, sec. 5, which provides for cases where persons, other than those required to make returns under sub-sec. 1 of sec. 7, who fail to make a return within the time limited therefor, will be subject to a penalty of $10 for each day during which the default continues, appears to apply to default under sub-sec. 3.

The word "unable," as used in the sub-section (7-8 Geo. V. 1917, ch. 28), has not as yet been interpreted by the Department, but probably means unable on account of physical or mental incapacity, or on account of immaturity. Guardians and committees should therefore make returns where their wards have taxable incomes, or if a demand is made for a return. If the ward is liable to make a return on Form T.3, T.4 or T.5, it may be the duty of the guardian to make it.

5. Sub-sec. 4 of sec. 7, as amended by 8-9 Geo. V. 1918, ch. 25, sec. 6, and 9-10 Geo. V. 1919, ch. 55, sec. 5, provides *inter alia*: "And all persons in whatever capacity acting, having the control, receipt, disposal or payment of fixed or determinable annual or periodical gains, profits or income of any taxpayer shall make and render a separate and distinct return to the Minister of such gains, profits or income, containing the name and address of each taxpayer. Such returns shall be delivered to the Minister on or before the 31st day of March in each year without any notice or demand being made therefor, and in such form as the Minister may prescribe."

The above provision is extremely broad and imposes the duty of making the return without demand upon many persons who have not as yet been

Annotation. required to deliver returns by the Department except upon demand. The form prescribed (T. 3) provides for the delivery of certain information by trustees, executors, administrators, assignees, receivers or persons acting in a fiduciary capacity. These forms have to be delivered to the Inspector of Taxation for the district in which the person making the return resides. A separate return has to be made for each trust or estate administered by the trustee, or trust corporation. The Department under this sub-section has the right to call for returns from such persons as brokers, real estate agents, lawyers and any other persons handling the funds of their clients, and if a form should be prescribed by the Minister suitable for use by such persons, they would be required to make a return giving the information required relative to the persons for whom they have acted during the taxation year.

It is understood that at present only those persons named on Form T.3 need file a return under this provision. Others within its scope may wait until a demand is made upon them. As soon, however, as a form is prescribed no demand is necessary on the part of the Department.

6. Where persons acting in a fiduciary or representative capacity carry on a business in such capacity, they may be liable to deliver a return of employees on Form T.4 on or before March 31 of each year.

It will be seen that upon the appointment of a trustee, he may be liable to make a return under any one or more of the above heads. Under certain circumstances he may be liable to make a return under all of them.

RE GRAND TRUNK ARBITRATION.

Re GRAND TRUNK ARBITRATION.

Sir Walter Cassels, Hon. W. H. Taft, Sir Thomas White. February 7, 1921.

EVIDENCE (§ XI F—796)—GRAND TRUNK R. CO. ARBITRATION—VALUE OF STOCK TO HOLDERS—ADMISSIBILITY OF EVIDENCE OF PHYSICAL VALUE OF PLANT.

In an arbitration proceeding to determine "the value, if any, to the holders thereof, of the preference and common stock" of the Grand Trunk Railway Company as of the date fixed, the Arbitration Board held, Hon. W. H. Taft dissenting, that evidence was not admissible to prove the reproduction value of the physical plant of the system as a going concern.

Statement.

RULING of the Grand Trunk Railway Co. Arbitration Board as to the admissibility of certain evidence.

Pierce Butler, H. A. Lovett, K.C., *Hector McInnes*, K.C., *E. F. Newcombe*, for the Government of the Dominion of Canada.

Eugene Lafleur, K.C., *W. H. Biggar*, K.C., *Hon. A. W. Atwater*, K.C., *Hon. F. H. Phippen*, K.C., for the Grand Trunk Railway Company of Canada.

Sir Walter Cassels.

SIR WALTER CASSELS:—I regret to say that there is a difference of opinion between the members of the Board on the important question raised on Friday.

I will read you my views. I have thought it better to put them into a written memorandum.

A question of importance in the determination of the subject matter submitted to the Board has arisen; viz.: The admission of a certain class of evidence tendered on the part of the Grand Trunk Railway, by Mr. Phippen.

Mr. Kelley, during the greater part of three days, has given valuable evidence as to the capacity of the Grand Trunk System, excluding the Grand Trunk Pacific, to do a profitable business and earn in the future a return sufficient to meet the interest on its indebtedness and give a return to its shareholders.

He has detailed at great length the capacity of the terminals at Chicago and other points such as Portland, Toronto, and so on; and as to the structural construction of the railway and so forth.

I suggested at the meeting of November 5 last that it would be wise, in my opinion, to have the basis of valuation discussed before any evidence was adduced.

This course was not considered to be in the interest of the Grand Trunk Railway shareholders, and the Board were not prepared to force upon the counsel for the Grand Trunk Railway any particular manner in which they should present their case.

Now, however, the direct point comes up for determination as the question has arisen and the decision one way or the other may affect the proceedings of the arbitration, its duration, and so forth.

Mr. Vaughan was produced as a witness, and is asked the value of the engines, assuming they were all new in 1920, and to then work back.

Mr. Phippen also states that the evidence he proposes to adduce is evidence of the value of the engines belonging to the Grand Trunk System and which pass with the property under the sale of the stock.

I said to Mr. Phippen: "And, I apprehend, a great deal of other rolling stock?"

Mr. Phippen's reply was: "I am not limiting it to engines. The object is to disclose the money value of the engines."

RE GRAND TRUNK ARBITRATION.

Sir Walter Cassels.

The effect of such evidence, if allowed, would be that evidence may be given as to the money value of every tie, every car, every mile of the land covered by the system, the money value of the terminal property in the various points of the system, as if the railway were broken up and sold piecemeal.

If such evidence is properly admissible the fact that the additional burden cast upon the arbitrators would be great, and the cost of the arbitration enormously increased should have no weight on the question of whether such evidence should be received.

If on the other hand such evidence should not be received, or if received would not be of value in subsequently arriving at a decision as to the value of the stock, then in my judgment such evidence should not be admitted.

I am of the opinion that such evidence should not be received. I think it is legally inadmissible, and I cannot see how it can bear upon the questions we have to decide. Moreover, if received, it would have no weight when considering the value of the stock. I therefore consider it my duty at the present time to give expression to my views on the subject.

I have considered the authorities cited by counsel, and various other authorities.

I do not think the view put forward by Mr. Lafleur, that this is in the nature of a compulsory expropriation, is correct. Even if it were, I fail to see what difference it would make.

The question of the value of the stock is one arrived at between the Government and the Grand Trunk after prolonged negotiation.

The correspondence is shewn in the Blue Book submitted to Parliament. It culminated in an agreement whereby the Grand Trunk System passed to the Government at a fixed sum in assumption of burdens and liabilities, claimed by the Government to be adequate compensation, if any additional amount should be paid for the three preference stocks and common stock, as claimed by the Grand Trunk, this amount also to be assumed by the Government in manner provided by the agreement.

The arbitrators are to determine the question and find whether any further sum should be paid, the award not to exceed $64,166,666.

The agreement provides that: "The value if any to the holders thereof of the preference and common stock shall be determined by the arbitrators."

The agreement contemplates the continued operation of the Railway System. The liabilities of the debenture stocks of the railway and other liabilities of the railway have been assumed.

To have a valuation as if the system were disintegrated and broken up, is to my mind not permissible.

The true method of arriving at the value of the stock is in my judgment to ascertain the earnings of the railway in the past, properly applicable to dividends, and the potentialities of the future. How far ahead, is a matter for future discussion. I cannot say anything about that.

It is argued that assuming what I have stated to be the correct method of arriving at the value of the stocks, that we should also assume a reasonable rate will be allowed in the future on passengers and freight carried by the system, and the contention is put forward that to arrive at this rate we should take evidence of the money value of a scrapped road.

In the American cases a difference exists between the principles that are applicable in rate cases and those that are applicable as between vendor and purchaser.

The railway passed out of the hands of the company as far back as the date of the appointment of the committee—said to be May, 1920—and possibly the date of the agreement, made March 8, 1920.

Increases in rates have been granted from time to time as detailed by Mr. Kelley.

The stock passed to the Government certainly not later than May, 1920. It is of that date or March 8, 1920, that the stocks have to be valued. The question will naturally arise whether any further increases can be considered. If so, how far ahead are we to look for future increases in rates? I prefer to express no opinion on this question until the question is discussed.

In any event it seems to me to be absurd to allow a mass of evidence with the view of endeavouring to determine what the Railway Board may conclude to be fair rates in the future if application be made to them. The question is too remote.

RE GRAND TRUNK ARBITRATION.

Hon. W. H. Taft.

Similarly with the American lines. Are we to take evidence of the values of the various other railways forming part of the various groups? How could we do so, and without doing so of what possible use is the value of the American Lines of the Grand Trunk System alone? Even if we spent months in this endless research, we would not reach any result. That is the view I hold.

HON. W. H. TAFT (dissenting):—This arbitration is a proceeding to determine the value, if any, to the holders thereof, of the preference and common stock of the Grand Trunk Railway Company of Canada, amounting in its par or nominal value to about £37,000,000. It is the final step in the purchase of the whole capital stock and entire control, use, and enjoyment of the railway of the company, the compensation to be paid for the debenture and guaranteed stock of the company having been fixed definitely in the contract and confirmatory statute. The Government is getting control of the whole railway in the purchase and this is to determine an unfixed part of the compensation for that complete control.

The question now presented is as to the admissibility of evidence. Mr. Kelley, the President of the railway company, has testified to the general character of the railway, its present earning capacity, the adaptability of its motive power, car equipment, trackage and terminals, to secure and do a large business. An expert witness, Mr. Vaughan, is now introduced, who has examined with close attention the motive power of the company and it is proposed to ask him what the reasonable reproduction cost of that motive power is. This evidence is to be followed by similar evidence as to the reproduction cost of all the other property of the company used by it in carrying on its business, discharging its public duties, and earning its compensation for service performed, with evidence as to the depreciation of the present property.

It is proposed in this way to shew the amount of money which would have to be invested now to reproduce a unit railway as a going concern to do the work which the Grand Trunk has to do, and will continue to have to do. This is offered as an aid to the arbitrators in determining the value of the whole stock of the railway company and thus in determining the value, if any, of the preference and common stock.

The question here is not what weight should be given to this reproduction value of the entire physical plant of the railway. It is only whether the arbitrators should permit the railway company to put in the evidence as shewing one of the factors or circumstances which may be reasonably considered by them in fixing the value of the stock.

If what is here being purchased were only a part of the shares of stock of the railway company, it might be that the best and perhaps the only evidence which should control us would be its market value if it was quoted or known; but obviously such market value for shares selling in lots on the Stock Exchange would be no conclusive guide for the purchase of all the stock, and the complete control. Indeed the twentieth section of the Act Confirming the Grand Trunk Railway Acquisition Act 10-11 Geo V., 1920, ch. 13, warns the arbitrators of the danger of such a standard by instructing them that they shall not take into account the fluctuation, if any, in the market prices or quotations of the said preference and common stock caused by the negotiations between the parties hereto, the passing of the Act, or the execution of the agreement, and expressly excludes the inference that it was intended to indicate affirmatively that market prices were relevant. Without saying that market quotations may not be admissible, it is clear that we must look for other means of determining the issue here. The whole stock of the railway is valuable or otherwise as the ownership and control of the physical property of the railway as a going concern in the discharge of its public duties will enable it to earn a sufficient amount to pay dividends on the stock. We are, therefore, to capitalise its net earning capacity present and potential, and fix the value of the stock on that basis. Its earning capacity, present and potential is what it now earns and what it may be expected to earn under reasonably probable conditions. Net earnings are the revenue received less the operating expenses. What determines the revenue of a going railway are the amount of its business and the rates it can charge. Even if we assume that the company may charge what it pleases and is only effected by competition, we may properly assume that in the long run the rates which it charges will have a tendency to produce a

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net reasonable return, on the investment necessary to reproduce at the time of enquiry, a railway which would do the work to be done for the public with efficiency and economy. It is true that because railway properties are in existence and must do their public duty, competition sometimes reduces rates and net earnings below reasonable return, but in the long run and in deciding the admissibility of evidence it is proper to assume that the economic law will secure for a railway the earnings which would be a reasonable return on what it would cost to substitute for it an efficient and economic railway to do the work. But the rates of compensation for the services of the railway are not left, in Canada and the United States, to competition. Experience has led to the appointment of public utility commissions to regulate and to fix such rates. There is such a Board in Canada, and we can properly assume that in fixing those rates in the future the Canadian Commission will grant rates that will secure a fair return on the amount of capital needed to reproduce the railway doing the work efficiently and economically. That is a fair and just rule. The character and effect of the rule will be wholly within the control of the Government purchasing this stock and it is not to be inferred that it will permit the Railway Commission, its own creature, not to do justice to its own railway. It is said that the Canadian Commission has adopted no such rule, and that it is impossible to tell by what rule it is guided. Perhaps this is because it has found it necessary and wise to follow in its rates the rates which would conform generally to the rates fixed in the United States. The rule of fair return on necessary value invested is the rule of the Government of the United States, and a considerable part of the lines of the Grand Trunk Railway is within the jurisdiction of that Government. The matter of fixing rates was originally left to the discretion of the Interstate Commission of the United States, with the direction only that the rates should be reasonable. But the result was that the rates fixed by the Commission were not high enough to enable the railways to prosper, and that the system came near to a complete breakdown. Congress, therefore, passed a law which adopted specifically the principle that the public service rendered by railways should be compensated for by rates which shall secure a fair

return upon the railway property used in the service of transportation under honest, efficient, and economical management. The Commission is to form railways into groups serving the same zone of territory and then ascertain the aggregate value of all the railways in the group and fix the rates to secure a fair return on the aggregate. This is to fix the rates according to the average physical value of the existing railways engaged in the service, which is only an alternative method of determining the amount of capital needed to reproduce a railway which could render the service efficiently and economically, assuming that the average value of all railways engaged in the service would be the cost of such a new railway. If it differs from that cost it must be greater and so is more liberal to the railways. My reference to the new Transportation Act of Congress, it is suggested, is without weight because such groups of railways have not yet been formed by the Commission and may never be. I have no doubt the Commission will proceed to execute the law as directed. Meantime under the inspiration of the Act, and more certainly to secure a return on the immediate investment the Commission has increased the traffic and passenger rates most substantially, and, as I understand it, the Canadian Commission has followed suit. It is not the particular method in reaching the actual present investment in railway property as the basis for fixing rates, which is important; it is the fact that the principle has been recognized by the statute, and will be followed in the future. This is what makes it proper for us in trying to determine future probable rates to allow evidence of such a factor.

In the cases coming before the Courts of the United States, where the question of rates either as being reasonable or as being confiscatory, was involved, it has been invariably held that the reproduction cost less depreciation is proper and legal evidence to aid in the fixing of reasonable rates. We have had evidence of Mr. Kelley that the rates in Canada necessarily approximate those in the United States, and this must be so, because the two great Canadian Trunk lines are competitors between termini in the United States and the trunk lines of the United States from Chicago to the seaboard, and between the Pacific and Atlantic seaboards. When we add to this the fact that 1,800 out of the 4,700

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miles of the railway passing now to the control of the Canadian Government are in the United States, it would seem to be fair to admit into evidence that reproduction cost of the railway upon the basis of which the future return to the purchaser may fairly be determined, and in all probability will be determined.

If this factor in anticipating and judging what will be the future earning capacity of that which is being sold is denied the railway stockholders, it is a serious and unjust restriction upon them in this case. In view of the transitory, disturbed, and temporary status of railway and general business, it is quite unfair to limit them in their proof of what the railway may be reasonably expected to earn in the future in the hands of the Government, to the actual earnings to-day, and the earnings in the past.

The evidence offered is not to shew the value of the disintegrated parts of the railway to be scrapped or for scrapping purposes. It is an offer to shew its reproduction cost as an entirety and as a going concern. This can only be done by shewing the present cost of motive power, of car equipment, of roadbed and track *in situ*, of terminals and all other accessories to a completly fitted railway needed to do the work of the Grand Trunk with efficiency and economy. This is not an attempt to value parts. It is a proffer to value the whole unit machine as it ought to be to do the work.

It is objected that the Government would be forced to bring in evidence of the cost of other American and Canadian railways to rebut this shewing of reproduction value. This is not at all necessary. The Government can meet the evidence, if disputable, by shewing the lack of economy and efficiency in the present railway, or the one proposed to be reproduced, by shewing original bad planning, or any other defect affecting its usefulness as a net revenue producing instrument and by proof of the great amount of additional expenditure on changes needed to render it effective and economical.

The only adjudicated cases on the subject of fixing railway rates are in the United States. There are no English cases. There are no Canadian cases. All the cases in the United States,

and they are legion, hold that reproduction cost of the railway which will do the work economically is proper evidence, and indeed necessary evidence in fixing rates.

I have attempted to set forth why, in my judgment, we should be able to judge what net earnings those rates are likely to be made to produce for the railway, by knowing what it will cost to reproduce an economical railway to do the duty of this Grand Trunk Railway.

It is urged that a different rule of evidence from that in rate cases should obtain in a case of sale and purchase like this, and that in such a case it is only the earning capacity which can be considered, and that value of the reproduction cost is inadmissible.

But the relevancy and usefulness of such evidence is not confined to rate cases. Mr. Whitten, an American text writer on the valuation of Public Service Corporations, has been quoted to sustain the view that in the case of purchase, evidence of reproduction or other cost is inadmissible. A reading of the book does not justify such a conclusion. He says, speaking of purchase, in the passage quoted, at p. 41:—

> An appraisal of value is usually based on market price. A thing is worth what a responsible bidder will offer. An appraisal is an estimate of the amount that will normally be offered. It is thus that a piece of land is appraised, and it is thus that a public utility plant would be appraised if it were a question of its transfer from one private proprietor to another. The market value theory recognises most consistently that the business, whether it be a gas plant or a great railroad system, must be valued as a single unit. There is but one value and that the value of the going business concern. *Structural costs, depreciated condition and many other things are considered,* but only for the purpose of gauging the net income.

This directly sustains the use of reproduction structural cost as evidenced in all such cases. The author follows this with a statement by Mr. Lawrence, a member of the Washington Railroad Commission, in his report as Chairman of the Committee on Railroad Taxes and Plans for ascertaining the fair value of railroad property, to the National Association of Railway Commissioners in 1910, in which he lays down the most important facts on which to base a determination of the value of railroad property, and among those enumerated are the cost of reproduc-

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tion new and the depreciated value. He is fully sustained in his conclusions by two cases of purchase by municipalities of public utility water companies. They are decisions of the Supreme Court of Maine: *Kennebec Water District* v. *City of Waterville* (1902), 97 Me. 185; *Brunswick and Topsham Water District* v. *Maine Water Company* (1904), 99 Me. 371. Brewer, J., of the Supreme Court of the United States, sitting in the Federal Circuit Court, in considering the taking over value of a utility corporation, a street car line, recognised and acted on the present investment as one factor in fixing the price to be paid, and it was stated in argument that the language of his judgment had secured the approval of the Supreme Court of the United States in an opinion in another case.

The reason why there are not more cases on the exact point in issue here is that the issue usually arises over the question whether in the taking over by the public of a public utility, the probable earning capacity of a company whose value depends on a franchise of the public will not be an unjust price for the public to pay, and the company seeks to avoid making the price turn on what has been called the mere "bare bones" value of the property used.

So, too, the issue is frequently whether to such a value may be added something for the fact that the property is a going concern. So in England in such cases the usual form of the statute is to fix the purchase value at the actual value of the property used. But no case can be cited from the United States or England that in the taking over of the whole property of a public utility, where the tribunal fixing the value is not restricted, that the reproduction cost of the property less depreciation is not a proper factor for admission and consideration. It was stated at Bar without question that in Canada, where the Canadian Northern was taken over by the Canadian Government, the arbitrator considered evidence of actual cost of the property as one circumstance for consideration in making up the award. Here we are under no restriction. Here, in view of the troubled aftermath of the war, we must struggle to get light and we should not reject that which has so often been recognised as a proper aid.

Of course what is being here taken is the stock; but we are in a position to deal with the case broadly and equitably. What the Government is doing is to take over the whole property of the company, and we are to deny the company the right to shew what it would cost to duplicate the property to-day to fulfill its purpose economically and efficiently. Stated in this wise, I submit it is hard to accept it as just.

If we can judge from cross-examination, we are to hear in diminution of the value of that which is being taken, money claimed to have been wasted, and money required to perfect the railway and make it more useful, but we cannot hear what would be required to reproduce what is being taken.

It is impossible to ignore in this case that the purchaser is the Government, and this altogether aside from the interesting question raised by counsel as to whether this is a proceeding actually *in invitum* by way of expropriation, which for the present I do not discuss. In this case, there is no real market value because there is really no possible purchaser but one.

The English Courts in fixing value for tax rate and other purposes, imagine an ordinary purchaser, and estimate what he could reasonably count on as the yearly value to him. Here we must take into consideration that the Government is in a position to prevent injustice to itself being done in the use of the property taken over, and that it may properly insist that the present investment as shewn by reproduction cost shall be the basis of a just return.

There are, as I have said, no English authorities bearing on the subject. The *Banbury* ([1909] A.C. 78) and other cases cited on railway valuation by the House of Lords deal merely with parochial taxation of a small piece of a great railroad system in a parish under a statute imposing the tax rate upon the yearly value of the property taxed to a tenant from year to year. The effect of the cases, after much conflict, is finally that the only proper method of fixing the yearly value of such a piece is to take the net earnings of the whole local district in which the piece is situate, from both local and through business and to find the yearly value of the piece by the ratio of its mileage to the mileage of the whole district. Of course in such a case it would not be

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permissible to shew its cost of production or its original cost. It was a very small part of a great whole, only a cog in a great machine for earning profit, and its value could be measured by the proportionate value it contributed to the earning value of the whole of which it was a small part.

It is to such a case that the remark applies of the Law Lord quoted, who said that original cost and proportionate earning value could not both be used and confused. This was obvious.

Such cases have not the slightest bearing in the present case, where the offer is to shew the reproduction cost of the whole machine to be transferred as a basis for estimating future earnings.

The English cases of valuing houses for rate purposes or sale are not applicable. The rental value in rate cases is made the basis by statute. The cost of construction is not of assistance because in such cases the rental value is easily determinable by rental values in the neighborhood, and as easily arrived at by experts as the market value of a stock constantly sold on the Stock Exchange.

Conditions of railroad business are changing. We have been through a great war, in which the railroads have all of them in the United States and Canada been subjected to a great strain and disturbing requirements and extraordinary expense which have not yet ended. The result of this on the future value of the road is not clear, and makes existing earnings not a certain basis for a just valuation. Under such circumstances, when we must consider potential earnings, we should not deny ourselves the use of every factor which will aid our reaching a just result.

Some reference has been made to the time which would be taken in hearing this evidence and the great expense which lengthening this hearing may entail on both parties. My impression is that the Board could limit the amount of this evidence and prevent great detail both in its production and rebuttal. But this is a great case, involving large interests, and considerations of this character should not, it seems to me, weigh in trying to reach a right conclusion. Railroad valuation is always tedious and long drawn out. It is inseparable from such an inquiry that it should be.

I regret much to differ with my colleagues in such a critical ruling in this case.

Sir Thomas White.

SIR THOMAS WHITE:—The question is as to the admissibility of evidence relating to the value, as of the beginning of 1920, of the locomotives of the Grand Trunk Railway System. The following extracts from the official report of the proceedings shew the precise nature of the evidence sought to be introduced, on page 464:

Counsel for Government: Are you proposing now to put in evidence as to the reproduction value of these?

Hon. Mr. Phippen: We are endeavouring to establish the value of these engines, assuming that they were all new in 1920, and to then work back.

Counsel for Government: That is, on the basis of what it cost to produce them in 1920?

Hon. Mr. Phippen: Yes.

The issue raised has relation to a much wider range of evidence than that as to the value of the locomotives mentioned. It is clear that if evidence is admissible as to the so-called reproduction value of locomotives, it is also admissible as to the reproduction value of the entire physical assets of the Grand Trunk Railway System, that is to say, of every mile of track, of terminals, rolling stock and all other tangible property used in connection with the operation of the system.

To determine the question at issue, it is necessary first to consider the subject matter of the arbitration reference. This is, in the language of the statute, 10-11 Geo. V., 1920, ch. 13, sec. 6, "The value, if any to the holders thereof, of the preference and common stock" of the Grand Trunk Railway Co., as of the date fixed.

If the system of the company is to be operated as a going concern, the value of the stock to its shareholders will depend upon the net earnings, present and prospective, of the system. All evidence bearing upon this question is admissible. It is not suggested that the value of the shares should be determined by considering the disintegration of the system, the sale of the assets piecemeal, payment of the debts and distribution of any surplus to shareholders. No such suggestion has been put for-

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ward. It is common ground that the property of the system, so long as needed for railway purposes, cannot be disintegrated and sold; the system must be regarded as a going concern.

Under the caption, "Going concern value—Public purchase," on pp. 567 and 568 of vol. I. of Whitten on the Valuation of Public Service Corporations, appears the following:

> If the Company is operating under a perpetual franchise, but subject to regulation as to services and rates of charge, the value of the property and rights transferred should be based on the estimated present and future net income (*under reasonable rates of charge*). In determining purchase price, the first thing to be determined therefore is the reasonable rate of charge. This should be determined in exactly the same way as if it were a rate case.

The Grand Trunk Railway System is in reality an undertaking having a perpetual franchise. Having such a franchise, and being compelled to continue to operate, the value of its shares must depend upon estimated actual and potential earnings of the system. Whitten at p. 43 of vol. I. expresses this in the question: "What is the ability of the company now and in the future to earn money as a going concern at a charge of reasonable rates?"

In my view the reproduction value of the physical assets of the system can only be regarded as relevant evidence in this inquiry if relationship can be established between such value and the rates under which the system may be expected to operate in the future.

In Canada traffic rates are under the control of the Board of Railway Commissioners. There is nothing before us to shew, nor am I aware, that the Board in fixing rates is obligated to consider the reproduction value of railway property. Nor do I understand that the Board has ever laid down the principle that such value has any bearing upon the question of Canadian railway rates. Even if, in determining such rates, the Board should decide to have regard to reproduction value of railway property, evidence as to the value of the physical assets of an individual railway undertaking would not be useful for the purpose unless supplemented by evidence of the value of the physical assets of its competitors. It would, in my view, be idle for this Board of Arbitrators to attempt to draw conclusions as to prob-

able future traffic rates in Canada from a consideration of a reproduction valuation of the physical assets of this one railway system.

Further, I can think of nothing more improbable than that the Board of Railway Commissioners of Canada will in fixing future rates regard as a factor to be taken into account the reproduction value of the railway properties, either in whole or by groups, of the Canadian Pacific, the Grand Trunk, and the Canadian National Railway systems.

The same general line of reasoning applies to the parts of the system in the United States. The situation as to rate determination is, however, different there. By the Interstate Commerce Act, 1920, it is enacted by sec 15a (2) as follows:—

> In the exercise of its powers to prescribe just and reasonable rates, the Commission shall initiate, modify, establish and adjust such rates so that carriers as a whole (or as a whole in ecah of such rate groups or territories as the Commission may from time to time designate), will under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

The principle embodied in this legislation is that rates shall be fixed having regard to the aggregate value of the railway properties of carriers as a whole, or as a whole in each of such rate groups or territories to be designated by the Commission.

There is nothing before this Board to shew that such aggregate value of all railroad property has been determined by the Commission, or that any group or groups have as yet been designated of which the lines of the Grand Trunk System in the United States form a part, and the aggregate value of the properties of such groups established. Reproduction valuation of the assets of the Grand Trunk Railway System in the United States is, in my opinion, valueless to aid this Board in reaching any conclusion as to the rates which the Commission may hereafter establish in the United States.

There is nothing to shew the comparative relation of such a valuation to that of other roads which may be in the same group or groups. Even if evidence could be adduced before us shewing an estimated valuation of all the railway property in a

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group, both in aggregate and detail, we should not be justified in making any assumptions as to the valuation which the Commission would establish with respect to the same property. This seems clear to me when there are taken into account the numerous and diverse factors which the Commission may consider in determining such valuation. Evidence of reproduction value of lines of this system in the United States appears to me too remote to be of any service to the Board in seeking to reach a conclusion as to probable traffic rates in the future in the United States, and their effect upon the revenues of the Grand Trunk System.

The existence of the statute mentioned, and its general bearing upon the subject of probable future rates in the United States, should, I think, be given consideration by the Board.

While reluctant to reject any testimony tendered in these proceedings, I am of opinion, for the reasons given, that this class of evidence, to which objection has been taken by counsel for the Government, is inadmissible as irrelevant for the purposes of the inquiry we are conducting. I cannot see that it would be in any degree helpful to us in endeavouring to estimate the actual and prospective earnings of the system, which is the essential point in issue here.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. December 17, 1920.

CONTRACTS (§ II D—70)—REAL PROPERTY—ORAL AGREEMENT TO PURCHASE —WRITTEN MEMORANDUM—ESSENTIALS OF IN ORDER TO SATISFY THE STATUTE OF FRAUDS.

The essential terms of an oral contract for the sale and purchase of real property are the parties, the property and the price, and if the written memorandum or receipt contains these essentials it is sufficient to satisfy the Statute of Frauds, although arrangements subsequently made for a time of completion and possession which are in the nature of appointments merely to carry out the contract and not varying its terms are not included in the memorandum.

[*McKenzie* v. *Walsh* (1920), 53 D.L.R. 234, 54 N.S.R. 26, reversed. See Annotation, Oral Contract—Statute of Frauds, 2 D.L.R. 636.]

Statement.

APPEAL by plaintiff from the judgment of the Supreme Court of Nova Scotia (1920), 53 D.L.R. 234, 54 N.S.R. 26, in an action for specific performance of an agreement for the sale of a house and premises. Reversed.

S. Jenks, K.C., for appellant; *J. J. Power*, K.C., for respondent.

DAVIES, C.J.:—I must confess I was not, at the close of the argument, without some doubts as to the sufficiency of the written receipt or memorandum relied upon in this case as satisfying the Statute of Frauds. After consideration, however, and reading of the authorities cited by counsel on both sides, I have reached the conclusion that the memorandum or receipt is sufficient. That it must contain all the essential terms of the contract and must shew that the parties have agreed to those terms is conceded by both sides. That it does do so, I conclude. The essential terms are the parties, the property and the price.

The memo. or receipt in this case reads as follows:

Halifax, N.S.,
February 5th, 1919.

Received from A. C. McKenzie, the sum of two hundred dollars on the purchase of house, No. 33 Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed.

(Signed) HATTIE WALSH.

It seems to me that these three essential terms of the contract—parties, property and price—are all included.

It appears that after the memo. was signed the parties met and arranged for a time of completion, viz., April 15, and possession May 1.

I have read most carefully the judgments delivered in the Court below (1920), 53 D.L.R. 234, and concur with the opinion of Harris, C.J., that the written memorandum or receipt discloses a contract in writing sufficient to satisfy the Statute of Frauds, and that the arrangements subsequently made for a time of completion and possession were in the nature of appointments merely to carry out the contract and not varying its terms.

I concur with Harris, C.J.'s judgment, and for the reasons given by him would allow this appeal and restore the judgment of the trial Judge, Drysdale, J., with costs throughout.

IDINGTON, J.:—The appellant as plaintiff sued respondent for specific performance of an agreement entered into by her for the sale to him of a house and premises in Halifax.

The appellant paid, after several meetings at which negotiations had taken place, $200, and got from the respondent the following receipt: [See above.]

She evidently, a month or so afterwards, had made up her mind not to sell.

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The appellant brought this action on May 2, 1919, and, by his statement of claim, delivered later, set forth therein a copy of this agreement as basis of his claim.

It is now contended by respondent, after being beaten in several other contentions she set up, that this is not a sufficient memorandum in writing to comply with the Statute of Frauds.

Primâ facie it certainly seems to be so by containing all the essential elements of a bargain and sale of land.

It is given expressly, for the cash payment, on the purchase of a house, definitely described, of which the purchase price is to be $10,500 and the balance on delivery of deed.

Surely that covers all that is necessary to satisfy the Statute of Frauds unless there is something rendering the transaction entered upon much more complicated than usual, which does not appear herein.

The respondent in defence pleaded that the actual agreement was only an optional one, dependent upon whether or not the respondent would be able to obtain possession of another property which she had leased, and further that the respondent signed the above quoted memorandum upon the representation by applicant that it was a mere receipt for $200.

Upon this issue the parties went to trial, and the result, upon most conflicting evidence, was a verdict of the jury answering questions submitted entirely negativing the contention thus set up.

No other questions seem to have been suggested by the respondent.

In an ordinary trial as to the validity of the receipt as a contract setting out the terms, this should have ended the whole matter in dispute.

The resourceful counsel for respondent was only able to suggest at the close of the trial Judge's charge the following, answered as appears by the Judge as follows:—

Mr. Ralston: Will you explain that the arrangement is everything that took place between them that night?

His Lordship: The arrangement is the agreement between the parties; the written agreement is conclusive in McKenzie's favour, if he is telling the truth, but the woman says that agreement was not the whole agreement, that the whole agreement contained that condition, and that is the difference between the parties.

Then one would have expected the matter to end by the verdict of the jury, for counsel did not object to the charge further, or except thereto in any other way.

What transpired between the Judge and counsel later, does not appear in the case before us, but one may infer from the judgment of the Judge that some further contentions, however irregular, had been set up by counsel, for there is a judgment of the trial Judge in which he deals with a contention first that the time for completion of the contract had not been contained in the memorandum of the contract, and secondly that the mode of dealing with the problem of an existing mortgage had not been dealt with in the memorandum.

He disposes of the former by finding as a fact that the time for completion had been determined by the parties after the signing of the memorandum.

It was quite competent for the parties proceeding upon the validity of the memorandum to have done so, and default that, for the Court to have determined what was a reasonable length of time, on the assumption that the contract was sufficient within the Statute of Frauds.

The finding of the trial Judge may fall within either, and must bind all concerned.

The other question of the existence of a mortgage is an everyday incident dealt with by the Courts in suits for specific performance, and is amply covered by the decision of this Court in *Williston* v. *Lawson* (1891), 19 Can. S.C.R. 673, at page 679, as expressed by Strong, J., in the language quoted.

I doubt if there ever sat in any Canadian Court a Judge more learned in the relevant law to be observed as a guide, or better qualified to express an opinion on such a point of equity jurisprudence upon which the right to specific performance rests.

It would seem to me that the matter should have rested there. But the respondent was persistent and appealed, taking, in her notice of appeal, the following grounds, the nature of which I give in abbreviated form:—

1st, that the findings were against the weight of evidence; 2nd, such as reasonable men should not have made; 3rd, because they were against the probabilities; 4th, that the Judge wrongly

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instructed the jury; and 5th, because the Judge's direction as to the effect of the conflict was to present an issue of one or other party committing perjury and hence a withdrawal of the case from the jury.

Not a word therein points to the question of the requirements of the Statute of Frauds having been fulfilled or not.

I cannot find in the case any leave to amend this notice or take any other ground.

The first observation I think this calls for is that all argument addressed to us relative to the noncompliance with the Statute of Frauds never seems to have occurred to counsel at the trial beyond what was properly submitted to the jury and thus disposed of; and seems to have been abandoned as a hopeless contention when giving notice of appeal but, by reason of something which does not appear, suggested in appeal, is again mooted.

The result thereof is an opinion judgment of Harris, C.J., completely answering any such contention; another of Longley, J., that finds fault with the trial Judge's charge, and expresses the opinion that there should be a new trial, and then, though finding difficulty in assenting to the proposition of Ritchie, E.J., that the document was not of a character to fulfill the conditions of the Statute of Frauds, finally assents thereto and to the dismissal of the action.

I recite all this as illuminating how little confidence either Bench or Bar had in the contention now made the sole basis of answer to this appeal here.

I respectfully submit that once the issues raised before the jury had been by them disposed of adversely to the respondent, there was nothing more, reasonably to be hoped for, as resting upon the Statute of Frauds.

I repeat that the memorandum was not solely a receipt for money, but *primâ facie* evidence of a complete contract within the Statute of Frauds, and when such substantial issues as presented to the jury were disposed of by them, nothing more should have been given effect to, and that the mere matters of method or form of carrying out the contract need not have been further considered as being required by the Statute of Frauds.

Hence I think the appeal should be allowed with costs throughout, and the judgment of the trial Judge restored.

DUFF, J.:—I concur on the whole with the judgment of Harris, C.J., of Nova Scotia, 53 D.L.R. 234, and there is only one point which I would like to put in a slightly different way.

The majority of the full Court took the view that the 4th section of the Statute of Frauds had not been complied with inasmuch as it was a term of the agreement that the balance of the purchase money was to be paid on April 15 and the deed then delivered, and that this term does not appear in the memorandum produced by the plaintiff. I assume, without expressing any opinion on it, that the document produced is not in itself of such a character as to preclude oral evidence shewing that it did not embody all the material terms of the contract, and consequently that it was open to the defendant to plead and prove by oral evidence that the stipulation to the effect mentioned was a term of the agreement.

The statement of defence raises no such issue. The 9th paragraph, it is true, alleges that the memorandum produced by the appellant did not contain all the terms of the agreement actually entered into between the parties, but the language of the plea ("does not contain all the terms of the said conditional agreement or option") unmistakably relates to the agreement alleged by the defendant in paragraph 7 which, while professing to set out fully the terms of the agreement, mentions no stipulation touching the date of the delivery of the deed or payment of the purchase money. The state of the pleadings is not without importance as indicating the issue to which the evidence was directed; although of course the pleadings in themselves are by no means conclusive to that. An examination of the proceedings at the trial, however, leaves no doubt on one's mind that the evidence was not directed to the issue whether or not such a stipulation formed part of the agreement between the parties. Such an issue would of course be an issue of fact and primarily therefore a question for the jury. In that issue the onus would be on the defendant because the plaintiff had alleged a contract in the terms of the memorandum set out and if the defendant denying an agreement in such terms alleged in the alternative that if there was an agreement in such terms there was a further term not disclosed by the memorandum that would be the matter of

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defence and of the onus of that defence he must acquit himself. Only once during the trial was the point adverted to. In cross-examination, the plaintiff was asked whether the arrangement that the balance of the purchase money was to be paid on the date mentioned was made on the day on which the memorandum was signed or later. The plaintiff was unable to answer, although he did say that this was a part of the arrangement between him and the defendant. No question was submitted to the jury upon the point, no suggestion was made by defendant's counsel that the jury should be asked to pass upon it. On motion for judgment the trial Judge was asked to dismiss the action on the ground that no date for completion was mentioned in the memorandum, but he rejected the contention, taking the view that the arrangement in respect of the date of completion was made after the day on which the memorandum was signed, and that in any event this arrangement was not part of the contract, but in the nature of an appointment for the purpose of carrying out the contract.

It was not, in my opinion, open to the defendant after the verdict to raise this question as a question of fact. I express no opinion as to whether the practice of the Nova Scotia Courts would permit such a question to be decided by the Judge as a question of fact. No such question of fact could be raised after verdict because the point not having been taken on the pleadings, it was the defendant's duty, if intended to rely upon it, to disclose it in such a way as to challenge the plaintiff's attention to it and it is very clear that this was not done.

I may add, however, that dealing with it as a question of fact, reading the memorandum with the evidence given by the plaintiff, my finding would be that the defendant had failed to prove that such a term was part of the contract. It follows, of course, from this that the defendant could not, raising the point as a point of law, succeed.

The appeal should be allowed, and the judgment of Drysdale, J., restored.

Anglin, J.

ANGLIN, J.:—This case has, in my opinion, been so satisfactorily dealt with by Harris, C.J., that I shall content myself with expressing respectful concurrence in the opinion which he

delivered. I would merely add a reference to the well-known language of Halsbury, L.C., in *Nevill* v. *Fine Art and Gen'l Ins. Co.*, [1897] A.C. 68, at p. 76, on the hopelessness of asking for a new trial for mere non-direction where no exception has been taken to the charge at the trial.

MIGNAULT, J.:—This is an action taken by the appellant for the specific performance of an agreement for the sale by the respondent to the appellant of the former's house in Halifax. On February 5, 1919, the appellant called on the respondent and proposed to purchase her house. The appellant testifies as to his conversation with the respondent as follows:—

Q.—Tell us what the conversation was? A.—I just asked her if the house was for sale; she told me it was; then I asked her the price; she told me what the price was, $10,500, and after a little talking back and forth I told her I would give her her price.

Q.—That is $10,500? A.—Yes.

Q.—What happened then? A.—At the same time she told me she was offered $10,000, or had been offered $10,000, and that she was asking $10,500. Q.—You agreed to give her $10,500. A.—Yes; then I went out and told her I would be back in half an hour; I went out and came back with the receipt and the money. Q.—You came back; you brought back this receipt I shew you and this cheque? A.—Yes, and that cheque. Q.—What took place then? A.—I read the receipt and passed it over to Mrs. Walsh, and apparently she read it; she had it anyway and she apparently read it before she signed it. Q.—She signed it in your presence? A.—Yes. Q.—And you gave her this cheque? A.—Yes. Q.—You got the cheque back from your bank vouchered cashed? A.—Yes. Q.—And what further was said about the property at that time? A.—There was nothing particular said at that time.

The receipt referred to is very material, because the issue now between the parties is whether it was a sufficient memorandum in writing to satisfy the Statute of Frauds. It reads as follows: [See judgment of Davies, C.J., *ante* p. 25].

Two objections are now made to the sufficiency of this receipt.

1. It was agreed between the parties, according to the appellant's story, that the balance of the purchase price would be paid on April 15, and that possession would be given the appellant on May 1, and this term was a material term of the agreement and was not mentioned in the memorandum.

2. There was a mortgage on the house of $5,000, and the appellant states that the respondent said that this mortgage could stay on, and no mention of this is made in the memorandum.

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I may say that the trial Judge, Drysdale, J., tried this case with a jury, and the issue raised at the trial by the respondent was that it was a condition of the arrangement that the appellant was not to have the house unless the respondent could get her tenants out of another house belonging to her by April 1. The trial Judge put questions to the jury covering this issue, and the answers were against the pretensions of the respondent. Judgment was given in favour of the appellant, but the respondent succeeded in her appeal to the Supreme Court of Nova Scotia *en banc*, 53 D.L.R. 234.

My opinion is clearly that the trial Judge's charge was a fair one, and if the evidence of the respondent's daughters was not sufficiently set out by the trial Judge, his attention should have been called to the matter by the respondent's counsel after the charge. This was not done, and I do not think the objection should now be entertained. I may add that no new trial was granted by the Court below, but the appellant's action was dismissed on the objections taken to the memorandum under the Statute of Frauds, Harris, C.J., dissenting.

Coming now to the objections founded on the Statute of Frauds, the only one on which I feel any difficulty is the first one, and this difficulty is on the point whether the agreement alleged by the appellant as to the payment of the balance of the purchase price and the delivery of possession took place at the interview on February 5, or was a subsequent parol agreement. If the former, I would think it was a material term of the agreement, and should have been mentioned in the memorandum. If it was a subsequent parol agreement, I think the memorandum is sufficient.

As can be seen, the memorandum describes the house to be sold and mentions the price, $10,500, on which $200 was then paid, and says: "Balance on delivery of deed."

The appellant in his statement of claim says that, by a subsequent parol agreement, it was agreed that payment of the balance and delivery of the deeds should be made by April 15, and that respondent should occupy the house free of rent until May 1.

In the evidence given by the appellant as part of his case, he says that this agreement would be in March some time, either

February or March. When called in rebuttal, he first says it was made the next time he was in the respondent's house, but adds further on that it may have been made either when the receipt was signed or later.

This, as it stands, is somewhat indefinite, but the trial Judge found as follows:—

It seems the parties met after the date of memo. and arranged for a time of completion, viz., the 15th of April, and possession the 1st of May, but I think such arrangements were in the nature merely of appointments to carry out the contract and not an effort to vary the terms, which could not, I think, be verbally done.

I think this agreement, if subsequent to the memorandum, was of the nature stated by the trial Judge, but the material point is that the Judge finds as a fact that the arrangement was subsequent to the memorandum. I think this finding of fact should be accepted.

The consequence is that this memorandum contains the material terms of the agreement of February 5, and is sufficient to support the appellant's action.

On the question of the sufficiency of the memorandum, the judgment of Harris, C.J., who dissented in the Court below, is so complete that I rely on his reasoning and do not find it necessary to repeat it here. I also accept as entirely sufficient the judgment of the Chief Justice on the second objection of the respondent as to the mortgage on the property.

In my opinion the appeal should be allowed and the judgment of the trial Judge restored with costs here and in the Court below. *Appeal allowed.*

ELLIS v. HAMILTON STREET R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. December 10, 1920.

CARRIERS (§ II G—111)—PASSENGER ON STREET CAR—REQUEST TO STOP CAR AT OTHER THAN USUAL STOPPING PLACE—INJURY TO PASSENGER FROM AUTOMOBILE—LIABILITY OF COMPANY—MOTOR VEHICLES ACT. (ONT.)

There is no statute in Ontario which imposes on a street car company the duty of warning passengers about to leave the car of the danger of being run over or injured by other vehicles in the street, or which makes it unlawful to stop at any other place than the regular stopping place, and a passenger who requests a street railway conductor to stop at a place other than a regular stopping place assumes

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the risk of any extra danger from injury by reason of the ordinary traffic of the street. There is nothing in the Motor Vehicles Act which makes the obligation of the driver of an automobile less, when the street car is stopped at a point other than the regular stopping place. [*Canadian Pacific R. Co.* v. *Hay* (1919), 46 D.L.R. 87, 58 Can. S. C.R. 283; *Wallace* v. *Employers' Liability Ass'ce. Corp.* (1912), 2 D.L.R. 854, 26 O.L.R. 10, referred to.]

Statement.

Appeal by the defendant company from the judgment of KELLY, J. (1920), 47 O.L.R. 526.

G. Lynch-Staunton, K.C., and *Colin Gibson*, for appellant.

M. J. O'Reilly, K.C., for plaintiff.

Ferguson, J.A.

FERGUSON, J.A.—Appeal by the defendant railway company from a judgment of Kelly, J., dated the 14th May, 1920, pronounced on the verdict of a jury, awarding the plaintiff $1,500 damages against the company, and dismissing the action against the defendant Stiles. There is no cross-appeal by the plaintiff, and the defendant Stiles is therefore not a party to this appeal.

The verdict and judgment at the trial appear to have been based upon the theory that there is more danger of a passenger being injured by passing automobiles when the car is stopped at a place other than the regular stopping place; and, though there is no law to prevent the street car being stopped where it was, yet that the railway company owed the disembarking passenger a greater duty to protect her against injury from passing vehicles than it would have owed her had the stop been made at a regular stopping place.

The plaintiff's claim was made upon the theory that the defendant company selected an improper and unsafe stopping place, and invited the plaintiff to alight there.

Paragraph 6 of the claim reads:—

"The plaintiff alleges that the defendant the Hamilton Street Railway Company was negligent in stopping its said car in the middle of a block and not at the regular stopping place, and inviting her to alight in a dangerous place, where she was liable to be run down by passing vehicles, and the plaintiff alleges that the defendant Stiles was negligent in carelessly and negligently running his motor car at a high rate of speed on the highway while passing a street car while in the act of allowing the plaintiff to alight."

The plaintiff stated that she had intended to get off at Arthur street, but did not reach the door in time to disembark when the car stopped there; that she reached the vestibule just after the car had started; that she then asked the motorman to let her off; that the car was again stopped, and she stepped out, alighting safely on a paved street; that, before she had time or opportunity to reach the kerb, she was struck by a passing automobile owned by the defendant Stiles.

The distance between the first and second stops was stated differently by different witnesses, varying from 40 to 75 feet.

This is not a case of a car being stopped at a place selected by the defendant company, coupled with an expressed or implied invitation to alight. The selection was made by the plaintiff—she was responsible for the making of the second stop.

The learned trial Judge and the jury appear to have thought, and I am inclined to agree with them, that, the street car having stopped and started again, drivers of motor vehicles who had observed the stopping would be led to believe that the car would not stop again for some distance, and that it would be safe for them to speed up to pass it, and that the bringing of it to a second stop, within 75 feet of the first, was not calculated to give the driver of such a motor vehicle either time or opportunity to obey the requirements of sec. 15 of the Motor Vehicles Act, R.S.O. 1914, ch. 207, which reads:—

"When a motor vehicle meets or overtakes a street car which is stationary for the purpose of taking on or discharging passengers, the motor vehicle shall not pass the car on the side on which passengers are getting on or off until such passengers have got on or got safely to the side of the street as the case may be."

It is unlikely that either the plaintiff or the motorman appreciated the danger involved in making the second stop; but the question is, should the motorman have had the danger in mind, and in the circumstances refused the plaintiff's request or warned her of the danger, and was his failure to appreciate the danger, and warn the plaintiff, negligence for which the defendant company is responsible?

There is nothing in the evidence to shew that the motorman knew that the plaintiff did not know and appreciate, as much as he did, any risk she was taking in asking that the car be stopped;

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and, though she had an opportunity of doing so, she did not, before stepping from the car, look for an approaching motor. Situated as she was, she must have had a better opportunity of doing this than had the motorman. I know of no statute or case, and none was cited to us, which imposes on a street car company the duty of warning passengers about to leave the car of the danger of being run over or injured by other vehicles in the street. Section 15 of the Motor Vehicles Act was, no doubt, passed to protect persons about to board or to alight from cars, but the duties and obligations are put by that Act upon the driver of the automobile, and not upon the street car company. There is nothing in the Act which obliges a street car company not to stop for the purpose of discharging passengers when other vehicles are passing, or not to permit a passenger to alight without seeing that the street is free from vehicular traffic, or even to warn its passengers to look out for passing traffic. Neither the Act nor the by-law makes it unlawful to stop at any place other than the regular stopping place and there is nothing in the Act that makes the obligation or duty of the driver of an automobile less when the street car is stopped at a point other than the regular stopping place. It might be well to have regulations on these points, but until such a law is enacted it seems to me that a passenger who requests a street railway company to stop at a place other than a regular stopping place, should be taken to have assumed the risk of any extra danger from injury by reason of the ordinary traffic in the street. See *Canadian Pacific R. Co.* v. *Hay* (1919), 46 D.L.R. 87, 58 Can. S.C.R. 283.

There is much in the case of *Wallace* v. *Employers' Liability Assurance Corporation* (1912), 2 D.L.R. 854, 26 O.L.R. 10, to support the view that where a passenger has landed safely on the street before the accident the obligation of the street car company to him or her has ceased. However, such a conclusion was not necessary to the determination of that appeal, and the point was not, I think, determined; but in a somewhat similar case the point seems to me to have been determined adversely to the plaintiff by the Appellate Division of the State of Massachusetts: see *Oddy* v. *West End Street R.W. Co.* (1901), 178 Mass. 341. True, that case is not binding upon us, but the reasoning of the Court commends itself to my judgment, and seems to me to justify the conclusion stated at p. 349 as follows:—

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"Street car companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or of being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning."

Ferguson, J.A.

I would allow the appeal with costs, and dismiss the action with costs.

MEREDITH, C.J.O.:—I agree entirely in the reasons for judgment of my brother Ferguson.

Meredith, C.J.O.

It is clear, as he points out, that it was the respondent, and not the motorman, who selected the place at which the car was to be stopped in order to enable her to alight, and the fact, if it be the fact, that she thought the place where it was stopped was the regular stopping place at the next street intersection is immaterial, because, if she so thought, the motorman was not informed of and did not know what was in her mind.

I should be sorry to decide anything which would deter a motorman who finds that a passenger has not got off the car at the stopping place at which he intended to alight, and is asked by the passenger, when the car has gone but a few feet beyond the stopping place, to let him get off, from complying with that request. To declare the law to be what the respondent's counsel contended it is would have that effect.

MAGEE, J.A., agreed with FERGUSON, J.A.

Magee, J.A.

HODGINS, J.A.:—I agree in the judgment of my brother Ferguson, upon the facts appearing in this case. I regard the stoppage of a street car, apart from statutory regulation or by-law, in the same way as the stoppage upon the highway of any other vehicle carrying passengers for the purpose of discharging them. There may be circumstances, however, arising out of the traffic, the dangers at a particular point of stoppage, the condition of the passenger, or other causes, which might cast a duty on the driver greater than that which arose in this particular case. While, therefore, I agree in allowing the appeal, I do not consider that we are laying down any absolute rule which excludes, in each case as it arises, considerations such as I have pointed out.

Hodgins, J.A.

Appeal allowed.

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SNELGROVE v. GARDEN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

BROKERS (§II B—12)—PROPERTY LISTED WITH TWO BROKERS—INFORMATION GIVEN TO PURCHASER BY BOTH—EXCHANGE NEGOTIATED—COMMISSION DUE.

In an exchange of lands, where one agent gives information in writing, and subsequently another gives the same information by taking one of the parties out to inspect the property, they both do the same work in a different way, and the former being first to do it, is entitled to the commission.

[*Barnett* v. *Brown & Co.* (1890),6 T.L.R 463; *Millar Son & Co.* v. *Radford* (1903), 19 T.L.R. 575; *Robins* v. *Hees* (1911), 19 O.W.R. 277, referred to. See Annotation, Real Estate Agent's Commission, 4 D.L.R. 531.]

Statement. APPEAL in an interpleader issue to determine which of two defendants is entitled to be paid a commission on an exchange of certain lands. Affirmed by an equally dividede Court.

E. S. Williams, for appellant.

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

Haultain, C.J.S. HAULTAIN, C.J.S.:—This is an interpleader issue to determine which of the two defendants is entitled to be paid a commission by the plaintiff, Bateman, on the exchange of certain lands of Bateman's for lands belonging to one Oliver. Both Bateman and Oliver had listed their properties for sale or exchange with each of the two defendants, who are "Real Estate Agents." The first information about Oliver's land was given to Bateman by Garden, who also first informed Oliver with regard to Bateman's land. Having obtained Oliver's name and address, together with a description of his land, from Garden, Bateman, who lived at or near Wolseley, informed him that he would come to Regina and look up the land. In the meantime Snelgrove had telephoned to Bateman, telling him that he had some land listed which he thought would suit him, and asked him to come to Regina. Bateman replied that he would come to Regina on the following Monday, February 9, 1920. Bateman accordingly came up to Regina on February 9, and was met at the station by Snelgrove, who took him out to the land which had been referred to in the telephone conversation. They went from Regina to Lumsden, where they were met by Oliver, who took them out to see his land. It was only after they had met Oliver and had seen the land that Bateman became aware that it was the same land which

had been mentioned to him by Garden. As a result of this visit to Oliver's land by Snelgrove and Bateman, Oliver went to Wolseley and looked over Bateman's land, and an exchange of the properties was arranged and carried out.

On the trial of the issue the trial Judge found in favour of Garden, and the defendant Snelgrove now appeals.

It is quite true that Garden was the first agent who brought Oliver's property to the attention of Bateman, but in my opinion, the facts of the case do not shew that the transaction which was completed between Oliver and Bateman was the result of Garden's intervention. It cannot be said that Bateman went out to see Oliver's place as the result of any information received from Garden. The visit of Snelgrove and Bateman to Oliver's farm was entirely unconnected with anything done by Garden. There is no suggestion that Snelgrove took advantage of anything done by Garden, or that there was any double dealing on the part of Bateman. The facts of the case bring it within the decision of *Barnett* v. *Brown & Co.* (1890), 6 T.L.R. 463, where Lopes, L.J., decided between agents that, where the first introduction resulted in nothing and the second resulted in a sale, the second agent was entitled to the commission.

In *Millar, Son & Co.* v. *Radford* (1903), 19 T.L.R. 575, it was pointed out by Collins, M.R., at 576, that:

> the right to commission did not arise out of the mere fact that agents had introduced a tenant or a purchaser. It was not sufficient to shew that the introduction was a *causâ sine qua non*. It was necessary to shew that the introduction was an efficient cause in bringing about the letting or the sale.

See also *Robins* v. *Hees* (1911), 19 O.W.R. 277.

In the present case it cannot be said that the introduction by Garden was even a *causâ sine qua non*. His introduction had nothing to do with the exchange of the properties. Both parties had listed their lands with Snelgrove, and they were brought together and the exchange was effected solely through his efforts.

The appeal should, therefore, be allowed with costs, and the judgment below set aside and judgment entered for the appellant declaring him entitled to the amount of the commission paid into Court. The appellant is also entitled to his costs of trial.

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Newlands, J.A.

NEWLANDS, J.A.:—This is an interpleader, and the facts are not disputed. The only question is, which of the parties, both of whom are real estate agents, is entitled to the commission from one Bateman for exchanging his farm, the west ½-21-17-10-W2nd, as part payment on a larger farm owned by one Oliver at Lumsden.

Garden was the first who was in communication with Bateman, and he gave him on a card the name of Oliver and a description of his farm.

Bateman went to Regina for the purpose of seeing the real estate agents with whom he had listed his farm for exchange, and took with him in his pocket the card Garden had given him. He intended to remain in Regina until he got a proposition that suited him, and during that time he was going to inspect Oliver's farm. He was met at Regina station by Snelgrove, who took him out to Lumsden and shewed him Oliver's farm, which he subsequently purchased; giving his own farm as part payment.

When in Oliver's house, Bateman says he realized it was the same place Garden had told him about, but he forgot he had Garden's card with this information in his pocket.

The question is, which of these two agents first found the purchaser of Bateman's farm?

Garden in his evidence says that he had intended going to Regina with Bateman to take him to Lumsden to see Oliver's farm, but was prevented from doing so. If he had gone with him, and Snelgrove had met them at the station and had taken them to Oliver's farm without their knowing it was that farm he was taking them to, I do not think it would be argued that by doing what Garden had undertaken to do, and was actually doing, he became entitled to the commission instead of Garden. Nor, if on the other hand, instead of going with Bateman, Snelgrove had given Bateman a card with the same information on it as was on Garden's card in Bateman's pocket, and Bateman, not remembering the fact that he had Garden's card with the same information, had gone to Lumsden and seen and purchased Oliver's farm, could it be said that he was entitled to the commission over Garden.

Nor do I see that when one agent gives the information in writing, and, subsequently, another agent gives the same information by taking the purchaser out and shewing him the land and the owner, that he has done any more than the first agent, or that it can be said that the second agent first introduced the proposition to the purchaser.

They both did the same work, but in a different way. Garden was the first to do it, and he is therefore, in my opinion, entitled to the commission, and the appeal should, therefore, be dismissed with costs

Lamont, J.A.

LAMONT, J.A.:—This is an interpleader matter. Bateman exchanged lands with one Oliver, on which exchange he admits he is obligated to pay a commission of $320. Both defendants are real estate agents, and both claim the commission. Bateman applied for an interpleader order and paid the money into Court An issue was directed to be tried to determine "which of the said defendants found the purchaser of the lands in question: West ½-17-21-10-W2nd (Bateman's) and would therefore be entitled to the commission?"

Oliver was the purchaser. The question, therefore, is: which of the defendants found Oliver as a purchaser for the said lands? The trial Judge found in favour of Garden, and Snelgrove now appeals.

The sequence of events, as disclosed by the evidence, to my mind does not leave the matter in doubt. The defendant Garden had Bateman's land listed for sale, but no sale seemed to be in sight. Bateman resided at Wolseley, as did also Garden. Snelgrove resided in Regina. On January 19, 1920, Bateman saw Garden as he was leaving Wolseley for Regina, and asked him if it would be possible to trade his half-section for a larger farm. Garden replied that he would be in Regina over night, and if he found anything suitable would put him in touch with it. In Regina that night Garden met Oliver, who had a large farm near Lumsden for sale. They discussed selling or trading Oliver's land. Garden says Oliver told him he would take something in trade for his land, and having Bateman's half-section in mind, he gave Oliver full particulars of it, and received from him a full description of his farm near Lumsden, except that Oliver

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could not remember the section, township or range, but he promised to send those on his return home. Oliver admits that on this occasion, in giving Garden the description of his land, he understood that Garden would use his best endeavours to effect an exchange of his land, "just the same as any other agent." In reference to this conversation the trial Judge in his judgment says: "Garden saw Oliver in Regina and drew his attention to the fact that Bateman wished to make an exchange."

On January 21, Garden saw Bateman and described Oliver's place to him, but could not give the township and range. On January 29 Oliver wrote Garden giving him the legal description of his farm. This Garden received on Monday, February 2, and the same day saw Bateman and gave the description to him, and Bateman said he would go and see the place. Bateman having mislaid this description, came back on February 7, and received from Garden a small township card containing a description of the land and the name of the owner, and he stated his intention of inspecting the land the following week, which he in fact did.

On January 26 Bateman had written to the Snelgrove Land Co. asking them if they had anything in a mixed farming proposition that would take in exchange his half-section, and at the same time giving them a description of his land. The company replied that they had taken the matter up with a party who would probably be in town the following week, and that Bateman might expect to hear from them about February 4. On February 5 or 6 Bateman received a telephone message from Snelgrove that, "he had something that he thought would suit." Bateman says that, before receiving the 'phone message, he had already made up his mind to go out and see Oliver's land. On February 9 Bateman went to Regina, was met at the station by Snelgrove, and taken out to Oliver's, whose farm had been previously listed for sale with the Snelgrove Land Co. At Oliver's, Bateman says he told Snelgrove that he believed Oliver's farm was the one Garden had directed him to come and see After inspecting the farm, and after Oliver had inspected Bateman's farm, an exchange was effected.

As to when he attempted to secure Oliver as a purchaser for Bateman's land, Snelgrove gave the following testimony:

Q.—As far as Mr. Bateman, the plaintiff in this action, is concerned, he did not have from you the description of this land or the name of the owner of it until he came up here and went to Lumsden with you? A.—No, he did not. Q.—And Mr. Oliver did not have any knowledge of Bateman or Bateman's farm until you got in touch with him when he came in to see you after you received this letter of January 26th? A.—I don't think he had any knowledge of Bateman. I happened to mention his farm casually.

Oliver in his evidence stated that he never heard Bateman's land mentioned until Bateman came to his place. This statement the trial Judge did not believe, as appears from the above quotation from his judgment.

There is not an iota of evidence in the appeal book that Snelgrove ever approached Oliver as an intending purchaser of Bateman's farm until February 9, when he and Bateman went out. He did not have Bateman's land for sale until he got the letter of January 26. Prior to that time Garden had called Oliver's attention, as an intending purchaser by exchange, to the land. Bateman had actually left Wolseley and was on his way to interview Oliver, for the purpose of making a deal if possible, when Snelgrove, who up to that time had not communicated with Oliver as an intending purchaser picked him up and took him the last half of the journey. Had Snelgrove not appeared on the scene at all, there does not seem to be much room for doubt that Bateman would have made the balance of the journey to Oliver's alone, and would have concluded the deal just the same. Under these circumstances, I fail to see how it can be said that Snelgrove found the purchaser. The purchaser was already found, and Bateman was on his way to see him before Snelgrove made any move.

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

ELWOOD, J.A., concurs with HAULTAIN, C.J.S.

Elwood, J.A.

Appeal dismissed by an equally divided Court.

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DREIFUS v. ROYDS.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 17, 1920.

TAXES (§ III B—125)—ASSESSMENT OF LAND—ONTARIO ASSESSMENT ACT, R.S.O., 1914, CH. 195, SECS. 40 (1) AND 69 (16)—PRINCIPLE GOVERNING.

The governing principle in assessing land under sec. 40 (1) of the Ontario Assessment Act, which enacts that "land shall be assessed at its actual value," and under sec. 69 (16), which enacts that "the Court may in determining the value . . . have reference to the value at which similar land in the vicinity is assessed," is to ascertain the actual value of the land and an assessment which is made entirely on consideration of the value at which other lands in the vicinity were assessed and where the actual value of the land being assessed was disregarded will be sent back to have the assessment made on the proper principle.

Statement. APPEAL from the ruling of the Ontario Railway and Municipal Board which set aside the assessment on appellant's land made by the County Court Judge and restored the higher valuation of the Court of Revision. Reversed.

F. H. Chrysler, K.C. for appellant.

G. F. Henderson, K.C., for respondent.

Davies, C.J. DAVIES, C.J.:—This is an appeal by the owner of two parcels of land in the city of Port Arthur from a judgment of the Ontario Railway and Municipal Board reversing a judgment of the District Judge for Thunder Bay, which in turn had altered the judgment of the Court of Revision confirming an assessment of the lands in question.

The assessment of the two parcels of land had been fixed by the Court of Revision at $32,000 and $28,000 respectively, being at the rate of $300 per acre; the District Judge reduced these assessments respectively to $10,700 and $9,300 being at the rate of $100 per acre. The Ontario Railway and Municipal Board restored the assessment fixed by the Court of Revision, namely, $60,000, for the two parcels of land.

Unless it was clearly apparent that the Board from whose judgment this appeal was taken had erred in its conclusions either by adopting some wrong principle or in ignoring some right one, I would not be disposed even if I had the power, to interfere with its judgment.

They are men of great experience in dealing with matters of the kind in question here and, as the hearing took place in Port Arthur where the lands are situate, I assume they would have an opportunity of inspecting them and those in the immediate

vicinity and, in this way, would be better qualified than we possibly could be to determine the actual value of the lands in dispute and the weight to be given to the evidence as to the assessment of these adjoining lands in deciding the actual value of those in question here.

It is contended, however, that the Board erred in that they disregarded the provision of the Assessment Act, R.S.O. 1914, ch. 195, sec. 40, sub-sec. 1, requiring the lands to be assessed at their actual value and in allowing undue weight to the evidence respecting the assessment of the lands of the same kind as those in question in the immediate vicinity.

The chairman of the Board, during the hearing of the appeal, expressed himself strongly, more than once, to the effect that the Board's duty was to find the actual value of the lands in question, and I find it difficult to reach the conclusion that he erred in giving undue weight to the assessments upon lands of the same kind in the immediate vicinity of those in question. He seemed fully to appreciate the finding of that "actual value" as the dominant and controlling factor in determining the amount at which they should be assessed.

But the evidence given before the Board was most meagre and unsatisfactory as to this "actual value" and the Assessment Act, R.S.O. 1914, ch. 195, sec. 69, sub-sec. 16, expressly provides that, in arriving at such actual value, consideration might be given to the assessed value of lands of the same kind in the immediate vicinity of those in question.

Whether undue weight was given to this evidence of the assessed value of other lands of the same kind as those in question in the immediate vicinity is very difficult to decide.

In view of the large amount involved and the very meagre and unsatisfactory character of the evidence of actual value given, some of my colleagues think that justice requires there should be a rehearing of the case by the Board and fuller and better evidence given of the "actual value" of the lands which the Act requires. Under the circumstances, I am not disposed to dissent from such a disposition of the appeal.

I think we are all agreed that the actual value of the lands and that only can be assessed. That is the dominant and controlling factor which must determine the assessment, and it would

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seem as if the assessor failed to appreciate the fact and did not bring before the Board the evidence necessary to enable it to find such actual value but relied too much upon the subordinate fact of the assessed value of adjoining lands.

Under all the circumstances I would agree to the reference back to the Board with instructions to take further evidence of the actual value of the lands in question, due regard being had to the assessment values, unappealed from, of the lands of a similar kind in the immediate vicinity of those in question, in order to arrive at the actual value of those in question.

It must not be assumed however, by this reference back to the Board to fix the assessment upon the "actual value" of the land, that the statutory direction in arriving at that actual value to consider the assessed values of similar lands in the immediate vicinity of those under consideration, is to be ignored. On the contrary, these values must have due consideration and weight, but they were evidently not intended by the Legislature to be the sole or even the controlling factor in determining the actual value of the lands being assessed, but simply as one item of evidence in reaching that actual value which had to be considered.

Idington, J.

IDINGTON, J.:—The appellant is a non-resident owner of two parcels of land situated in Port Arthur, one of 107 acres and the other of 93 acres, separated only by a highway running between them, and thus together forming a rectangular block of 200 acres.

The respondent is the Assessment Commissioner of Port Arthur who had these parcels placed on the said city's assessment roll at an assessed value of $300 an acre.

The said owner appealed from said assessment to the Court of Revision for the municipality, which dismissed his appeal.

He then duly appealed to the Judge of the District Court of the Provisional District of Thunder Bay, who, after hearing evidence (which for some reason or want of reason is not before us) allowed the appeal and reduced the assessment to $100 an acre.

It does appear from notes of his finding that appellant had called two witnesses well acquainted with the lands in question for many years, and well qualified to speak on the subject of real estate values in the part of Port Arthur in question, who put the value of the whole possible farm land, undrained, at $75 to $100

an acre. One of these men speaking from personal experience, indicates it would cost more to drain and clear and make productive than it would be worth.

The Judge say Royds did not call any witnesses.

And then the Judge closed his remarks thus:—

In my opinion, the value put by Mr. Schwigler and Mr. Tomkin is altogether too high, and I cannot see where any owner can put these swamps and muskegs to any use that would justify such a value. But on their evidence I fix the assessment at $100 per acre and it is reduced accordingly.

From that judgment the respondent herein appealed to the Ontario Railway and Municipal Board, which reversed same and restored the assessment made by said respondent.

The record of the proceedings before us indicates that counsel appeared respectively for the appellant then, now respondent herein, and for the respondent then, now the appellant herein. Yet the proceedings were opened by Royds in person without being sworn, so far as appears, though in regard to any others called as witnesses the record indicates that each man so called was sworn.

He began thus:—

As shewn on the blue print submitted, the parcels marked in red ink, 1, 2, 3, 4, 5 and 6, form assessment subdivision 22, and parcels numbered in red pencil 7, 8, 9, 10, 11, form assessment subdivision 32. We do not intend in this particular appeal to burden this Court with witnesses regarding the valuation. We do not wish to take up that matter at present, because as you know since the war these things differ considerably, and we are going to appeal to you as a matter of equity in the assessment of this property.

The Chairman: The reduction as made by the Judge stands unless we are satisfied that its actual value is more than the value fixed by him.

Passing that perfectly correct ruling of the chairman, without heeding it, Royds launched out into something unusual on the part of a witness, and which is somewhat difficult to understand, but incidentally discloses, if it means anything, that he had in mind to compare adjoining or adjacent blocks of land (which had been subdivided and partly built on, extending over a wide stretch of such neighbouring territory) with these uncleared, unbroken, unimproved non-subdivisions now in question.

He apparently conceived the idea of selecting such improved subdivisions into small lots (assessable to different owners) and making a total estimate of the whole of such assessments, and then, computing the entire acreage of each of such tracts so selected, divided the total assessment of each by its acreage so ascer-

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tained, and thus arrived at an assessment per acre exceeding the assessment of the land now in question herein, thus satisfying his own mind that he had made an equitable assessment.

The only vacant unsubdivided block considered at all lay nearer the centre of the city and hence furnished no basis for a fair comparison based on acreage.

He was asked, before he got started very far, as follows:—

To the Vice-Chairman: Q. Is this property marsh lands? A. No. It is straight back nearly directly west from the post office. There is one lot on each side of the Dawson Road. The assessment against parcels 1 to 6 at the time it was purchased by the owner were approximately $10,000; that was in 1895.

To the Chairman: Q. That is the aggregate assessment? A. Yes, in 1895, and the aggregate assessment of that subdivision 22 at the present time is $536,275.

To Mr. McKay: Q. What do you mean by subdivision 22? A. The land west of High Street to the city boundary, subdivision 2 of Ward 2. That is the assessment for the whole subdivision. It was assessed for $10,100 in 1895. Parcels 7 to 11 were assessed approximately at $7,000 in 1895, and the assessment in 1919 was $331,810. I have taken the whole block of land so as to make the assessment appear more equitable, and I have taken the total assessment against these lands.

To the Chairman: Q. It is actually assessment by subdivision lots? A. Yes, but I have apportioned it out in the whole acreage, including streets, lots and everything.

One and another asked questions but the results may be just as inaccurate as when he denied the fact of those lands being marsh lands.

I doubt if he really intended to swear as it reads, for if anything is clearly proven in the case, these lands in question are largely marsh lands.

Possibly his mind was running on his preconceived notion of the other tracts he was speaking of a minute later. If so then there was no fair comparison possible between the subdivisions he referred to and the unsubdivided lands in question and, for the purposes of this appeal, that is all that need concern us.

He seems aggrieved that appellant has not improved and subdivided his lands, although, from all that appears, subdivision within the city's bounds seems to have run, as elsewhere, far beyond the bounds of prudence.

The only other evidence, if this and such like irrelevant talk can be called evidence, given on behalf of appellant before the Board appealed from herein, was a single witness who was called

to prove that in 1911 or 1912 he tried to buy the land in question from the appellant and he refused to consider any offer as he had determined to keep his land for some relative, although the said witness tried it on by steps up to $20,000 or $30,000 and even $50,000. The latter figures evidently I suspect, were a joke.

That witness on cross-examination testified as follows:—

Q. You anticipated making a large profit? A. We wanted a subdivision and we wanted to divide it up. It was close to the town, and the extension of the railway out that way would make it a marketable property, if we spent a little money on it. Q. What did you reasonably expect to make over your figure of $50,000? A. I could not tell you that now. This was a long time ago. Q. Would you give that for it now? A. No. Q. At what price did you anticipate putting the individual lots on the market? A. We had not made up our minds; we would figure that out. We would fix a price according to what it would cost, but Mr. Dreifus would not commit himself to any price and we had to give him up. We corresponded with him for about two years. He would not answer a letter for a long time after we had written him.

The respondent would not venture to swear that the land in its present state and in the state of the market when the assessment was made, was worth, in the market, what he had assessed it at, or to name a price.

His appeal ought, I respectfully submit, instantly to hav been dismissed for want of evidence, but it was not.

The now appellant, therefore, was driven to calling three witnesses who demonstrated by facts that the judgment of the District Judge could not have been disturbed by raising the assessment above what he had fixed.

The ruling which followed, and is now appealed against, would maintain any assessment, no matter if double or treble the actual value, so long as it could be argued that some other property was assessed in like manner illegally and improperly beyond its value on same assessment roll and hence must be upheld.

That is not the meaning of the words "And the Court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed," interjected in 1892 into the section from which the sec. 69, sub-section 16, R.S.O. 1914, cn. 195, relied upon, has come.

In the Assessment Act the predominating clause is that in which, as the chairman of the Board repeatedly suggested in the course of the proceedings, the actual value is made the rule to be observed.

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Idington, J.

To reject this appeal would revolutionise the whole jurisprudence established by many decisions during the 28 years since the embarrassing subsidiary paragraph relied upon was quietly introduced so long ago as 1892, and enable municipalities to defeat through compliant assessors the very fundamental principle of the Assessment Act.

Instead of the respondent bearing the onus of proof in such an appeal as before the Board, it was the duty of the appellant assessor to have established by evidence that the actual value of the land in question had been that set down on the roll. If the practice had been adopted of reporting the evidence given before the Judge from whose judgment the appeal was taken, so that the Board could read it, that might not be necessary. Assuming, however, as appears herein, that it formed no part of the record before the Board, then clearly the appellant on a re-hearing must bear the burden I indicate; in same manner as an appellant to the Court of Revision must bear the burden of proving the assessor in error.

Then, if that *primâ facie* is so established, the onus of proof may be shifted to the respondent.

It does sometimes so happen that the conflict of evidence renders it difficult to determine. The actual difference of opinion so made to appear may be slight and in such a case I conceive the change of 1892 was designed to permit the appellate Court to refer to the roll as an element to help to a solution of such a problem as thus presented.

It was never conceived that it should be taken as the sole guide, but only as a factor in the last resort to avoid, by the allowance or disallowance of the appeal, unjust consequences of disturbing a roll clearly founded on the strictest effort to give full force and effect to the imperative requirement of the Act that land, unless in the excepted cases, had been set down at its actual value.

A roll that its maker does not pretend to have been so made out is not available for any such purpose.

It certainly is remarkable that in a city of the size of Port Arthur not a single person could be brought to say the assessment was right on the basis of actual value.

The pretence that there are no sales rather tends to shew there is no value. Of course we ought to know that such is not the case.

It may well be that the actual value is low, indeed very low, and, if you will, unexpectedly so, but whatever it is, according to the judgment of witnesses competent to speak, their evidence must be the guide.

The absurdity of bringing forward evidence of a refusal to sell, or worse still, of such a refusal in 1911 and 1912 when everyone knows that estimated values then and eight or nine years later are not identical, tends to shew, on respondent's part, a rather perverse way of looking at things, which, I submit, should not be encouraged.

The appeal should be allowed with costs herein and before the Board appealed from, and the judgment of the District Judge be restored.

Duff, J.

DUFF, J.:—Sec. 40, sub-sec. 1, should be read with sec. 69, sub-sec. 16, of the Assessment Act, R.S.O. 1914, ch. 195. Reading the two provisions together I can entertain no doubt that the rule given by them as the rule governing the Court of Revision in hearing and determining an assessment appeal is that the assessment is to be determined by the actual value of the land and that for the purpose of arriving at the actual value of the land the Court may refer to the assessment of land in the vicinity "similar" in character and consider the value of such land as manifested by the assessment. It is not necessary to attempt for the purposes of this appeal any definition of the phrase "actual value" as employed in this statute. It is very clear to me that the Board has proceeded upon the theory that the enactment of sec. 40, sub-sec. 1, is modified by that of sub-sec. 16 of sec. 69 and that the actual value for the purpose of assessment may be something other than the actual value in fact, the determination of which is governed by the practice of the assessor as applied to similar lands in the vicinity. This I think is an erroneous view. The governing enactment is that of sec. 40, sub.-sec. 1, and the rule laid down by sub-sec. 16 of sec. 69, is a subsidiary rule which has been enunciated with the object of facilitating the application of the governing rule. The assessment of other lands may be referred to for the purpose of ascertaining the actual value, that is to say as affording some evidence of the actual value but only for that purpose.

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Anglin, J.

The appeal should be allowed and the matter referred back to the Board to enable them to determine the assessment in accordance with this principle.

ANGLIN, J.:—The following concluding paragraph from the opinion of its chairman contains the basis of the decision of the Ontario Railway and Municipal Board allowing an appeal in this case from the District Court Judge.

> The chief reliance of the appellant is the provisions of sec. 69, sub-sec. 16, of the Assessment Act which so far as material reads "the Court may, in determining the value at which any land shall be assessed have reference to the value at which similar land in the vicinity is assessed."
>
> Under the authorisation of this provision, the appellant shewed that parcel 4, the unsubdivided block above referred to, is assessed to a resident of Port Arthur at $400 an acre; parcel 6, the subdivided parcel above referred to, is assessed in the aggregate at $425 per acre; parcel 7, a subdivided parcel lying west of parcel 8 and further than it from the centre of the city is assessed in the aggregate at $400 per acre. No satisfactory proof was given that the character and quality of the land embraced in parcels 5 and 8 were materially different from the land in parcels 4, 6 and 7.
>
> From this evidence the Board has reached the conclusion that there is not such a disparity in the value of parcels 5 and 8 as compared with parcels 4, 6 and 7, as to warrant the reduction made by the learned District Judge, and in the opinion of the Board the assessment as confirmed by the Court of Revision should be restored.

The principle involved in this passage is in my opinion clearly erroneous. If it does not entirely ignore the paramount provision of sub-sec. 1 of sec. 40, of the Assessment Act—that "land shall be assessed at its actual value" it at least treats as dominant a subordinate clause of sec. 69 (sub-sec. 16) which permits the Court of Revision "in determining the value at which any land shall be assessed (to) have reference to the value at which similar land in the vicinity is assessed."

Moreover this latter provision rests on the assumption that the assessment shall have been made on the basis directed by the Act, *i.e.*, that land shall be assessed at its actual value. The evidence of the assessor Royds shews that the roll in this instance was not so prepared—that his idea in making his valuations was that there should be such relative uniformity of assessment that the burden of taxation "should be borne in an equitable manner" —that a person situated as is the appellant "should be at least willing to contribute his equitable share with the people who gave his land the value it has." Royds' evidence as a whole demonstrates that in preparing the assessment roll his purpose was not

to assess land at its actual value, but rather to assure what he deems equality of assessment, regardless of actual value. The assessment of similar lands in the vicinity of those of the appellant therefore do not in this case afford the criterion of value which the Legislature doubtless had in view when it provided that reference might be had to them by the Court charged with "determining the value at which any land shall be assessed."

With great respect, the Board appears to have restored the original assessment of $300 an acre, which the District Court Judge had reduced to $100, solely because "there is not such a disparity in the value of parcels 5 and 8 (the subject of the assessment under appeal) as compared with parcels, 4, 6 and 7 (similar land in the vicinity) as to warrant the reduction made by the learned District Judge." The Board would seem to have taken the assessment of these neighbouring lands assumed in the absence of evidence to the contrary to be of the same character as conclusive of the valuation that should be put upon the lands of the appellant for the purpose of the assessment roll. Actual value, of which there was some evidence, seems to have been wholly disregarded. The decisions of this Court, *Roman Catholic Arch. Corp. of St. Boniface* v. *Transcona* (1917), 39 D.L.R. 148, 56 Can. S.C.R. 56, and *Rogers Realty Co.* v. *Swift Current* (1918), 44 D.L.R. 309, 57 Can. S.C.R. 534, seem to me to be in point.

I would allow the appeal with costs and set aside the order of the Board. Although at first disposed to restore the order of the District Court Judge, which there is evidence to support, I think on the whole the better course is to exercise the power conferred by sub-sec. 2 of sec. 41 of the Supreme Court Act, as enacted by 8-9 Geo. V. 1918 (Can.), ch. 7, and remit this case to the Ontario Railway and Municipal Board in order that it may fix the assessment of the actual value of the land as prescribed by sec. 40, sub-sec. 1, of the Assessment Act.

Brodeur, J.

BRODEUR, J. (dissenting).:—I am not satisfied that the Ontario Municipal Board have based their decision on some erroneous construction of the law.

The law requires under the Assessment Act, R.S.O. 1914, ch. 195, sec. 40, sub-sec. 1, that land should "be assessed at its actual value."

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The land in question covers a somewhat large area in the midst of the city of Port Arthur, and has belonged for a great number of years to the appellant, who apparently keeps it for a relative to whom he proposes to leave it in the future.

It is not subdivided into town lots.

Some years ago the appellant had the opportunity of selling this land for $50,000 and he would not consider favourably such an offer. The land is assessed at about that sum.

The evidence is conflicting. Some witnesses say the property is not worth more than $100 an acre. On the other hand, it is in evidence that it is worth far more than that. The members of the Board held their sittings in the locality and saw the land and could make as good an estimation as these witnesses. They came to the conclusion that the property should be assessed at $300 an acre. They base their judgment on a case of *Lake Simcoe Hotel Co.* v. *Barrie* (1916), 11 O.W.N. 16, or at least they refer us to the decision in that case.

In that case of *Lake Simcoe*, it is stated that value alone is to be considered in making assessments and it is added also that the proper guide is to be found in sec. 69, sub-sec. 16, of the Assessment Act, providing that the Court may in determining the value at which any land shall be assessed have reference to the value at which similar land in the vicinity is assessed.

In the present case, the land not being on the market, we have no sale price to guide us. It does not give any revenue; and we cannot then have reference to the returns to determine the value. The Board considered the assessment at which the lands in the vicinity were assessed. Different groups of lots of lands were formed for making the comparison; and it was found that these adjoining properties were assessed at four and five hundred dollars an acre.

It seems to me that the appellant, in these circumstances, cannot complain of the decision of the Board which assessed its land at $300 an acre?

If I could read in the decision of the Board that they had disregarded the actual value of the land and had based their valuation only on the neighbouring property I would decide in favour of the appellant. But as they failed to find out by sales,

by the income or by other means the actual value of the property, and as the evidence of value given by witnesses was "little more than guesses," they found in the value of adjoining properties a guide which the law itself declares could be considered.

The appeal should be dismissed with costs.

MIGNAULT, J.:—The only ground on which this Court has jurisdiction to vary the valuation of property assessed, is that the Court appealed from has proceeded upon an erroneous principle (sec. 41, Supreme Court Act). So on this appeal from the Ontario Railway and Municipal Board, which is the Court of last resort in the Province of Ontario on matters of assessment, it must be shewn that the board, in allowing the appeal of the present respondent from the judgment of the District Judge, has proceeded upon an erroneous principle.

There is no doubt that the respondent urged an erroneous principle before the Board when he contended that because of municipal requirements the city of Port Arthur had to have a certain amount of revenue and that therefore equity of assessment (whatever that may mean) would be the fair way. But the Board does not appear to have proceeded on any such ground, so it is unnecessary to consider it.

However, the Board clearly bases its judgment upon sub-sec. 16 of sec. 69 of the Assessment Act, R.S.O. 1914, ch. 195, which says:—

> In other cases, the Court, after hearing the complainant, and the assessor, or assessors, and any evidence adduced, and, if deemed desirable, the person complained against, shall determine the matter, and confirm or amend the roll accordingly. And the Court may in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed. And in all cases which come before the Court it may increase the assessment or change it by assessing the right person, the clerk giving the latter or his agent 4 days' notice of such assessment, within which time he must appeal to the Court if he objects thereto.

The governing provision in the Assessment Act is sec. 40, sub-sec. 1, which is as follows: "Subject to the provisions of this section, land shall be assessed at its actual value."

Section 40, which lays down an imperative rule, is among the provisions of the Act concerning the valuation of lands, while sec. 69 is in the part of the statute which deals with the Court of Revision. Subsection 16 of sec. 69 is clearly permissive only, and allows the Court, before which an appeal against the assess-

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ment is taken, to have reference, in determining the value at which any land shall be assessed, to the value at which similar land in the vicinity is assessed.

Thus the imperative rule is that land shall be assessed at its actual value, and that rule is binding on the Court. But in determining the actual value of the land, the Court may have reference to the value at which similar land in the vicinity is assessed.

Careful reading of the reasons for judgment of the chairman of the Board, has convinced me that undue prominence was given by the Board to sub-sec. 16 of sec. 69, while the imperative rule of sub-sec. 1 of sec. 40 was apparently lost sight of. Evidence of the actual value of the land was given before the Board, but this evidence was dismissed with the remark that "in view of the fact that there is no movement in properties of this kind at present or indeed since before the war, such estimates of value can be little more than guesses."

Other facts were also relied on by the learned chairman, such as the assessment of the two parcels in question in 1915 at $104,500 without protest, and the further fact that when asked whether he would take $50,000 for the property some 8 or 9 years ago, the appellant stated that he did not wish to sell and was holding the lands for a relative. It is noticeable that Meikle, who testified as to this conversation with the appellant, says, in answer to a question put to him by the respondent's counsel, that he would not give that price for the property now. And the silence of the appellant in 1915 is certainly not conclusive against him when he protests the assessment in 1919, although it is possibly a circumstance to be weighed.

I have therefore come to the conclusion that instead of considering what was the actual value of the land, the Board based its judgment, to the exclusion of evidence of actual value, on sub-sec. 16 of sec. 69, which merely permits the Court in determining the actual value, to have reference to the value at which similar land in the vicinity is assessed. Giving to this provision the prominence which the Board gives it, practically nullifies the imperative rule of sec. 40, sub-sec. 1, and makes it really the dominant rule, instead of being, what it is, a guide to the Court in determining the actual value. The result is that

evidence of actual value was disregarded, and the assessment of similar land in the vicinity was considered as the controlling element in the passing on the appeal from the District Judge, whose judgment was based on evidence of actual value.

I agree that the case should be referred back to the Board in order that it may determine what the assessment of these lands should be according to their actual value as required by the Assessment Act. To that end the appeal should be allowed with costs.

Mignault, J.

Appeal allowed.

MUNROE v. GRANT.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Chisholm, JJ. January 11, 1921.

MORTGAGE (§ I B—8)—DEED ABSOLUTE IN FORM—AGREEMENT OF EVEN DATE—CONSTRUCTION—DEED OPERATING AS MORTGAGE.

The defendant, J. Albert Grant, and others by deed conveyed to the plaintiff, George E. Munroe, and Donald Grant, deceased, from whom the plaintiff Sophia Grant derives title, certain lands and premises and also rents and royalties accruing to the grantors under the terms of a lease made between themselves and the Pictou Charcoal Iron Co. The deed is absolute in form and the consideration is expressed to be $16,000. An agreement of even date with the deed and reciting the fact of the execution of the deed was also executed; and the plaintiffs rely upon the agreement to shew that the deed though absolute in form was, as to the sum of $4,127, part of the consideration, intended to operate as a mortgage. The trial Judge held that the documents read together vested the property described in Munroe and Grant, and that the deed and agreement did not create a mortgage to secure the payment of the cash advanced by the said parties.

The Appellate Division held, Russell, J., dissenting, that the deed was, as to the $4,127, a charge upon the land and granted the usual order for foreclosure.

[See annotations: "Conveyance absolute in form, creditor's action to reach undisclosed debtor," 1 D.L.R. 76; and "Competency and sufficiency of parol evidence for the purpose of shewing that an instrument purporting to be a deed was intended to operate as a mortgage," 29 D.L.R. 125.]

Statement.

APPEAL from the judgment of Mellish, J., dismissing with costs plaintiffs' action as mortgagees of lands belonging to the defendants by virtue of an absolute deed which was intended as a mortgage. Plaintiffs claimed payment of a balance alleged to be due or in default sale or foreclosure or possession. Reversed.

W. A. Henry, K.C., and *H. K. Fitzpatrick*, K.C., for appellants.

John Doull, for respondents.

Harris, C.J.

HARRIS, C.J.:—By a deed dated September 19, 1896, the defendants conveyed to Donald Grant and the plaintiff, George E. Munroe, their heirs and assigns, certain lands at Bridgeville in the county of Pictou in consideration of the sum of $16,000.

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By an agreement of the same date between the same parties this deed is recited and provision is made for the payment of the $16,000 consideration by the grantees to the grantors. There were judgments outstanding against the male grantors or some of them for sums aggregating $4,127 and the agreement provided that this amount should be advanced by the grantees to pay off these judgments and the male grantors were to convey to the grantees "by way of mortgage as security for said sum all their personal property and chattels;" and the agreement provided that "said chattel mortgages shall be released when said $4,127 are paid to the parties of the first part as provided hereinafter."

The lands conveyed were supposed to contain valuable iron ore and the minerals therein were then leased to the Pictou Charcoal and Iron Co., upon certain rents and royalties, and the agreement referred to provided that the balance of the consideration for the deed—apart from the $4,127—should be contingent upon the rents and royalties and should only be payable to the grantors from time to time as the rents and royalties were received. The agreement also provided that when the grantees had received the whole $16,000 out of the rents and royalties they were to reconvey the lands to the grantors or their wives reserving certain mining rights to themselves. In the meantime the use of the lands was reserved to the grantors.

The grantees also had the right to recoup themselves for the $4,127 out of the rents and royalties upon which it was made a first charge, concurrently with another sum which had previously been made a charge upon the rents and royalties in favour of one Lithgow.

The $4,127 was advanced and paid by the grantees and they received $1,513.64 out of the rents and royalties and then the mines ceased to be operated and have been idle for many years. The grantees now bring an action claiming the deed and conveyance to be a mortgage and security for the $4,127 and they ask for foreclosure and sale.

The trial Judge reached the conclusion that the $4,127 was not repayable except out of the rents and royalties and was not secured on the lands and premises and he dismissed the action, and there is an appeal from his decision.

It must at once be admitted that the question, which is purely one as to the construction of the agreement, is a difficult one. Taking the whole document into consideration I have reached the conclusion that the $4,127 was a charge upon the lands.

The $4,127 was a charge on the lands at the time of the conveyance and the plaintiffs advanced the money to pay off the judgments. Apart from the agreement they would have been entitled upon making the payment to be subrogated to the rights of the judgment creditors. There is nothing in the agreement taking away this right, but on the other hand there is a provision that the male grantors shall convey to them "by way of mortgage as security for said sum all their personal property and chattels."

There is also a provision in sec. 10 of the agreement with regard to interest being payable at the rate of 7% on $4,000 which can only be referable to this amount of $4,127.

I cannot see any reason why the lands themselves—as distinguished from the mineral rights—were conveyed to the plaintiffs unless it was as security for this advance.

The whole object apart from this could have been accomplished by leaving the title of the land in the grantors and vesting the mineral rights in the grantees.

The result of the decision of the trial Judge is to leave the legal title to the lands as well as the mineral rights in the plaintiffs and the use of the lands in the defendants. The plaintiffs have only paid out the $4,127 and have received back $1,513.64. The balance of the consideration they have never paid and never will pay, because the mineral rights are worthless. It seems perfectly clear that if the lands were worth more than the balance due the plaintiffs on the advance of $4,127, the defendants would under the circumstances be allowed to redeem; and we cannot construe the agreement differently because the lands are worthless.

It is suggested that there is no covenant to repay the $4,127. There would be no written covenant in the case of any absolute deed which might under certain circumstances be construed in equity as a mortgage, and here, of course, if the chattel mortgages had been given they would have contained a covenant for payment. The absence of a covenant does not seem to be by any means conclusive. Nor does the fact that no time is fixed for repayment. Under the circumstances it cannot be said that a reasonable time has not elapsed.

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I would allow the appeal and grant the usual order for foreclosure with costs here and in the Court below.

RUSSELL, J. (dissenting):—The question to be decided in this case arises out of transactions connected with a mining property which seems to have included some lots of land as well as the rights conferred by the mining lease. There was a deed of the property absolute in form from seven grantors to two grantees one of whom and a party claiming as heir at law of the other are the plaintiffs in the action. The consideration of the deed is $16,000, but it is contended that, as to $4,127 of this amount, the deed must be construed as a mortgage to secure the repayment of the amount. If that sum stood by itself and were loaned by the grantees to the grantors and nothing more were known of the matter the deed would be construed as security for the loan. But in the present case there is an agreement contemporaneous with the deed, executed between the same parties as those named in the deed, except that the name of one of the several wives named in the deed is omitted. The nature of the transaction must, therefore, be determined by construing the deed and the agreement together in the light of what we know of the circumstances of the case which are very imperfectly presented. The agreement makes the payment of the purchase money, with the exception of the $4,127, payable only in the contingency of the amount being realised from the royalties derived through the operation of the mine. It recites that three parties named in the agreement are entitled to an undivided fifth interest in the property and that the property is to be held in trust for them and the rents and royalties paid over to them to the extent of their interest. It further provides that the grantees in the deed, who, except as aforesaid, are the parties of the first part in the agreement, shall, upon the execution of the agreement, pay C. E. Grant the sum of $4,127, which payment is to be concurrent with a payment of $6,000 or whatever balance thereof may be due to John Lithgow of Halifax. The relation of C. E. Grant to the matter is not explained, but I should conjecture from the identity of the figures that it was for the purpose of paying her that this sum was advanced by the grantees in the deed. No explanation is forthcoming as to the provision that three-fifths of the rents and royalties are to be appropriated towards the payment of Lithgow

and only one-fifth towards the liquidation of the $4,127 payable to C. E. Grant. The grantors in the deed are to have the use and occupation of the lands with the exception of the mines and minerals, free of rent or charge for such occupation and when the full amount of the consideration has been realised part of the land is to go to C. E. Grant and part to M. A. Grant, provided that it is expressly understood that the parties of the first part, who are the grantees in the deed, reserve to themselves their heirs and personal representatives the mine and minerals, etc., except as provided in a subsequent paragraph under which at the expiration of 2 years after the whole sum of $16,000 has been realised from the mine and also interest at 7% on $4,000, the said parties of the first part shall reconvey to M. A. Grant the one undivided fifth share in the mine.

The provision that I have just referred to is not commented on by the trial Judge, but it seems to me to completely dispose of the contention that the deed should be construed as a mortgage. Why should the mine with its veins, beds, seams, etc., become the absolute property of the grantees if the conveyance is merely a mortgage to secure the advances? When the "consideration" is paid, that is when the loan, as this "consideration" is contended by the plaintiffs to be, is repaid, the property conveyed by way of security should go back to the grantors. If it be said that the document is a mortgage as to the $4,127 but an absolute conveyance as to the balance of the consideration I can only say that such a mixture is outside of my experience and seems to me a legal impossibility.

There are sundry other provisions in the agreement which need not be referred to with the exception of one about to be noticed. I have probably made a fuller reference to the agreement than was necessary, but my purpose in doing so is to lay the ground for the conclusion that the parties have by their own agreement fully expressed their intentions with reference to the transaction and the nature and extent of the various rights which were meant to be created, so that there is really no field left for the operation of the familiar principle under which, in the absence of an agreement such as we have here, an Equity Court, on proof that a loan has been made, will construe an absolute deed into a mortgage.

There is a provision that certain of the grantors in the deed, not all of them as the trial Judge points out, shall, in consideration

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of the advance of $4,127 make a chattel mortgage of their personal property as security for said sum which shall be released when the said sum of $4,127 is repaid to the grantees in the deed. The chattel mortgage was never made. But counsel for the plaintiff bases on this provision an argument that the $4,127 was a loan to be repaid by the borrowers and that the deed must therefore be construed as a mortgage. I agree with the trial Judge that this provision as to a chattel mortgage must in view of all the other features of the transaction be construed to mean that these intending mortgagors were willing to give security that the mine would be sufficiently productive to enable the parties who had advanced the $4,127 to get back their money in the way provided for in the agreement, that is, from the operation of the mine.

The trial Judge makes the same suggestion with reference to the provision for the assignment in a certain event of certain shares in the capital of the Pictou Charcoal and Iron Co., but that explanation does not seem to be required. The grantees are only to hold these as security for Christie E. Grant.

On the whole I must say that the documents and the oral evidence shed a very imperfect light upon the precise nature of the transaction. The best conjecture I can make is that the original owners of the property were anxious to raise money for its development and the plaintiffs were willing to invest that it was the expectation of all the parties that the property could be made to pay, that the plaintiffs furnished ready money to the amount of $4,127 on which they were eventually to receive interest at 7%, that the property was to be worked until $16,000 had been realised from the rents and royalties, that the surface property should then be conveyed to Christie E. and M. A. Grant, and the mining rights were to be the property of the plaintiffs absolutely. The motive of the plaintiffs for advancing the $4,127 was that they should eventually become the owners of the property with 7% interest besides on their investment. All these expectations have been defeated by the comparatively unproductive nature of the property and there must be some proceeding available for winding up the business and distributing the losses, but there is no evidence upon which the transaction can be construed into a loan on mortgage.

The appeal must, I think, be dismissed.

LONGLEY, J., concurs with Harris, C.J.

CHISHOLM, J., (after setting out the facts):—The agreement, as already stated, recites the making of the deed, and the amount of the consideration, namely, $16,000. Of this amount, $4,127 was advanced in cash by Munroe and Grant and went to pay off judgments against the grantors or some of them, which were a lien on the property. The mine at the time was working and the parties intended that the consideration other than the cash advanced should be paid from the produce of the mine.

In one of the recitals of the agreement it is stated "that payment of the said consideration except $4,127 shall be contingent upon the above referred to rents and royalties;" from which statement it is clear that repayment of the cash advance was to be otherwise secured to Munroe and Grant.

Section 2 of the agreement provides for the distribution of the amount of the consideration for the mortgage, namely, $16,000 (excepting the $4,127) among the parties interested in the property at the time the mortgage was made. Section 4 speaks of the sum of $4,127 as an "advance made to pay off certain judgments against the parties of the second part," and it further provides that certain of the grantors should give a chattel mortgage of all their personalty as security for the said sum.

This section is consistent with the idea that the sum was a loan, repayment of which was to be secured independently of the success of the mine. Section 8 provides that the parties of the second part shall have the right to use and occupy the lands, except the mines and beds of mineral and vegetable substances, without rent, and such occupation is the ordinary incident of mortgage transactions. Section 9 provides that when the full amount of the consideration shall be realised out of the rents and royalties, a reconveyance of the real estate shall be made but the mines shall remain the property of Munroe and Grant.

I should regard the conveyance of the fee as being by way of security for the loan or advance of $4,127 as I cannot see any other good reason for it. Nor can I see why Munroe and Grant should advance that sum of money to pay off the judgment creditors, unless they thought that so far as the advance was concerned, they were at least putting themselves in as good a position as the judgment creditors previously held.

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Taking the whole circumstances of the case as disclosed in the evidence into consideration I think the deed must be regarded as having been intended as a mortgage to secure the cash advanced to pay off the judgments held by the creditors, which formed a lien on the property. The fact that the grantors were left in possession of the real estate and were not required to pay rent has been regarded as one of the more important indicia of a mortgage. *Marshall* v. *Steel* (1873), Russ. Eq. Dec. 116. Nor must the covenant to reconvey the real estate to the grantors after repayment of the advance be lost sight of. The absence of a covenant to repay the principal sum with interest is not a sufficient answer to the plaintiffs' claim. One cannot expect such a covenant in the case of a deed absolute in form, nor is its absence from a formal mortgage a difficulty for, as Fisher on Mortgages, 6th ed., p. 7, para. 8, puts it:—

> It is usual in a mortgage to insert a covenant to repay the principal sum with interest on the day fixed for payment and also to pay interest after default so long as the security shall subsist. But these were never necessary parts of a mortgage, which implies a loan and therefore (except in the case of a Welsh mortgage) a debt recoverable by action, and bearing interest even if none be expressly reserved.

In my opinion the appeal should be allowed with costs of appeal and trial and the plaintiffs should have an order for foreclosure and sale. *Appeal allowed.*

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GOLD v. STOVER.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

CONTRACTS (§ IV B—335)—OPTION AGREEMENT—BREACH—NOTICE—ACTION FOR DAMAGES—TIME LIMIT—TENDER OF PURCHASE-PRICE.

Where there has been a breach of an option agreement to purchase land, the holder of the option may, upon receiving notice of the breach, bring an action for damages, although the time limit named in the option has not expired. It is not necessary for him to tender the purchase-money before bringing the action. The fact that the holder of an option to purchase land has agreed to assign a one-half interest to a third party does not preclude him from recovering the full amount of damages for breach of the option agreement, the holder of the option being alone able to bring action for the breach.

[*Stover* v. *Gold* (1919), 48 D.L.R. 620, affirmed in part.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1919), 48 D.L.R. 620 at 625, reversing the judgment of Stuart J., 48 D.L.R. 620, and maintaining the respondent's action. Affirmed in part.

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

C. C. McCaul, K.C., for respondent.

DAVIES, C. J.:—I concur in the reasons stated by my brother Mignault for dismissing the appeal with costs and the cross-appeal with costs, subject, however, as to the latter, to a reference as stated by him to determine respondent's damages if either party so desires.

Idington, J.

IDINGTON, J.:—The appellant and respondent executed the following contract:—

This agreement made and entered into this thirteenth day of November A.D. 1916, by and between R. G. Gold of Minneapolis, Minnesota, party of the first part, and C. C. Stover of Milk River, Alberta, party of the second part, witnesseth:

The first party in consideration of one hundred dollars ($100) in hand paid by the second party, the receipt of which is hereby acknowledged, agrees and covenants with the second party to sell him the option to purchase the following described lands, the North West Quarter (N.W. ¼), of Section Four (4); all of section five (5); the north half (½), of section six (6), and the east half of section seven (7), all in township three (3), range fifteen (15), west of the fourth principal meridian, containing fourteen hundred and forty (1,440), acres more or less according to Government survey thereof for the sum of twenty-one thousand six hundred and ninety dollars ($21,690).

The second party shall have until March 1st, 1917, to pay the first half of the above, and in case he fails to do so shall forfeit all money paid down and this agreement shall become null and void.

The first party may have the right to sell the above property himself, without advertising same or through other agents, and in case he does sell at not less than sixteen dollars ($16), per acre, and in such case shall pay the second party three hundred dollars ($300), for such privilege.

(Sgd.) R. F. GOLD.
(Sgd.) C. C. STOVER.

The appellant on January 11, 1917, wrote the respondent as follows:—

Minneapolis, Minn.

Mr. C. C. Stover,
Milk River, Alberta.

Dear Mr. Stover:—

As per my telegram to you, I herewith enclose you my check for $300 to take up the option which I gave you on the Countryman property. I have sold it to a pretty good man, who expects to handle it himself. You will have to buy me a dinner on this. Please return option to me.

Yours very truly,
R. F. GOLD,
Treasurer.

Jan. 11th, 1917.

The foregoing contract though presenting some unusual features clearly was made for a valuable consideration and hence

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valid, and binding the appellant to the due observance of all its terms. He chose to disregard the due observance of the term contained in the last clause thereof by selling through another agent than the respondent, and to improperly announce to him by the foregoing letter the sale of the property, as if made within the literal terms of the right reserved.

Upon the receipt of the said letter there enured to the respondent a right of action for damages arising from said breach.

And as an outcome thereof there seems to have arisen, I most respectfully submit, an unfortunate misapprehension of the legal results.

Stuart, J. (See 48 D.L.R. 620), after reciting the salient facts in the story, seems to have overlooked the nature of the contract, and reached the conclusion that there could be no damages for such a breach of contract, unless and until the respondent had tendered the part of the purchase-money, which was to have become payable on March 1, 1917.

The case of *Hochster* v. *De la Tour* (1853), 2 El. & Bl. 678, 118 E.R. 922, and many decisions in cases since, founded thereon, seem to have been overlooked.

The cause of action arose for breach of said contract within the principle upon which these cases proceeded, long before March 1, 1917, and has been open to the respondent to pursue ever since.

The Appellate Division, 48 D.L.R. 620 at 625, properly set aside the judgment of Stuart, J., but unfortunately seems to have approached the assessment of the damages which the respondent was entitled to, as if to be assessed upon the same basis as if the option had been effectively exercised.

And, in doing so, it allowed only the measure of damages which the respondent could have in fact received, because he had before the breach, sold part of his chances of success to another party who had validly bargained with him for half the prospective profits and thus became entitled to half the fruits of the adventure, which, in the legal result, means, of course, though obviously not so intended, half the sum receivable herein by respondent under the assessment of damages allowed.

In so doing, in my opinion, the Court of Appeal erred gravely.

It is not what the personal results to the estate of the respondent alone or his personal profits might develop by reason of his calling in the assistance of partners but what, on such a contract, he was entitled to recover for the obvious breach thereof that should have been the guide to the assessment of damages.

And that seems to have been proceeded upon by assuming that as a certainty, the respondent could have reaped in profits the same sum as if he had in fact completed the anticipated contract of purchase.

Certainly that was an erroneous way of viewing the matter, for to complete the contract he must have raised half the purchase-price named in the option and thereby, and in many other incidental ways, have incurred some expense of which he was relieved by the breach.

And again, he stood to have run the risk for two and a-half months of the appellant selling by his own unaided efforts without advertising any price he was at liberty to receive, of not less than $16 an acre.

All these and the like considerations render it very difficult to say that the sum at which the damages were assessed is correct.

It may well be that even if the proper principles upon which the assessment of damages should have proceeded had been observed, the result would have been about the same, but how can we say so?

The misapprehension of the nature of the claim seemed to mislead also appellant's counsel into contending that, unless and until the respondent had tendered the price named in the option, he had no right to relief and no right to damages because he had not assented to the repudiation of the contract by the appellant.

I submit there is no foundation for such a contention and certainly nothing in *Roots* v. *Carey* (1914), 17 D.L.R. 172, 49 Can. S.C.R. 211, to uphold it.

That was a case of specific performance in which this Court held that as there had been no binding acceptance of the proposal, or option given, there could be no such relief granted, and all said therein by the majority so holding must be read in view of that aspect of the case.

Counsel for appellant relied upon the conduct of respondent in filing a caveat early in February, 1917, following the above quoted letter of the appellant.

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Idington, J.

No copy thereof appears in the case, but assuming it claimed an interest in the lands in question, how can that in law affect the actual outstanding liability of the appellant for breach of his contract? Or the rights of respondent resting thereon?

The respondent seems to have had the impression that the appellant had played him false in securing a purchaser by means against which he had contracted, and to have assumed that thereby the necessity for a tender was waived.

Certainly that would have been a contention much more arguable than many of the several misapprehensions of the nature of the contract, and the legal results flowing from the breach thereof, which have been presented.

The respondent also seems to have supposed that in some way, not very clear, he had by virtue of the breach become entitled to an interest in the land by way of recovering damages.

Are we to deprive a man of his legal rights because he has pursued an erroneous view of the method and means by which they are to be enforced? I submit not.

And the only result of all that so transpired which we ought to consider is that the parties, after pursuing such erroneous paths and contentions, agreed that the claims for specific performance should be abandoned, and respondent's claims and contention be reduced to the claim for damages and rely upon the bond of suretyship given to answer same.

In conclusion, if the parties wish, or either of them respectively think, that the amount awarded by the Appellate Division, 48 D. L.R. 620 at 625, is too much or too little to be allowed for such a breach of contract as I have outlined, within the ordinary principles upon which damages are assessable for breach of contract, such as I have indicated this is, and desire a reference to proceed upon such principles instead of the erroneous basis upon which the Appellate Division proceeded, I would allow such a reference at the risk to either so contending of costs following the result.

Possibly the parties may shrink, as counsel seemed to do, from the suggestion when made by me in course of the argument, and feel that they have had enough of the game of chance involved in a lawsuit.

The assessment of damages upon such a repudiation of the contract by way of anticipatory breach has always been recognised

as raising a difficult problem for those called upon to assess damages for such breach.

In the event of neither of the parties desiring such reference as suggested, the appeal should be dismissed with costs.

In the event of either, or both, of them desiring a reference, the costs of this appeal should await the result thereof. And, if resulting in a substantial increase or diminution of the amount found by the Appellate Division, costs thereof and of the appeal should be awarded accordingly.

Duff, J.

DUFF, J.:—I concur with Idington J.

Anglin, J.

ANGLIN, J.—The defendant, appellant, comes into this Court conceding the anticipatory breach or repudiation of contract alleged by the plaintiff, which he had stoutly contested in the provincial Courts. He seeks to avoid consequential liability on a ground which appears not to have been taken below—viz., that the plaintiff elected not to treat the defendant's repudiation as a breach entitling him to bring action, but to maintain the contract—thus keeping it alive for both parties and for all purposes—and that he failed to take up the option before its expiry by effluxion of time and had therefore no ground of action for breach at that time.

I incline to think that such a *volte face* should not be permitted. But if it be open to the defendant to take that position, in my opinion it does not help him. Citing the judgment of Cockburn, C. J., in *Frost* v. *Knight* (1872), L.R. 7 Ex. 111, at 112, he treats the case as if it were one of breach of contract for sale and purchase. But it was not that. The defendant's contractual obligation was to keep an offer of sale open for a definite period, subject to its earlier termination on a condition which did not arise. He broke that contract and put it out of his power ever to fulfil it by selling the property to another. Thereupon a cause of action for damages—the only cause of action he ever would have, as I view the matter—vested in the plaintiff. He may have mistaken his rights and sought relief to which he was not entitled but he did not forego the right to recover whatever damages the defendant's breach of contract entitled him to. That breach was permanent in its effects and, once committed, the contract was at an end and could not be revived at the election of the "optionee." The case was not one for election at all.

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Moreover, pending the action, some arrangement was made whereby the claim for specific performance put forward by the plaintiff was abandoned and a caveat which he had lodged to protect any interest that he might have acquired in the property was vacated in consideration of the defendant giving security for such damages as the Court might find the plaintiff entitled to recover. I rather incline to think that the basis of that arrangement must have been that the plaintiff's right to maintain his action for damages, if he could establish the breach of contract (which he averred and the defendant denied), should be recognised, and that if the defence now raised had been advanced at the trial that understanding would have been proved.

In any event the defendant's appeal in my opinion should not succeed and must be dismissed with costs.

The plaintiff cross-appeals claiming that the damages awarded should be increased from $3,335 to $6,910. The Appellate Division, 48 D.L.R. 620 at 625, found that the damage caused by the defendant was the difference between the sale price mentioned in the plaintiff's option and the actual value of the land. That difference it found amounted to $7,110. But, because the plaintiff had agreed to assign a one-half interest in the option to one Madge, he was held entitled to recover only one-half of the amount of the damages so ascertained, less $200 which he had already received from the defendant. With great respect I think the plaintiff was entitled to recover the entire damages—whatever they were. The option held by him was not assignable at law and no right of action against the defendant was vested in Madge. Whatever equitable interest he may have acquired in the option, or in the plaintiff's rights under it, and whatever right he may have as between himself and the plaintiff to require the latter to account for the proceeds of any judgment he may recover, the plaintiff alone was entitled to maintain an action for damages for the breach committed by Gold and is entitled in that action to recover the entire damages arising therefrom. The authorities cited by Mr. McCaul are conclusive on that point. From those damages, however, there should be deducted not merely the $200 for which credit was given by the Appellate Division, 48 D.L.R. 620 at 625, but $300, which was the sum actually received by the plaintiff from the defendant at the time of the repudiation of the option.

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But, again with profound respect, there would seem to have been a misapprehension as to the measure of damages. The option was treated as unconditional and damages were assessed as for the breach of a firm contract of sale. Now the option was on its face subject to the condition that, at any time before Stover had taken it up, Gold might sell the property at a price not less than $16 per acre, provided he did so without the intervention of an agent and without advertising, on paying to Stover $300 as compensation for his loss in being deprived of the option. Since the property has been found to have been actually worth $20 an acre the chance of this condition being fulfilled was by no means negligible and an option subject to it was obviously of less value than an unconditional contract of sale. It may well be that the damages for loss of such an option would fall short of the $3,335 for which the plaintiff has judgment.

But, inasmuch as the defendant has not appealed in regard to the quantum of the recovery, I would be disposed not to disturb the present judgment unless the plaintiff insists on our doing so. If he is satisfied to accept it, I would dismiss the cross-appeal without costs.

But, although I understand that two of my colleagues share this view we do not constitute a majority. With some reluctance, because the appellant will hereby obtain relief which he has not sought, in order that an effective judgment may be pronounced, I concur in the following disposition of the appeal and cross-appeal which, as I understand it, will meet the approval of my brothers Idington and Brodeur:

The appeal will be dismissed with costs. Upon the cross-appeal the question of damages will be referred to the proper local officer should either party so desire and within one month file an election to take such reference. If a reference is not so taken the cross-appeal will be dismissed with costs. If a reference is taken and results in the damages being assessed at more than $3,335 the defendant will pay to the plaintiff his costs of the cross-appeal and of the reference; if the damages be assessed at $3,335 or less the plaintiff will pay to the defendant his costs of the cross-appeal and reference.

Brodeur, J.

BRODEUR, J.:—This is an action in damages arising out of an option agreement by which Gold agreed to sell to Stover a property

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for a price of about $20,000. Gold, however, on the payment of $300 could withdraw this option and sell the property to some other person, provided he would not utilise the services of an agent. Stover could exercise his option on or before March 1, 1917, and would then have to pay half of the purchase price.

But, before Stover exercised his option, Gold advised him on January 11, 1917, that he had sold the property to another person and enclosed with the letter a cheque for $300 payable under the terms of the option agreement.

As Stover had satisfied himself later on that the sale had not been made in accordance with the terms of the option and that Gold had utilised the services of a real estate agent to carry it through, he filed a caveat to protect his interest in the lands in February, 1917, and in October, 1917, he instituted the present action in damages.

This action was dismissed by Stuart, J. (See 48 D.L.R. 620), on the ground that Stover should have accepted the option and tendered the money.

This judgment was reversed by the Appellate Division, 48 D.L.R. 620 at 625. Gold now appeals.

There was some question as to the construction of the agreement but this point was not pressed before us. It seems to me very plain that the agreement means that Stover could not sell the property through agents; and it has been found by the two Courts below that Gold sold the property through an agent, and in that respect the findings of this fact by two Courts below should not be disturbed. The point which is now raised by Gold is that Stover, instead of considering the agreement as terminated by the repudiation, elected to have it specifically performed and filed a caveat.

This point has not been raised by the pleadings nor in the Courts below. It may be that if this issue had been tried circumstances might have been adduced which would have set aside this contention.

The respondent Stover cross-appeals on the ground that he should receive not merely half of the damages found by the Court below but all the damages. The damages seem to have been ascertained as if the contract was a contract of sale between the

parties and not a contract of option agreement. Both parties are willing that this question of damages should be referred to the Master to be fully inquired into.

The appeal should be dismissed with costs with a proviso that the whole question of damages be referred to the Master.

MIGNAULT J.:—In this case both Courts were of opinion, on the construction of the option to purchase granted by Gold to Stover, that the former, during the interval of time given by him to the latter to pay the first half of the purchase price, to wit, until March 1, 1917, could sell the property provided he did so without any advertising and without the services of any agent, and for a price of not less than $16 per acre. I accept this construction of the contract of option which does not appear to be open to reasonable doubt.

I also agree with the two Courts in holding that, under the circumstances disclosed by the evidence, Gold committed a breach of his contract by selling the farm to Ponsford, inasmuch as, although the price was for more than $16 per acre, the sale was effected through an agent.

So far I am in agreement with Stuart, J., and with Harvey, C.J., I respectfully however differ from the former as to the effect of the breach by Gold of the contract of option he had given to Stover. Stuart, J., dismissed Stover's action because he had not, on or before March 1, tendered to Gold the amount payable in cash on account of the purchase of the farm. In my opinion no such obligation was incumbent on Stover, for Gold, by his sale to Ponsford, had put it out of his power to sell to Stover, or, to the same effect, had definitely repudiated his obligation to sell to Stover if the latter carried out the conditions of the option. It does not appear to be open to Gold to answer that before he had actually made a transfer of the land to Ponsford in the land titles office, Stover had ample time to take proceedings under his option to force a sale to him and to file, as he actually did, a caveat to protect his right to a transfer of the land. The breach by Gold of the option and his sale to a third party gave Stover the right to claim immediately the damages suffered by him in consequence of this breach, and in my opinion, he was not obliged to make a tender to Gold, when the latter had sold the property to a stranger.

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There is therefore only a question of damages at issue, and although Stover unnecessarily alleged that he was still ready to carry out the option and to fulfil all its conditions, his action against Gold was for damages. It is true that Stover asked for a lien against the land for the amount of the damages, but, at least since a bond was furnished him, the question is reduced to one of damages, and no such lien has been granted him.

The Appellate Division found that Stover could have sold the land for $20 per acre, making a profit of $7,110, but inasmuch as one Madge had promised to furnish him the money to purchase the land on condition of obtaining a half interest therein, Stover only obtained a judgment for one-half of the above sum, to wit, $3,355, as being the amount of his share in the profit to be made on a resale, and now Stover demands the whole $7,110 by his cross-appeal.

Very respectfully, I cannot agree with the view adopted by the Appellate Division. It may well be that Stover would have had to pay Madge one-half of the profit made by a resale, or of any damages recovered by him from Gold, but this is on account of an agreement between him and Madge, to which Gold was no party. As between Stover and Gold, I think the latter is not entitled to any deduction by reason of the agreement between Stover and Madge. I discussed a somewhat similar situation recently in *Bainton* v. *John Hallam Ltd.*, (1920), 54 D.L.R. 537, 60 Can. S.C.R. 325.

This however does not mean that Stover is entitled to the same amount of damages as if he had made with Gold an agreement of sale which Gold had refused to carry out. He had only an option, under which Gold could sell if he obtained an offer of at least $16 per acre, without any advertising or the services of any agent, and then Stover was only entitled to $300 which Gold actually paid to him and which he has not returned.

The acceptance by Stover of Gold's cheque for $300 does not prevent the former from claiming full damages for the breach of the option, for this acceptance was induced by Gold's assurance that the sale to Ponsford had not been made through an agent, but clearly the only damages which Stover can obtain is for the breach of an option which reserved a right of sale to Gold until Stover took up the option by paying on or before March 1 half

of the purchase price. Under these circumstances the measure of damages is the value of Stover's right to purchase, qualified as it was by Gold's right to sell to a stranger, provided the sale was not advertised or made through an agent. On the construction of the option, it looks as though Stover himself had in view the sale of the property as agent for Gold, his commission being the excess of the sale price over and above the price mentioned in the option, and this construction is fortified by the words "or through other agents" in the last paragraph of the option, but be that as it may, the right of Gold to sell himself must be regarded as substantially diminishing the value of the option acquired by Stover and of which he was deprived by the latter's sale to Ponsford.

In this view of the case, the position taken by the parties before this Court must be considered. Gold contended that Stover by his caveat and subsequent conduct had insisted on the agreement being specifically performed, and was deprived of any right of recovery inasmuch as he had not tendered half of the purchase price before March 1. Stover considered the measure of his damages as being the same as if he had obtained a firm contract for the purchase of the property instead of a restricted and qualified option. Both parties have therefore misconceived their legal position. Under these circumstances, I think Gold's appeal is clearly unfounded and should be dismissed with costs.

Stover's cross-appeal involves the question whether, having been deprived of a restricted and qualified right of purchase—which he might have lost in case of a sale by Gold in accordance with the option, and then his damages were fixed at $300—he is really entitled to more than he obtained in the Appellate Division on a basis which I respectfully think was erroneous. After full consideration, I have come to the conclusion that, if either party desires, there should be a reference to the proper local officer to determine the amount of damages to which Stover is entitled, the whole as stated in the judgment of my brother Anglin.

Appeal dismissed.

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C. A.

BLIGH v. GALLAGHER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

CONTRACTS (§ I C—26)—TO WILL PROPERTY—SUFFICIENCY OF CONSIDERATION — AGREEMENT — PROOF — SUBSEQUENT WILL—STATUTE OF FRAUDS.

Where a testator makes and executes a will, leaving all her property to a certain person in pursuance of an agreement, whereby such person agrees to keep such testator and look after her until her death, and the testator actually lives and has her home with such person until her death, there is an enforceable contract which cannot be set aside or rendered nugatory by a subsequent will.

[*Maddison* v. *Alderson* (1883), 8 App. Cas. 467, distinguished; *Hammersley* v. *De Biel* (1845), 12 Cl. and F. 45, 8 E.R. 1312, followed.]

Statement.

APPEAL by plaintiff from the judgment of Murphy, J., in an action for specific performance of a contract. Reversed.

N. R. Fisher, for appellant; *J. Martin*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The contract upon which the plaintiff's claim rests, has, I think, been proved, and the plaintiff's evidence has been sufficiently corroborated by other material evidence. Great care must of course be exercised by our Courts to guard the estates of deceased persons against fraudulent claims put forward by persons whose evidence cannot be met by that of the other alleged contracting party. What was a rule of prudence with the Chancery Judges in England has been made a statutory one here. One must therefore scan with a watchful eye what the plaintiff has sworn to and what other witnesses called to corroborate her evidence have sworn to. The effect of the plaintiff's evidence shortly stated is as follows:—

She was asked under what circumstances the arrangement between her and the deceased was made and said:—

> Well, she (the deceased) said that she was afraid to be alone and her son had put her out and she wanted to find a place to make a home *for the balance of her years.*

Plaintiff was not then able to take her and the deceased came back shortly afterwards and again requested to be taken into plaintiff's home. The plaintiff's evidence then proceeds:—

> I decided to take her, and she said she had very little ready money but she would pay me 5 or 6 dollars a month or more if she could and would make her will to me for the balance for her care, and that was what was agreed upon.

The deceased was provided with a home and care during the balance of her life, about 2 years. She actually made a will in conformity with the promise set out above but before her death and unknown to the plaintiff she revoked the will and bequeathed

her property to her two sons. The evidence with regard to the making of the will is important because it connects the will with the contract and corroborates the plaintiff's story. It is the evidence of George Warton. He said:—

Before the will was made, she (the deceased) often asked me if I would go down with her to make her will, that she had agreed to make a will to Mrs. Bligh for her keep and home. She wanted to know if I would go with her and act as executor.

There is other evidence corroborating the evidence of the plaintiff but I do not think it is necessary to refer to it. There is no suggestion in this case of undue influence or want of capacity or of intelligence on the part of the deceased. The trial Judge appears to have relied very strongly upon language used by Lord O'Hagan in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467. The only question decided in that case was as to whether there had been part performance so as to take the contract out of the Statute of Frauds, a question which does not arise in this case at all, as it was stated by counsel that the statute was not relied upon. Whether that statute could have any application to this case or not I am not called upon to enquire into. True, in the case just mentioned, their Lordships made some observations in regard to the sufficiency of the contract, but these observations are entirely *obiter;* they are entitled nevertheless to very great respect but the facts of that case were not nearly so favourable to the plaintiff as they are in this case. In this case the plaintiff relies upon a distinct promise to make a will in consideration of the plaintiff taking the deceased into her home, providing her with rooms on payment of very small sums, caring for her for the balance of her years, upon the promise aforesaid to make a will.

What took place cannot, in my opinion, be read as a mere revocable intention to make a gift. It is sufficient in support of her right of action to refer to *Hammersley* v. *De Biel* (1845), 12 Cl. & F. 45, 8 E.R. 1312. The authority of that case has never been questioned and it has been relied upon in many subsequent cases.

The plaintiff in her statement of claim asked for specific performance of the contract not for damages for breach of it. No merely technical questions were raised during the argument, the only question argued was as to whether the contract had been made out or not and sufficiently corroborated. I gather from

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the evidence that the executors under the second will got in the estate which realised some $2,077, and there is an intimation in the evidence that this money has been disbursed in some way with the exception of $800. It is therefore evident that specific performance cannot be ordered even if the property involved were such as to make that the proper remedy. The plaintiff of course is entitled as against the executors to damages to the full value of the property which had been promised her under the first will.

While in terms the statement of claim does not ask for damages for breach of contract, yet all the facts are before the Court and no objection at all has been taken by counsel in respect of the form in which relief is sought. I would therefore amend the statement of claim and give the plaintiff damages as aforesaid and direct a reference to the District Registrar of the Supreme Court at Vancouver to ascertain what deduction should be made from the said sum of $2,077, for debts, funeral and testamentary expenses of deceased over and above the legacies, other than the legacy to the plaintiff mentioned in the first will, and which amount to the sum of $70 and the head-stone $100, which I think I must infer plaintiff assented to having deducted from the property to be devised to her.

The plaintiff should have costs here and below and the costs of the reference.

Martin, J.A.

MARTIN, J.A., would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—In this case I am unhesitatingly of the opinion that the appeal should be allowed.

I refrain from passing any strictures upon the fact that we find an old woman 68 years of age and subject to epileptic fits, practically on the street without a home, though one of her sons with whom she had lived still resided in Vancouver, not knowing what may have led to such a condition.

However, be that as it may, while in that condition the deceased came to the home of the plaintiff and as the plaintiff alleges entered into an agreement with her by which the deceased was to have two rooms at $6 per month, to have a home with her during her life and when her misfortune overtook her was to be properly cared for, in consideration of which the deceased would make a will in favour of the plaintiff, which, with the exception of the reservations in the will, was to leave the plaintiff the entire estate of the deceased at her death.

Such will was duly made and attested on or about the month of November or December, 1917. This is sworn to by the plaintiff herself and corroborated by the evidence of defendant Gallagher, who took the instructions and drew the will and saw to its execution in proper and legal form and who was named one of the executors, as well as by the witness Warton, who was also named an executor.

It is suggested that this will was not drawn in pursuance of any agreement but I do not think it requires any stretch of imagination in this case, to conclude that it was so drawn, rather than that it was a mere whim to bequeath her property to a stranger who was kind to her.

But fortunately, we are not without evidence in that regard.

There is first the condition of the deceased without a home and subject to the infirmity mentioned; there is the evidence of the plaintiff herself and there is in corroboration, the evidence of Warton, in these words:—

> Well, before the will was made she (meaning the deceased) often asked me if I would go down with her to make her will, that she had agreed to make a will to Mrs. Bligh for her keep and home.

And Mrs. Burns: "She said any one that looked after her in her last days, they were to have all that was left after her funeral expenses were paid," and again: She said "She spoke of Mrs. Bligh and said that she had arranged everything, that if anything happened to her at any time Mrs. Bligh would have everything."

This evidence of Mrs. Burns is not as direct as that of the witness Warton but fits in with the evidence of the plaintiff to some extent. Moreover, there is the proved fact that a will was actually executed in the terms of the alleged agreement although not stating that it was in pursuance of any agreement, and this is in itself a circumstance to be taken into consideration.

After all it is for the Court to decide after making all due and proper allowance and observing all safeguards thrown around claims against the property of a deceased person to determine what evidence is sufficient to warrant them in maintaining any such claim and in my opinion that onus has been discharged by the plaintiff.

Some months after making the will referred to, the deceased, while still an inmate of plaintiff's home, made another will revok-

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ing the will in favour of the plaintiff, but continued to live with and be cared for by the plaintiff up to the time of her death.

This will was also prepared by the defendant Gallagher who with one of the sons of the deceased, was named executor and such last mentioned will was duly probated.

The plaintiff knew nothing about this subsequent will until told by the sons a day or two after the funeral, who informed the plaintiff that she could do nothing but that she had better send in a bill for expenses which she did, believing she had no other remedy. This was not even paid although to use the words of the sons as stated in the evidence: "Why," they said, "it certainly is an awful state of affairs, but never mind *Sister*, we will see you paid."

The will in favour of the plaintiff could not be produced. Gallagher had delivered it to the deceased but had at the time taken a copy which was either destroyed or mislaid and could not be found and the original itself, if it still existed, was borne away by the sons in the trunk of the deceased after the funeral.

That such a will was executed, however, is not in dispute.

Now, if the will was executed in pursuance of that agreement (and I so find) there is an enforceable contract which cannot be set aside or rendered nugatory by a subsequent will.

The trial Judge relied upon the authority of *Maddison* v. *Alderson*, 8 App. Cas. 467. On the facts of that case their Lordships were inclined to the view that no contract had been established but assuming that there was such a contract there was no part performance unequivocally referable to a contract so as to exclude the operation of the Statute of Frauds.

In the case at Bar, I have already stated that the evidence is sufficient to establish a contract. The Statute of Frauds although pleaded was not argued or insisted on before us.

The estate of the deceased consisted of two mortgages on real estate which have since been paid off, the defendant Gallagher as one of the executors having received the moneys amounting in all to $2,077.11.

As specific performance cannot be decreed under the circumstances, and as the evidence discloses that breach of contract is the proper remedy we should, I think, amend the pleadings to conform to the evidence.

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There should be judgment against the executors for the value of the estate which came into their hands less all proper deductions and a reference to the Registrar to take the accounts.

McPhillips, J.A.

McPHILLIPS, J.A. (dissenting):—I am of the opinion that Murphy, J., arrived at the right conclusion and the appeal should be dismissed. The onus was upon the appellant to establish an enforceable contract and that onus was not discharged—*In re Fickus*; *Farina* v. *Fickus*, [1900] 1 Ch. 331, Cozens-Hardy, J. (afterwards M.R.), said, at pp. 334-335:—

> A mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to obtain specific performance or damages. There must be a contract in order to entitle the party to obtain any relief. This seems to me to result from the judgments of the House of Lords in *Hammersley* v. *De Biel*, 12 Cl. & F. 45, 8 E.R. 1312; *Jorden* v. *Money* (1854), 5 H.L. Cas. 185; 10 E.R. 868; and *Maddison* v. *Alderson*, 8 App. Cas. 467.

In *Ungley* v. *Ungley* (1877), 5 Ch. D. 887, 46 L.J. (Ch.) 854, Jessel, M.R., said (see 46 L.J. (Ch.)):—

> Now as to the facts; and before dealing with them I make this preliminary observation, that the decision of the Judge, who has had the advantage of seeing the witnesses and hearing the evidence, ought not to be lightly overruled, and the case should be an exceptional one to induce the Court of Appeal to interfere with the view he has taken of the evidence. I do not say that the Court of Appeal should never do so, but a strong case must be shewn to justify such interference.

Eberts, J.A.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

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ABELL v. MUNICIPAL CORPORATION OF COUNTY OF YORK.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 17, 1920.

HIGHWAYS (§ II A—20)—DEDICATION BY OWNER—ONTARIO MUNICIPAL ACT, (1913) 3 & 4 GEO. V., CH. 43—EASEMENT RESERVED AND EXISTING AT TIME OF PASSING—RIGHTS OF SUCCESSOR IN TITLE.

Section 433 of the Municipal Act (1913), 3-4 Geo. V., ch. 43, Ont., provides that "the soil and freehold of every highway shall be vested in the corporation of the municipality or municipalities," and by sec. 432, "All roads dedicated by the owner of the land to public use" are declared to be "common and public highways." The passing of this legislation and the repeal of 3 Edw. VII., ch. 19, which was concurrent with it, does not take away an easement of carrying a mill raceway across a highway constituted solely by the dedication of the predecessors in title, who obviously had reserved such easement, which was in existence at the time the legislation was passed and through whom the present owner claims.

[*Abell* v. *Village of Woodbridge and County of York* (1919), 46 D.L.R. 513, reversed. See Annotation, Private Rights in Highways antecedent to Dedication, 46 D.L.R. 517.]

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ABELL v. MUNICIPAL CORPORATION OF COUNTY OF YORK.

APPEAL by plaintiff from the judgment of the Ontario Supreme Court, Appellate Division (1919), 46 D.L.R. 513, which reversed the judgment of Masten, J. (1917), 37 D.L.R. 352, in an action to establish the right of the appellant to maintain a raceway in connection with his mill property under the surface of a highway in the village of Woodbridge. Reversed.

H. J. Scott, K.C., for appellant.

T. H. Lennox, K.C., for respondent.

Davies, C.J.

DAVIES, C.J. (dissenting):—The contest in this case is as to the right of the now appellant to maintain a raceway in connection with his mill property under the surface of a highway called Pine street in the village of Woodbridge.

The question in dispute depends upon the proper construction of sec. 433 of the Municipal Act, 3-4 Geo. V. 1913 (R.S.O. 1914, ch. 192). That section reads as follows:—

433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act.

The law applicable down to the enactment of this section was 3 Edw. VII. 1903, ch. 19, sec. 601, and is as follows:—

601. Every public road, street, bridge, or other highway, in a city, township, town or village—except any concession or other road therein, which has been taken and held possession of by any person in lieu of a street, road or highway laid out by him without compensation therefor—shall be vested in the municipality subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.

It is not contended that there was any express reservation of appellant's rights within the meaning of those words in section 433.

Agreeing as I fully do with the reasoning of Meredith, C.J.O., who delivered the judgment of the Appeal Court (1919), 46 D.L.R. 513, 45 O.L.R. 79, concurred in by Maclaren, Magee and Hodgins, JJ.A., I would dismiss this appeal with costs.

The Legislature has since altered sec. 433 and its proper construction is now not of public importance, and as I have nothing material to add to the Chief Justice's reasons for judgment, I content myself with simple concurrence therein.

Idington, J.

IDINGTON, J.:—The question raised herein is whether or not the appellant's easement of carrying a mill raceway across a highway constituted solely by the dedication of the predecessors in

title, through whom appellant claims, who obviously had reserved such easement, has been taken away by sec. 433 of the Municipal Act, 3-4 Geo. V. 1913, which reads as follows:—[See *ante* p. 82.]

I should be very unwilling to assume that the Legislature ever intended to exercise its undoubted but extreme power of taking any man's property and transferring it to another without due compensation. I cannot think that it intended deliberately to do so as is contended for herein. Such legislation, if ever attempted, must be construed in the most restricted sense.

Much stress is laid upon what is claimed to be the clear meaning of the language used.

The introductory words, "Unless otherwise expressly provided," are read by those urging this view as if it were absolutely necessary to have the express provisions framed in the form of a deed or other instrument of that sort.

It seemed at the close of the argument as if respondents were willing to concede that, for example, a statutory right of a railway crossing or running along the highway might be such an express provision. But why so? Surely that sort of provision is often beyond the legislative jurisdiction of the Provincial Legislature as much as any private grant.

It is not an express provision within the power of the Legislature, much less within the literal meaning of the words in question in the connection in which they are used; which would seem possibly to imply something expressly provided by the Legislature.

Passing this more or less arguable proposition, I am decidedly of the opinion that unless the narrow limits suggested thereby or something akin thereto is to be adhered to, the words "otherwise expressly provided" are quite comprehensive enough to cover a claim such as the reservation of this easement claimed by appellant, and all other rights established by law as that is; just as effectually as those created by other statutes for purposes of railways crossing or running along the highway or the use of parts of the soil by watermains of water supply companies, and such like.

All such like rights would be obliterated by maintaining the interpretation of the Appellate Division of the Supreme Court of Ontario of the said section, unless resting upon the provision of some Dominion legislation.

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Idington, J.

I agree so fully with the reasoning of Middleton, J., in his dissenting opinion that I need not enlarge.

I do not think that the amending Act, 9 Geo. V. 1919, ch. 46, in any way helps or hinders either side in such a case as this pending at the time it was passed. Counsel for the respondent after taking his point having had time to consider the objections thereto, with commendable frankness, admitted so on resuming his argument.

I think the appeal must be allowed with costs throughout and the trial Judge's judgment restored but not to go into effect for 6 months in which, meantime, if so advised, respondent can remedy the wrong or expropriate appellant's property in the said easement.

Duff, J.

DUFF, J.:—This appeal turns on a dry question of law, namely, the application of sec. 433 of the Ontario Municipal Act, 3-4 Geo. V. 1913. The section is in the following words:—[See judgment of Davies, C.J., *ante* p. 82.]

This section replaced sections 599 and 601 of the Municipal Act, 3 Edw. VII. 1903, the text of which was in these words:—

599. Unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out according to law, and every road allowance reserved under original survey along the bank of any stream or the shore of any lake or other water, shall be vested in His Majesty, His Heirs and Successors.

601. Every public road, street, bridge or other highway, in a city, township, town or village—except any concession or other road therein, which has been taken and held possession of by any person in lieu of a street, road or highway laid out by him without compensation therefor—shall be vested in the municipality subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.

It has been held by the majority of the Appellate Division that the effect of the legislation of 1913 is to abrogate rights existing at the time the legislation was passed secured by the provision of sec. 601 that the interest vested in the municipality shall be "subject to any right reserved in the soil reserved by the persons who laid out such road, street, bridge or highway."

Sections 599 and 601 of the Act of 1903 have had a place in the Ontario Municipal legislation for many years and have been the subject of a good deal of discussion and the general effect of the decisions appears to be correctly stated by Biggar's Municipal Manual, at 818, namely, that as regards highways created by dedication "the soil and freehold" were vested in the muni-

cipality subject as in that sec. 601 provided. In this general view of sec. 601 the Act of 1913 effected, as regards such highways, no change in the law presently relevant, unless, as has been held by the Appellate Division, by repealing sec. 601 it did as regards such highways abrogate the rights secured by the language above quoted. I am unable myself to agree with this conclusion and I think that sec. 14, sub-sec. c., of the Interpretation Act, R.S.O. 1914, ch. 1, points to the principle which ought to be applied if indeed its language does not expressly cover the case. That section is in these words:—

> 14. Where an Act is repealed or wherever any regulation is revoked, such repeal or revocation shall not, save as in this section otherwise provided,
>
> . . . . .
>
> (c) Affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment, regulation or thing so repealed or revoked.

In the case at least of highways established by dedication after the passing of sec. 601 or its parent enactment, one is not, I am inclined to think, exceeding the bounds of reasonable construction in holding that the right of the dedicand was a right "acquired under the Act" and therefore protected by this clause. But whether that be or be not strictly so the Act of 1913 ought, I think, to be read in light of the canon of construction laid down in *C.P.R.* v. *Parke*, [1899] A.C. 345, applying the language of Lord Blackburn in *Metropolitan* v. *Hill* (1881), 6 App. Cas. 193, at 208:—

> It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears.

The words "soil and freehold" are not words of such aptness and precision as one might have expected to find if the intention had been to transfer the full and unincumbered proprietorship *a coelo usque ad centrum*: and indeed obviously the *dominium* of the municipality is subject so long as the highway remains a highway to the public right of passage exercisable by all His Majesty's subjects.

In the result the construction contended for would disable the municipality from acquiring only a stratum of land sufficient for highway purposes in a case in which the acquisition of the soil *ad centrum* (in the case, *e.g.*, of a highway laid out over a mining property), might entail a great deal of unnecessary expense and

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Duff, J.

inconvenience. The better view appears to be that the subject matter with which the Legislature is dealing is the title held at the time of the passing of the Act by the Crown or by some public authority subject to the public right of user as a highway. If that is the subject matter to which the enactment is directed, and I think that conclusion is justified by the character of the existing legislation, then the principle of construction applies that general words should not be extended so as to involve collateral effects upon the rights of individuals which the Legislature must be presumed not to have contemplated. *Railton* v. *Wood* (1890), 15 App. Cas. 363, at p. 367.

Anglin, J.

ANGLIN, J.:—The findings of the trial Judge are now fully accepted with the result that the right of the appellant to maintain the raceways in question across Pine street, a public highway, prior to the enactment of the Municipal Act of 1913, 3-4 Geo. V., ch. 43, is conceded. The sole question on this appeal is whether that legislation destroyed or took away such right without compensation. Such a confiscatory effect will not be given to a statute unless it be inevitable. Maxwell on Statutes, 6th ed., 501. The intention to accomplish that result must be expressed in clear and unambiguous language, 27 Hals., para. 283, p. 150. Here it has been inferred chiefly because of the omission in sec. 433 of the Municipal Act of 1913, which replaced secs. 599 and 601 of the Municipal Act of 1903, of the words "subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway."

It is obvious, as is pointed out by Middleton, J., 46 D.L.R. 513 45 O.L.R. 79, that there must be some restriction on the broad meaning which it is sought to attribute to the language of sec. 433. Certain rights which form part of the soil and freehold of highways were not thereby vested in the municipalities. I agree with that Judge that it is reasonably clear that the purpose of the change made by the Act of 1913 was to do away with some uncertainty and confusion that arose from the former legislation which, while providing that highways should be vested in the municipalities (sec. 601), at the same time declared (sec. 599) that the soil and freehold thereof were vested in the Crown. Apparently to overcome this difficulty the legislation of 1913 vested the soil and freehold in the municipalities, thus transferring to them the

proprietary rights theretofore held by the Crown. The attainment of the purpose of the amendment does not require interference with easements, such as that held by the plaintiff, and reasonable effect, and I think the full effect intended by the Legislature, can be given to the language of sec. 433 without involving their confiscation.

Moreover, I doubt whether the language "the soil and freehold of every highway shall be vested" is apt or appropriate to carry a mere easement enjoyed over the highway, since an easement is only a right in the owner of a dominant tenement to require the owner of servient land "to suffer or not to do" something on such land and neither forms part of the ownership thereof nor involves a right to any part of its soil or produce. Gale on Easements, 9th ed., p. 1.

In reaching the conclusion that the appeal should be allowed and the judgment of Masten, J. (1917), 37 D.L.R. 352, 39 O.L.R. 382, restored, I have entirely put out of consideration the amendment of 9 Geo. V. 1919, ch. 46, sec. 20, brought to our attention by Mr. Lennox. See *Boulevard Heights* v. *Veilleux* (1915), 26 D.L.R. 333, 52 Can. S.C.R. 185. If, notwithstanding secs. 18 and 19 of the Interpretation Act, R.S.O. 1914, ch. 1, any inference may properly be drawn from this enactment it would seem to afford an indication that the view of the effect of the legislation of 1913 above stated probably accords with what the Legislature intended. Of course, sec. 19, precludes any inference that the statute of 1913 before the amendment of 1919 had the effect for which the respondent contends or that such amendment was necessary to give it the effect for which the appellant contends. The amendment was obviously passed to meet the decision of the Appellate Division, 46 D.L.R. 513, 45 O.L.R. 79, in this case and may well have been introduced merely *ex majori cautela*.

The appellant is entitled to his costs here and in the Appellate Division.

BRODEUR, J.:—It is common ground that the street under which were the raceways in question had been dedicated as a public highway by the predecessor in title of the plaintiff-appellant and that the dedication was subject to his right as owner of certain mills to enjoy the raceways across the street. The public highways were before 1913 partly vested in His Majesty and partly vested in the municipalities, 3 Edw. VII. 1903, ch. 19, secs. 599 and 601.

Brodeur, J.

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ABELL v. MUNICIPAL CORPORATION OF COUNTY OF YORK.

Brodeur, J.

The vesting in the municipality was made subject to any rights in the soil reserved by the person who laid out the road (sec. 601).

In the year 1913, it was enacted that all the roads would be vested in the corporation. It is true that the old secs. 599 and 601 of the Municipal Act were repealed and that no formal provision was enacted as to the reservations that the former owners of the road possessed under the old law. But it seems to me that the object of the statute of 1913 was simply to bring a change as to the vesting of the highways from His Majesty into the municipal corporations.

The repeal had not the effect of affecting any right, privilege or easement that the appellant possessed concerning those raceways, R.S.O. 1914, ch. 1. The appellant still possesses the right which he reserved to himself when his predecessor made his dedication to use these raceways and continue the industrial development which he could make with his mills.

I entirely concur in the views expressed in the Appellate Division by Middleton, J. (dissenting) (46 D.L.R. at 515).

The appeal should be allowed with costs of this Court and the order of the trial Judge restored with a proviso however that it shall not become operative for a period of 6 months, to enable the municipality in the meantime, if it so desires, to expropriate the right or easement in question.

Mignault, J.

MIGNAULT, J.:—I concur with Anglin, J.

Appeal allowed.

ONT.

S. C.

WAMPLER v. BRITISH EMPIRE UNDERWRITERS AGENCY.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Magee, J.A., Riddell and Masten, JJ. October 20, 1920.

INSURANCE (§ IX—450)—AUTOMOBILE—SPECIAL CLAUSE—CONSTRUCTION—DAMAGE WHILE BEING UNLOADED FROM FERRY—LIABILITY OF COMPANY.

A policy insuring a motor car contained a clause *inter alia* against loss "while being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable." Held, that on the proper construction the two parts of the clause should be held to be distributive; that the first part covered loss arising from injury to the automobile itself, while being transported in any conveyance by land or water, and the second provided, in addition, that even though there was no physical injury to the automobile itself, yet loss, arising from general average and salvage charges for which the insured is legally liable, was insured against, and that the company was liable for damage caused by a ferry-boat backing away and allowing the automobile to drop into the water, while being unloaded.

[*Wampler* v. *British Empire Underwriters Agency* (1920), 54 D.L.R. 657, 48 O.L.R. 13, reversed.]

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APPEAL by plaintiff from the judgment of Orde, J., 54 D.L.R. 657, 48 O.L.R. 13, in an action upon an automobile insurance policy. Reversed.

J. G. Kerr, for appellant; *A. C. Heighington*, for defendants.

The judgment of the Court was delivered by

MASTEN, J.:—Appeal from the judgment of Orde, J., dated the 14th June, 1920.

The claim is for loss sustained by the plaintiff in respect to his automobile, which was insured by the defendant company.

The circumstances which occasioned the loss are fully set forth in the judgment now in review and need not be here repeated.

On the argument counsel agreed that the quantum of the claim was not disputed, and that, if liability exists, the judgment should be for the sum of $1,181.47.

The points argued on the present appeal are:—

First, whether the loss in question is or is not covered by the terms of the policy.

Second, that the plaintiff's action was prematurely brought before any liability to pay had arisen. Coupled with this point is an appeal by the plaintiff against the leave to amend granted to the defendants at the trial whereby they were permitted to set up this defence, though it was not originally pleaded.

A third question was mentioned as to the non-delivery of formal proofs of loss by the insured to the company, and an alleged waiver thereof by the company.

Referring to this last point, I am of opinion that the correspondence between the parties, appearing in exhibits 6, 7, 8, 9, and 10, operates as a waiver of any proofs of loss other than those which were delivered: *Morrow* v. *Lancashire Insurance Co.* (1899), 26 A.R. (Ont), 173.

Turning then to the question of construction of the policy in question, I agree with the appellant's contention that the policy, on its true construction, covers the loss in question.

It was pointed out by the Court in the course of the argument that the policy contains no direct covenant to pay; but, nevertheless, I am of opinion that the policy does evidence an agreement to insure, and if any such question originally existed it is covered by the second clause of para. 1 of the statement of defence, which

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admits that the "defendants did enter into a contract of insurance of the said automobile of the plaintiff on certain terms and conditions."

It seems to me that the question now under consideration falls to be determined under the opening words of the policy, which I quote as follows:—

"Automobile.

"In consideration of $28.05 premium and the declaration of the insured, it is hereby understood and agreed that this policy is extended to cover the insured to an amount not exceeding $1,700 on the body, machinery and equipment while within the limits of the Dominion of Canada and the United States . . . including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits, subject to the conditions before mentioned and as follows:—

"(A) Fire, arising from any cause whatsoever, and lightning.

"(B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable.

"Theft Endorsement.

"(C) Theft, robbery, or pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment, whether the theft, robbery, or pilferage occur during the hours of such service or employment or not (and excepting also the wrongful conversion or secretion by a mortgagor or vendee in possession under mortgage, conditional sale, or lease agreement), and excepting in any case, other than in case of total loss of the automobile described herein, the theft, robbery, or pilferage of tools."

The internal evidence afforded by these words and by the manner in which they are printed satisfies me that the defendants intended to accept liability for loss or damage to this automobile, (A) from fire, (B) "while being transported in any conveyance by land or water," (C) from theft, robbery, or pilferage: subject, however, to any exceptions clearly and unambiguously set forth in the subsequent portions of these three clauses; and I am of

opinion that no such clear and unambiguous exception is set forth in the latter part of clause (B).

But, apart from the form of the policy and the manner in which the words are printed, there are other considerations which appeal to me as strongly supporting the appellant's contention:—

First, the inherent probabilities from the surrounding circumstances of the case. I cannot conceive that an insurance company offering insurance on an automobile while being transported would offer such insurance only in case of "stranding, sinking, collision, burning or derailment" of the conveyance in which the motor was being transported. Is it reasonable to suppose that the insurance company would offer to insure an automobile which was being conveyed in a train against loss only if there was a burning, collision, or derailment of the train, but would not insure the motor against breakage, scratches, or other injuries from jolting or from shifting of other freight which was being conveyed in the same car with it? Similarly, is it reasonable to suppose that in case of transportation of the motor by ship the insurance should only hold in case of stranding, sinking, or collision of the ship, but that the company should not be liable if the cargo shifted and the motor was injured?

That being my view of the surrounding circumstances, and the policy being at best ambiguous and uncertain in its phraseology, I think the ambiguity is to be resolved against the company.

But indeed I cannot consider that the clause is in truth ambiguous. We are bound to give effect, if possible, to both parts of clause (B) above quoted, and I think it is the better construction to hold the two parts of (B) to be distributive: that the first clause covers loss arising from injury to the automobile itself while being transported in any conveyance by land or water; and the second clause provides, in addition, that, even though there is no physical injury to the automobile itself, yet loss arising from general average and salvage charges for which the insured is legally liable is insured against—thus, in my opinion, giving full effect to every part of the contract.

Dealing now with the second point, as to the action having been prematurely brought, I am of opinion that the amendment ought not, in the circumstances here existing, to have been allowed. This defence was not set up by the defendants in their statement

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of defence, but was permitted by the learned Judge at the trial. The question of permitting amendments and of extending time for appeal has been considered in numerous cases, but I am unaware of any recent case in which the principle has been departed from that the discretion to permit an amendment is to be exercised so as to do what justice may require in the particular case; and it seems clear to me that in the present case justice does not require that a technical defence of this kind, which has not been set forth in the pleadings, ought to be permitted at the trial. Had this plea been set up in the statement of defence, the plaintiff could at once have abandoned this action and begun a new action the next day. At the trial such an amendment should only have been permitted on terms that the defendants should bear all costs thrown away in consequence of the amendment, and the plaintiff could then have begun a new action. In either case the amendment was not only technical but valueless in determining the real rights of the parties. I refer to the cases of *James* v. *Smith*, [1891] 1 Ch. 384, and *Aronson* v. *Liverpool Corporation* (1913), 29 Times L.R. 325, and *Sales* v. *Lake Erie and Detroit River R.W. Co.* (1896), 17 P.R. (Ont.), 224 (reversed in the Supreme Court but on other grounds), as illustrations of refusal to permit an amendment of the defence where the justice of the case does not require such amendment.

Our Rule 183 is not quite the same as the English Rule; but, even under our Rule, it has been held by my brother Riddell, in a judgment concurred in by my brother Sutherland—*Witherspoon* v. *Township of East Williams* (1918), 44 O.L.R. 584, at p. 602, 47 D.L.R. 370, at p. 387—that "Rule 183 does not compel us to amend *proprio motu*: amendments under that Rule are 'to secure the advancement of justice,' not to enable a litigant to obtain a dishonest advantage. 'The real matter in dispute' (see Rule 183), the real issue here, is—Did the plaintiff fulfil his contract?"

In that statement of the law I wholly agree; and, applying it to the present case, add, "The real matter in dispute" is what was insured against.

I would, therefore, allow the appellant's appeal on this branch of the case also, with the result that I think the judgment of the trial Judge should be reversed, and judgment entered for the plaintiff for $1,181.47, with costs throughout.

Appeal allowed.

THE KING v. McCARTHY.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. January 21, 1921.

AUTOMOBILES (§ III B—205)—DRIVER OF—LEGAL DUTY TO USE REASONABLE CARE—NEGLIGENCE—LIABILITY—MANSLAUGHTER.

A person driving an automobile on a public street is under a legal duty to use reasonable care and diligence to avoid endangering human life. If he fails to perform that duty without lawful excuse he is criminally responsible for the consequences.

[See Annotation, Automobiles and Motor Vehicles, 39 D.L.R. 4.]

CASE STATED by the trial Judge on a conviction for manslaughter. Conviction affirmed. Statement.

H. E. Sampson, K.C., for the Crown.

P. M. Anderson, K.C., for the accused.

HAULTAIN, C.J.S., concurs with LAMONT, J.A. Haultain, C.J.S.

NEWLANDS, J.A., (dissenting):—The charge in this case is manslaughter. The facts are that the accused, who was driving an automobile on Albert St., Regina, struck and killed the deceased, a telephone workman, who was working in a man-hole on the street. This man-hole was covered with a canvas tent about 4 ft. high, under which the deceased was working. Newlands, J.A.

The trial Judge, in charging the jury, said:

It has been decided, and I am going to tell you that the law is, that every person who drives a motor-car has a duty to drive it with such care and caution as to prevent, so far as is in his power, any accident or injury to any other person; that is, he has got to use all reasonable precautions to see that no person is injured through his want of caution or precaution. It does not, I apprehend, require any argument to bring to your attention the fact that a motor-car negligently driven is an extremely dangerous thing; it is dangerous to the public; and therefore it is quite necessary and quite proper that any person who drives a vehicle of that kind must use care to see that he does not injure any person else, and that if, through want of care on his part—that is reasonable care, the care that an ordinary reasonably prudent man would exercise—injury or death ensues to another person, then in law—and I am so charging you—he is criminally responsible. And if in this case you come to the conclusion that it was through some want of ordinary reasonable care which an ordinary prudent man would have observed in the driving of the car, that the man Young came to his death by the car driven by the accused, then I am going to charge you that in law he would be guilty of manslaughter, and it would be your duty to find him guilty.

At the request of the accused's counsel, he recalled the jury and told them:

I am also asked to direct your attention to the fact that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case. I think that is quite so, and I am going to charge you to that effect—that while in a civil case a man may be liable to an action

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for damages, in a criminal case it would take a greater degree of negligence to render him liable. That is so. But in this case it is for you to say whether or not the accused, driving a vehicle of that sort along the streets of the city, took that care which it was the duty of an ordinary prudent man to take in order to avoid doing damage to some person else on the street. If you come to the conclusion that he did not take that care, and that it was in consequence of that want of care that the death of Young took place, then he is guilty; if he did take that care he is not guilty.

In my opinion the Judge erred in his first charge to the jury and in the latter part of his charge when the jury was recalled. The want of ordinary reasonable care which an ordinary prudent man would have observed, although sufficient to render the accused liable in a civil action, is not sufficient in a criminal case. There must be gross negligence before there is criminal liability.

In *Rex* v. *Allen* (1835), 7 C. & P. 153, at 154, Park, J., said: "We are not trying the question of who is liable civilly. It is a question of felony. It is a question of gross negligence." In *Reg.* v. *Noakes* (1866), 4 F. & F. 920 at 921, Erle, C.J., said: in charging a jury:

> Without saying that there might not be evidence of negligence in a civil action, he did not think that there was sufficient to support a conviction in a criminal case.

The author in a note to this case says (at p. 922):

> The real ground of the opinion was that even a culpable mistake and some degree of *culpable* negligence is not *felonious* unless it be so gross as to be reckless.

And in *Reg.* v. *Doherty* (1887), 16 Cox, C.C., 306, Stephen, J., at p. 309, said:

> Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished. As to what act of negligence is culpable, you, gentlemen, have a discretion, and you ought to exercise it as well as you can. I will illustrate my meaning. Supposing a man performed a surgical operation, whether from losing his head, or from forgetfulness, or from some other reason, omitted to do something he ought to have done, or did something he ought not to have done, in such a case there would be negligence. But if there was only the kind of forgetfulness which is common to everybody, or if there was a slight want of skill, any injury which resulted might furnish a ground for claiming civil damages, but it would be wrong to proceed against a man criminally in respect of such injury. But if a surgeon was engaged in attending a woman during her confinement, and went to the engagement drunk, and through his drunkenness neglected his duty, and the woman's life was in consequence sacrificed, there would be culpable negligence of a grave kind. It is not given to everyone to be a skilful surgeon, but it is given to everyone to keep sober when such a duty has to be performed. To

find culpable negligence in the present case you must assume that the prisoner went into his bedroom, brought out the loaded revolver, and so handled it as in some manner to fire the two shots without intending to fire at all.

Lord Campbell, C.J., said, in *Reg.* v. *Hughes* (1857), 7 Cox C.C. 301, at 302:

> The general doctrine seems well established that what constitutes murder being by design and malice prepense, constitutes manslaughter when arising from culpable negligence.

Gross negligence has been defined by Erle, J., in *Cashill* v. *Wright* (1856), 6 El. & Bl. 891, at p. 899, 119 E.R. 1096, as greater negligence than the absence of the ordinary care: "It is such a degree of negligence as excludes the loosest degree of care and is said to amount to dolus."

The trial Judge in this case told the jury that the accused was guilty if he did not take that care which it was the duty of an ordinary prudent man to take in order to avoid doing damage to some person else on the street. In my opinion this charge was incorrect. He should have told the jury that the accused would only be criminally liable if he was guilty of gross negligence as defined by the above quotations, and he should have left to the jury the question as to whether the accused was guilty of such gross negligence in this case.

I am of the opinion, therefore, that there should be a new trial.

Lamont, J.A.

LAMONT, J.A.:—The accused was found guilty of having unlawfully killed Percy Young. The trial Judge remanded him for sentence, and reserved for the consideration of this Court the following questions:

> 1. Did I properly instruct the jury as to the negligence which, under the circumstances of the case, would render the accused guilty of manslaughter? 2. In view of the fact that there was no evidence that the accused saw the deceased or knew that the deceased was under the tarpaulin referred to in the evidence, could the accused be found guilty of manslaughter?

The evidence in the case was not supplied to us, but I take it from the charge of the trial Judge that the question for the consideration of the jury was, had the accused failed to keep a proper lookout, while driving his car on Albert St., to see that no person lawfully using the street would be struck and injured by it?

It appears that the deceased Young and two others were working at a man-hole on the street. Over the man-hole was placed a tarpaulin spread on a frame in the shape of a tent or inverted V. The structure was from 3 to 4 ft. wide at the bottom, and extended

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5 or 6 ft. along the street, and was some 4 to 5 ft. high. Two of the men were in the man-hole. The deceased Young was either under the tarpaulin or beside it, when he was struck by the accused's automobile and killed.

The trial Judge in his charge instructed the jury that a motor car driven negligently along the street was a dangerous thing; that the driver of every such vehicle was under a legal obligation to drive with the care and caution necessary to prevent, as far as possible, injury to any other person in the street, and that if they came to the conclusion

that it was through some want of ordinary reasonable care which an ordinary prudent man would have observed in the driving of the car, that the man Young came to his death by the car driven by the accused, then I am going to charge you that in law he would be guilty of manslaughter, and it would be your duty to find him guilty.

Counsel for the accused objected to this direction, contending that the Judge should have told the jury that the negligence necessary to justify a conviction for manslaughter was negligence of so gross a character as to amount to recklessness. Before us he now makes the same contention, and argues that a trifling disregard of duty or momentary inattention is not sufficient to support a verdict of guilty.

The argument must be considered in the light of the facts. It would appear from the charge that the accused's windshield was dirty, and this to a greater or less extent obstructed his vision. In his charge the Judge said:

It is said that the condition of the windshield was such that you could not see out of it, at least, that it was imperfect. I think the accused's own evidence is that it was 25% dirty . . . However, on account of the condition of his windshield, he says, he did look out at the side from time to time, and the last time he looked out was some time before the crash. Under the circumstances, did he do everything that a reasonably prudent man would have done? . . . Does the fact that he ran over the obstacle without seeing it convince you, or does it not convince you, that he could not have been doing what he should have been doing, otherwise he could not have helped but observe it? It is for you to say. If you come to the conclusion, under all the evidence, that if he had been looking ahead at all as the driver of a motor car should have looked ahead, he would or should have seen this, then you would be justified in coming to the conclusion that it was through culpable negligence on his part that the accident occurred, and that therefore he was guilty of manslaughter.

A number of English cases were cited in which it was held that, in order to justify a conviction, the Crown must shew some-

thing more than negligence: that it had to establish what was designated as "gross negligence" or "criminal inattention."

In *Reg.* v. *Nicholls* (1875), 13 Cox C.C. 75, at 76, Brett, J., said to the jury:

> . . . If a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter. Mere negligence will not do, there must be wicked negligence, that is, negligence so great, that you must be of opinion that the prisoner had a wicked mind, in the sense that she was reckless and careless whether the creature died or not.

See also *Rex* v. *Williamson* (1807), 3 C. & P. 635; *Reg.* v. *Noakes* (1866), 4 F. & F. 920; *Rex* v. *Allen*, 7 C. & P. 153; *Reg.* v. *Doherty*, 16 Cox C.C. 306; *Reg.* v. *Elliott* (1889), 16 Cox C.C. 710.

This rule, however, does not seem to have been applied in cases where persons were run over and killed while on the highway by others riding or driving.

In *Rex.* v. *John Grout* (1834), 6 C. & P. 629, the accused, who was near-sighted, was driving his cart along the highway at a rate of 8 or 9 miles an hour, sitting in the bottom of the cart. He ran over a foot passenger and killed him. Bolland, B., told the jury that the question for their consideration was whether the prisoner, having the care of the cart and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of His Majesty's subjects; if they thought he had conducted himself properly they would say he was not guilty, but if they thought he had acted carelessly and negligently they could pronounce him guilty of manslaughter.

In *Reg.* v. *Dalloway* (1847), 2 Cox C.C. 273, a driver, standing in his cart, driving without reins on the public road, but not driving furiously, ran over and killed a child. He was indicted for manslaughter. Erle, J., directed the jury that a party neglecting ordinary caution, and, by reason of that neglect, causing the death of another, was guilty of manslaughter.

In *Reg.* v. *Murray* (1852), 5 Cox C.C. 509, the accused while driving a cart knocked down and killed a child. Perrin, J., in charging the jury, said at p. 510:

> The question which you have to try here is, I may say in a word, whether the death was caused by the careless and negligent driving of the prisoner, or was the result of an accident which he could not reasonably foresee or provide against.

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In *Reg.* v. *Cavendish* (1874), I.R. 8 C.L. 178, the accused, driving a cab along the street, ran over a woman, inflicting injuries from which she died. He was indicted for manslaughter. There was some evidence of negligence on his part. Fitzgerald, B., told the jury that, in order to convict the defendant (see p. 179),

> they should be satisfied that the death of the deceased was caused by the act of the defendant; and that, if they were satisfied of that, it lay upon the defendant to shew, either by independent evidence, or from the facts as proved on the part of the prosecution, that he was excused; that the act of driving a cab in the street was a lawful one, and that he would be excused if that act was done with due care and caution on his part; that they need not trouble themselves with any particular consideration of the party on whom the burden of proof lay; that the real question was, whether, on all the facts, due and proper caution was exercised by the defendant or not . . . if they were satisfied that he exercised due care and caution in doing it, they ought to acquit him.

The accused was convicted, and the question was reserved for the Court of Criminal Appeals as to whether or not the jury had been misdirected. Six out of seven Judges constituting the Court held that the direction given was correct. Dowse, B., in his judgment, quoted a passage from Sir Michael Foster's book, which seems to me to be appropriate. It is as follows (I.R. 8 C.L., at p. 181):—

> A person driving a cart or other carriage happeneth to kill. If he saw or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder, for it was wilfully and deliberately done. Here is the heart regardless of social duty, which I have already taken notice of. If he might have seen the danger, but did not look before him, it will be manslaughter for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused.

The dissenting Judge, O'Brien, J., differed from his colleagues only on the question as to the onus of proof. In a subsequent case, *Reg.* v. *Elliott*, 16 Cox C.C. 710, O'Brien, J., distinguished between the application of the rule laid down in the *Cavendish* case and the application of the rule contended for by Mr. Anderson on behalf of the accused in this case, and which the Judge adopted in the case then before him. His distinction was as follows, at pp. 713-714:—

> *Reg.* v. *Cavendish* was a case of direct violence causing death, and the fact alone made the prisoner guilty, unless the prisoner could excuse himself. Here the prisoner was not the agent that caused the death, for *non constat* that any accident would have happened, and the train might have gone back without a collision, however likely that was to happen.

I have referred to these English cases at some length on account of the strenuous arguments *pro* and *con* which were based upon them.

In my opinion, however, it is not necessary for us to refer to these authorities at all, because the framers of our criminal law have expressly legislated upon the subject, and in their legislation they have, it seems to me, adopted the principle laid down in *Reg.* v. *Dalloway*, and *Reg.* v. *Murray*.

Section 247 of the Cr. Code reads as follows:—

> 247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

That an automobile on a public street of the city may endanger human life if driven without care or caution is self evident. In the case before us the accused was in charge of the automobile. He was therefore under a legal duty to use reasonable care to avoid endangering human life. If he omitted to perform that duty without lawful excuse, the section expressly says that he is criminally responsible for the consequences thereof. Criminal responsibility follows as a result upon a failure, without lawful excuse, to take reasonable care under the circumstances; that is, to take the care which a reasonable and prudent man would have taken.

The law is summed up in Archbold's Criminal Pleading, Evidence and Practice, 1918 ed., at 856, as follows:—

> The degree of care to be used in driving depends on the number of persons or vehicles in the street; *R.* v. *Murray*, 5 Cox. 509 (Ir.); and if reasonable care and diligence is used, no criminal liability is incurred.

As the absence of reasonable care and caution was precisely the degree of negligence which the trial Judge instructed the jury was necessary to justify a conviction, his charge, in my opinion, was correct.

That the principle for which Mr. Anderson contended has no application to a case like the present, is, I think, also clear, from the fact that, once the Crown has established the killing and that the death resulted from a failure by the accused to perform a legal duty, a *primâ facie* case of unlawful killing has been made

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out for which the accused is criminally responsible, unless he satisfies the jury that, under the circumstances, he should be excused.

Archbold's Criminal Pleading, p. 832, states the law as follows:—

> Thus upon an indictment for manslaughter by negligent driving, on proof being given of the killing, it was held to lie on the accused to shew that he had driven with proper skill and care . . .

The verdict of the jury shews that the accused failed to satisfy them that he had used due care and caution. He must therefore be held criminally responsible for the death of Young.

As to the second question, the fact that the accused did not know the deceased was under the tarpaulin is no excuse. He should have seen the structure, and should have assumed that there might be some person working under it.

In my opinion, therefore, both questions submitted should be answered in the affirmative, and the conviction sustained.

Conviction affirmed.

N. S.

S. C.

THE KING v. EATON.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Chisholm, JJ. December 9, 1920.

APPEAL (§ I C—28)—JUDGMENT—CONVICTION—APPLICATION FOR NEW TRIAL—WHEN GRANTED—CRIMINAL CODE, SEC. 1019.

An Appellate Court will not set aside a conviction or order a new trial directed, even though evidence has been improperly admitted or rejected, unless it appears to the Court that some substantial wrong or miscarriage of justice has been occasioned.

[See Annotation, Misdirection as a "Substantial Wrong," 1 D.L.R. 103.

Statement.

APPEAL from the judgment of the County Court Judge refusing to reserve the following point of law on the conviction of defendant for unlawfully stealing one Ford motor car of the value of $400 or thereabouts, the property of one Gussie S. Robinson: "Was there any evidence of the crime of theft to sustain the conviction?" Affirmed.

J. J. Power, K.C., for appellant.

W. J. O'Hearn, K.C., for respondent.

The judgment of the Court was delivered by

Harris, C.J.

HARRIS, C.J.:—The reserved case is as follows:—

> The defendant was convicted before me on April 29, 1920, on a charge that he did "at Halifax in the county of Halifax on the 30th day of June, A.D. 1919, unlawfully steal one Ford motor car of the value of four hundred dollars or thereabouts, the property of one Gussie S. Robinson."

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An application for a reserved case has been made by counsel for defendant on the following grounds:—1. Was there any evidence of the crime of theft to sustain the conviction? 2. Was the Judge right in allowing the Crown to give in evidence in main the testimony of another witness named Ernest Bell shewing the non-failure of the defendant to pay the price of another car which he sold to the defendant, and did the introduction of such evidence vitiate the conviction, although the Judge stated that he was uninfluenced by its reception?

There was an appeal from the refusal to state a case on the first ground and the whole matter was heard at one time.

The Court was unanimously of opinion that there was evidence of the crime of theft to sustain the conviction and it seems unnecessary to discuss it.

On the argument of the appeal counsel raised a question as to the admissibility of the evidence of the witness Bell, but it is not necessary to express any opinion regarding it for two reasons:—

First. The Judge states that he came to his decision irrespective of this evidence; therefore, assuming that it was not admissible, it did not affect the result.

Sec. 1019 of the Criminal Code, R.S.C. 1906, ch. 146 provides:

1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

We agree that no substantial wrong or miscarriage was occasioned on the trial by what took place.

Second. The evidence discloses that the accused went to the stand in his own defence and was properly cross-examined regarding the matter referred to in the evidence of Bell and admitted it. The admission of the evidence, even if inadmissible at that stage, did no harm under the circumstances.

For these reasons the appeal will be dismissed and the second question will be answered that the introduction of such evidence did not vitiate the conviction. *Appeal dismissed.*

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SHAW v. GLOBE INDEMNITY CO. OF CANADA.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

INSURANCE (§ III D—71)—POLICY OR CONTRACT—"ENTIRE SIGHT OF ONE EYE IS IRRECOVERABLY LOST"—CONSTRUCTION—LIABILITY.

The "entire sight of one eye is irrecoverably lost" within the meaning of an indemnity policy when the insured, although able to distinguish light from dark and notice shadows, has lost the useful sight of the eye in relation to his avocation, and when no operation is recommended that affords reasonable belief that the sight can be restored.

[*Re The Etherington and Lancashire etc. Accident Ins. Co.*, [1909] 1 K.B. 591, referred to.]

Statement.

APPEAL by defendant from the trial judgment in an action to recover under an accident policy. Affirmed.

S. S. Taylor, K.C., for appellant.

E. P. Davis, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal for the reasons given by the trial Judge, Gregory, J., who has, if I may say so, stated the facts and his conclusions of law thereon with great clearness and accuracy.

Galliher, J.A.

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

I cannot accept the view so strongly urged by Mr. Taylor, that where there remains the faintest glimmer of sight and where by a delicate operation that might be improved, that the insured cannot recover under the wording of the policy.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The clause in the policy which needs to be construed is numbered 9, and reads as follows: "Entire sight of one eye is irrecoverably lost."

Now the facts would appear to be clear and conclusive that one eye has lost its usefulness for all time. Such may reasonably be said upon the evidence of the respondent and Dr. Crosby, specialist, and one circumstance that cannot fail notice is this, that the respondent submitted himself at the request of the appellant to another specialist, Dr. Anthony, selected by the appellant, but the appellant did not call Dr. Anthony; in fact, called no evidence. Upon the facts it is demonstrated to a certainty that the sight of one eye is "irrecoverably lost." The eye itself is there but not in its natural state; it is injured and sightless. To be able to distinguish light from dark and notice shadows, is not seeing, it is not the possession of "sight." In my opinion, as at present advised—although in the present case it is unnecessary

to go that far—it must be sight that is useful sight in relation to the avocation of the respondent, *i.e.*, "Train Despatcher (office duty only)," as set forth in the policy.

Can it be said at all successfully upon the facts of this case, that there has not been "loss of sight" within the meaning of the policy? It would seem to me that there can be but one answer to this question and that must be that the sight is lost and cannot be recovered or got back. There would not appear to be any possible remedy nor is any operation recommended that would afford any reasonable belief that the sight would be restored. A miracle only could restore the sight. As I read Dr. Crosby's evidence, no human skill would appear to afford any remedy of a situation which would appear to be hopeless. That being the position, the final analysis must result in the determination, that that which was insured against has happened and the indemnification under the terms of the policy is payable.

The general principle upon which the Court must proceed in determining liability is admirably and trenchantly set forth in the judgment of Vaughan Williams, L.J., in *Re The Etherington and Lancashire &c. Accident Ins. Co.*, [1909] 1 K.B. 591, 78 L.J. (K.B.) 684. We find the Lord Justice saying: (78 L.J. (K.B.) 684 at 686):

> In my opinion, the judgment of Channell, J., in this case is right and should be affirmed. I do not say that the construction of this policy is easy. But I start with this—that it is well established by authority that in construing a policy of insurance, whether life, fire or marine, or any other kind of policy, an ambiguous clause should always be construed against rather than in favour of the insurance company. That view was affirmed by this Court in *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K.B. 863, and was particularly emphasised by Fletcher Moulton, L.J., in the course of his judgment. He said, "I fully agree with the words used by Lord St. Leonards in his opinion in the case of *Anderson* v. *Fitzgerald* (1853), 4 H.L. Cas. 484, 10 E.R. 551, to the effect that in this way provisions are introduced into policies of life insurance which, "unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable proportion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written." I think that this policy should be construed *fortius contra proferentem*, and on that basis I will consider what is its meaning. But before I do so I wish to refer to two points. The first is this: Counsel for the insurance company called our attention to the case of *Isitt* v. *Railway Passengers' Ass'ce Co.* (1889), 22 Q.B.D. 504, as being a decision which, if it were applicable and were followed in this case, would make it difficult for the company to maintain

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their defence; for there the Court held that the death of the assured was due to the "effects of injury caused by accident," where the ultimate cause of the death was a result which was reasonably to be expected from the accident. But we were told that the clause which appears in this policy was introduced for the purpose of getting rid of the decision in that case. I have no doubt that that is historically right, and that that was the object of the clause. But I think that if the company desired to get rid of that case they had not the commercial courage of their desire. They have not, in my opinion, expressed with sufficient plainness their desire that what was laid down by the Court in that case should in no sense be applied against their policies. Then there is another point. We must not construe this policy merely in reference to this particular case. We must recollect that it is a document which is used and regularly issued by this insurance company to persons who are desirous of effecting insurances against accidents, and we must consider where the construction which is urged upon us on behalf of the company would lead if we were to adopt it. So far as I can see, if we adopted that construction it would lead to this result—that it would be very difficult to establish the liability of the company on such a policy in any case except where the accident resulted in what used to be called death on the spot; for every other case except that of death on the spot, there is always the possibility of an intervening cause. It would be very difficult to look forward with any certainty to any money being recoverable on such a policy if we were to put that construction upon it. My view, therefore, is supported by this consideration, which I think will in a sense be welcomed by the insurance company—that if I am right I am avoiding a construction under which the policies that could be enforced against the company would be so reduced in number that very few people would care to insure against accidents.

In the present case the argument that has been so forcefully pressed by the counsel for the appellant, cannot, with deference, be given effect to; it would be destructive of the true principle of indemnification as defined by the authorities. Here it is contended that owing to the fact that there is a mere sensibility of light and shadow, with really no capability to see at all, and no hope of recovery of sight, that the "entire sight" of the eye is not "irrecoverably lost;" it would seem to me upon the facts to be a most untenable contention.

In my opinion, therefore, Gregory, J., the trial Judge, arrived at the right conclusion, and the judgment should be affirmed.

Eberts, J.A.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Dennistoun, JJ.A. November 29, 1920.

COMPANIES (§ VII A—364)—FOREIGN COMPANY—SHAREHOLDER DOMICILED IN MANITOBA—LIABILITY UNDER STATE LAWS OF COMPANY.

When a British subject domiciled in Manitoba becomes the owner of shares in an incorporated American company he becomes subject to the liabilities imposed on shareholders by the laws of the State in which the company is incorporated, and is deemed to have submitted in common with the other shareholders to its jurisdiction, and is bound by its process and may be sued in Manitoba for the amount of his liability.

Statement.

APPEAL by defendants from the trial judgment (1919), 49 D.L.R. 399, in an action by the receiver of a foreign company, against the executors of the estate of Sir William Whyte, to recover the amount of the par value of 50 preferred shares held in said company, and interest thereon. Affirmed.

E. K. Williams, for appellant.

A. C. Ferguson, for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—The plaintiff in this case is the receiver of The O. W. Kerr Company, a corporation created under the laws of the State of Minnesota. The defendant is the executor of the late Sir William Whyte, deceased. In January, 1911, the deceased became the owner of 50 shares of the preferred stock of the corporation of the aggregate par value of $5,000. The manner in which the shares of the corporation were sold in Manitoba was as follows: The agent to make these sales was furnished with stock certificates executed in blank under the seal of the corporation. When a sale was made and the purchase-money was received, the name of the purchaser and the number of shares were written in the blank spaces in the certificate, and the certificate was delivered to the purchaser. The money was remitted to the corporation and the purchaser's name was entered in the books of the corporation as that of a shareholder. The evidence shews that this was the procedure followed in the present case. The deceased was received as a shareholder and dividends were paid to him on his shares from time to time. He was still the owner of these shares when he died in April, 1914. At the time he acquired these shares, and up to the time of his death, Sir William Whyte was domiciled in Manitoba.

By the constitution and laws of Minnesota, each stockholder in a corporation, whether he is the holder of common or preferred

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shares, shall, with certain exceptions, which do not include the O. W. Kerr Co., "be liable to the amount of stock held or owned by him." The further allegations in the statement of claim are to the effect that the O. W. Kerr Co.'s financial affairs were in such a condition in the early part of the year 1915 that on the application of a creditor the plaintiff was appointed as receiver of that corporation; that the corporation is indebted to various persons, firms and corporations to an amount exceeding $400,000: that it has no assets except the "superadded or constitutional liability of the stockholders."

I think it was sufficiently proved that the deceased had subscribed for and become the owner of the shares in question. The plaintiff, who is a practising attorney-at-law in the State of Minnesota, gave evidence as to facts of importance in the case, and also proved the laws of that State applicable to the matters in question. The procedure relating to the appointment of a receiver and the proceedings instituted and completed thereunder were proved by certified copies under the seal of the Minnesota Court, and were further identified by the evidence of Allen. The sufficiency of the proof of the legal proceedings and of the various documents relating to the formation, business and affairs of the company, as put in evidence, are fully dealt with by my brother Cameron in whose conclusions I agree.

The stock certificate delivered to Sir William Whyte when he purchased the shares shews on its face that the company was incorporated under the laws of Minnesota. The letter written to him on January 3, 1911, by the agent of the company suggesting that he should make the purchase, mentions it as "The O. W. Kerr Company of Minneapolis." The letter from Sir William in reply refers to it in the same terms and expresses a willingness to take $3,000 worth of stock. On January 24, 1911, he wrote again and said: "I have your letter of 21st inst., in connection with increasing the capital stock of the O. W. Kerr Company, of Minneapolis. From my knowledge of this firm's methods, and your own strong recommendation, I will take $5,000 preferred stock, and enclose herewith my cheque for same."

By the word "firm" the writer no doubt meant company. He must be taken to have intended to become a shareholder in the

company with all the benefits and all the obligations attached to the ownership of such shares.

Copin v. *Adamson* (1874), L.R. 9 Exch. 345, is a leading case on the liability of a person who becomes a shareholder in a foreign corporation. That action was brought on a French judgment. The defendant pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law, that he was never served with process, nor had any notice or opportunity of defending himself. The first replication to this plea alleged that defendant was the holder of shares in a French company, having its legal domicile at Paris, and that he became thereby subject to all the liabilities, etc., belonging to holders of shares, and in particular to the conditions contained in the statutes or articles of association; that by these statutes it was provided that disputes arising during liquidation should be submitted to the jurisdiction of the French Court; that every shareholder provoking a contest must elect a domicile at Paris and in default election might be made for him at the office of the imperial procurator; that summonses, etc., should be validly served at the domicile formally or impliedly chosen; that the company became bankrupt and defendant's unpaid calls became payable to plaintiff as assignee; that he made default and provoked a contest; that he never elected a domicile; that plaintiff caused a summons to be served at the office aforesaid; that by the law of France the office provided was the implied domicile of election for the purpose of service and the service was regular; that defendant was bound to appear but did not, whereupon judgment by default was entered against him. The second replication alleged that the defendant was a shareholder, as in first replication mentioned, and stated the provisions of the law of France to the same effect as those contained in the above-mentioned statutory articles of association, but omitting all reference to the statutes or articles of association, and alleging that defendant did not elect a domicile, that the company became bankrupt, etc., and that a summons was served as in first replication stated. It was held by all the Judges who heard the argument that the first replication was good. Kelly, C.B., held that the second replication was also good, but the major-

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ity of the Court, Amphlett and Pigott, BB., held that it was bad. On appeal from the decision, in L.R. 9 Exch. 345, upon the first replication, the Court of Appeal upheld the judgment of the Court of Exchequer (1875), 1 Ex. D. 17.

In giving judgment in the Exchequer Court, Kelly, C.B., said, L. R. 9 Exch., at p. 349:

I apprehend that it is now established by the law of this country that one who becomes a shareholder in a foreign company, and therefore and thereby a member of that company—such company existing in a foreign country, and subject in all things to the law of that country—*himself becomes subject to the law of that country, and to the articles or constitutions of that company construed and interpreted according to the law of that country* in all things and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively.

I take it that all the Judges agreed with the statement of the law contained in the above extract. Amphlett, B., with whom Pigott, B., concurred, said at L.R. 9 Exch. 353:

As to the first replication demurred to, the Court is unanimously of opinion that the defendant is shewn upon the face of it to have contracted with the company, of which he is a shareholder, and whose representative the plaintiff is, that he would, under the circumstances disclosed, be amenable to the jurisdiction of the Court of the Tribunal of Commerce of the Department of the Seine. But as to the second replication, my brother Pigott and myself think that although the allegations are sufficient to shew that defendant's contract is to be governed by French law, still that they do not shew that he is subject to the jurisdiction of the French Court. The contract must be interpreted by an English tribunal.

The decision on the first replication was appealed to the Court of Appeal and was upheld: 1 Ex. D. 17, at p. 19. In giving judgment Lord Cairns said:

The averment is, that by the law of France he was bound by all the statutes and provisions of the company. The Court of Exchequer have held that a good replication. I am clearly of the same opinion. It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant.

It must be borne in mind that the action in the *Copin* case, *supra*, was brought upon a foreign judgment and not upon the original cause of action. The case at Bar is upon a liability of the defendant arising out of obligations attached by the laws of Minnesota to the holder of shares in the corporation in question, obligations which he is taken to have assumed by

voluntarily becoming a shareholder. The contract into which the deceased entered when he applied for, received and accepted the shares was governed by the law of Minnesota and was subject to any condition or liability attached to it by that law. It is no defence to say that he did not know of the double liability on the shares. The law made that liability a part of the contract. He must be held to have notice of it. See opinion of Amphlett, J., in *Copin* v. *Adamson*, at p. 354. The contract was performed on the part of the company and the subscriber received dividends on the shares. He must be held to have accepted the shares subject to the obligations attached to them by law.

The decision upon the second replication in *Copin* v. *Adamson, supra,* does not affect the present case. That decision was to the effect that an Englishman, who had no domicile in France either actual or by agreement, who had in no manner submitted himself to the jurisdiction of the French Court, or been served by any process, was not bound by a judgment obtained against him in that Court. The present action is brought, not upon a judgment, but upon the double liability on the shares. The proceedings in Minnesota established the representative character, duties and powers of the receiver, the insolvency of the corporation and the doing of certain acts which led up to the accruing of the liability of the shareholder and the perfecting of the demand upon him.

I have discussed *Copin* v. *Adamson* at almost undue length. I have done so because I regard it as being the leading decision on the subject and as settling the main controversy in the case before us.

The provision upon which the liability of the shareholder is based is contained in the constitution of the State of Minnesota, art. 10, sec. 3, General Statutes of Minnesota, 1913, p. 2093, and is in these words: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

It is clear from leading American authorities that the O. W. Kerr Co. does not come within the exception.

By sec. 32 of the Manitoba Evidence Act, R.S.M., 1913, ch. 65,

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the Courts of this Province may take judicial notice of the laws of any part of the United States of America and may refer to statutes, reports of cases and works upon legal subjects as the Court may deem authentic. In this case we have also the benefit of the expert evidence of Mr. Allen as to the laws of Minnesota, and particularly with reference to the enforcement of stockholders' liability in the case of corporations formed under the laws in force in that State. In considering the effect of the statutes of Minnesota this Court would naturally adopt the interpretation put upon them by the highest Court in that State and by the Supreme Court of the United States.

In *Bernheimer* v. *Converse* (1906), 206 U.S. 516, it was held by the Supreme Court of the United States that in a State where, as in Minnesota, stockholders' liability is fixed and measured by the constitution, a stockholder upon acquiring his stock incurs an obligation arising from the constitutional provisions, which is capable of being enforced in the Courts not only of that State but of another State and of the United States. Day, J., in delivering the judgment of the Court enunciated the following principle, at p. 533: "By becoming a member of the Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulations as the State might lawfully make to render the liability effectual."

The above is in substantial agreement with Kelly, C.B.'s statement of the view adopted by English Courts, as given in the passage I have quoted from his judgment in *Copin* v. *Adamson*, *supra*.

In *Converse* v. *Hamilton* (1911), 224 U.S. 243, the provisions in the constitution and laws of Minnesota as to the double liability of a stockholder were discussed. The constitutional validity of these provisions and the power and authority of the receiver of the corporation to enforce the double liability of the stockholder in another State were considered and upheld. The Supreme Court of the United States in this case reversed the decision of the Supreme Court of Wisconsin in which a contrary view was taken.

The certified copies of the proceedings by the plaintiff as receiver of the insolvent corporation together with the other evi-

dence adduced before the trial Judge in this case satisfy me that all proceedings required by the laws of Minnesota to render effectual the liability of the shareholder, or bearing upon its enforcement, have been taken in that State. A liability of a contractual nature existed upon the part of each shareholder in the company to contribute, in case of its insolvency, towards the payment of its liabilities to the extent of the amount of his shares. The plaintiff as a quasi-assignee for the benefit of the creditors of the company is entitled to enforce this liability against the shareholder or his personal representatives, and when the shareholder was domiciled in Manitoba the Courts of that Province may enforce it.

The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiff as receiver of the O. W. Kerr Co., a corporation incorporated under the laws of the State of Minnesota for the purpose amongst others of purchasing and selling lands and having its head office at Minneapolis in that State, against the defendants as executors of the estate of the late Sir William Whyte, to recover the sum of $5,000, an amount equal to the par value of 50 shares of the preferred stock of the company held by him, with interest at 6%. The statement of claim fully sets forth the facts of the case, the laws of the State of Minnesota fixing the liability of shareholders of corporations and prescribing the method of enforcing that liability in the State Courts and the proceedings taken in those Courts pursuant thereto.

The action was tried before Galt, J. (1919), 49 D.L.R. 399, who gave judgment for the plaintiff for the amount claimed and interest. In his judgment the pleadings, facts and evidence as well as the authorities on the points of law involved are fully dealt with.

Objection was taken on the argument to the admissibility of the evidence presented to establish the incorporation of the O. W. Kerr Co.

Under the laws of Minnesota the method of procuring incorporation differs somewhat from that laid down by our Companies Act, R.S.M. 1913, ch. 35. (1) There must be a certificate of incorporation, signed by three or more persons constituting them-

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selves a body corporate, and declaring the name of the corporation, the general nature of its business, with amount of its capital stock and other particulars set forth in the statute; (2) This certificate is filed and recorded with the Secretary of State and thereafter with the register of deeds, where the principal place of business of the corporation is specified to be in the certificate; (3) The prescribed fees must be paid to the Secretary of State; (4) The certificate must be published as provided; and (5) Proof of the publication is to be filed with the Secretary of State, and upon such filing its corporate organisation is complete. Provision is made for the amendment of the certificate of incorporation in respect of any matter which the original certificate might have contained by a majority vote of the shareholders as therein specified, which upon being authenticated and approved, filed and published as in the case of the original certificate becomes effective and complete.

At the trial there was put in as Ex. 1 a certificate of the Secretary of State of the State of Minnesota signed by him and sealed with the Great Seal of the State that he had compared the annexed copies with the original articles and amendments thereof of the O. W. Kerr Co., and that the said copies are true and correct transcripts thereof and that the affidavit of publication of the said articles was duly published.

Also as Ex. 2, a certificate of the said Secretary of State, signed by him and sealed with the Great Seal of the State, that he had compared the annexed copy with the articles of incorporation of the O. W. Kerr Co., and amendments thereto as recorded in the record of incorporation and of the proof of publication in each case and that the said copy is a true and correct transcript of said instruments and of the whole thereof.

There was also filed at the trial as Ex. 3, a copy of the certificate of incorporation of the said company with the annexed certificate of the register of deeds in and for Hennepin County in the State of Minnesota signed by him and under his official seal, that he had compared the same with the original filed in his office and that the copy is a true and correct transcript and copy of the same.

Exs. 4 and 5 are copies of the amendments to the articles of incorporation certified to by the register of deeds in like manner.

Finally there is Ex. 6, a certificate of the Secretary of State under the Great Seal of the State that the O. W. Kerr Co. was on December 23, 1910, and has since been a corporation duly organised, created and existing under the laws of Minnesota, with an authorised capital of $500,000, divided into 5,000 shares of the par value of $100 each, and that the said charter has never been cancelled or annulled.

In addition to this documentary evidence the plaintiff, the receiver in the proceedings in the Minnesota Court and an attorney at law, testified that he had himself compared Exs. 2, 3, 4 and 5 with the originals of which they purported to be copies and that they were true copies of the same.

Before the passage of the statutes relating to the admission of documentary evidence there were well-established methods of proving foreign official records and acts of state.

In the absence of some such statutory provision the rule has been laid down that the proper mode of authentication of foreign records or documents other than foreign laws or judicial records must be determined under the guidance furnished by the rules of the common law or the usages of nations, and that any evidence is in general sufficient that legitimately tends to prove that the document offered is in fact certified by the official custodian of the original of which it purports to be a copy and that he has due authority to make such certification. Thus a copy certified under the Great Seal of State is admissible without further authentication. [22 Corp. Jur., 855.]

In *National Bank of St. Charles* v. *De Bernales* (1825), 1 Car. & P. 569, an examined copy of a charter deposited in the proper public office at Madrid was allowed in evidence.

Here we have copies of the articles of incorporation and the amendments thereto certified by the Secretary of State of Minnesota under the Great Seal, and, in addition, the certificates of the register of deeds under his seal of office.

Furthermore the certificates of the Secretary of State are admissible under the Evidence Act, 14-15 Vict., 1851, ch. 99, sec. 9. They relate to "acts of state" as therein mentioned. "The official acts of every state or potentate whose independence has

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been recognized by the Crown, and of their authorized agents, are acts of State." (23 Hals., p. 310, para. 650.)

"A foreign patent is an 'act of state' within the meaning of this section." *In re Betts' Patent* (1862), 1 Moo. P.C. 49; Roscoe, on Nisi Prius, vol. 1, p. 102.

See also 13 Hals. 527, para 728: "Acts of state of a foreign state . . . may be proved by examined or authenticated copies."

The Act of 14-15 Viet. has been held to expand the common law. See Erle, C.J., in *Motteran* v. *Eastern Counties Ry.* (1859), 7 C.B. (N.S.) 58, at p. 71, 141 E.R. 735.

The certificates not only authenticate the copies of the articles but certify them to be examined copies. And not only have we this evidence but also that of the plaintiff, who testified that he had compared the copies with the originals on record. I see no ground whatever for refusing to admit the documents. It is difficult to see what further steps could have been taken to perfect this evidence.

The argument that the Manitoba Evidence Act, R.S.M., 1913, ch. 35, displaces and supersedes the Act of 14-15 Viet. is wholly ineffective in view of the express provisions of sec. 33. Apart from this provision, such an Act is to be construed cumulatively.

Objection was also taken to the admissibility of documents purporting to be certified copies of the proceedings in the Courts of Minnesota. But the provisions of sec. 13 of our Evidence Act apply and have been complied with.

The liability sought to be enforced here is founded on the following provision in the constitution of the State of Minnesoat. (Revised Statutes of Minnesota, 1905, p. 1186.) "Each stockholder in any corporation, except in those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

In the statutes of the State of Minnesota provisions are made prescribing the proceedings to be taken to ascertain and enforce this liability of the shareholder in the event of the insolvency of the company. Upon complaint of a judgment creditor, whose execution against the corporation has been returned unsatisfied, the Court may sequestrate the property of the corporation and

appoint a receiver thereof. The receiver then alleging the existence of a constitutional or other liability of the stockholders and that it is necessary to resort to the same secures from the Court a date to hear his application and to give such notice as might be deemed proper. Upon the hearing the Court then considers the evidence as to: (1) The nature and probable extent of the indebtedness of the corporation; (2) The probable expense of the receivership; (3) The probable amount of the available assets; and (4) The parties liable as stockholders, the nature and extent of their liability and their probable solvency and the Court, if necessary, may order a ratable assessment on the stockholders or otherwise as may be deemed necessary and shall direct the payment of the amount so assessed against each share to the receiver. On failure of any one liable to such assessment to pay the same within the time prescribed the order may authorise the receiver to bring an action against him wherever found, and such order shall be conclusive as to all matters and as to all parties therein adjudged liable whether appearing or being represented at the hearing or not, or having notice thereof or not. Upon the expiration of the time fixed in the order of assessment the receiver shall commence an action as against every party so assessed and failing to pay wherever he is found unless he satisfies the Court that it is useless or too costly to do so.

These statutory provisions were complied with so far as the necessary proceedings in the Minnesota Court were concerned, as appears by the authenticated copy of the proceedings filed. A copy of the order of the District Judge dated at Minneapolis, January 24, 1916, ordering that the receiver's petition be heard on March 11, 1916, when the Court would proceed to consider the nature and probable extent of the indebtedness of the corporation and the other particulars required by the statute as aforesaid and directing publication and service by mailing of the order itself and a copy of the order of the District Judge, dated April 1, 1916, declaring the liability of the shareholders and ordering an assessment of $100 on each share and authorising the receiver to bring such actions as might be necessary to recover same and directing the receiver to give notice of the order by mailing a copy of the same to each shareholder, were produced

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by the defendant's manager, who admitted their receipt at or about their dates. These orders are fully set out in the judgment of Galt, J., 49 D.L.R. 399.

It thus appears that the liability of a shareholder in this corporation has its origin in the constitutional provision above quoted, but that liability is not finally determined and does not become enforceable until the order of assessment is made by the Court pursuant to the statute.

In an action in *personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction where the party objecting to the jurisdiction of such Court has, by his own conduct, submitted to such jurisdiction, *i.e.*, has precluded himself from objecting thereto, by having expressly or impliedly contracted to submit to the jurisdiction of such Court. Dicey on Conflict of Laws, 2nd ed., pp. 361-2. For this statement of the law the author cites *Copin* v. *Adamson*, 1 Ex. D. 17; *Vallee* v. *Dumergue* (1849), 4 Exch. 290, 154 E.R. 1221; *Bank of Australasia* v. *Harding* (1850), 9 C.B. 661, 137 E.R. 1052; *Bank of Australasia* v. *Nias* (1851), 16 Q.B. 717, 117 E.R. 1055, and other cases. I refer also to *Feyerick* v. *Hubbard* (1902), 18 T.L.R. 381, and *Jeannot* v. *Fuerst* (1909), 25 T.L.R. 424.

In *Emanuel* v. *Symon*, [1908] 1 K.B. 302, at p. 314, Kennedy, L.J., says: "In *Copin* v. *Adamson* there is an express decision that a subject of this country does not by the mere fact of becoming a shareholder in a foreign company submit himself necessarily to the jurisdiction of the foreign Courts."

That is to say the mere fact that Sir William Whyte was a shareholder of this Minnesota company would not necessarily be decisive of his agreement to submit to the jurisdiction of the Courts of that State. There must be evidence to shew that he expressly or impliedly contracted to submit to the jurisdiction of the Minnesota Courts.

In this case there is more than the mere fact of being a shareholder. There is the stock certificate purporting on its face to be issued according to the laws of the State of Minnesota. The name of the corporation "The O. W. Kerr Company" indicates no limitation of liability but the contrary. The certificate leads back to the articles of association and they are based on and

derive from the general statutes of the State, which give the State Courts the powers set out above. All these relevant provisions become part of his contract. This branch of the case has been fully dealt with by Dennistoun, J., and I agree with his views and conclusions thereon. With the other matters raised on the argument and discussed by him in his judgment I also concur.

DENNISTOUN, J.A.:—This is an appeal by the defendants as executors of the estate of the late Sir William Whyte from a judgment of Galt, J., in the Court of King's Bench (1919), 49 D.L.R. 399, whereby the estate was found liable in the sum of $5,000 and interest, assessable as double liability upon stock in the O W. Kerr Co., of Minneapolis, which is insolvent, and of which the plaintiff has been appointed receiver by the Courts of the State of Minnesota. Dennistoun, J.A.

The stock was fully paid for on subscription and the double liability is imposed by virtue of a provision in the constitution of the State of Minnesota applicable to all corporations excepting those organised for the purpose of carrying on any kind of manufacturing or mechanical business. The O. W. Kerr Co. is primarily a land company.

This is not an action on a judgment, but is one to enforce a liability imposed by the laws of Minnesota on shareholders of an insolvent company after determination of certain facts by the District Courts of Minnesota as *personæ designatæ* by statute.

The proceedings taken in the Courts of Minnesota to shew the necessity for a resort to the double liability and the assessment of that liability are taken as the basis of the action in the Courts of Manitoba.

Sir William Whyte was a British subject domiciled in Canada, and it is necessary, first of all, to arrive at a conclusion as to the jurisdiction, if any, acquired over him or his estate by the foreign Court, and, secondly, the sufficiency of the proof and the admissibility of the evidence tendered at the trial in the Court of King's Bench to establish liability and entitle the receiver to judgment in this Province.

It was frankly admitted by counsel for the appellant that had Sir William Whyte been an American citizen or had he been

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resident within the territorial jurisdiction of the Minnesota Courts no defence would be available. None was attempted on the merits. The case rests on the validity of the proceedings taken to enforce the claim.

In *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155, at p. 161, Blackburn, J., formulates 4 rules which have been relied on in subsequent cases for the determination of the liability of defendants who are sued upon a foreign judgment to the effect that they must bear an absolute or a qualified or a temporary allegiance to the country in which the Court is. Lord Blackburn's rules are (see L.R. 6 Q.B. at pp. 161 *et seq.*): (1) If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them its laws bind them. (2) If the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or as it is sometimes expressed, owing temporary allegiance to that country its laws bind them. (3) If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we are inclined to think its laws bind them. (4) If a person selected as plaintiff the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him. Baron Amphlett adds a fifth rule in *Copin* v. *Adamson* (1874), L.R. 9 Exch. 345, at p. 355. (5) A man may contract with others that his rights shall be determined not only by foreign law but by a foreign tribunal, and thus by reason of his contract, and not of any allegiance absolute or qualified would become bound by that tribunal's decision.

To these rules may be added another which is generally conceded: (6) Voluntary submission to the jurisdiction of a foreign Court by entering appearance to its process will make its judgments binding: *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351, at p. 371.

In *Emanuel* v. *Symon*, [1908] 1 K.B. 302, at 309, Buckley, L.J., restates these rules omitting rule 3, which was formulated with some doubt by Blackburn, J.

It is under the fifth rule that the executors of the estate of Sir William Whyte are said to be liable.

An examination of facts surrounding the making of the contract establishes that Sir William Whyte applied for, and received, his share certificate in Canada and paid for the 50 shares issued to him by cheque to the O. W. Kerr Co.'s agent at Winnipeg. He was recorded as a holder of preference stock at the head office of the company at the city of Minneapolis in the State of Minnesota, and from time to time received dividends as a shareholder remitted from the head office. A stock certificate dated January 25, 1911, was duly delivered and is produced by the executors from the documents of the deceased. It contains the words at the top of the certificates "Incorporated under the laws of Minnesota," and certifies that William Whyte, Winnipeg, is the owner of 50 shares of the preferred stock of the O. W. Kerr Co.

The certificate of incorporation of the O. W. Kerr Co. was filed in the office of the Secretary of State for Minnesota on January 28, 1907. It recites in opening:—

> The undersigned agree to and do hereby associate themselves as a body corporate for the purposes hereinafter expressed, and do hereby under and pursuant to the laws of the State of Minnesota, incorporate ourselves and our successors, and to that end we hereby adopt and sign the following Certificate of Incorporation, etc.

When Sir William Whyte accepted the status of a shareholder in this company as determined by the words quoted, he not only contracted to be bound by the laws of the State of Minnesota in respect of that contract as fully and specifically as if the laws applicable had been incorporated into and set forth word for word in the certificate of incorporation, but in addition he agreed to submit himself in common with all other shareholders to the jurisdiction of the Minnesota Courts and to be bound by their process for the relief of creditors, as set forth in the statutes of the State, in the event of the company becoming insolvent.

The case of *Copin* v. *Adamson, supra*, was relied on by counsel for both parties on the argument before this Court.

On behalf of the receiver it was urged that this case falls within the terms of the first replication which was held good, while on behalf of the Whyte estate it was argued that it comes within the terms of the second replication which was held bad. The action was taken on a French judgment; the defendant

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pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law; that he was never served with any process; nor had any notice or opportunity of defending himself.

The plaintiff met this plea by two replications which are too lengthy to be set out *in extenso*. I am content to indicate in a few words what they contained.

The first replication alleged that the defendant was the holder of shares in a French company having its legal domicile at Paris, and became thereby subject by the law of France to all liabilities belonging to the holders of shares. That he further became subject to the conditions contained in the articles of association, which made provision for the submission of all disputes to the jurisdiction of the French Court, for the fixing of the domicile of shareholders, for service of process at that domicile, and alleging further that judgment had been duly recovered in the French Courts *in accordance with the provisions of the articles of association* and of the law of France.

The second replication was in most respects similar, alleging that defendant was a shareholder, and stating the provisions of the French law to the same effect as those contained in the articles of association *but omitting all reference to the articles of association*, and alleging that the defendant did not elect a domicile and that a summons was served as in the first replication stated.

It was held on demurrer by Kelly, C.B., Amphlett, and Pigott, BB., that the first replication was good, and by Amphlett, and Pigott, BB., that the second replication was bad.

This judgment was affirmed by Lord Cairns, L.C., Blackburn and Brett, JJ., 1 Ex. D. 17.

Lord Cairns, L.C., says at p. 18, that the statutes and provisions of the articles of association were "agreements *inter socios*"; and at p. 19 he says:—

> It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant; and that if it were necessary to bring an action against him on the part of the company, the service of the proceedings at the office of the imperial procurators, if no other place were pointed out, would be good service.

In other words the first replication was good because the de-

fendant had expressly contracted to submit himself to the laws of France and the jurisdiction of the French Courts, and the second replication was bad because the plaintiff relied not on any agreement by the defendant but on the general law of France, and the case was not brought within the terms of the fifth rule above stated.

Copin v. *Adamson* was much discussed in *Emanuel* v. *Symon*, *supra*. Kennedy, L.J., [1908] 1 K.B., at 314, says:

> In *Copin* v. *Adamson* there is an express decision that a subject of this country does not by the mere fact of becoming a shareholder in a foreign company submit himself necessarily to the jurisdiction of the foreign Courts, and it seems to me that what applies to a company applies equally to a partnership.

Had the certification of incorporation in the case at Bar been silent as to the law and procedure which should govern the rights and liabilities of the shareholders, Sir William Whyte's position might possibly have been that indicated by Kennedy, L.J., and the executors would have been in a strong position to maintain that the Courts of Minnesota had acquired no jurisdiction *in personam* over them, and that the liquidation proceedings of the O. W. Kerr Co. bound only the property and assets of the estate in Minnesota. But the certificate is not silent on the point. By agreement *inter socios* these shareholders undertook to be bound by all the laws of the State applicable to them as shareholders, to the company, and to its creditors, including the procedure to be taken against them, the service of process, and the assessment of the double liability on the stock held. Lord Watson in *Huntington* v. *Attrill*, [1893] A.C. 150, says, at p. 159: "In the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors."

Nevertheless there must be an express or clearly implied agreement on the part of the shareholder to submit himself to the burdens imposed by the foreign law. *Bisdon Iron and Locomotive Works* v. *Furness*, [1906] 1 K.B. 49; *Feyerick* v. *Hubbard*, 18 T.L.R. 381.

In my humble judgment it is reasonable that the liability of a non-resident shareholder to creditors should be fixed by the law of the country in which the company is situate where those

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laws are not penal in their character, but on the contrary limit the liability which would without them be imposed at common law. Any person taking shares in the O. W. Kerr Co. should assume that his liability is unlimited. The name carried on its face all the obligations and responsibilities of a partnership. It is only by virtue of the laws of Minnesota that the liability of shareholders to creditors is limited to the amount of stock held. Why should a non-resident shareholder be permitted to evade a law which has been passed for his benefit and while accepting immunity from the claims of creditors which that law gives repudiate the lesser liability which it imposes upon him. He cannot "approbate and reprobate" at the same time. Such law is the very foundation upon which the corporation has been built and cannot be separated from it. See Hagarty, C.J.O., in *Huntington* v. *Attrill* (1891), 18 A.R. (Ont.) 136, at 145.

No question is raised as to the sufficiency and regularity of the proceedings taken to assess the double liability upon the shareholders of this company. The process leading up to the making of the order by the District Court was duly brought to the notice of these executors both by registered post and by advertisement in accordance with the Minnesota statute law. This is admitted by counsel and has been proved by evidence adduced at the trial.

The conclusion is therefore reached that the defendants were subject to the law imposing double liability, and by contract they were subject to the jurisdiction of the Minnesota Court, and in accordance with the law and the practice of that Court they were properly before it when the assessment order was made. No appeal from it has been taken, and it is now final and conclusive as against all the shareholders of the company.

It only remains to consider the sufficiency of the proceedings which have been taken and the evidence by which they have been proved in the Court of King's Bench.

The defendants did not attempt at the trial to refute any of the facts relied on by the plaintiff but were content to rest their case upon the absence of legal evidence in proof of those facts.

The first objection is in respect to the proof of the law of Minnesota. That point is determined by sec. 32 of the Manitoba

Evidence Act, R.S.M., 1913, ch. 65, which enables the Courts of this Province to take judicial notice of the laws of any part of the United States of America and to refer to statutes, reports of cases, evidence on oath, etc. These three methods of proof were taken in this case. Expert evidence was given by the receiver, who appears to be a duly qualified attorney of the State, the statutes and decided cases were produced. There was ample proof of the law.

Incorporation of the O. W. Kerr Co. and the proceedings before the Minnesota Courts were duly proved under the provisions of Lord Brougham's Act, 14-15 Vict., ch. 99, and the Manitoba Evidence Act, which are cumulative. I agree with my brother Cameron on this point. Not only were copies duly certified by the Secretary of State under the State seal tendered and admitted as acts of state, but examined copies proved such by oral testimony were submitted and filed, and certificates of the proper officers under the seal of the Court were in all cases supplied. *Leishman* v. *Cochrane* (1863), 1 Moo. P.C. 315, 15 E.R. 720.

The proceedings taken to establish insolvency and leading up to the making of the order of assessment, are set out in the judgment of Galt, J., 49 D.L.R. 399, and I fully concur with the conclusions at which he has arrived in respect to them.

One other point may be briefly referred to. It was argued that the double liability imposed by the State constitution did not apply to companies organised for the purpose of carrying on any kind of manufacturing or mechanical business and attention was drawn to the powers given the O W. Kerr Co. to manufacture logs, timber and lumber, to operate grist mills, and to do a general store business. This point has been settled by the Supreme Court of Minnesota in the case of *Senour Co.* v. *Church Plant* (1900), 84 N.W.R. 109, and *Meen* v. *Pioneer Co.* (1903), 97 N.W.R. 140, to the effect that where other than manufacturing and mechanical powers are granted by the certificate of incorporation, the double liability in favour of creditors exists. The decisions of the State Courts are to be noticed judicially in our Courts in determining the State law, under the provisions of the Manitoba Evidence Act, ch. 65, R.S.M., 1913, sec. 32. In any

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event the reasoning and conclusions of the Judges in the cases referred to are convincing, and inasmuch as the O. W. Kerr Co. is a land company with certain ancillary powers it is beyond question that the double liability of the shareholders exists.

The objection that the constitutional imposition of double liability is penal in its character and not enforceable by the Courts of a foreign country is disposed of by the judgment of the Privy Council in *Huntington* v. *Attrill, supra*. The remedy here given is for the protection of the private rights of creditors, and is not a penalty recoverable in favour of the state. This is the test applied by the Privy Council in respect to legislation of a similar character in that case and disposes of the objection.

Mr. Williams argued that the clause in the constitution which creates the liability in question does not, and should not be held by our Courts to, impose a double liability. It is very brief and I see possibilities of much argument as to how it should be construed. It says:

> Article 10, sec. 3. Liability of Stockholders. Each stockholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him.

It has been decided by the Supreme Court of Minnesota that this section does impose a double liability: 4 Thompson on Corporations, 4793; *Willis* v. *St. Paul Sanitation Co.* (1892), 50 N.W.R. 1110.

In my opinion we are bound to accept these decisions as conclusive as to the law of the State. The placing of a different construction on the meaning of the section by this or any other foreign Court would in no way alter the law by which this case must be governed.

In *Huntington* v. *Attrill, supra*, the Privy Council decided that the Courts of Ontario were not bound to accept the decisions of the Courts of New York State as to what constituted a penal action, for the reason that what was being determined in that case, was not the law of New York, but the rule of international law which a British Court would enforce, and that it was the duty of the British Court to determine the rule for itself untrammelled by the divergent views of the New York Courts.

In the case at Bar it is the law of the State of Minnesota which we have to determine.

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The case of *Hale* v. *Allinson* (1902), 188 U.S. 56, is a decision of the Supreme Court of the United States adverse to the right of a receiver to recover against a foreign shareholder under the law of Minnesota as it stood when that case was tried. An amendment of the statute law by ch. 272 of 1899 now included in the General Statutes of 1913, secs. 6645 to 6651, has removed the disability as settled by *Bernheimer* v. *Converse*, 206 U.S. 516, and *Converse* v. *Hamilton*, 224 U.S. 242.

Upon the whole case I concur with the views of Galt, J., at the trial and would affirm his judgment.

The appeal should be dismissed with costs.

Appeal dismissed.

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(Annotated.)

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 10, 1920.

APPEAL (§ VII L 2—477)—CRIMINAL CASE—MOTION BY LEAVE AGAINST VERDICT—CASE RESERVED ON QUESTION OF LAW.

On concurrent applications, one under sec. 1021 of the Criminal Code, made by leave of the trial Judge for a new trial on the ground that the verdict is against the weight of evidence, and the other by case reserved under Code sec. 1014, as to the rejection of certain testimony offered by the defence, the Court of Appeal may allow a new trial under sec. 1021 without answering the question reserved as to the admissibility of testimony.

[See Annotation at end of this case.]

Statement.

APPEAL on question of law and motion by leave for a new trial. New trial ordered.

W B. O'Regan, for accused.

H. E. Sampson, K.C., for Attorney-General.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—The accused in this case was tried before Embury, J., and a jury on the charge of rape of one Nettie Wintomyk, and convicted of such offence. During the course of the trial, counsel for the accused tendered certain evidence to contradict part of the evidence given by the husband of the said Nettie Wintomyk. Admission of this evidence was refused; and at the conclusion of the trial the trial Judge stated for the opinion of this Court the question of whether he should or should not have admitted such evidence. In addition to this, the ac-

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cused, by leave of the trial Judge, has applied to this Court, under sec. 1021 of the Cr. Code, for a new trial on the ground that the verdict was against the weight of evidence. In view of the conclusion I have come to with regard to the application for a new trial, it is unnecessary that I should express any opinion as to the question referred to us by the trial Judge.

Leaving out of consideration the evidence adduced on the part of the accused, the story told by the woman Nettie Wintomyk and her husband is a most improbable one. Her whole course of conduct and the course of conduct of her husband after the alleged raping took place are to my mind quite inconsistent with the contention that she was raped. I make all allowances for the fact that these people are foreigners, who possibly have not been accustomed to look upon affairs of this kind in the same light as people of greater refinement would look upon them; but after taking all that into consideration, it does seem to me that the evidence for the prosecution points to the conclusion that what took place was not rape, but seduction. The woman said she told her husband of the first offence and that she told him exactly what took place. The husband in his evidence purports to tell what she told him. He may have intended to say that she told him that the accused had carnally known her, but he does not say so. It is, I think, unnecessary that I should discuss in detail the evidence adduced; but in addition to the oral testimony given, the letter of Mr. Parsons is certainly much more consistent with the theory of seduction than that of rape. In that letter he speaks of it as having been seduction, and then he says, "I understand that you made her certain promises that if anything happened you would look after her, promising her a quarter-section of land among other things."

The thing that did happen to her, and for which Mr. Parsons in the letter was making claim, was that she was pregnant, by reason, as the letter says, of the seduction by the accused.

Without going into the matter any further, I think it is simply sufficient to say that in my opinion the verdict was at least against the weight of evidence, and there should therefore in my opinion be a new trial. *New trial ordered.*

ANNOTATION.

Annotation.

CONCURRENT MOTIONS FOR NEW TRIAL UNDER CR. CODE SEC. 1021, AND ON CASE RESERVED.

The practice followed in the case above reported of granting a new trial on a motion under Cr. Code sec. 1021 without deciding the question concurrently brought before the Court of Appeal under Cr. Code sec. 1014, appears to be one which should not generally be adopted. It appears to have been assumed that because a new trial was being granted, which would have been the natural result on a decision favourable to the accused on either application, there was no necessity to decide whether certain testimony offered by the accused at the trial under review, and rejected by the Court below, was or was not admissible. The motion under Cr. Code sec. 1021 made by leave of the trial Judge is one of review only of the findings of fact, which in this particular case were found by a jury. The only ground for a motion under sec. 1021 is that the verdict was against the "weight of evidence."

Questions of law arising during the trial, including the question of the wrongful rejection of evidence, come within the scope of an appeal under Code secs. 1014-1019. Under sec. 1019 the Court of Appeal has to determine whether some substantial wrong or miscarriage was occasioned by the evidence having been improperly rejected if it finds the rejection to have been improper. A new trial is not to be directed on questions of law reserved, although it appears that some evidence was improperly rejected unless, in the opinion of the Court of Appeal, "some substantial wrong or miscarriage was thereby occasioned on the trial." Cr. Code sec. 1019.

The question of law as to whether testimony offered by the accused was properly rejected or not, remains undecided by the granting of a new trial under sec. 1021. The ruling of the trial Judge against such testimony is not reversed by the new trial order, and might still be urged as a precedent on the second trial when the same question would probably come up. If the second trial happened to come up before the same Judge as presided at the first trial, the same question arises for him to decide again, without any direction from the Appellate Court as to the correctness of his former decision. Thus a second unnecessary appeal is made probable or possible on a point which might well have been disposed of on the first appeal, and as to which the reservation of a case is in itself a request by the trial Court for directions. It does not appear that the question was waived by the accused, and it is submitted that it was one which he had a legal right to have answered by the Court of Appeal under the facts disclosed in the opinion above reported.

The weight of authority is in favour of the regularity of an appeal upon questions of law under Code sec. 1014, joined with a motion for a new trial under Code sec. 1021, made by leave of the trial Judge; *R.* v. *O'Neil* (1916), 9 Alta. L.R. 365, 25 Can. Cr. Cas. 323; *R.* v. *Jenkins* (1908), 14 B.C.R. 61, 14 Can. Cr. Cas. 221; although the right to the concurrent remedy was doubted in *R.* v. *McIntyre* (1898), 31 N.S.R. 422, and *R.* v. *MacCaffrey* (1900), 4 Can. Cr. Cas. 193, 33 N.S.R. 232.

N. S.

S. C.

RHODES CURRY Co. Ltd. v. GEORGE McKEAN & Co. LTD.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Chisholm, JJ. January 11, 1921.

DAMAGES (§ III A—70)—ESTIMATION OF—SALE OF GOODS—VENDORS WRONGFUL FAILURE TO DELIVER—PREMIUM OF UNITED STATES MONEY TO BE CONSIDERED.

In estimating the measure of damages under the Sale of Goods Act, 10 Edw. VII. 1910 (N.S.) ch. 1, sec. 51, for wrongful non-delivery of goods contracted to be sold, a sub-sale by which the purchaser agreed to make payment in United States funds should be considered, the high premium considerably enhancing the value of the goods at the time and place when they should have been delivered.

[*Dic Elbinger* v. *Armstrong* (1874), L.R. 9 Q.B. 473, *Grébert-Borgnis* v. *Nugent* (1885), 15 Q.B.D. 85, considered.]

Statement. APPEAL and cross-appeal in an action claiming damages for the non-delivery of lumber contracted for. The action was tried before Ritchie, E.J., sitting without a jury and both parties appealed.

J. McG. Stewart, for plaintiff; *S. Jenks*, K.C., for defendant.

The judgment of the Court was delivered by

Chisholm, J. CHISHOLM, J.:—This is an appeal from the decision of Ritchie, E.J., sitting without a jury, in which he directed judgment to be entered for the plaintiff in the sum of $1,379 and costs of action. The action was brought to recover damages for breach of contract for the sale of lumber, which was resold by the plaintiff to Smith, Fassett & Co., of North Tonawanda, N.Y., and the particulars of the damage claimed by plaintiff is as follows:—

Loss of profits on sale to Smith, Fassett & Co	$1,379.00
Paid Smith, Fassett & Co	1,540.00
Exchange on selling price, being premium on money of United States	2,010.00
	$4,929.00

The trial Judge ordered judgment for the amount of the first of the above items, namely, $1,379 and the plaintiff appeals from the said judgment so far as it disallows the two items last mentioned, and claims judgment for the whole amount. The defendant appeals from the whole decision.

Leaving aside for the moment the question of the measure of damages, the contentions of the defendant's counsel on this appeal were: 1. That there was no enforceable contract under the Sale of Goods Act, 10 Ed. VII. 1910 (N.S.), ch. 1, sec. 6, sub-secs. 1 and 2. That McEachern through whom the contract was made has no authority to bind the defendant.

1. By letter of August 13, 1919, (Ex. E–2) the plaintiffs wrote the defendant asking for particulars respecting the stock of boards which the latter had for sale. By letter dated August 16, 1919, (Ex. E–3.) the defendant wrote plaintiff giving particulars as to quantities and prices of the spruce boards which it had along the Canadian National Railways for shipment; and on January 6, 1920 (Ex. E–4), the plaintiff wrote defendant accepting the offer and placing a definite order with defendant for all the spruce boards set forth and priced in the letter of August 16, 1919. This letter was followed by a letter of January 8, 1920 (Ex. E–5), acknowledging receipt of the acceptance contained in plaintiff's letter of January 6, 1920. This correspondence constitutes, in my opinion, a sufficient memorandum in writing to comply with the statute.

2. As to the authority of McEachern to bind the defendant, the trial Judge finds on the evidence that McEachern had not in fact authority to make the contract in question, but he finds however that it was within the apparent scope of his authority and that McEachern was held out as having such authority. The trial Judge deals with this point in the following terms:

> I now come to the question as to whether the making of the contract was within the apparent scope of McEachern's authority. I find that it was. On the 26th July the plaintiff company received a letter, Exhibit E–1, from the defendant company, signed for them by a man by the name of Roberts, who was then in the defendant's office at Amherst. On the 13th day of August, Roberts being not in Amherst office that day, the plaintiff company wrote a letter to the defendant company at St. John with reference to the subject matter of the letter of the 26th July, namely, the sale of lumber; the answer to that letter came from the Amherst office signed by Roberts for the defendant company. This, I think conveys the idea that at that time Roberts was authorised to deal with the matter, and if the contract had been closed with him I do not see how the defendant company could have successfully contended that it was not within the apparent scope of his authority. This, I think, is a circumstance to be considered when the question arises in respect of McEachern's authority, because it gave the appearance that the Amherst office dealt with matters of this kind. McEachern was the man in charge of the Amherst office when he made the contract; I take it that he had succeeded Roberts. The plaintiff company had bought lumber from the defendant company before through McEachern; it is true that lumber was not delivered, but, so far as the evidence shews, no question was raised as to his authority. For a considerable time the business between the two companies had been conducted through the man in charge for the defendant company at Amherst.

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It was strongly urged upon us that the case of *Farquarson Bros. & Co.* v. *King & Co.* [1902] A.C. 325, concluded the matter in defendant's favour. But in that case the trial was before Mathew, J., who left to the jury the question, "Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell the goods to the defendants?" and the jury answered "No." It seems to me that that finding distinguishes the case relied on; and that the finding of the trial Judge in the case at Bar that the defendant did so act as to hold out McEachern to the plaintiff as its agent to sell the lumber to the plaintiff should not be disturbed on the point of the agent's authority.

On the question of damages, Mr. Jenks, urged for the defendant that there was no evidence on which damages could be assessed against the defendant, that the defendant did not sell dry boards to the plaintiff, and the plaintiff did not make a contract of sub-sale with Smith, Fassett & Co., for dry boards, and that the contract of sale and the contract of sub-sale could both have been executed by furnishing green lumber for which there was a market. There is nothing in the minutes of evidence to suggest that the defendant intended taking that position in the litigation, and it would appear that it was not raised before the trial Judge, for it is not mentioned in his reasons for judgment. Negotiations between the parties were begun in July, 1919, and the boards were about that time ready for shipment. That was about 6 months before the sale to Smith, Fassett & Co., and I may assume that plaintiff regarded the boards as sufficiently dry to make them suitable for re-sale as dry boards. Mr. Smith, plaintiff's superintendent, was asked if he could not fill the order of Smith, Fassett & Co. with any kind of spruce boards. The extract dealing with the question is as follows:—

> Q. You could have filled that order with any kind of spruce boards? A. If we wanted to be sharp and say they did not specify dry. Q. That is the way business men do? A. If we understand we are to give dry boards we do not try to give them green ones. Q. You had an understanding outside this order in writing you were to give them dry spruce boards? A. Yes. Q. And that is the contract you were trying to carry out and for which you paid them damages when you could not? A. Yes.

It is clear that as between plaintiff and Smith, Fassett & Co. only dry boards were intended to be sold, and I do not think the Court should assist the defendant in the contention that Smith,

Fassett & Co. should have been supplied with green boards, merely because that firm did not specify dry boards in their order, when it is clear that both themselves and their vendor had in mind dry boards.

The measure of damages for wrongful non-delivery of goods contracted to be sold is set out in the Sale of Goods Act, 10 Ed. VII. 1910 (N.S.), ch. 1, sec. 51, sub-secs. 2 and 3 as follows:—

2. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. 3. Where there is an available market for the goods in question, the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

The evidence shews that at the time of the breach there was no market for dry boards and the rule to be applied in such a case is thus stated in Benjamin on Sale, 5th ed., at p. 988:

The buyer may recover as special damages the loss of his actual or anticipated profits, together with a reasonable indemnity against the buyer's liability to the sub-buyer and costs reasonably incurred.

See the cases of *Die Elbinger Actien-Gesellschafft etc.* v. *Armstrong* (1874), L.R. 9 Q.B. 473; *Grébert-Borgnis* v. *Nugent* (1885), 15 Q.B.D. 85.

The Judge has found that the defendant had no notice of the special contract made with Smith, Fassett & Co., and that it was not in the contemplation of the parties when the contract between them was made. That finding, which I accept, distinguishes this case from the leading case of *Grébert-Borgnis* v. *Nugent*, and I think that the plaintiff's appeal, so far as the item of $1,540 is concerned, should fail. The trial Judge says as to the first item:

I do not give damages under the head of loss of profits but I find that the lumber at the time when it ought to have been delivered under the contract was worth $1,379 more than the plaintiffs were to pay under the contract.

Apart from any special damage, I am of opinion that the natural and just measure of damages is the value of the goods at the place and time when they should have been delivered under the contract. I hold that the plaintiff company are entitled to recover $1,379.

It is clear that the trial Judge inadvertently overlooked a term of the sub-sale (E–14) by which Smith, Fassett & Co. agreed to make payment in United States funds which on account of the high premium would considerably enhance the value of the goods at the time and place when they should have been delivered.

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It was agreed by counsel that the exchange would increase the value by $1,272.33, which added to the amount for which judgment was given would make $2,651.33.

The result, therefore, is that the defendant's appeal is wholly dismissed with costs; the plaintiff's appeal as to the item of $1,540, being the indemnity paid Smith, Fassett & Co. fails; and the plaintiff's appeal as to the item of premium on United States money succeeds.

The plaintiff will have the costs of the appeal.

Plaintiff's appeal allowed: defendant's appeal dismissed.

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FINUCANE v. STANDARD BANK.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

CONTRACTS (§ II D—145)—AGREEMENT TO ADVANCE MONEY ON TERMS—BANK HOLDING SECURITY OF BORROWER—KNOWLEDGE AND APPROVAL OF BANK—MONEY DEPOSITED IN BANK—ASSIGNMENT OF AGREEMENT—RIGHTS OF ASSIGNEE.

Where a customer of a bank, having hypothecated to the bank its entire product and output as security for advances made, and being in need of more money than its line of credit admits of, borrows from another company upon terms, a sum of money which is deposited in the bank and becomes subject to the usual exigencies of business between the bank and its client, the bank although in no way a party to the borrowing, having knowledge of it and having given its approval, and for a certain period having honoured the cheques of the borrower in payments on the loan in accordance with the agreement, the approval of the bank is a specific undertaking to see that the payments are made in accordance with the terms of the agreement and an assignee of such agreement may enforce such undertaking.

[*Finucane* v. *Standard Bank of Canada* (1920), 53 D.L.R. 720, affirmed.]

Statement.

APPEAL by defendant from the judgment of Morrison, J. (1920), 53 D.L.R. 720, in an action for the payment of a sum of money and to declare the defendant a trustee for the plaintiff in respect of the said sum and for an accounting. Affirmed.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I entertain no doubt whatever of the soundness of the judgment and would therefore dismiss the appeal.

Martin, J.A.

MARTIN, J.A., would dismiss appeal.

Galliher, J.A.

GALLIHER, J.A.:—I entertained no doubt at the close of the argument of the correctness of the trial Judge's findings.

As the case was reserved I have taken the trouble to read the evidence and look into the authorities cited which confirm me in my original view.

The appeal should be dismissed.

McPHILLIPS, J.A. (dissenting):—This appeal involves the determination as to whether there is any contractual or other obligation enforceable in law as against the appellant the bank at the suit of the respondent the assignee of the Holley-Mason Hardware Co., of Spokane, Washington, U.S.A.

The facts shew that the Rainy River Pulp and Paper Co. were customers of the bank at the city of Vancouver, and in the course of the company's business hypothecated to the bank its entire product and output of kraft pulp as security for advances made. It would appear that the company was in need of more money than its line of credit with the bank admitted of, and borrowed $50,000 from the Holley-Mason Hardware Co. The bank though was in no way a party to this borrowing—save that the bank was made aware of it and the then manager of the bank at Vancouver signified his knowledge and approval of the facts of the borrowing. The advance of the $50,000 was acknowledged by the Rainy River Pulp & Paper Co. by a writing reading as follows—and the approval of the manager of the bank it will be seen was written at the foot thereof.

Vancouver, B.C., May 13, 1918.

Holley-Mason Hardware Co.,
Spokane, Washington.
Dear Sirs,

In consideration of your advancing us $50,000, we will give you our note, payable on demand, for the amount, with interest at the rate of 7%, and by way of security, we undertake to pay you $10 per ton from the proceeds of each ton of pulp manufactured and sold by us from June 1, 1918, until the amount advanced, with interest, is fully paid. In any event, the full amount of said advance to be repaid within one (1) year from date.

It is understood that our bankers, the Standard Bank of Canada, to which all our output is hypothecated for advances from time to time, has full knowledge of this arrangement and approves of it, and will waive its security to that extent.

Very truly yours,
RAINY RIVER PULP AND PAPER CO.,
By Robert Sweeney, President.

Approved:
Standard Bank of Canada,
Vancouver, B.C., J.C. Perkins, Manager.

It would appear that in ordinary course the $50,000 received by this borrowing was deposited by the Rainy River Pulp & Paper Co. to its credit in its current account with the bank, but with no arrangement made with the bank whatever as to its disposition,

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that is, it was like any ordinary deposit carried to the company's credit by the bank and drawn against without any interposition of the bank, that is, the bank never at any time undertook to scrutinise or control, nor was it at liberty to do so by any agreement with its customer, its free right to carry on its business as it saw fit.

The benefit of the agreement above set forth as entered into by the Rainy River Pulp & Paper Co. with the Holley-Mason Hardware Co. was assigned to the respondent on March 10, 1919, and express notice of the assignment was given to the bank on June 26, 1919. It would further appear that during the months of July, August, September and October, 1918, before the assignment to the respondent, the Holley-Mason Hardware Co. were paid in the ordinary course of business in compliance with the agreement above set forth, without any interposition upon the part of the bank at all, amounts which represented the sum of $10 per ton for each ton of pulp manufactured during that time but no further payments would appear to have been made.

The trial Judge gave judgment against the bank for the sum of $7,240. [See 53 D.L.R. 720.]

The contention of the respondent upon this appeal is that the trial Judge was right in his conclusion that liability rests upon the bank to pay the amount due in respect of the agreement so assigned to him. Upon the argument it was submitted that what took place amounted to (as set forth in the trial Judge's reasons for judgment), "a specific undertaking to see at least that the payment of the $10 per ton was carried out and the bank, with that object in view, consented to honour the company's cheques as issued," and further on as we have seen in the reasons for judgment, "as regards the payment of the $10 a ton, the bank stepped into the shoes of the Rainy River Co., and, in my opinion, are trustees for such sums as may be found due in an accounting in that respect."

With great respect to the trial Judge and to all contrary opinion, I cannot come to any such conclusion as that arrived at by the Judge. I see no writing, facts or circumstances that can at all warrant the imposition of liability upon the bank by reason merely of its signification of its approval of the borrowing without more. How can it be said that the bank is under any

contractual obligation to pay the money or as trustee for the respondent to recover the money and pay it to the respondent? In effect, a surety or guarantor that the money would be paid out of the proceeds of each ton of pulp manufactured and sold by the Rainy River Pulp & Paper Co. This contention (and not to be wondered at) is strenuously combatted by the bank.

It is well at this point to note that the evidence shews that the payments that were made in respect of the agreement by the Rainy River Pulp & Paper Co. with the Holley-Mason Hardware Co., assigned to the respondent, were made without any interference on the part of the bank, the bank in no way enforcing or exercising its security. The fallacy pressed and persisted in, in the argument—in the trial Judge's judgment—is this, the finding of liability upon the bank to the respondent without even a scintilla of foundation therefor—where is the contract and where can be found any consideration for a contract—that the bank would be insurers of payment to the respondent of the moneys that would become due and payable?

The bank, it is true, had security upon the pulp, but because the bank had security was it obligated to enforce it? The answer must be in the negative. The bank in all that it did merely waived 10% of its security thereby relieving its customer to that extent, *i.e.*, instead of paying or being called upon to account to the bank for the 100% of the proceeds from the pulp, the Rainy River Pulp & Paper Co. could only be required to pay or account for 90% thereof. This situation though never could be held to be one of requirement upon the part of the bank to enforce its security upon each and every occasion upon which there was a sale of the pulp, and collect the 100%, or any portion of the moneys—that would be a matter of business discretion resting with the bank. Further, the bank's security stood reduced to 90%, and it could not have enforced the security to the extent of 100%. It cannot but be idle contention to advance any such argument, that once the bank had approved of the agreement it was thereafter incumbent upon the bank to enforce its security and collect the 90% or the 10%, which the Rainy River Pulp & Paper Co. had obligated itself to pay. If necessity requires any elucidation of this point—plain to demonstration already—it can be well illustrated by shewing what was agreed to, what was done and the course of conduct

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of the parties to the agreement, which is always a good way of determining what contract was entered into.

It will be noticed that in the agreement (the letter of the Rainy River Co. to the Holley-Mason Co. of May 13, 1918), the contractual obligation is that of the Rainy River Co. to do what "we (the Rainy River Co.) undertake to pay you (Holley-Mason Co.) $10 per ton from the proceeds of each ton of pulp manufactured and sold by us from the first of June, 1918, until the amount advanced with interest is fully paid. In any event the full amount of said advance to be repaid within one (1) year from date." Then further on: "Our bankers, the Standard Bank of Canada, to which all our output is hypothecated for advances from time to time has full knowledge of this arrangement and approves of it and will waive its security to that extent," *i.e.*, to the extent of $10 per ton. Then because the bank by its manager, signifies its approval of this, forsooth there arises the formidable nemesis of the law, and the bank by accommodating its customer and its customer's creditor by waiving its security in part, has become the principal debtor, the surety or the trustee for the respondent the assignee under the agreement, and is contractually liable to discharge the debt although the bank has no fund out of which to pay the moneys, apart from all other considerations, even if it could be looked at as an equitable assignment, which it is not. See *Galt* v. *Smith* (1888), 1 Terr. L.R. 129. There it was held, *per* McGuire, J., "that the order in conjunction with the other documents could not operate as an equitable assignment because the evidence did not shew that the company either were debtors to B. or held a specific fund to which he was entitled." So far as the bank is concerned, there was no fund out of which the moneys were to be paid. Also see *Percival* v. *Dunn* (1885), 29 Ch.D. 128. In the present case, the bank was not the debtor of the Rainy River Co. or the Holley-Mason Co. nor did the bank hold a specific fund then existent or to be later acquired to which the Rainy River Co. or the Holley-Mason Co. were or would be entitled. In *Galt* v. *Smith*, 1 Terr. L.R. 129, Wetmore, J. (afterwards C.J.), said at 134, and it is peculiarly applicable to the present case:

Now does this case under consideration come within either of the rules laid down by Lord Truro? (*Rodick* v. *Gandell* (1852), 1 DeG. M. & G. 763, 42 E.R. 749.) In the first place does it come within the definition of "an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor?" . . . The H.B. Co. owed no money to B. [here the Bank owed no money to the Rainy River Co.] and held no fund belonging to him, or out of which he was to be paid.

The Rainy River Co. paid the moneys that were paid in respect of the agreement in the ordinary course of business, the bank not enforcing its security.

The following was the letter advising the Holley-Mason Co. of what the Rainy River Co. had done by resolution with respect to the borrowing of the $50,000, and note at the end thereof, "to give us security therefor and to repay the same at the rate of $10 per ton on all the pulp manufactured and sold commencing June 1st, 1918":—

Rainy River Pulp & Paper Co.,
Manufacturers of Kraft Pulp.

Standard Bank Building,
Vancouver, B.C., May 14, 1918.

Mills:
Port Mellon, B.C.
Holley-Mason Hardware Co.,
Spokane, Washington.

Dear Sirs:

This is to advise you that at a meeting duly called and held by the Board of Directors of the Rainy River Pulp & Paper Co., held at the office of the company, 222 Standard Bank Building, Vancouver, B.C., on Wednesday, April the 24th, 1918, at 11.00 a.m., a resolution was properly moved and seconded, and unanimously carried, authorizing the Rainy River Pulp & Paper Co., to negotiate and secure a loan from your company in the amount of Fifty Thousand ($50,000) Dollars, and to give as security therefor, and to repay same *at the rate of $10 per ton on all of the pulp manufactured and sold commencing June 1st, 1918.*

Very truly yours,
Rainy River Pulp & Paper Co.,
By M. W. Morfey,
Secretary.

RS-M.

The effect of the above was to give to the Holley-Mason Co. a direct security to the extent of $10 per ton, and the bank made this possible and allowed it to be done.

The query might well be, why was not the security enforced? The attempt now is to make the bank liable for the respondent's neglect to enforce a security which the bank by waiving its security to that extent rendered possible.

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The bank never received the moneys the proceeds from the pulp under its security. The circumstance that all such moneys were paid in, in the ordinary course of business by deposit by the Rainy River Co. to its credit in its current account with the bank cannot be said to be the receipt of the moneys by the bank under its security. The deposits were not ear-marked in any way. The bank was not a party to the payments in or the withdrawals. The moneys went in as all other moneys and were drawn out as all other moneys were, and when the customer's account was not in funds the bank refused payment of cheques of the Rainy River Co., that amongst the cheques dishonoured. There were cheques given by the Rainy River Co. in payment of moneys due in respect of the agreement, and borrowing of the $50,000 is not a matter of moment to the bank. Such happenings can in no way impose any liability upon the bank, it had not agreed to pay these or any other cheques of its customer. It was obligated only to pay cheques when there were funds out of which they could be paid, and it was not the duty of the bank to scrutinise the business of the customer and apprise itself as to whether the customer was making payments in pursuance of the agreement. It had undertaken no such responsibility. Further, it is to be noted that as contemplated by the agreement a promissory note was given for the $50,000 borrowed and the endorsements thereon shew the various payments made in ordinary course by the Rainy River Co. without the interposition of the bank. Clearly the Rainy River Co. dealt with the Holley-Mason Co. quite apart from the bank and this punctuates the position of things, that the bank had in no way assumed or undertaken any liability in the matter of this borrowing of $50,000. The promissory note and endorsements thereon read as follows:

War Tax
2 cents.

$50,000.00 Vancouver, B.C., May 23rd, 1918.

On demand after date we promise to pay to the order of Holley-Mason Hardware Co., Fifty thousand...../100 Dollars at Standard Bank of Canada, Vancouver, B.C., with interest at 7% per annum. Value received.

Rainy River Pulp & Paper Co.
per Robert Sweeney, President.
B. F. Taylor, Asst. Treas.

No. 1915.....Due.....

Endorsements.

War Tax $10.00.
Robert Sweeney.

July 10/18 rec'd check for $2,404.40, int. $264.40 ex. on check $48.10 amount to credit of note $1,991.90.

8/14/18 rec'd ck. for $2,383.20, int. $285.10 exchange on ck. of 2/10 $48.10, amt. applied to note $2,098.10.

9/16/18 rec'd ck. $3,131.80, int. $264.15 ex. on ck. 8/14 $47.65.

10/18/18 rec'd ck. $2,670.52, int. $247.90 ex. $62.62, amt. applied to note $2,360.00.

11/30/18 rec'd ck. $2,755.55 of which $242.15 is int. and $53.40 ex., amt. applied to note $2,460.00.

12/18/18 rec'd on principal $2,360.00, int. $220.18, ex. on ck. $55.10.

Then we have the correspondence throughout between the Rainy River Co. and the Holley-Mason Co. relative to payments and delays in payments, and throughout all the time the bank is not called in or made a party to any of the payments, in fact throughout the bank, save as to its "approval" given was not consulted or dealt with in respect of this indebtedness between the Rainy River Co. and the Holley-Mason Co., and this is not to be wondered at, as it had nothing to do with the repayment of the moneys and no liability in respect thereof in law or in equity.

The following letters well indicate the course of procedure between the companies and that the bank was not dealt with or looked into in respect of the loan of $50,000, the bank's position merely being that it had waived its security to the extent of $10 per ton:—

Roy R. Gill, Vice-Pres. & Mgr. E. D. Thompson, Sec'y & Treas.
Holley-Mason Hardware Co.
Jobbers of Hardware.

Codes used Iron and Steel Merchants.
Western Union
U.S. Steel Corpn.

Spokane, Wash., December 13th, 1918.
Received Dec. 16, 1918.
Answered.....

Rainy River Pulp & Paper Co.,
Standard Bank Building,
Vancouver, B.C.

Gentlemen:

Kindly send us check upon receipt of this letter as per agreement of $10.00 per ton on pulp manufactured and sold during the month of November. We also note in your agreement that the Standard Bank of Canada *waive their security to that extent.* We therefore would be pleased to receive, at your earliest convenience, a report on tonnage manufactured and sold since we made you the advance of $50,000.00; and oblige,

Yours respectfully,
Holley-Mason Hardware Company,
E. D. Thompson, Sec'y & Treas.

EDT/H

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Reply on back of above letter.

Holley-Mason Hardware Co., Dec. 16th, 1918.
Spokane, Wash.

Dear Sirs:

We are in receipt of your letter of December 13th and in reply thereto we enclose you our statement of production for November, together with our cheque for $2,635.28.

Our previous monthly reports have given you the amount of our production, and the amount of our payment on loan per month, but for your convenience we append herewith a summary of past statements:

Month.	Production	Re-payment of loan.
June	204 tons	$2,040.00
July	205 "	2,050.00
August	282 "	2,820.00
September	236 "	2,360.00
October	246 "	2,460.00
November	236 "	2,360.00
Total	1,409 tons	$14,090.00

This shews to you that we have repaid the sum of $14,090.00 and trust this is the information you require.

Yours very truly,

The Rainy River Co. in the end got into financial difficulties and became insolvent and on January 28, 1919, made an assignment pursuant to the Creditors Trust Deeds Act, 1901, and it appears that the bank is a creditor for a large amount and throughout all the time in the carrying on of its business, and loans made independent, even of the loan of the $50,000 from the Holley-Mason Co., the Rainy River Co.'s liability to the bank increased, the bank did not receive in payment of indebtedness due to it by the Rainy River Co. any of the moneys so borrowed. The customer carried on business in ordinary course and all the moneys were deposited in current account and were checked against in ordinary course.

The insolvency having ensued then and for the first time the position is taken up that the bank is directly liable to the respondent, it being put forward as will be seen by the following letter written by the solicitors for the respondent to the bank, that the bank "undertook to pay to the said Holley-Mason Hardware Co., $10 per ton from the proceeds of each ton of pulp manufactured and sold." The letter reads as follows:

The Standard Bank of Canada, June 26th, 1919.
Cor. Richards & Hastings Streets,
Vancouver, B.C.

Dear Sirs:

We beg to advise you that by indenture dated the 10th day of March A.D. 1919, the Holley-Mason Hardware Company, of Spokane, Washington,

assigned to Francis J. Finucane of the same place all moneys due or to become due from you to it under the agreement dated the 13th day of May, A.D. 1918, between the Rainy River Pulp & Paper Company and the said Holley-Mason Hardware Company, approved by you, *whereby you undertook to pay to the said Holley-Mason Hardware Company $10.00 per ton* from the proceeds of each ton of pulp manufactured and sold by the Rainy River Pulp & Paper Company from the 1st day of June, A.D. 1918, until the sum of $50,000.00 bearing interest at the rate of 7½ per annum loaned by the Holley-Mason Hardware Company to the Rainy River Pulp & Paper Company had been fully repaid.

We are instructed that you have received from the proceeds of pulp manufactured by this company a tonnage, which at the rate above mentioned, would entitle our client to receive the sum of $8,440.00 from you, and we have to request that you will make payment of this amount, or such amount as you have received for the use of our client, forthwith.

Yours truly,

RSL/D Lennie, Clark & Hooper.

The evidence does not establish the receipt by the bank of one dollar in respect of the agreement referred to in the above letter. As before pointed out, the circumstance that the moneys derived from the sales of the pulp were deposited in ordinary course to the credit of the Rainy River Co. in its current account with the bank means nothing. It was not the receipt of moneys by the bank in respect of the agreement. These moneys were wholly at the command of the customer the depositor, and the bank in ordinary course paid out these moneys upon the customer's cheques, and the bank was under obligation to do this. The moneys were not ear-marked in any way in being paid in or in being paid out and the bank was under no contractual obligation to the Holley-Mason Co. or the respondent to enforce its security. The bank's security in any case stood reduced to 90% and the Holley-Mason Co.'s security existed as to 10% (the security the respondent is now the assignee of). What prevented the enforcement of that security? I am quite unable to follow the submission made by the counsel for the respondent, that the liability rests upon the bank and that the judgment can be supported. In my opinion the judgment is wrong and should be set aside. In support of the judgment the counsel for the respondent relied upon the following, amongst other cases: *In re Irving, Ex parte Brett* (1877), 7 Ch.D. 419. That was a case though of an express agreement. There could be no doubt in such a case, and with deference, I cannot see its application to the present case. In justice to the counsel for the respondent, he frankly admitted that the liability contended for could have been better expressed.

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My difficulty is to see where it is expressed at all. *Burn* v. *Carvallo* (1839), 4 My. & Cr. 690, 41 E.R. 265. That was a case of the passing of title in goods and it was held that there was a good title in equity to the goods, but here there is no such transaction or element. In my opinion the case of *Malcolm* v. *Scott* (1850), 3 Mac. & G. 29, 42 E.R. 171, is one that is helpful in determining the question we have to decide and it is favourable to the appellant. The present case has not the elements of an equitable assignment and the only question is whether the bank entered into a legal contract with the Holley-Mason Co. I have already said that I fail to see where any legal contract is shewn.

There was no fund in the present case out of which the moneys could have been paid and if the bank had even enforced its security it would have only been able to enforce it to the extent of 90% of the security, and to that extent the moneys would have been the moneys of the bank not the moneys of the respondent.

I cannot see the applicability of *Rodick* v. *Gandell* (1849), 12 Beav. 325, 50 E.R. 1085; affirmed, 1 DeG. M. & G. 763, 42 E.R. 749. If helpful at all in the present case, it is favourable to the appellant. Here there is no distinct promise or agreement to apply a fund in any particular manner, nor any fund existent or required to be subsequently acquired or got in. Then as to *Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, I cannot see its application. The principle governing equitable assignment is, of course, in this case well and ably defined, but where in the present case was there any right in the bank to receive this $10 per ton from the Rainy River Co. for the Holley-Mason Co., or any contractual obligation that it would enforce its security and get in a fund out of which the payment would be made?

Further, this is disregarding what I have before pointed out, that the Holley-Mason Co. had been given its security by agreement and resolution of the Rainy River Co., absolutely independent of the bank, the bank waiving its security to the extent of 10% to admit of the Rainy River Co. doing this. Then it rested with the Holley-Mason Co. to implement that security if it thought fit. I cannot see that there is any analogy between the present case and *Adams* v. *Craig* (1911), 24 O.L.R. 490, at 502. This is not the case of the bank taking and dealing with the pulp with the knowledge of the interest of the Holley-Mason Co., and being

liable to account to the extent of the respondent's interest therein. The security was not enforced and no moneys were received by the bank. The proceeds of the sale of the pulp were received by the Rainy River Co. and it was the plain meaning of the whole transaction that the bank should stand aside and waive its security to the extent of the 10%, but there was no other contractual obligation either in law or in equity.

The following language of Lord Truro, L.C., in *Malcolm* v. *Scott*, 3 Mac. & G. 29, 42 E.R. 171, is peculiarly applicable to the facts of the present case (3 Mac. & G. at 50):

> This case . . . now comes on for further directions, and it seems to me clear from Lord Cottenham's judgment, that he expressly determined that the correspondence raised no case of equitable assignment, and that the only equity of the plaintiff was to have an account taken, if the defendants had entered into a legal contract with the plaintiff . . . The result of the action decided that, in point of law, no contract was proved by the correspondence against the defendants, and I think that decision leaves no equity in the plaintiff to be administered, and, therefore, that the bill should be dismissed.

No contract, in my opinion, has been established in the present case against the bank, therefore it follows, if I am right in this, that there is no equity left in the respondent as in the *Malcolm* case. Here, as in the *Malcolm* case, as stated by Lord Truro, L.C., it was argued that (3 Mac. & G. at 51):

> independently of the question of contract, the correspondence operated as an equitable assignment; but I repeat that, after full consideration, I am satisfied that Lord Cottenham intended to, and, in fact did, decide that the plaintiff had no case of equitable assignment . . . but I think it right to add, as I have heard the question of equitable assignment fully argued and have considered it, that if I were called upon to decide the question, I entirely concur in the opinion expressed by Lord Cottenham.

The position was simply one, well known in law, of debtor and creditor, as between the bank and the Rainy River Co., and there was no relationship between the bank and its customer or the Holley-Mason Co. of trustee and *cestui que trust*: (*Robarts* v. *Tucker* (1851), 16 Q.B. 560 at 575, 117 E.R. 994, *per* Alderson, B.; *Foley* v. *Hill* (1848), 2 H.L. Cas. 28, 9 E.R. 1002; *National Bank* v. *Insurance Co.* (1877), 5 Otto. 673 (95 U.S. Rep.); *Marten* v. *Rocke* (1885), 53 L.T. 946; *Reynolds, M'Mahon* v. *Fetherstonhaugh*, [1895] 1 I.R. 83; *Mutton* v. *Peat*, [1899] 2 Ch. 556; *London and Canadian Loan Co.* v. *Duggan*, [1893] A.C. 506), and I cannot accede to the contention that there existed any trusteeship in the bank coupled with an obligation to get in the moneys payable to the Holley-Mason Co. from the proceeds of the sale of the

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pulp. There was no contract upon the part of the bank to do this, nor was there the legal right to do this in the bank. The bank could only have enforced its security to the extent of the 90%, and failing action by way of enforcement of the bank's security and that of the Holley-Mason Co., it followed that the Rainy River Co. was at liberty to collect in the moneys derived from the sales made of the pulp and disburse the moneys as thought fit, and that is what did occur.

In the present case it is clear that the Holley-Mason Co. were desirous that the bank should release its security to the extent of 10%, and thereby enable it to obtain that security and relied for payment upon this security which it took from the Rainy River Co. along with the demand note, but failure ensuing, now the attempt is to saddle the liability upon the bank, a most unconscionable proceeding, when the facts shew that the bank did not enforce its security or receive any of the moneys, being the proceeds from the sales of pulp, its customer dealing with the moneys, as it was entitled to do in the ordinary course of business. It is the duty of the bank to cash its customer's cheques if the customer has sufficient moneys and the bank is liable for breach of contract if it fails in this: *Foster* v. *Bank of London* (1862), 3 F. & F. 214; *Carew* v. *Duckworth* (1869), L.R. 4 Exch. 311; *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, 109 E.R. 842; *Rolin* v. *Steward* (1854), 14 C.B. 595, 139 E.R. 245.

Further, it is to be noted that the Holley-Mason Co. did not advance the contention it now makes, *i.e.*, the liability of the bank, until after the insolvency of the Rainy River Co. See *Thompson* v. *Clydesdale Bank*, [1893] A.C. 282 at 287; *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201; *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333; *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A.C. 693; *Bank of New South Wales* v. *Goulburn Co.*, [1902] A.C. 543; *Coleman* v. *Bucks & Oxon Bank*, [1897] 2 Ch. 243.

I fail to see upon the whole case that any equitable assignment or any contractual obligation has been established imposing liability on the bank in favour of the Holley-Mason Co. or the respondent, or that the bank was a trustee for the Holley-Mason Co. or the respondent, or owed any duty to the Holley-Mason Co. or the respondent, therefore it follows, in my opinion, that the judgment is wrong and should be set aside and the action dismissed, that is the appeal should be allowed.

Eberts, J.A.

EBERTS, J.A., would dismiss appeal. *Appeal dismissed.*

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Ex. C.

Exchequer Court of Canada, Audette, J. February 17, 1921.

RAILWAYS (§ VI—120)—RECEIVER—MANAGER'S SALARY—RIGHTS TO PRIVILEGE AND PRIORITY THEREFOR—"WORKING EXPENDITURE"—EFFECT OF RECEIVERSHIP ON SALARY OF MANAGER—RESOLUTION OF BOARD—INTERPRETATION.

Where by resolution of a company the yearly salary of one of its officers is fixed, and it is further provided that "the said salary is to be paid from time to time as the board direct," such salary, though fixed, does not become payable or exigible until the board so direct.

While the Court will not interfere with the domestic affairs of a company so long as the company does not impair the funds necessary to meet the creditors, claims, it will refuse priority and privilege to the claim of the manager of a railway for the payment of $10,000 a year salary for managing a railway that is not a going concern, has no railway to operate and has no revenue. Such salary is not under the circumstances of this case "working expenditure" as defined by the Railway Act.

That where a receiver has been appointed to a railway company the person formerly acting as manager of said company cannot claim salary as such since the said appointment, as against the assets or fund in the receiver's hands, the management of the company being then in the receiver's hands.

Report of referee affirmed.

Statement.

APPEAL from the report of the Registrar of the Court (*Charles Morse, K.C.*), acting as referee.

The report appealed from in which the facts of the case are fully stated is as follows:

This was a claim for $109,947.41 as remuneration for certain services alleged to have been rendered to, and certain expenditure alleged to have been incurred on behalf of the defendant railway company in this action. The claim was filed on September 9, 1919, and was contested by the plaintiff company. The hearing of the contestation took place in Montreal on December 17, 1919, and at Ottawa on December 23, 1919, *J. W. Cook*, K.C., and *A. Magee* appeared for the plaintiff contesting, and Armstrong appeared in person. On May 10, 1920, the claim was reopened to allow Senator Domville to contest it.

I approach the task of preparing my finding on this claim with some diffidence—not because I am not confident as to how it should be determined on the facts, but because the facts themselves are of such a character that to stir them up does not tend to sweeten the atmosphere of business ethics in this country.

*Appeal to Supreme Court of Canada pending.

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I have said that the claim was for a certain sum, but that needs to be qualified by the statement that certainty was lost so soon as the hearing of the contestation began. A perusal of the evidence *passim* will shew that the claim never became static in amount before the undersigned. At the very outset of his evidence Armstrong, no doubt unintentionally, throws a veil of uncertainty and obscurity over his claim. I quote from pp. 227 and 228, Proceedings on Reference:

Q. When does the claim begin? A. In the books of the company it dates back as far as October 18th, 1911, and it is continued in the books of the company up till 1st March, 1919. It then shewed a balance to my credit of $57,940.21. Q. That appears in the books? A. I cannot accept that account as correct, but I am taking it at that amount. On checking over the account last night, I found two errors in connection with the travelling expenses. In one case my wife had accompanied me on the passage across the Atlantic, and in charging the amount the two passages were charged $271. Q. You correct that? A. Yes. One-half should not have been charged. I had frequent passages, and in another account my passage across had not been charged, so that it makes a difference of about $85, which should have been credited to the company. That amount would have to come off. Q. Off that balance of $57,940.21? A. Well, out of the total claim of $109,000. The total claim is $109,947.41. Q. What is the amount to be deducted? A. $79.85. There is an overcharge of $175.85, and an undercharge of $85, so that $79.85 should be credited to the company. There are in the company's books a number of charges made against me. Q. $109,857.56 is your net claim before me? A. Yes. There are a number of items charged against me in that account of the company which I have not given credit for. One or two of them are correct, and one or two of them I would want some information about before giving credit for them, and that information I can only get from the books of the company. There is one large item charged on the 15th September 1913. It is "To W. Owens $14,926.09." Q. What do you say ought to be done with that? A. Apparently this is a payment which Mr. Owens claimed he had paid to me and wished the company to assume. I think that amount is correct. Q. Then that should be deducted? A. I think so, but I would like to see if there was a resolution at that time. Q. You might reserve all these mistakes to the end of the case, and tell me what the net claim before me is? A. The net claim is, of course, as I have sworn to here, but these different amounts altogether would come to $19,817. Q. To be deducted from your claim? A. Yes, if they are correct. Two of them, one item of $55.17 and another of $500 are correct. Q. I will ask you to file a statement shewing the difference between the claim as sworn to and the exact amount you contend is due? A. Yes, that will be quite satisfactory.

Armstrong did not furnish me with a formal amended statement of claim in writing; but he did put in certain exhibits having a corrective bearing (*e.g.*, Ex. No. 18) on his original statement, which unfortunately did nothing but add to its uncertainty as a whole.

Now, in view of these facts and bearing in mind that Armstrong, during the period for which he claims, was a director of the railway company (for the whole time he was managing director and for certain periods was vice-president and president) and as such stood in a fiduciary relation to the company and its creditors (see *per* Lindley, L.J., in *In re Lands Allotment Co.*, [1894] 1 Ch. 616), his remark that the claim is a very simple one, serves to reinforce the point ot the French epigram: *Les affaires? C'est bien simple: c'est l'argent des autres.*

A president and managing director is not only the executive and confidential agent of the company, he is also a trustee for the company's money and property. See *Rogers Hardware Co.* v. *Rogers* (1913), 10 D.L.R. 541, at p. 543, citing *Great Eastern R. Co.* v. *Turner* (1872), L.R. 8 Ch. 149; *Gluckstein* v. *Barnes*, [1900] A.C. 240.

It will be useful at this stage to state briefly the history of the railway company and Armstrong's connection with it. The company was organised in 1903 to build a railway from Montreal to Grenville, P.Q., being incorporated by 3 Edw. VII. (Dom.) ch. 172, under the name of the Ottawa River Railway Company. By an amending Act, 4 Edw. VII. ch. 112, it was authorised to extend its line from Grenville to Ottawa. By 4-5 Edw. VII. ch. 79, the name was changed to the Central Railway Company of Canada and authority was given to extend its line from Ottawa to a point on Georgian Bay at or near Midland, and to construct certain branch lines. Thus it will be seen that the company had valuable charter privileges which with honest and efficient management might have been turned into great profit for the shareholders. Senator Domville, in giving evidence on his own claim before the undersigned, did not hesitate to characterise the company as "conceived in sin and born in iniquity." I pointed out this serious indictment to Armstrong as will appear from the following extract from the evidence: "Q. Although you were not responsible for the conception of this company in sin, you had something to do with ushering it into the world in some way? A. Yes, I was a sort of midwife." The first event of importance after the formation of the company was the borrowing of £20,000 in London, one-half of which was applied on account of the purchase of 50 miles of an existing railway, a purchase which was capriciously

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abandoned and the money so paid forfeited to the vendor. That was the beginning of a long history of wasteful and incompetent management of the affairs of the company. It was not until 1911 that the company succeeded in launching its first bond issue. On October 18, 1911, Armstrong was appointed managing director and vice-president of the company. The road was never in operation because it was never physically completed. The company was never a "going concern." On May 3, 1916, the company filed a scheme of arrangement with its creditors, which was never confirmed by the Court, but was dismissed by an order of the Court on December 6, 1917. In the month of June, 1917, Armstrong purporting to act on behalf of the company, proceeded to sell certain steel rails to the Government of Canada, without the authority of the trustee for the bondholders, although such rails were covered by the trust deed of May 5, 1914. Mr. Hogg, the solicitor of the company, had advised Armstrong that the consent of the trustee for the bondholders was necessary before the rails were sold. The amount received from the Government on the sale of the rails was $93,170.49, and on or about the same time there was certain other property sold to one St. Denis upon which he realised $2,652, and also certain plant and material belonging to the company, but mortgaged to the bondholders under the said trust deed, were sold by Armstrong to the Royal Agricultural School, a moribund if not insolvent institution of which he was president, for the sum of $415. The purchase price of the rails was paid into the Exchequer Court of Canada by the Government on January 22, 1918, there being a proceeding then before the Court wherein the trustee for the bondholders asked for a sale of the railway and the appointment of a receiver of the road until the sale became effective. Armstrong never paid the moneys he received from the sales above mentioned into Court. He never paid the moneys over to the company alleging as a reason that the company owed him. He did not credit them in his statement of claim filed but he is willing to do so now.

Armstrong became president of the railway company in 1917. On December 6 of that year, F. Stuart Williamson was duly appointed interim receiver, and his appointment was made permanent by the order of this Court on October 9, 1918. By the terms of the last mentioned order, the undersigned was

appointed referee for the purpose of making enquiry and report as to the amount and nature of the claims of creditors against the said railway company.

In response to a public advertisement calling upon creditors of the defendant company to file their claims before the undersigned, Armstrong filed the claim which is now before me for consideration, and it was contested by the plaintiff company as hereinbefore mentioned.

Armstrong's claim is one for salary, travelling expenses and disbursements as managing director of the defendant company, down at least to his assumption of the position of president of the company in 1917. The administration of the affairs of the company was irregular from the start, for although it appears that he was appointed vice-president and managing director on October 18, 1911, it seems that he had been working in some capacity for the company before that. Furthermore, although Armstrong was appointed to the above mentioned offices in October, 1911, he was not authorised to be paid any salary or remuneration until September 19, 1912. On that date it was resolved at a meeting of directors "that the salary of C. N. Armstrong, as managing director, be the sum of ten thousand dollars per annum, to be computed from October 18, 1911, the said salary to be paid *from time to time* as the board directs." Now it must be borne in mind in considering this resolution that the company was not at the time a "going concern." It was not proved before me by Armstrong that this meeting was regularly called or that a quorum was present apart from Armstrong himself. (*In re Greymouth Point Elizabeth Ry., etc., Co.*, [1904] 1 Ch. 32. *In re North Eastern Ins. Co., Ltd.*, [1919] 1 Ch. 198. *In re Webster Loose Leaf Filing Co.* (1916), 240 Fed. Rep. 779.) Having verified Ex. 4 by reference to the original I find that there were five directors only present of whom C. N. Armstrong was one. Now by referring to the by-laws of the defendant company which were put in the Domville claim as Ex. E, and made part of the evidence in the contestation of the present claim, it will be found that the board of directors must consist of nine of whom a majority shall form a quorum. There was then no quorum present at the meeting in question if we exclude Armstrong. Under such circumstances there could be no valid by-law or resolution passed by the board.

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See *per* Rose, J., in *Cook* v. *Hinds* (1918), 44 D.L.R. 586, at p. 595, 42 O.L.R. 273 at p. 306; *per* Street, J., in *Birney* v. *Toronto Milk Co.* (1902), 5 O.L.R. 1 at p. 6; Mulvey on Dominion Company Law, p. 370; *Enright* v. *Heckscher* (1917), 240 Fed. Rep. 863. But even if it were conceded that this meeting of directors was in every respect regular and valid, there are two features of it that require consideration in relation to the sufficiency of proof of Armstrong's rights under it. In the first place he has not satisfied me that the salary was paid "from time to time as the board directs." On the contrary, he seems to have paid himself whenever he got hold of the company's funds. For instance, I have already pointed out that in connection with the sale by him of property and plant at McAlpine in the summer of 1917, he received on his own admission over $3,000 in cash. When asked by Mr. Cook why he had not paid it over to the company, his answer was: "Because I had a claim against the company, and a heavy one, *and I took what I could get out of that for myself.*" To make this clear the undersigned asked him: "For arrears of salary and disbursements made on behalf of the company?" His answer was "Yes." He also cashed certain coupons of bonds in his possession.

The other feature that requires proof from Armstrong is that this resolution of directors of September 19, 1912, was approved by a resolution of the shareholders duly convened. For authority setting forth the requirement of the law that to constitute the valid payment of salary to a director of a company there must be a resolution of the shareholders, I need go no further than the clear statement of the principle by the referee (now Audette, J.) in *Minister of Railways* v. *Quebec Southern Ry. Co.* (1908), 12 Can. Ex. 11, at pp. 14, 15 and 16. Affirmed by Cassels, J., 12 Can. Ex. at pp. 58, 59, and by the Supreme Court of Canada, February 15, 1910.

It should not be overlooked that the action of the board of directors in settling the remuneration to be paid to Armstrong for his services was forestalled by the executive committee of the company in a meeting of that body held on June 27, 1912. Ex. 6 is a certified copy of the minutes of the said meeting of this committee. Among others it sets out the following resolutions:

Resolved: That the amount of compensation to be allowed to C. N. Armstrong for his services to the company up to October, 1911, and for the

balance due him for disbursements made by him on behalf of the company, after deducting any sums already paid to him, be and it is hereby fixed at fifty thousand dollars, and that the said sum be paid to C. N. Armstrong out of the first moneys which the company shall receive, which can be applied to said payment, and that pending said payment the sum of seventy-five thousand dollars in first mortgage bonds of the company shall be given to C. N. Armstrong as collateral security for said payment, it being understood and agreed that the Bellevue property at Carillon is to be transferred and made over to C. N. Armstrong in further consideration of the payment of ten thousand dollars.

Mr. Raphael dissented.

Resolved: That in accordance with the terms of settlement with C. N. Armstrong the property at Carillon, formerly belonging to the Ottawa River Navigation Company, and known as the Bellevue property, as fully described in the Deed of Transfer from Charles F. H. Forbes to the Ottawa River Navigation Company, 6th August, 1873, be transferred, made over and assigned to C. N. Armstrong, in consideration of the payment of the sum of ten thousand dollars, to be payable in ten annual instalments of one thousand dollars each, with interest. The wharf and all land necessary for the right-of-way for the railway to be reserved by the company.

Mr. Raphael dissented.

The company not being a "going concern" no such undertaking could be validly made by or on behalf of the directors. See *per* Lindley, L.J., in *In re George Newman & Co.*, [1895] 1 Ch.D. 674 at p. 685; *Burland* v. *Earle*, [1902] A.C. 83 at p. 93; Mitchell on Canadian Commercial Corporations, p. 1040. See also my reasons in the Domville claim. It may be remarked in passing that as a result of this benevolent action of the executive committee towards Armstrong, Senator Campbell resigned from the board of directors. This letter I quote in full later on. Now the executive committee is, as Mr. Cook graphically put it in his argument, "a sort of cabinet of the directors," Armstrong in this instance being one of them. Notwithstanding provision being made for it in the by-laws this committee lacked the authority of the board of directors so far as administering the affairs of the company is concerned. Mulvey, on Dominion Company Law, p. 26, says:—

> The affairs of the company are managed by the board, and all powers given to the company by the charter are exercised by the directors subject to the restrictions provided by the Act . . . The duties of the directors having the nature of those of a trustee may not be delegated. *It is illegal to appoint an executive committee* to perform the duties imposed by the Act upon the directors.

So much for the executive committee, and its handsome treatment of Armstrong. In this connection it is interesting to refer

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to by-law No. 42 of the defendant company which enacts that the office of director shall become vacant "if he accepts any other office of profit under the company and is or becomes interested directly or indirectly in any contract with the company." This throws an important light upon the facts hereinafter stated.

Returning to Ex. 4, Armstrong attempts to put the generosity of the board of directors as therein expressed on a sure foundation by a document purporting to be minutes of an adjourned meeting of shareholders of the Central Railway Co. of Canada, held on September 30, 1912. It is also worthy of mention that Armstrong was one of the *four* shareholders present, and that he did not omit to bring many proxies with him. The first resolution reads: "Resolved: That the minutes of all meetings of the directors and executive committee held since the last annual meeting of the shareholders be and the same are hereby approved and confirmed." The last resolution too, is not unmindful of Armstrong, as it reads: "Resolved: That the sale and transfer of the Bellevue property at Carillon to C. N. Armstrong be and the same is hereby approved and confirmed." Now, it may be that the maxim, *Expressio unius est exclusio alterius* should be applied here as there is a specific sanction of one only of the benefits conferred upon Armstrong by the directors in Ex. No. 4; but on the other hand it is well to seek authority as to the sufficiency of the first resolution for the purpose of approving the action of the directors in giving Armstrong a salary of $10,000 *per annum*. It is a blanket resolution, indefinite in its terms, and giving no assurance that the shareholders (with the obvious exception of Armstrong) had their minds directed to the fact that they were dealing with the managing director's salary. I asked Armstrong whether the minutes of meetings of directors prior to that date were read at this meeting of the shareholders, and he could not say that they were. There is nothing to shew on the face of Ex. "C" that they were. Now it is to be noted that Ex. "C" shews the meeting was an adjourned one. There was an annual meeting called for September 3, 1912, and it was adjourned to September 30. There is nothing before me to shew that it was not postponed by the directors without the shareholders convening, which would be invalid. (Mulvey on Dominion Company Law, p. 47.) But apart from that the meeting would seem to

have been incompetent to ratify Armstrong's salary, because that item would not come within the ordinary agenda of an annual meeting, and it was not proved before me that there was any notice to shareholders as required by sec. 3 of the by-laws of the company setting out specifically the proposed business. See *per* Fry, J., in *Hutton* v. *West Cork Ry. Co.* (1883), 23 Ch.D. 654, at p. 659.

Mulvey, on Dominion Company Law, says, at p. 46:

The notice should set out specifically the proposed business. It is not necessary that a by-law proposed to be approved, or a resolution to be passed should be set out *in extenso*. But it is necessary that the gist of it should be given . . . Only such business as is referred to in the notice may be transacted, and every shareholder is entitled to notice.

And again at p. 49:

A meeting may be adjourned. But only such business as the meeting itself was called to decide may be considered at the adjourned meeting, unless a further notice is duly given for the consideration of other business.

See also *Birney* v. *Toronto Milk Co.* (1902), 5 O.L.R. 1.

Mitchell's Canadian Commercial Corporations, at p. 1031, says:

The general rule is that unless authorised by the charter, or by the company's regulations or memorandum of association, *or by the shareholders at a properly convened meeting*, directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves, out of the company's assets.

And see the judgment of Kelly, J., in *McDougall* v. *Black Lake Asbestos & Chrome Co. Ltd.*, decided on April 8, 1920, in the Supreme Court of Ontario, but not yet reported [47 O.L.R. 328]. Kelly, J., says, at p. 333:

Of transactions intended to be dealt with but not covered by a general notice of an annual meeting, special notice should be given. . . . The notice must contain a sufficient statement of the facts which are to be considered by the corporation at the proposed meeting.

And at p. 334:

There was here a special reason why the attention of the shareholders should have been drawn to the nature of the business intended to be transacted at the meeting—viz., *the proposal for payment of moneys to the president of the* company personally. Where a contract is to be submitted to a meeting for confirmation, and the directors of the company are interested therein, it has been held that the notice convening the meeting should give particulars as to that interest.

Mitchell on Canadian Commercial Corporations says, at pp. 1031-1032:

The shareholders in general meeting assembled may vote remuneration to the directors for past services, *but the company must be a going concern*. Remuneration for past services of directors cannot be voted at an ordinary general meeting unless special notice be given of the intention to propose such a resolution.

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It is obvious that these last observations obtain as well against the resolution affecting the Carillon property in Ex. 4 as against the so-called blanket resolution.

It is under these corporate acts of the company, over which the shadow of Armstrong's dominance looms largely, that he asserts his right to be paid the major portion of his claim, *i.e.*, for salary or remuneration from October, 1911, down to January, 1918. Let me say here that if my finding in disallowing this whole claim as against the fund in the receiver's hands had to depend on the invalidity of these resolutions voting him salary or remuneration, I would have little difficulty in holding them invalid. The law does not favour methods by which company directors can make easy money at the expense of shareholders and creditors. On the other hand, even conceding for the sake of argument, that the aforesaid resolutions of the executive committee and the directors were regular in all respects, and that there was a proper ratification of them by the shareholders, I would have to reject this claim in its entirety because the facts of the case conclusively shew that instead of the company owing Armstrong anything, Armstrong owes the company a very considerable sum of money which he ought, both in good conscience and as a matter of law, to repay to the company. All this will appear later on.

To return to the items of his statement of claim. The claim for salary down to December 31, 1913, depends for its validity upon the impugned acts of the directors and shareholders of the company embodied in Exs. 4, 6 and C, respectively. I shall not labour the case further as to those documents.

Armstrong's claim for remuneration from January, 1918, to September, 1919, "twenty months at $250 per month," resolves itself purely into a question of *quantum meruit*. Mr. Cook questions Armstrong, as follows:

Q. Now we come to services from the 1st of January, 1918, to the 1st September, 1919, 20 months at $250 per month. What services did you render to the company during that period, remembering that Mr. Williamson was appointed on the 6th of December 1917? A. Mr. Williamson was appointed receiver, but that in no way did away with the company, nor the necessity for the company protecting itself and the creditors and shareholders. Q. And so you charge $250 a month for exercising supervision over its affairs? A. And I would not do it again for four times that amount. I have lost more than four times the amount by being tied down to the company instead of attending to my own business. I consider that that is a very, very small

charge to make—very small. My whole time has been taken up. Q. I suppose you claim as a *quantum meruit*, the value of services? A. Yes. Q. What do you consider you have accomplished for the company during that period? A. I made several trips to the other side during that time, one particular reason being the claims against Wills & Son, and I may say it is an outrage that that claim was not pressed. We had a perfectly good claim for damages there for hundreds of thousands of dollars. Unfortunately the solicitor for Wills was the solicitor for the receiver.

After Armstrong's attempts to justify his charge of $250 per month since the receiver was appointed (and it is to be noted that he values his services at the same figure as the receiver's compensation was provisionally fixed at) by reciting services for the company, some of them works of supererogation and most of them unauthorised by any mandate of the directors, we have the following answers by him to questions by Mr. Cook:

Q. On the 6th December, 1917, the Exchequer Court saw fit to appoint a receiver to manage this company? A. Yes. Q. How can you charge for services of this character in view of the fact that the Court saw fit to take the management of the concern out of your hands and place it in the hands of a receiver? A. No, they did not take it out of our hands at all; the company remains intact. Q. Its property and assets are in the hands of the Court? A. But the assets were neglected by the receiver and the company had a right to try and collect everything that is due to it.

The Registrar—That is a reflection on the Court.

Now, as we have seen, Armstrong bases this part of his claim on a *quantum meruit*. The authorities shew that he must fail on that head.

Mitchell on Canadian Commercial Corporations, p. 1031, says: "Directors are not to be considered as servants of the company, and as such entitled to remuneration for their labour according to its value, and cannot, therefore, recover on a *quantum meruit*." And see *Brown & Green Ltd.* v. *Hays* (1920), 36 T.L.R. 330.

In the absence of a provision of the charter or of a special contract, a director is not entitled to compensation. See *Ogden* v. *Murray* (1868), 39 N.Y. Rep. 202. There is no implied promise to pay such an officer either for regular or extra services. To subject the corporation to liability it must be shewn that the services were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for. See *Pew* v. *Bank* (1881), 130 Mass. 391, followed in *Fitzgerald & M. Const. Co.* v. *Fitzgerald* (1890), 137

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U.S. Rep. 98; *per* Rose, J., in *Cook* v. *Hinds*, 44 D.L.R. 586, at 598, 599, 42 O.L.R. 273, and see my reasons in Domville claim.

Beyond all this it is quite certain that nothing Armstrong did since the appointment of the receiver enured to the benefit of the creditors by protecting or augmenting the fund now in the receiver's hands for the liquidation of the company's obligations.

Dealing next with the question of the company's liability for Armstrong's "expense accounts" from October, 1911, to the date of the appointment of the receiver, the claimant is forced to rely on the resolution of the executive committee of October 8, 1913. As that resolution was never ratified by any valid meeting of the shareholders, I shall rely on what I have already said about the executive committee and its lack of authority to bind the company. But even this last resolution of the executive committee was not complied with by Armstrong as he did not, so far as the proof before me shews, *render monthly expense accounts to the company as required by that resolution;* and, moreover, the resolution does not purport to be retroactive, while Armstrong carries his expense accounts back to October, 18, 1911.

On the other hand, if Armstrong seeks to ignore this resolution and recover expenses and disbursements on an implied contract, he cannot do so, as I have shewn in considering the question of *quantum meruit* above. Nor can he recover anything for expenses for his voluntary peregrinations since the appointment of a receiver. His whole claim for expenses, etc., amounts to something over $17,000 and as he has presented neither vouchers nor any admission of liability for them by the company I must disallow them all.

I have already stated that even if Armstrong's claim for remuneration for his services were buttressed by a proper ratification of the shareholders and in every way responded to the formal requirements of the law, yet upon the facts he is not entitled to recover anything. Before I proceed to establish this by citations from the evidence, I think it proper to shew how Armstrong's conduct as managing director of the company—occupying as such the position of a trustee for the company, and, after its declaration of insolvency, a trustee both for the company and its creditors—disentitles him to the consideration of the Court when he seeks a right of priority over the bondholders

which, although expressly given by statute, yet has its foundation in equity. In Mitchell's Canadian Commercial Corporations, p. 1058, we have the following propositions of law laid down:

The common law liability of directors in respect of misfeasance is contained in sec. 123 of the Dominion Winding-Up Act (R.S.C. 1906, ch. 144), which creates no new liability. Thus a director is liable to the company where he "has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company," and must repay or make compensation to the company for the loss.

And at pp. 1060-1061:

There are certain broad general rules governing the conduct of directors. They must act in good faith and exercise reasonable care in the discharge of their duties. They must not allow their private interests to conflict with the duty they owe to the company. The Courts cannot lay down any precise rules, but must deal with each particular case on its own merits. . . . The law of Quebec does not differ from the English decisions in respect of directors' responsibility, for these decisions are based, not upon any special rule of English law, but upon the broadest considerations of the nature of the position and the exigencies of business.

Accepting this as a correct statement of the law, how does Armstrong stand in relation to it?

In the first place, bearing in mind the provisions of sec. 6 of art. 4 of Trust Deed of 1914, if not officially responsible as managing director for the irregular way in which the books of the company were kept, he actively contributed to their unreliability. The late J. D. Wells, who was secretary of the company, when testifying in support of his own claim, spoke as follows:

A. The entries that were made there were very irregular and not made by my book-keeper. Q. Is it not a fact that the books were under your charge as secretary of the company since the year 1912? A. No, they were not. They were not in my charge half the time. Q. In whose charge were they? A. Well, different parties. Q. Whom do you mean by different parties? A. Well, Mr. Armstrong, for one, had charge of them for a while, not as book-keeper. *He had them in his care.* Q. At all events, you allowed them out of your possession? A. They were not in my possession. I never allowed them out of my possession, because they never were handed over to me practically or theoretically.

And see the receiver's evidence in the plaintiff company's claim.

Now, Armstrong, as I have before indicated, complains of the irregularity of the books, but it is noteworthy that most, if not all, of the irregularities enure to the benefit of Armstrong rather than to that of the unfortunate people who have lost money in this enterprise. Armstrong admits that he had never

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rendered at any time to the company, a complete statement of his account, although he was handling a very large amount of the negotiable securities of the company. The books could not be regular without such an account appearing therein. But, the evidence shews yet more clearly Armstrong's intimate connection with the books and accounts of the company. He had prepared a balance sheet of the company's affairs, which drew forth the following letter from A. K. Fisk, of the firm of A. K. Fisk & Co., consulting accountants and auditors of Montreal, who had been engaged to audit the books of the company. I quote the letter *in extenso* in fairness to all parties concerned:

MONTREAL, May 9th, 1912.

C. N. ARMSTRONG, Esq.,
London, Eng.

Dear Mr. Armstrong:

I was surprised to see from your cable of this morning that you wished me to sign the balance sheet that you had prepared to December 31st of your company's affairs. You will remember when we discussed this matter before, that I told you it would be impossible for me to sign any balance sheet of the company in its present condition.

I am quite clear in my own mind that your viewpoint and mine are not going to agree with regard to this company's affairs, and after investigating, as I have had to in the course of my audit up to date, the past history of your company, I have come to the conclusion that I cannot see my way to sign any balance sheet prepared by the company which throws into construction of the railway the expenditure incurred prior to the last issue of bonds. Again, the allotment of the capital stock of the company prior to that bond issue is to my mind very open to question as to its legality, and I have decided not to take the responsibility of passing the corresponding assets to these stock issues as shewn in the books, as construction assets.

Turning to the more recent transactions of the company, there seems to have been a considerable amount of looseness in the handling of funds, which to my mind should have been rigidly placed to the credit of the company's own bank account and chequed under authority of directors' resolution. Instead of this, I find the funds received from the trustees, etc., to have been sometimes handled by individuals apparently in trust, and chequed out at their pleasure. In one notable case there was a specific amount taken care of by two of the officials of the company which was to have been applied for a specific purpose, but cheques were immediately drawn in favour of one of these gentlemen operating the account, as payments on account of services rendered, although I am not aware of any particular resolution having been passed entitling this gentleman to any specific sum, nor have I seen an account such as an auditor could pass for such services as a *bond fide* voucher.

Again, I have already raised an objection to the personnel of the office staff. It is quite impossible under modern conditions to give a satisfactory audit in an office where there appears to be no organization. My connection

with Mr. Langlois has been very unsatisfactory, also with Mr. Raphael, and it further is quite obvious that your secretary-treasurership should be in the hands of a railwayman of modern views and up to date methods.

I see by a resolution of directors that I was instructed to open up a new set of books. This was no doubt following a suggestion made by myself to that effect, but the difficulty lies in the fact that the past records of the company cannot be verified sufficiently to entitle them being brought into the new books as correct assets and liabilities, and the only medicine that I can see that would meet this point would be by a return to the treasury of the capital stock issued prior to the new bond issue, and to wipe out corresponding assets to that effect. I do not assume for a moment that this will meet with your concurrence, and I have therefore decided to withdraw from the audit without asking for any fees for my services to date, in order that it will leave you with an entirely free hand to make a fresh appointment. I value your personal friendship far more highly than I do any fees that I might be able to earn from the audit of this company's affairs.

I enclose copy of a letter that I have addressed to the president and directors, resigning from my position under to-day's date, and I hope you will appreciate the motives that have led to my resignation and that this will make no difference whatever to our personal friendship.

I will return all papers in my hands to Mr. Wells without delay, and would suggest that you consider this letter as confidential between us.

Yours sincerely,

Enclos. A. K. FISK.

A few months after this intrepid protest against the extraordinary system of book-keeping that marked Armstrong's regime as managing director of the company, we have a further criticism of his methods. Referring to the action of the executive committee on June 27, 1912, in giving Armstrong $50,000 and the Bellevue property at Carillon, the late Senator Campbell writes the following letter to Armstrong on August 5, 1912:

TORONTO, Aug. 5, 1912.

C. N. ARMSTRONG, Esq.,
Winchester House,
Old Broad St., London, E.C.

Dear Mr. Armstrong:

I have your favour of the 25th ult., and in reply I cannot see what there was in my letter to Sir Frank Crisp and the other persons named to give you such a shock. It was simply a notice to them that I had resigned my position as director and president of the company, and that I would not be responsible for what had been done or which might be done in the future "only that and nothing more."

It is quite true I sent my resignation some days before the 21st June, but at your earnest request I went to Montreal and attended a meeting on the 21st of June so as to form a quorum, but at the close of the meeting I formally resigned, although you requested me to let my resignation stand over until the annual meeting, but I positively refused to do so and you promised before

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you left you would have a meeting of the directors and formally accept my resignation and elect a new president, whom you thought would be Mr. Smith. But instead of that you left without having a meeting of the directors, but called a meeting of the executive instead and had them pass a resolution to convey to you the Bellevue Farm and voting you $50,000 for your services, and in the meantime handing you over $75,000 of the company's bonds as security for the $50,000. This action of the executive seemed to me so outrageous and so unjustifiable that I felt in justice to myself I should make known the fact that I was no longer an officer of the company, and not responsible for its actions, more especially as I learned you had made no mention in London of my having resigned, but were still using my name as president. Under the circumstances, I think I was perfectly justified in sending the formal notice I did.

Had I known at the time that a notice of my resignation appeared in the Montreal *Herald* I would have simply mailed them a marked copy of the paper instead of writing a formal notice. I resent your statement that "I took special pains to wreck the company." I did nothing of the kind as you may well know. Had I wanted to wreck the company I think a simple statement from me as to how the company's money and bonds had been disposed of would have had that effect. I give you full credit for your energy and ability in promoting this railway for some years, but I remember that this was only one of the different enterprises you had on hand and which engaged your time and ability and I cannot forget that you have, through one source or another, drawn considerable sums of money and have also received a good round lot of bonds of the company, and it seemed to me you ought to have been satisfied until *there was a Central Railway.* At present it only exists on paper and although a start has been made in building it you must not forget that there are many rivers to cross and obstructions to remove before trains are running on the road.

Yours truly,

ARCH. CAMPBELL.

This letter constitutes an interesting aid to the interpretation of Ex. 20, which purports to be a copy "of the minutes of a meeting of directors held on June 21st, 1912." Armstrong sets much store by Ex. 20, saying: "It is only fair to myself that the opinion of the directors who knew what I had done should be put on record." It is true that the document is milder in its references to Armstrong than Senator Campbell's letter, but it will be noted that the minutes set out in Ex. 20 are signed by Senator Owens, who was not present at the meeting. However, they manage to record the fact that Senator Campbell was not impressed with the "equity of Mr. Armstrong's claim against the company." But the causes of Senator Campbell's resignation of the presidency and retirement from the Board are euphemistically stated as compared with the terms of the Senator's letter to Armstrong, which is a document later in date and, from what I have learned

of the methods of the directors, impresses me as a much safer record of Senator Campbell's reasons for severing his connection with the company.

There are other documents (the Domville claim) to shew that the company was not always in accord with Armstrong, although generally there is too much compliance with his methods apparent upon the proceedings of the directors to render his colleagues on the board free of criticism. Ex. D is a certified copy of an adjourned annual meeting of shareholders on October 13, 1914, whereby it appears that Armstrong had tendered his resignation as managing director. The meeting resolved that, "Mr. Armstrong be informed that his resignation cannot be accepted until he renders his account, reports on the administration of the affairs of the company, and returns to the company the company's bonds in his possession as shewn in the auditor's statement." Armstrong says that this meeting of shareholders was composed of "a little clique that did not represent the shareholders at all." The auditor referred to here is Midgely who had previous to this dated filed a report which led up to the action of the shareholders at this time. When examined as to the account demanded by the shareholders in Ex. D, Armstrong said that he did not render an account in accordance with this resolution, because "there was no account to render." Later on, explaining this, he says:—"I said there were no accounts to render, because they had already been rendered." Now the fact is that he had at that time only rendered a statement of his bond transactions, not of his general account with the company.

Turning now to Midgely's connection with the case, it is well to state that Midgely was employed by the directors of the company to examine and audit the books so that a financial statement could be made. This was after Fisk had declined to go on with his audit. Midgely filed two reports, that contain certain statements concerning Armstrong's dealings with the bonds of the company, as well as his "lack of proper vouchers for payments made," which caused Armstrong to stigmatise them as false. "He was employed by the company to make a report, and he made a false report" . . . "His report is false and proved to be false." And yet on the very same page of the proceedings he

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states that, "I was the very one who recommended him;" and in speaking of errors in his statement of claim he says: "I may be wrong on some of the items. I am quite willing to be corrected by Mr. Midgely if there is anything wrong," and, "I believe Mr. Midgely and I could settle it in half an hour." Midgely's character being thus restored out of Armstrong's own mouth, let us hear what Midgely says. "It is impossible to adjust Mr. Armstrong's account under present conditions." "Debit balance per ledger $289,713.57." "This account is obviously of such an important and urgent character that no time should be lost in dealing effectively with same."

Nor, Midgely, in his effort to systematise the books of the company prepared a statement of Armstrong's account, and this is the pivot upon which one of the most extraordinary episodes in the strange history of this company revolves. In this statement of account Midgely charged Armstrong with bonds to the amount of $229,999.50. When, however, the company was preparing its scheme of arrangement in 1916 Armstrong evidently thought it inexpedient to have his account stand in this awkward light, and we find Blagg, the accountant of the Ottawa River Navigation Co., brought in to amend the account as Midgely framed it as the authorised auditor of the company. Blagg transmuted by a process no more subtle than the bold stroke of a pen the debit entry of $229,999.50 into a credit entry of the same amount. Thus the bond indebtedness that Midgely found against Armstrong was wiped out. This was in February, 1916. Now Armstrong asserted that this was done under the authority of the directors, but there was no resolution to that effect produced. On the other hand it was shewn that the instructions were given to Blagg by Senator Owens and Armstrong himself. This will appear from the extracts from Blagg's testimony which I subjoin. Senator Owens is dead, and no good purpose would be served by discussing his motive in departing so strangely from his duty as a trustee towards the insolvent company and its creditors; but Armstrong is here to bear the consequences of his conduct. It seems that Carmichael, another director, was also present when Blagg carried out the behests of Owens and Armstrong; but just what part was played by Carmichael is not quite clear. Ex. Q, embodying the written instructions given to Blagg by Armstrong, is as follows:

Credit C. N. Armstrong,
Charged wrongly.

Sept. 15-13	Coupon Interest	$ 10,692.00
Oct. 31-13	Bonds, £3,175	15,430.53
	No. 4 Coupon	1,041.86
	Bonds	229,999.50
		$257,163.89

Let me quote Blagg's story of the transaction.

Examined by Mr. Cook.

Q. Will you please look at the journal of the Central Railway Company of Canada, at pages 70 and 71, and say whether any entries appear in that journal made by you? A. They are all my entries. Q. Will you also look at the ledger account of Mr. C. N. Armstrong, being number 73, and state whether any entries appear in that account made by you? A. Yes, from here down. Q. Then entries in that account from the entry which is headed 27th June, 1914, down to the end of the account were all your entries? A. Yes. Q. And they were all made in February, 1916? A. Yes, at one time anyway. Q. So that, although the entries bear different dates they were all written in February, 1916? A. Yes, I suppose within a day or two. Q. Under whose instructions did you make those various entries to which you are now referring? A. Senator Owens. Q. Did you receive any instructions from Mr. Armstrong in connection with these entries? A. *Well, Mr. Armstrong gave me the statement that I wrote in here.* Q. So that the actual entries were made on a statement furnished you by Mr. Armstrong? A. Yes. Q. Will you look at the statement filed as Exhibit Q and state whether that was the statement? A. I have the word here "ent." Q. Was that the statement handed you by Mr. Armstrong? A. I presume it was. Q. And the letters "ent" are in your writing? A. Yes, and the figures. Q. Meaning that those figures were entered and the total of the figures is in your handwriting? A. Yes. Q. By that memorandum Exhibit Q you were crediting Mr. Armstrong's account with the sum of $257,163.89? A. Yes. Q. You were writing that into his ledger account from your journal entries? A. Yes. Q. And where did you get your authority to place that sum of $257,163.89 to the credit of Mr. Armstrong in the journal and in his ledger account? A. I got no other authority except through Senator Owens and Mr. Armstrong and Mr. Carmichael, and they asked me to do the posting, and I said I would accept no responsibility, as I did not know whether it was right or wrong. Q. You said you would accept no responsibility? A. Yes. Q. As a matter of fact, you do not pretend to say whether the entries which you made are correct, or the reverse? A. I could not say. Q. You merely entered them because you were instructed to do so? A. Yes. . . . Q. I would like to ask you, Mr. Blagg, if you wrote up the account headed "Contractors St. Agathe Branch, Suspense Account," and being account Number 79 in the ledger? A. These two items, February 12th, 1916, are in my handwriting. Q. They were entered by you? A. Yes. Q. The first giving a credit to the account of $59,501.80, and the second giving a debit to the account of $6,813.33? A. Yes. Q. Under whose instructions did you make those entries? A. The same parties.

Cross-examined by Mr. Armstrong:

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Q. You stated that you had instructions from Senator Owens and that Mr. Carmichael and Mr. Armstrong were also present. You have not stated whether Mr. Wells was there or not? A. Yes, Mr. Wells was there. Q. Mr. Wells had charge of the books and produced the books for you? A. He did. Q. And helped you to work out the items? A. No. I do not think he helped me. I do not remember Mr. Wells helping me at all. He gave me their old cash book written in pencil. Q. He gave you any explanations you required to make the entries? A. No, I do not think he knew anything about it. I do not remember asking Mr. Wells anything. Q. Was not Mr. Wells there the whole time? A. He was there. I do not remember Mr. Wells saying anything in that way. Q. You have been shewn a little memorandum Q. Will you swear this was not given to you by Mr. Wells? A. I could not say. Q. It is very important. A. I do not remember Mr. Wells giving me anything. I think that must have been given to me by you. Q. You have stated that you thought so? A. I am not going to swear who gave me that, but I think it was you. I know Mr. Wells did not hand me anything. Q. *It is my writing, and the question is whether I prepared it for you or for Mr. Wells?* A. Yes, I am pretty sure you gave me that, and Mr. Owens gave me another, but it is so long ago I cannot swear. Q. You will not swear it was not handed to you by Mr. Wells? A. It might possibly have been, but I thought it was you. Q. Do you know this handwriting? A. That is my own handwriting. *That was evidently given me by you.* Q. These are part of the same figures of Exhibit Q, and these are figures taken in your own handwriting. Where did you get those figures? A. I must have got those instructions from you. Q. It is not a question of instructions: I am asking you where you got those figures? A. *I will say from you. No one else would give me that, I could not get them out of my head.* Q. You said Mr. Owens was there and Mr. Wells. You had a good deal of discussion with Mr. Carmichael while you were preparing this? A. Yes. Q. And he took an active part in the matter? A. He did. Q. In fact, you thought he took too active a part? A. I told you and Senator Owens that I would not be responsible for any of these entries, because I did not know anything about them. *They might all be true or they might be concocted, but I would write them in and accept no responsibility.*

I shall supplement Blagg's evidence with the following excerpts from Midgely's oral testimony.

By Mr. Cook:

Q. Had you anything to do with the entries that were made by Mr. Blagg in February, 1916, and following? A. No, I had absolutely nothing. Q. I see that these entries of Mr. Blagg have apparently the effect of almost entirely reversing the entries which you had previously made: is that correct? A. Well, one entry, the $229,999.52, reversed the largest item in the account. Q. What was that item? A. For the bonds which had been charged to Mr. Armstrong under the authority of the various resolutions, and in accordance with my report. A further explanation might be found in the journal, page 65. Here is an entry charging Mr. Armstrong—and this is in my writing—so that the most important item in Mr. Armstrong's account was in my own writing: that is, the foundation of it was in my own writing: $229,999.52 for bonds, the value of £60,825 taken by him, less £3,175 and £10,325 already charged, as per his letter of December 10th, 1913.

The Registrar—That will be filed as Exhibit X.

Q. But your making charges did not depend on the interpretation of any written document? A. No, but it remained for Mr. Armstrong to justify his having taken the bonds. I found that Mr. Armstrong had the bonds: consequently, I charged him very properly with having the bonds. Q. He said the reason was found in the interpretation you placed on the contract? A. No, the reason I charged him with the bonds was that I found he had *received the bonds and he admitted that.*

By Mr. Cook.

Q. He admitted that he had the £60,250 of bonds? A. Absolutely, but so fer as the credit to which Mr. Armstrong was entitled, I did not pretend to interpret what credit he should have, and my understanding was that Mr. Armstrong was later to bring to me a full statement of his account. I was to go into in with him, but I never saw it. . . . Q. Will you please turn to Mr. C. N. Armstrong's account, Number 73, Ex. T, and state how much the credits made by Mr. Blagg in February, 1916, amount to? A. Well, the total credits—do you want them on that particular day? Because he has made several credits. He has made about a dozen. Do you want them all? Q. I only want the total of them, in account number 73—A. $304,881.77.

By the Registrar.

Q. What does that represent? A. That represents the total of the credits entered into this account of Mr. Armstrong by Mr. Blagg.

By Mr. Cook.

Q. Is there anything, in your opinion as an expert accountant, that justifies those credit entries? A. Well, I should certainly have hesitated to make them myself, *because I do not think they are justified.* Q. Have you been able to find any resolutions of the Board of Directors of this company, or of the executive committee that would justify such credit entries in this account? A. I have not seen any.

By Mr. Armstrong:

Q. You have made a statement under oath that you do not believe that I am entitled to sufficient credit to make up the amount of the debit, and that, instead of me being a creditor of the company, I am a debtor. I ask you on what you base that statement, and I ask you whether the credit here, which is passed by resolution of the Board of £11,725 should not have been credited and cancelled the charge which you made of those bonds against me? A. I should have to make very sure, Mr. Armstrong, for this reason: the condition of the accounts as I found them at the time I went into them, and all the circumstances in connection with the company, which caused me a tremendous amount of worry, and in which I endeavoured to do you full justice, would certainly lead me to make most careful examination and investigation *before I would pass any amount to your credit.* Q. You are not aware of the amount of work that had been done on that road? A. I never saw any engineers' certificates, never, and that would be my authority for passing a credit to your account.

By the Registrar.

Q. Did you ever make any search for the certificates? A. I had access to all the papers, and examined every scrap at one time or another up to the time of making my report. Q. You never saw anything which would justify you making a credit to Mr. Armstrong? A. No, except the Allen contract.

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No doubt he was entitled to some credit in connection with that, but it was never determined to my satisfaction. I never could get down to what he should be credited with, and I mentioned that in my report. It was of a very vague and nebulous character to my mind.

I doubt if this deliberate tampering with the books of the company by Blagg at the instance of Armstrong, and in his interest, has any parallel in the history of corporations in Canada.

Now, to shew that the minds of the directors in February, 1916, were not disposed to settle Armstrong's account in the summary way he himself did it through the instrumentality of Blagg, we have the following appearing in the minutes of the meeting of the directors on the 12th of that month:—"Mr. C. N. Armstrong's account as submitted by the auditor was considered and held over until a further statement of expenditures in London now on the way was supplied."

I have discussed Armstrong's conduct at great length because to my mind not only has it a very important bearing on his right to recover remuneration for his services, but it is in the public interest to know just how the affairs of this unfortunate company have been conducted by its managing director. Lord Cairns, in his luminous judgment in *Gardner* v. *London Chatham & Dover Ry. Co.* (1867), 2 Ch. App. 201, at p. 217, described a railway company as a "fruit bearing tree," but thought that under the English statute law as it applied to the case, the debenture-holders while entitled to the fruit of the tree could not proceed to the length of cutting it down. In view of the facts of this case, and especially recalling the reference to "wrecking" in Senator Campbell's letter, it would seem that Armstrong has been able to do here what Lord Cairns would not admit to be within the power of debenture-holders in England. But I am free to say that in view of his own conduct as established in evidence in these proceedings, and again having especial reference to Senator Campbell's letter, Armstrong's pretext for claiming remuneration at $250 per month after the year 1917, namely, that "the assets were neglected by the receiver, and the company had a right to try and collect everything that is due to it" is a masterly adventure in cynicism.

But I am not obliged to rest my finding against Armstrong's right to rank in priority on the fund in the receiver's hands on the ground of his maladministration as managing director or vice-

president of the affairs of this company. I prefer to place my finding on the evidence which shews that the company is not as a matter of cold fact indebted to him at the present time. Not only has Armstrong failed to prove his right to recover any portion of his claim as preferred against the company, but, quite apart from the fact that the resolutions of the executive committee and the board of directors granting him remuneration were not properly ratified by the shareholders, and the evidence given by Midgely on behalf of the plaintiff contesting, I cannot find that Armstrong has established by satisfactory proof that he is entitled to any definite amount as against the company. I must find as a fact that he had no proper authority from the shareholders under which to make a claim for salary, travelling expenses or disbursements between October 18, 1911, and December 31, 1917. I must also find that he has proved no legal claim to remuneration for services rendered between January 1, 1918, and September 1, 1919, or for expenses incurred between those dates. This disposes of his whole claim.

I wish to support my finding as above stated by referring to Ex. P, which has an especial bearing on his claim as asserted after February 12, 1916. This exhibit embodies a resolution, *inter alia*, that "all officials of the company be notified that their services are no longer required and that no person be employed in future unless he gives an undertaking to hold the directors free from any personal obligation to pay any salary or wages to him." Now the question at once arises, is a managing director an "official" or an officer of the company? Sec. 78 (*d*) of the Dominion Companies Act, R.S.C., 1906, ch. 79, says: "The directors shall, from time to time elect from among themselves a president, and if they see fit, a vice-president of the company; and may also appoint all other *officers* thereof." In *Hutton* v. *West Cork Ry. Co.* (1883), 23 Ch. Div. 654, at p. 666, Cotton, L.J., uses this language:—"Then comes the question as to the directors. I was not quite satisfied that the vote for compensation to the *officials, etc.*" (*Per* Baggallay, L.J., p. 680):—"It may be said, and I think very properly said, that until such time as a general meeting has fixed the amount of remuneration of the directors or of the treasurer or secretary, *or any other officer*, the person so indicated has not any right to demand his remuneration." Then we have the

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explicit statement by Mitchell in his Canadian Commercial Corps., p. 1112:—"A managing director is an officer." Finally, sec. 42 of the by-laws of the defendant company treats a director as the holder of an "office," which may be vacated by the director accepting "any other office or profit."

So that Ex. P has an important bearing on Armstrong's right to recover salary or remuneration between February 12, 1916, and September 1, 1919, a period involving a large portion of his claim. Without relying on the language of Ex. P to exclude the items of his claim on and after February 12, 1916, I wish to refer to it as one of the obstacles which Armstrong has to surmount before he has discharged the burden of proof that rests upon him.

Another fact in evidence, which negatives Armstrong's contention that the documentary evidence establishes acquiescence by the directors in his claim for a large amount of money due him, is embodied in Ex. G, being a certified copy of the minutes of a meeting of directors on July 4, 1913 (Armstrong being present and concurring in the action of the board so far as the evidence shews). These minutes concern proceedings on *saisie arêt* in the suit of *Nash* v. *C. N. Armstrong*, and declare, *inter alia*: "That the Central Railway Company of Canada has an open account with the defendant C. N. Armstrong, but does not admit that any amount is due by the company to the said C. N. Armstrong."

Armstrong did not attempt to say that this minute does not correctly describe the situation between himself and the company on July 4, 1913; but he ventures to treat the corporate act of the board lightly, and says: "They did not want to be called upon to pay out any money: that is a good way to get out of it." In this connection Armstrong makes a statement which goes to strengthen the contention of the plaintiff contesting that there never was at any time after the year 1912 a specific acknowledgment by the company of any amount due him. The following evidence refers to his account as mentioned in Ex. G:

Q. You were present at that meeting? A. Well, I asked you that question. I do not know. Yes, I was present at that meeting. Q. You do not remember anything about it? A. No, I do not. Q. Did you take any objection to that entry being made? A. There is no objection recorded.

By the Registrar:

Q. Is it a mere "scrap of paper"? A. Well, there is nothing to it. They simply say they cannot admit anything until the account is made up.

By Mr. Cook.

Q. And the account never has been made up? A. Well, it is before the Court now. Q. But it was never made up to the company? A. No, I was away most of the time in England, and no object in making up an account if you could not get any money out of them.

Armstrong has not been able to adduce affirmative evidence of a credible character to establish his claim. We have seen how far the proof which he has tendered on his own behalf fails to support it. I have already quoted from certain evidence of Midgely, the accountant, who was called in by the company to prepare a reliable financial statement for it, the effect of which in a general way displaces any right of Armstrong to recover against the company. I will conclude my enquiry by quoting some explicit statements by Midgely, upon which I shall rest my finding that Armstrong has failed to establish any claim against the company.

Before doing so I wish to point out that before I closed the hearing Armstrong filed an informal statement in typewriting and pencil reducing his claim to $105,729.08. But throughout the hearing, as I have stated, the exact amount he claimed was very much in doubt.

I quote first from Midgely's direct examination by Mr. Cook:

Q. Will you please state what, in your opinion, according to the books of the company, should be the debit balance standing against Mr. Armstrong to-day in dealing with the books.

The Registrar. The amount which you stated before? A. The amount would be the same as my report, $298,713.57 which Mr. Armstrong might be entitled to reduce under the Allen contract or by any engineer's certificate he could produce for the St. Agathe Branch contract.

The Registrar: Mr. Armstrong claims $109,999 odd, less a possible reduction of $3,000, if I so decide, and you find that upon the books of the company he should be debited with $298,713.57, less any other credits he might possibly establish? Witness: Yes, absolutely. I think I mentioned that he might be allowed certain credits for expenses, and I suggested that a committee be appointed to go into that, but it would be up to Armstrong to establish the credits he is entitled to.

By the Registrar:

Q. But, giving him credit for everything he would be able to establish, he would be indebted to the company in a considerable sum? A. He would in my opinion.

By Mr. Cook:

Q. You have no doubt about that? A. I have no doubt that it is a very large sum of money, and I do not see how Mr. Armstrong could justify such a large amount. Q. So that the net result of your evidence is that, instead of the company owing Mr. Armstrong, Mr. Armstrong is heavily indebted to the company? A. I do not think the company owes Mr. Armstrong a single cent.

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By the Registrar:

Q. That is, even admitting his claim as filed before me as being correct and a substantial one in law: that is that $105,000 that I have mentioned that his claim amounts to? A. In my opinion there is nothing due to Mr. Armstrong by the company. I would say if everything was in, it is my opinion he would be indebted to the company. Q. In a very considerable sum? A. I think in a very *considerable sum of money*.

By Mr. Armstrong:

Q. From what you have seen since, are you prepared to modify the statement you made earlier that I owed the company a large amount of money instead of the company owing me? A. I give it as my opinion that if everything was in the accounts *pro* and *con* the company would not owe you a dollar. Q. And on what do you base that? A. By my knowledge of what I found at the time. Q. Up to the time you made your report in January, 1914? A. Yes. Q. And you do not know what has taken place since? A. I am not cognizant of those resolutions first hand that you refer to, but in order to give a further opinion about it I should have to know all the circumstances leading up to this.

By the Registrar:

Q. You have not seen anything to cause you to depart from the statement you made, which has been brought out on cross-examination? A. No, I take this position: Mr. Armstrong had an opportunity to come to me to settle this account: it was an account that caused me a tremendous amount of worry. I was anxious to settle it, and to render justice to himself and the company. It was never done. I had no information to enable me to come to the conclusion that Mr. Armstrong was entitled to all those amounts he was credited with, and to my knowledge I do not think he was entitled to such heavy credits.

It remains to be stated that on the hearing of the contestation of the claim of Senator Domville, viz., on May 10, 1920, I allowed the contestation of this claim to be reopened for the purpose of permitting certain evidence to be adduced by Senator Domville as a contesting party herein. Such evidence will be found in the proceedings in the Domville claim, and it will serve no useful purpose to summarise it here.

In conclusion, the undersigned has the honour to report that: (a) The claim of Armstrong against the defendant company for the sum of $109,947.41, as filed herein on September 9, 1919, is not entitled to be paid out of the fund in the receiver's hands in priority to the claim of the trustee for the bondholders. (b) That the defendant company does not owe the said Armstrong the sum of $109,947.41 or any other sum of money.

The undersigned, therefore, begs further to report that in his opinion the claim of the said Armstrong, filed herein as aforesaid, should be dismissed by this Court, and that the costs of and

incidental to the contestation of the claim before the undersigned be ordered to be paid to the plaintiff contesting by the said Armstrong.

The appeal from the report of the referee was heard before Audette, J.

John W. Cook, K.C., for plaintiff contesting.

E. W. Westover, for claimant.

AUDETTE, J.:—This is an appeal, by the claimant Armstrong, from the referee's report filed herein on November 11, 1920, and also a motion, on behalf of the plaintiff, for judgment pursuant to the report.

The claimant contends the defendant company is indebted to him in the sum of $109,947.41, being, he alleges, "the balance due him under a settlement of June 29, 1912, of $50,000 for services and expenditures to October 18, 1911, with interest from that date to be added—$45,000, and for salary and travelling expenses and disbursements to September, 1919, as *per* statement following:

1.	Balance of account on June 30th, 1913, as per ledger	$42,315.55
2.	Salary, June 30th, 1913, to December 31st, 1917, 4½ years at $10,000 per annum	45,000.00
3.	Services January 1st, 1918, to September 1st, 1919—20 months—at $250 per month	5,000.00
4.	Expense accounts:	
	October 18th, 1911, to December 31st, 1911	657.97
	January 1st, 1912, to October 28th, 1912	2,514.50
	November 1st, 1912, to December 31st, 1912	752.85
	January 1st, 1913, to June 30th, 1913	1,140.13
	July 1st, 1913, to October 18th, 1913	1,056.78
	October 18th, 1913, to December 31st, 1915	2,545.04
	January 1st, 1916, to August 2nd, 1917	4,852.04
	August 2nd, 1917, to February 26th, 1918	1,399.44
	February 26th, 1918, to April 30th, 1918	400.20
	May 1st, 1918, to March 15th, 1919	1,178.96
	March 15th, 1919, to September 1st, 1919	1,133.95
		$109,947.41

5. I have a further claim against the company defendant in connection with disbursements made in England for the company and for the expenses of the London office, and in connection with the scheme of arrangement, etc., but I am unable to make up this claim until I can go to England and get the necessary information. For the same reason I cannot at present make up the account in connection with the sale of rails, ties, etc., at Vankleek Hill.

6. I hold $75,000 of first mortgage bonds of the Central Railway Co. of Canada as security for the balance of $45,000 under the settlement of June 29, 1912.

7. This claim is privileged and has priority over other claims.

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The claimant, in the course of the proceedings before the referee, varied somewhat the amount of his claim but not materially. This variation, however, in the view I take of the case is of no moment or importance.

Approaching the consideration of this claim in *seriatim* order, the first item presented reads as follows:—"1. Balance of account on June 30th, as per ledger, $42,315.55."

This last amount is the balance of the $50,000 above referred to, which is claimed under a resolution of the executive committee of the defendant company, bearing date June 27, 1912, and which reads as follows:—[See *ante*, p. 150].

Whether the $75,000 in first mortgage bonds of the company were ever given to Armstrong as collateral security for the payment of the $50,000 or not, has not been proved. The claimant has totally failed to establish by any evidence whether or not the company has handed him these bonds, and finally and especially the claimant has not filed these bonds in support of his claim, through which he claims privilege and priority.

The claim of privilege and priority of this balance of $42,315.55, attaching to the bonds in question, fails for want of evidence. There is not a tittle of evidence in support of such allegation or contention, and the claim for privilege and priority is therefore disallowed.

"2. Salary June 30th, 1913, to 31st December, 1917, 4½ years at $10,000 per annum, $45,000."

This item is founded upon a resolution passed at a meeting of the directors of the company, held on September 19, 1912, and reads as follows:—"Resolved: That the salary of C. N. Armstrong as managing director be the sum of ten thousand dollars per annum, to be computed from the 18th October, 1911, *the said salary to be paid from time to time as the board direct.*"

While it is quite regular to appoint executive officers to a company in course of formation, such as president, vice-president, secretary and board of directors, it is quite another matter to appoint a manager, at a salary of $10,000 a year, to a railway company that is not a going concern, that has no railway to operate.

There is no justification to allow a salary of $10,000 a year to such manager, as against *bonâ fide* creditors of the company.

How could it be reasonably contended that $10,000 be paid to the manager of a non-existent railway out of the capital—because it has no revenue—in preference to creditors? Stating the case, is answering it.

But there is more. The resolution of September 19, 1912, fixes the salary, but, undoubtedly having in mind there was then no occasion to pay such salary at once—it also provides that *"the said salary is to be paid from time to time as the board direct."* That is to say, the salary, whilst fixed, is not now payable, but is only so, when the Board will direct.

There is no evidence adduced shewing that any resolution was ever passed directing the payment of such salary. And it is what should be expected. A captain is not appointed to manœuvre a vessel, with a salary to date from the time the keel is laid on the ways of the shipyard. His salary will be paid when the vessel is constructed and afloat. It is the same for a railway. A manager can reasonably be appointed only when the railway is in existence.

A Court will not interfere with the domestic affairs of a company, provided the company does not impair the necessary funds to meet the creditors' claims; but a claim like the present one cannot be allowed with privilege and priority. It cannot under the circumstances be placed in the class of working expenditures as defined by the Railway Act, R.S.C., 1906, ch. 37, sec. 2, sub-sec. 34 (*a*).

The claim for priority is disallowed.

"3. Services—January 1st, 1918, to September, 1919—20 months—at $250 per month, $5,000.00."

Suffice it to say that this claim is for salary as manager since the appointment of the receiver, in whose hands the management of the company's business is now placed.

The claim was not insisted upon on the appeal, and was, by counsel at Bar, practically withdrawn.

This item is disallowed.

4. This is an item for the claimant's expenses from 18th October, 1911, to 1st September, 1919, composed of several amounts.

All items since the appointment of the receiver must obviously be disallowed for the reasons above mentioned.

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Then with respect to the balance, to the other amounts of the item, I find that there has been no vouchers filed, no resolution of the company recognising such expenditure—in other words, beyond the claimant's statement, that these amounts represented, in a conservative degree, his expenses—there is no evidence proving the same.

However, there is more. The claimant stated in his evidence that he has already received $4,458.35 on account of travelling expenses for 7 years and the total sum of $24,569 on account of salary and expenses. Furthermore, witness Midgely, a chartered accountant engaged by the claimant and the company to make an examination and report on the affairs of the defendant company, to open the necessary books and furnish a report concerning the financial position of the company, states in his evidence that:

> Giving Armstrong credit for everything he would be able to establish, he would be indebted to the company for a considerable amount . . . I have no doubt that it is a very large sum of money. Do not think the company owes Armstrong a single cent. I would say, if everything was in, it is my opinion he would be indebted to the company in a very considerable sum of money.

The claimant has also received $3,067 for some property of the defendant company, sold about the time the rails were also sold, and has never accounted to the company for the same. That previous to the entries in the books of the company by witness Blagg (who said he made the same—did such posting, refusing to accept any responsibility in respect of the same, "as he did not know whether it was right or wrong"), a very large amount was standing against the claimant.

If the claimant has any meritorious claim with respect to this item—which he has failed to establish by evidence—the amount thereof will be set off, as against what he owes the company.

This item cannot, under any of the circumstances of the case, be allowed with privilege and priority, as claimed under the head of working expenditure.

This item will be disallowed.

Therefore, there will be judgment dismissing with costs the appeal from the referee's report, and directing that judgment be entered dismissing with costs the claim of Armstrong for any priority and privilege in respect of the above statement of claim.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 4, 1921.

MASTER AND SERVANT (§ II D—206)—WORKMEN'S COMPENSATION ACT, ALTA STATS., 1908, CH. 12—DISOBEDIENCE TO RULES IN REGARD TO DETAILS OF WORK—COURSE OF EMPLOYMENT—LIABILITY.

The fact that an employee is negligent or disobedient as regards some detail in connection with the work on which he is engaged does not necessarily mean that the resulting accident did not arise out of and in the course of his employment.

[Review of authorities.]

Statement.

APPEAL from the judgment of a District Court Judge sitting as an arbitrator under the Workmen's Compensation Act, Alta. stats., 1908, ch. 12, who refused the application for compensation. Reversed.

H. A. Friedman, for appellant; *J. B. McBride*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from His Honour Judge Crawford sitting as an arbitrator under the Workmen's Compensation Act, Alta. stats., 1908, ch. 12.

The facts as found by the arbitrator are that the applicant, a switchman in the employ of the respondent, was engaged in making a coupling between some cars while in the performance of his duties but that by reason of the draw-bar not operating properly owing to some defect, he stepped between the cars and tried to push the parts with his foot and slipped and his foot was crushed. The injury, it is admitted by counsel for the respondent, has resulted in a permanent disablement.

The arbitrator drew the conclusion from the evidence that the applicant in doing what he did was knowingly breaking rules of his employer, and adopting the conclusion that appeared reasonably to follow from certain *dicta* in *Lancashire etc. R. Co.* v. *Highley*, [1917] A.C. 352, that he was in consequence not within the sphere of his employment and therefore refused his application for compensation.

Our Act, like the English one, provides that a workman is entitled to compensation for injury by accident "arising out of and in the course of the employment" subject to certain limitations, one of which is stated as follows (Alta. stats. 1908, ch. 12, sec. 3 (*c*)):—

> If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman any compensation claimed in respect of that injury shall, unless the injury results in death or permanent disablement, be disallowed.

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The conclusions of fact of the arbitrator are binding on us and though he does not expressly find that there was a rule of the respondent which the applicant knew he was breaking when he did what caused the accident, I assume that he intended to so find and for the purpose of my judgment I assume that there was evidence upon which he could make such finding and that that is an established fact. The question, however, whether on the established facts the accident arose "out of and in the course of the employment" is one involving matters of law with which this Court has power to deal.

Lord Wrenbury, in *Herbert* v. *Fox & Co.*, [1916] 1 A.C. 405, at 419, says:—

> The few and seemingly simple words "arising out of and in the course of the employment" have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute.

In that case as in this the workman was permanently disabled and he points out that wilful misconduct would therefore be no defence and disobedience to an order never seems to be put higher than wilful misconduct.

The difficulty of deciding whether an accident arises out of or in the course of the employment is well illustrated by that case in which three of the Lords considered that the facts did not warrant that conclusion while the other two had a contrary view.

In *Davidson* v. *McRobb*, [1918] A.C. 304, the House of Lords decided that "In the course of the employment" does not mean during the currency of the engagement as in some cases had been supposed but means in the course of the work which the workman is employed to do and what is incident to it, but notwithstanding that decision, in *Armstrong Whitworth & Co.* v. *Redford*, [1920] A.C. 757, again the House of Lords divided three to two on the question of whether the evidence warranted the conclusion that the accident did not arise in the course of the employment.

These instances illustrate some of the difficulties in these cases.

In *Jackson* v. *C.P.R. Co.* (1919), 49 D.L.R. 320, 12 S.L.R. 433, the Court of Appeal of Saskatchewan held that an accident of the same character as the present and on facts almost identical did not arise out of the employment. In that case the head-note is as follows:—

Where a workman deliberately performs an act prohibited by his employers the transgression committed carries him outside the sphere of his employment, and as he is not required or expected to perform such act he is not entitled to compensation for injuries resulting from such act.

Although having the greatest respect for the Judges whose decision that is, it appears to me that it has not attached sufficient importance to a fundamental distinction which the various authorities point out between two kinds of disobedience of rules, one a disobedience which has reference only to the workman's conduct in the performance of the very services which he is employed to perform and the other a disobedience with reference to other matters in respect of which the employer has deemed it expedient to make such prohibitions as have the effect of limiting the sphere of the employment or a disobedience in respect to something outside and apart from such service. The first does not affect the scope of the employment even though in a sense one may say that no one is employed to do anything in disregard of or disobedience to rules.

As Lord Dunedin said, in *Plumb* v. *Cobden Flour Mills*, [1914] A.C. 62, at 67:—

There are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

The distinction is also shewn in the words of Lord Loreburn in *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44, at p. 47:—

Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment.

The very recent case of *Robertson* v. *Woodilee Coal and Coke Co.* (1920), 89 L.J. (P.C.) 79, is one in which the distinction is clear though the arbitrator allowed compensation which was subsequently refused. The workman was a miner who after his meal in the mine struck a match to light his pipe for a smoke. An explosion followed, killing him. To have matches in the mine was forbidden by the rules, and by statute, and to strike one was an offence by statute. Viscount Finlay says, at p. 80:—

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The conduct of the deceased added a peril which was really not incident to his employment. In my opinion he did not suffer these injuries from anything arising out of the employment; he suffered them because he did something which was extraneous to his employment, and created a danger which would not have materialised but for what he did.

It is not the disobedience which disentitles him to recover but the fact that what he was doing was not part of or incidental to what he was employed to do.

The case of *Herbert* v. *Fox*, [1916], 1 A.C. 405, illustrates the difficulty of determining just whether the disobedience is of an act incidental to the employment or of something not part of the employment. The workman was employed on the employer's private railway as a shunter, and the head-note says: "His duty when wagons were being moved was to walk in front of them and keep a lookout." Instead of walking in front he climbed on the buffer of the leading wagon against orders and fell off and was run over. If his employment was to walk in front of the cars and keep a lookout he was not performing it when he rode on the car instead of walking in front of it and three of the Lords considered that was what his employment was. But if his employment had been merely to keep a lookout, which he could do while riding on the car and which he was doing, though disobeying orders, then he would have been performing the work he was employed to perform, though in an improper and forbidden manner, and two of the Lords thought it was competent for the arbitrator to find as he did that the accident arose out of the employment.

The foregoing cases are all ones in which compensation was held not to be recoverable, but in *Watkins* v. *Guest, Keen & Nettlefolds Ltd.* (1912), 5 B.W.C.C. 307, the Court of Appeal, Buckley, L.J., dissenting, held that compensation was payable. In this case the workman was being conveyed by his employer's train to his work and was thus in the course of his employment. As the train approached the station, in order to get off quickly, he stepped out on to the footboard, which was forbidden, slipped and fell and was run over. Buckley, L.J., refers to the point which causes so much difficulty in these words, at p. 315:—

I quite appreciate the difficulty to which Moulton, L.J., calls attention, arising from the wilful misconduct clause in the Act because of course a man is never employed wilfully to misconduct himself, and he must be doing something outside the scope of his employment.

Then he refers to the words of Lord Loreburn in the *Barnes* case, above quoted, and after considering the facts comes to the conclusion that the accident did not arise out of the employment but was due to a peril created by the workman for his own purpose "which had nothing to do with the employment at all."

In the *Plumb* case, [1914] A.C. 62, Lord Dunedin, who gave the only reasons for the judgment of the House of Lords, at p. 70, says that the judgment of Buckley, L.J., is more in accordance with the judgment in the *Barnes* case, *supra*, than that of the majority.

Having referred at such length to the authorities in which compensation was not allowed to determine the principles it appears to me necessary to refer to only two or three recent cases in which compensation was allowed to shew their application to such cases.

In *Mawdsley* v. *West Leigh Colliery Co.* (1911), 5 B.W.C.C. 80, a decision of the Court of Appeal, the head-note is as follows:—

A workman was employed to oil machinery. He was strictly forbidden to oil it when in motion. He had been seen to do so and warned against the practice. He did so again and received some injuries from which he died. Held, the accident arose out of and in the course of the employment.

In the *Herbert* case, [1916] 1 A.C. 405, Lord Atkinson, at p. 413, distinguishes the two cases with apparent approval of the *Mawdsley* case. He says: "There a workman did the very thing he was employed to do, and it was his duty to do, but did it in a rash and prohibited manner." He adds:—

It [*i.e.*, the *Herbert* case] is equally distinguishable from *Chilton* v. *Blair & Co.* (1914), 7 B.W.C.C. 607. There a boy was employed to turn a certain machine. The posture he ought to have assumed was a standing posture. He sat down on a ledge attached to the machine, where boys, if they thought they could escape the eye of the master, were in the habit of sitting; but he kept on turning the machine—his posture alone being changed. A boy who was passing spoke to him, he turned round to reply, his foot slipped and he was injured. Here again the act in the doing of which the accident occurred was within the workman's sphere of employment. It was the rather rash manner of doing it that was alone prohibited.

In the *Chilton* case in the Court of Appeal (1914), 7 B.W.C.C. 607, Cozens-Hardy, M.R., says, at pp. 608-609:—

It is well established that a workman who is seriously and permanently disabled by an accident may recover compensation if he was doing the work he was employed to do though doing it negligently and contrary to rules laid down. On the other hand, a workman cannot recover compensation if he was not doing the work he was employed to do but was doing something substan-

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tially different though intended to produce the same result. An instance of the first class is when a man's duty was to oil machinery and he was told not to do it when the machinery was in motion. He did it while the machinery was in motion. The employer was held liable though there was serious and wilful misconduct. An instance of the second class is found in the recent case in the House of Lords of *Plumb* v. *Cobden Flour Mills Co.*, [1914] A.C. 62, where a man whose duty it was to pile up sacks by hand took upon himself to rig up some machinery to lift them. It was held affirming this Court that he had taken himself out of his employment.

The arbitrator had treated the case as falling within the second class and disallowed the claim. This was held to be an error in law and the appeal was allowed and the matter referred back to him to assess the compensation. This was upheld in a short but unanimous judgment in the House of Lords (1915), 8 B.W.C.C. 324, and the words of Pickford, L.J., at p. 326, are taken as summing up shortly the case when he says: "This I think is doing his work in a wrong way and not doing something outside his sphere." A still later case in the Court of Appeal is *Foulkes* v. *Roberts* (1919), 12 B.W.C.C. 370.

The use of the word "duty" in some of the quotations as meaning much the same thing as employment appears to me likely to cause confusion because it is equally the workman's duty to observe the rules whether this breach will put him outside the sphere of his employment or not.

I can however see no difference in essence between the case before us and the cases referred to in which compensation has been allowed and particularly the *Mawdsley* case (1911), 5 B.W.C.C. 80, the distinction between which and the ones mentioned before it seems so clear. Only could the decisions in the other cases govern this if it were to be held that the applicant's employment was not to make the coupling of the cars but simply to work the levers from the outside of the cars, but there is no suggestion that such was the case and it seems clear from the evidence and the arbitrator's conclusion that his employment involved the making of effective couplings.

Such being the case it appears to me clear that the accident was one which arose out of and in the course of his employment.

I would therefore allow the appeal with costs and refer the matter back to the District Court Judge for the assessment of the compensation.

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Stuart, J.

STUART, J.:—I would allow this appeal. In many of the cases cited in the argument reference is made by the Court to the subtleties and refinements which have been indulged in by Judges in interpreting the language of the Act, Alta. stats., 1908 ch. 12, here in question. It does little good to refer to this and then proceed to do the same oneself. Yet perhaps I cannot keep away from it.

But surely one thing is clear that when the Legislature referred to an accident happening or arising "in the course of employment" it just simply meant "happening or occurring while the man was proceeding generally about his master's affairs and not off duty entirely and so going about his own business exclusively." It is thus a very wide term and undoubtedly covers the case of the applicant here who was a brakeman and was injured while attending to the coupling of two cars. To say that, because while engaged in that duty, he did some act of detail which was negligent or forbidden he was therefore not "in the course of his employment" is to my mind trifling with language and is starting directly toward that domain of subtlety where anything can be suggested and argued by a nimble mind.

Then did the accident "arise out of his employment?" I confess that the only reason I can see for giving or at least attempting to give this phrase a different meaning from the other phrase "in the course of his employment" is that the Legislature did in fact use the two expressions. I find it extremely difficult to understand how an accident which has "arisen out of a man's employment" could ever possibly be said not to "arise *in the course of* that employment" although no doubt the converse might not be true. The endeavour to give distinct and mutually exclusive meanings to the two phrases is I think but an example of that much deprecated subtlety which I think we Judges are a good deal more inclined to indulge in than is the Legislature.

No doubt it is rather difficult to visualise the exact physical process which the Legislature had in mind when it spoke of an accident *arising out* of his employment. An accident is a *physical thing*, an occurrence in the material and not the intellectual or mental world. And when the Legislature speaks of such a physical material occurrence, such a movement of physical material things, as "*arising out of* his employment" it would appear to be plain

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that it simply meant that that physical occurrence must be the result of, or must result from, the acts which he was then doing and the physical situation in which he then stood provided he was at the time really and truly employed in his master's business.

To say that this brakeman was not employed in his master's business when he kicked the draw-bar with his foot in order to effect promptly and correctly the coupling between the two cars which it was his duty and employment at the moment to cause to be effected merely because it was a careless thing to do or because he had been told that he must not use his foot for that purpose is (and I say this with much respect to other decisions) to enter at once the field of dangerous subtlety where the paths will lead one anywhere one likes to go.

I do not say that the act of the appellant was not both negligent and disobedient. But that it was both negligent and disobedient does not in this case have the consequence that the accident did not result from his employment.

Taking the question of negligence first, it must be observed that the Legislature carefully refrained from enacting that the negligence of the employee should deprive him of his rights under the Act. If the theory of some super-added risk or hazard were sound then, as I suggested on the argument, it would mean that the words "accident arising out of his employment" were to be interpreted as if they said "accident resulting from the necessary risks of his employment" so that any unnecessary risk added by the negligence of the workman would not be included and thus the defence of the workman's own negligence would be read into the Act by implication when its omission from the actual words of the Act stands out so baldly and obviously.

Then with regard to disobedience practically the same rule will guide us. Because an accident resulted from disobedience in a detail of the actual operations of the man in his employment is, to my mind, no reason at all for saying that it did not result from or arise out of his employment in the broad and general sense in which that phrase is used by the Legislature.

The man was employed at the moment to effect the coupling of two cars. Granting that he was supposed to effect this result by guiding the engineer, by stopping the car when necessary, by adjusting the draw-bar when the car was at a standstill and by

then signalling the engineer to proceed, nevertheless if he chose to effect that same result which he was employed to effect by a rougher and readier method even though it was a forbidden method surely it cannot be said that the accident did not result from his employment all the same in that broad and general sense to which I have just referred.

If by an act of disobedience the workman proceeds to effect or endeavour to effect some result or object which he was not employed to effect, then of course he would not be acting in the course of his employment and an accident then happening would not be the result of his employment. In other words, the prohibition would, as has been said in some of the cases, have actually limited his employment. But that is of course an entirely different matter.

Moreover, both the matter of negligence and the matter of disobedience seem clearly to have been dealt with by the Legislature as far as it intended to deal with them in sec. 3 of the Act, Alta. stats., 1908, ch. 12. The effect of that section is clearly that *even where the Act would otherwise apply* "serious and wilful misconduct" will destroy the workman's rights. If ordinary negligence making a mere super-added risk or disobedience in respect to the mere method of effecting the desired result were sufficient to take the case out of the words of the statute, what conceivable reason would there be for enacting that serious and wilful misconduct should deprive the workman of his rights? Quite obviously the Legislature intended to leave such negligence and such disobedience to the judgment of the Court and to destroy the workman's right only where the negligence or disobedience had reached such a degree as in the opinion of the Court to come properly within the category of "serious and wilful misconduct."

It would be a strange result indeed if where, as here, the workman is permanently disabled he should be entitled to compensation even though he had been guilty of "serious and wilful misconduct" and yet if he had been guilty of some misconduct not so serious and not wilful but merely due to momentary impulse such as was really the case here he should not be entitled to get anything at all. Clearly no such result was intended by the Legislature.

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Beck, J.

The appeal should therefore be allowed with costs and the case referred again to His Honour Judge Crawford for the fixing of the compensation. I may add that I have read the judgment of Harvey, C.J., and fully concur in his reasoning which is what I have attempted in substance to express.

BECK, J., concurs with HARVEY, C.J. *Appeal allowed.*

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C. A.

Re IVERSON and GREATER WINNIPEG WATER DISTRICT.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. February 8, 1921.

1. WATERS (§ IC—47)—NAVIGABLE RIVER—OWNERSHIP OF SOIL UNDER RIVER BED—MANITOBA.

The title to the soil under the waters of the Red River, in the Province of Manitoba, is in the Crown in right of the Dominion of Canada. The law that the title to land forming the bed of a non-tidal, navigable river is presumed to be in the riparian owner *ad medium filum aquæ* does not apply.

2. ARBITRATION (§ III—46)—ARBITRATION ACT, R.S.M., 1913, CH. 9—THE GREATER WINNIPEG WATER DISTRICT ACT, 1913, GEO. V. (MAN.), CH. 22—CONSTRUCTION—RIGHT OF ARBITRATORS TO DEAL WITH COSTS.

The Arbitration Act, R.S.M., 1913, ch. 9, is supplementary to the provisions of the Greater Winnipeg Water District Act, 1913, Geo. V. (Man.), ch. 22, and where the respective arbitrators have been appointed by the parties under the latter Act, and these two subsequently appoint the third, this constitutes a written submission to arbitrate, and under Part I., sec. 4, of the Arbitration Act, the arbitrators are given full authority to deal with the costs of the reference.

3. ARBITRATION (§ III—17)—ARBITRATORS MAKING AWARD ON WRONG ASSUMPTION AS TO OWNERSHIP OF BED OF RIVER—MISTAKE NOT AFFECTING RESULT.

Where the arbitrators have made the award on the wrong assumption that the fee in the submerged land to midstream belonged to the riparian owner, but where the award would probably have been the same if they had not acted on this assumption, the rights of riparian proprietors being in effect as valuable as those that flow from the ownership of the soil, the award will not be disturbed.

Statement.

MOTION to set aside an award of arbitrators under the Greater Winnipeg Water District Act, 1913, Geo. V., Man., ch. 22. Award affirmed.

J. G. Harvey, for Greater Winnipeg Water District.

A. W. Morley, for Iverson.

Perdue, C.J.M.

PERDUE, C.J.M.:—For the reasons stated by my brothers Cameron and Dennistoun, I am of the opinion that the Arbitration Act of this Province, R.S.M., 1913, ch. 9, applies to arbitrations under the Greater Winnipeg Water District Act, 3 Geo. V., 1913 (Man.), ch. 22.

The majority of the arbitrators found the value of the land affected by the works, compensation for which is sought by Iverson, to be as follows: "Land to normal summer level, $6,000; submerged land to mid-stream, with all the rights and privileges of the riparian owner, $9,000; Total, $15,000.

The compensation awarded was $8,250.

In their award the arbitrators state that both parties agreed that the award should be made on the assumption that Iverson was the owner in fee simple of the submerged land to the mid-stream of the Red River. The evidence shews an admission by counsel for the water district that the patentee from the Crown of the parish lot owned the land opposite that lot to the middle of the river, but he claimed that when the land was subdivided the owner of lot B, the land in question, was only entitled to the land which was shewn on the plan to be comprised within the boundaries of the lot, and which only extended to the margin of the stream. No doubt, the admission was made in deference to the decision in *Patton* v. *Pioneer Navigation & Sand Co.* (1908), 21 Man. L.R. 405, which followed the judgment of the Ontario Court of Appeal in *Keewatin Power Co.* v. *Kenora* (1908), 16 O.L.R. 184.

Although it may not be strictly necessary for the decision of this appeal, I think it is proper that some comment should be made upon the first case above mentioned. The case could have been decided upon the simple ground that the frontage of the plaintiff's land on the Assiniboine River was endangered by the defendants' action in removing the sand from the bed of the river which might cause the bank to slide into the river. With great respect for the Judge who decided the case, I must differ from his view that the title to the land forming the bed of a non-tidal navigable river in this Province is presumed to be in the riparian owner *ad medium filum aquæ*.

The Red River is navigable for the whole of its course through Manitoba and for a considerable distance south of the international boundary. From the time of the first arrival of civilised men in the territory comprising this Province, the Red River has afforded one of the chief means of travelling north or south through that territory. While the Hudson's Bay Co. was, under its charter, the proprietor of the land through which the river flowed

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it certainly never granted or conceded to any settler on the river bank a title to any portion of the land forming the bed of the stream. When the lands comprised in that territory were vested in the Crown represented by the Government of the Dominion of Canada for the purposes of the Dominion (subject to the terms of the surrender of Rupert's Land by the Hudson's Bay Co. to the Imperial Government), it was declared by the Manitoba Act that all grants in freehold or estates less than freehold, theretofore granted by the company, and all titles by occupancy with the sanction or authority of the company should, if required by the owner, be confirmed by grant from the Crown. Persons in peaceable possession of lands at the time of the transfer to Canada were to have the right of pre-emption. It is not necessary to discuss the question as to what portion of the laws of England were in force in the territory at the time of its transfer to Canada. They would only include such laws as would be applicable to the condition of the colony. It would not be reasonable to hold that they conferred upon a settler on the bank of the Red River the same rights in respect to that river as would be enjoyed by the riparian owner of a non-navigable stream in England.

The *ad medium filum* right of the riparian owner was a property right attached by the common law to that ownership. If it has become part of the law of the Province, it has become such only by the Act of the Legislature which in the year 1874, 38 Vict. (Man.) ch. 12, introduced the laws of England as they stood in England on July 15, 1870, "so far as the same can be made applicable to matters relating to property and civil rights in this Province."

Now on the date last mentioned all the lands in the Province, subject to the exceptions contained in the deed of surrender, were vested in the Crown in the right of the Dominion of Canada. A provincial enactment could not detract from or affect Dominion rights in these lands. See *Burrard Power Co.* v. *The King*, [1911] A.C. 87, at p. 95; *Att'y-Gen'l for British Columbia* v. *Att'y-Gen'l for the Dominion of Canada*, 15 D.L.R. 308, at p. 310, [1914] A.C. 153. The patents issued by the Dominion Government granting lands bordering on the Red River describe the land in each case in accordance with the plan of survey made under the direction of that Government. The river lots are numbered and the patent

of each lot describes it by the number on the plan. The patent of the land of which the plaintiff's land is a portion is dated February 12, 1881. It grants to the patentee lot No. 76 on the plan of river lots of the parishes of St. John, St. James and St. Boniface. The plan shews the lots to be bounded on the river side by the margin of the stream. There is a reservation in the patent of navigation rights upon all navigable waters that now are or may be hereafter found on or flowing through or upon any part of the land. This was intended to protect navigation in the event of the river changing its course—a thing liable to happen in the case of a prairie stream. The patent also contains a reservation securing the right of any person to land on the slope of the Red River bank in connection with purposes of navigation, from any vessel, barge, etc., and to plant posts in the bank for tying up the vessel.

In my opinion, the title to the soil under the waters of the Red River is still in the Crown in the right of the Dominion of Canada. The patent did not include the bed of the river. Assuming that the provincial statute introducing the laws of England in respect to property and civil rights had the effect of introducing the *ad medium filum* doctrine it would not, as I have pointed out, affect Dominion rights in the land. Neither could a statute of the Province extend the rights under a patent granted by the Dominion.

In *Keewatin Power Co.* v. *Kenora* (1906), 13 O.L.R. 237, after an exhaustive discussion of the rights of riparian owners in navigable rivers, Anglin, J., held that in Ontario the *ad medium filum aquæ* doctrine did not apply in favour of such owners. His decision was varied by the Court of Appeal ((1908) 16 O.L.R. 184), that Court holding that in the case of a non-tidal river, whether navigable or not, the title in the bed *ad medium filum* is presumed *primâ facie* to be in the riparian owner. But in Ontario the same authority that controlled the grant introduced the legal principle. For the reasons I have already set out, I do not think that the reasoning of the Court of Appeal upon which its conclusion was based would apply to the widely different circumstances of the case now before this Court.

The Dominion Government has exclusive jurisdiction over navigation and shipping: The B.N.A. Act, sec. 91, sub-sec. 10. It is in the public interest that the Dominion should retain in

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itself the ownership of the beds of the navigable rivers in Manitoba, thereby enabling it to guard effectually against the placing of obstructions to, or interfering with, the free navigation of these rivers. The ownership of the beds of such rivers should be in the Crown as represented by the Dominion Government and be treated as inalienable. If the ownership passed to private persons questions of compensation would arise whenever a bridge was built or a pipe line laid across the river. Further, the Red and the Assiniboine Rivers, like all prairie streams, are exceedingly crooked. They are in fact a succession of loops. The parish lots on the Red River have a very narrow river frontage as compared with their depth. Some of them are only two or three chains wide. There would be much confusion as to the ownership of the bed of the river. The *ad medium filum* doctrine would seriously interfere with the system of registration of titles under the Real Property Act, R.S.M., 1913, ch. 171, in this Province in so far as river lots are concerned.

I have carefully read the Privy Council decision in *Maclaren* v. *Att'y-Gen'l for Quebec* 15 D.L.R. 855, [1914] A.C. 258. It dealt with the ownership of the bed of a non-navigable and non-floatable stream in the Province of Quebec. Lord Moulton in giving the judgment of the Judicial Committee stated the following legal propositions at pp. 862, 863, (15 D.L.R.):

> In construing the parcels in a document affecting land, say for example a grant, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee. But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquæ* or *viæ* the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream.

The above emphatic statement of the common law rule is binding on Canadian Courts in questions arising between private persons and is apparently applicable to grants from a Provincial Government in the case of lands abutting on a non-navigable stream. But I do not think that it applies to a navigable river

such as the Red River in this Province. I do not think, for the reasons I have given, that the introduction of the rule by the provincial authority as part of the common law makes it binding on the Crown, as represented by the Dominion Government, and creates a presumption against the Crown in such case which adds something to its grant and derogates from its rights. Further, the reservations in the patent shew that the Dominion authority intended to retain complete control of the river in the interests of navigation and shipping. This control could not be effectual if the bed of the river passed into the hands of private persons. I think the peculiar position of the Dominion of Canada as the primary owner of the land in this Province, and as the only authority that can legislate in regard to these lands while that ownership continues, distinguishes its position from that of the Crown in such cases as *Keewatin Power Co.* v. *Kenora, supra*; *Lord* v. *The Commissioners for the City of Sydney* (1859), 12 Moo. P.C. 473, 14 E.R. 991; *Att'y-Gen'l for Quebec, etc.* v. *Scott* (1904), 34 Can. S.C.R. 603, and other cases in which the Crown making the grant was represented by the same authority that introduced the law.

There is high judicial authority for the proposition that the common law doctrine that has prevailed in England in regard to tidal navigable rivers, namely, that the title in the alveus of such rivers remained in the Crown unless expressly granted, should be applied to inland navigable rivers and waters in Canada. These are referred to at length in the exhaustive and instructive judgment of Anglin, J., in *Keewatin Power Co.* v. *Kenora*, 13 O.L.R. 237. Although his judgment was varied by the Court of Appeal, his discussion of the authorities, his logical deductions and his conclusion in regard to the principle in question appeal to me as peculiarly applicable to the case at Bar.

Although I am of opinion that Iverson was not the owner of the part of the bed of the river claimed by him, I do not think that we should disturb the finding of the arbitrators upon that ground alone. He was awarded compensation for the "submerged land to midstream with all the rights and privileges of the riparian owner." The main consideration in this item was the value of his riparian rights. I cannot say that these rights are

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worth less than the sum awarded, or that the actual ownership of the submerged land would enhance the value of such rights.

I would dismiss the appeal with costs.

CAMERON, J.A.:—The Act to incorporate the Greater Winnipeg Water District, 3 Geo. V., ch. 22, was passed in 1913. Sec. 22 of this Act, as amended by 1919, Man., ch. 39, sec. 1, gives to the district corporation power to enter on and take lands for their purposes and provides for compensation to owners and, in cases of disagreement, for the determination of such compensation by arbitration. In the section it is provided

> that any award under this Act shall be subject to be set aside on application to the Court of Appeal for Manitoba in the same manner and on the same grounds as in ordinary cases of arbitration, in which case a reference may be again made to arbitration as hereinbefore provided.

The Arbitration Act, 1911, passed in that year, was re-enacted (without change except that it is called therein the Arbitration Act) in the R.S.M. 1913, ch. 9, which were brought into force by ch. 1, 4 Geo. V., assented to February 2, 1914. By this Act the various provisions of the Revised Statutes substituted for the provisions of the Acts repealed thereby are to be held to operate retrospectively as well as prospectively.

It is contended that the above provision in sec. 22 is exhaustive and that the provisions of the Arbitration Act are excluded. If well taken this view would confine this Court's powers to setting aside the award and would not give it the wide jurisdiction conferred on it by the Arbitration Act, under which it can remit the award to the arbitrators or deal with it in the same manner as on an appeal from the order, decision or judgment of a single Judge and reverse, alter or vary it in any manner that seems just. Nor would the arbitrators have the powers conferred on them in certain cases as, for instance, with reference to costs.

There is, it is true, a general rule that a subsequent general Act does not affect a prior special Act by implication. But the special Acts so referred to are really private Acts, and even then the rule is not inflexible as will be seen by reference to the cases cited in Craies' Hardcastle, pp. 314 *et seq.* The distinction between public and private Acts for evidential purposes is now abolished. The Greater Winnipeg Water District Act is a public Act of great importance, creating a public service corporation with wide powers

and extensive jurisdiction. I can see no adequate reason myself why it and the Arbitration Act are not to be read together, and this apart from certain provisions of the Act which, to my mind, are conclusive on the point.

By sec. 12 of the Arbitration Act, R.S.M., 1913, ch. 9, it is provided:

> In all cases of reference to arbitration the Court or a Judge may, on motion for such purpose, from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.
>
> (2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order so remitting.

Section 13 provides that the Court or a Judge may remove "an arbitrator" for misconduct.

It is to be observed that, whereas the statutory power of enforcing an award is confined to the cases where an award is "an award on a submission" (sec. 14), *i.e.*, on a submission in writing, the power to remit or set aside is given in *all* cases of reference to arbitration. See 1 Hals. 476, footnote. The relevant provisions of the English Act are substantially the same as those of our own statute in secs. 12, 13 and 14. The words in sec. 12, "In all cases of reference to arbitration," are clear, beyond question, and include all references, whether by oral agreement, written submission or otherwise.

Some of the general provisions under Part III. point clearly to the conclusion that the Act is intended to be of the widest application. Sec. 29 says:—"Any referee, arbitrator or umpire may, at any stage of the proceedings under a reference . . . state in the form of a special case for the opinion of the Court . . . any question of law arising in the course of the reference."

This is plainly inclusive of all arbitrations. Sec. 35 provides that the Act "shall not affect any arbitration pending before the first day of November, 1912, but shall apply to any arbitration commenced on or after the said date under any agreement or order theretofore made."

In my opinion the provisions of the Act were intended to extend to and include all arbitrations save those actually pending and proceeding before the date mentioned.

It is my conclusion, therefore, that the provisions of the Arbitration Act must be read as supplementary to the provisions

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of the Greater Winnipeg Water District Act. This Court has, therefore, on this motion, all the powers given by sec. 22 of the Greater Winnipeg Water District Act and by sec. 22 of the Arbitration Act, as well as those given to the Court of King's Bench by secs. 12, 13, 14, 15 and other sections.

The water district and Iverson in writing appointed their respective arbitrators, and these two subsequently appointed the third. It is well settled that this constitutes a written submission to arbitrate: *Herring & Napanee, etc., R. Co.* (1884), 5 O.R. 349, at p. 355.

The result is that if there had been no written appointments or if Iverson had refused to appoint, the arbitration would not have been within those sections of Part I. of the Arbitration Act relating to arbitrations on written submission. The Legislature knew the provisions of the Arbitration Act, 1911, when it passed the Greater Winnipeg Water District Act and it knew the provisions of the latter when it re-enacted the Arbitration Act in 1914. Here the parties in order to arbitrate were not called upon to make a written submission, but they elected so to do and thus to come within Part I. of the Arbitration Act. In that Part, sec. 4, sub-sec. (*i*), the arbitrators are given full authority to deal with the costs of the reference. This consideration disposes of the objection taken to the award that the arbitrators exceeded their jurisdiction in giving costs against the water district.

This motion comes before us as an application to set aside the award and is, in its terms, confined to that purpose. But the whole matter is before us and we are entitled to deal with it having in view all the powers conferred on this Court by the Arbitration Act in addition to those given by the Greater Winnipeg Water District Act.

As to the material brought before us, it is the fact that no affidavits have been filed verifying the award or other documents. That, however, is a matter that can be easily remedied. The shorthand notes of evidence are properly before us when we consider sec. 17 of the Arbitration Act which makes express provision therefor, and the provisions of sec. 22 of the same Act along with the Rules of this Court, which are part of the Court of Appeal Act, R.S.M., 1913, ch. 43. There is no doubt that the evidence before the arbitrators is to be taken in shorthand

and that copies of the shorthand notes can be used on motions to set aside or enforce, or on motions by way of appeal from, an award.

Upon examination of the award of the majority of the arbitrators we are confronted with their express and explicit holding that the parties had agreed that the award be made on the assumption that Iverson owned the fee in the submerged land to midstream and they base their finding on that agreement. The third arbitrator concurs in this. I find nothing in the record or notes of evidence or documents filed that affords the slightest ground to set aside or disregard this holding. There can be no question that the arbitrators clearly understood what was stated to them. The water district is, therefore, precluded from setting up the main ground on which it now seeks to set aside the award. It is impossible for it to deny now what it admitted before the arbitrators.

Moreover, the award of the majority may be read as expressing their intention to award compensation for the damages sustained by Iverson to his rights as a riparian owner of the lot in question (in addition to those incurred by the actual taking of his property as to which there is here no question) in which case the amount awarded therefor cannot be regarded as excessive. Had no question of the ownership to midstream been raised, a perusal of the award conveys the impression that the amount would have been the same. The value of the ownership of a part of a river bed, such as that of the Red, rests largely on the imagination and can hardly be said to enter the realm of reality. The rights of riparian proprietors are, in effect, as valuable as those that flow from the ownership of the soil, as was pointed out by Moss, C.J.O., in *Keewatin Power Co.* v. *Kenora*, 16 O.L.R. 184, at p. 194.

In the result we are not called upon to decide upon the main question discussed on the argument. I may say that I find myself unwilling to agree with the contention that the English common law rule, that in the case of non-tidal navigable waters the title in the bed *ad medium aquæ* is presumed *primâ facie* to be in the riparian proprietor, prevails in this Province. It is wholly at variance with our ideas to consider that rule applicable to a great highway of transportation such as the Red River is

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and has been since the earliest times. Nor is there the slightest evidence of any intention on the part of the Crown to alienate the ownership of the river bed which it holds as trustee for the public. The considerations that influenced the Ontario Court of Appeal in arriving at its decision in *Keewatin Power Co.* v. *Kenora*, *supra*, are not applicable in this case, on the facts and on the principles as to the applicability to this Province of the laws of England as they existed prior to July 15, 1870, recently laid down by this Court in the case of the Mortmain Acts (*Re Fenton Estate* (1920), 53 D.L.R. 82, 30 Man. L.R. 246.

While Iverson is, in one view, in the position of a consenting party to the arbitration, yet he was forced to take that attitude owing to the statutory power of expropriation conferred on the water district. He was compelled either to appoint an arbitrator or to allow the arbitration to proceed without his naming an arbitrator. The parties had failed to come to an agreement and Iverson's property has been taken from him without his consent. The water district is responsible for the taking and for the arbitration and the award made as a result of its operations ought not to be disturbed at its instigation except upon manifestly clear grounds. There was no misconduct on the part of the arbitrators, they made their award evidently on the fullest consideration of the facts and evidence and the water district does not place itself in a too favourable light in challenging the finding of a tribunal of its own creation. Iverson did not want to part with his property, it has been taken from him by compulsory proceedings and now he very reasonably wants the compensation awarded him by a board of arbitration that was imposed on him by the district.

In my opinion the motion must be dismissed with costs.

Fullerton, J.A.

FULLERTON, J.A. (dissenting in part):—The first point to be determined in this appeal is whether or not the proceedings are governed by the Arbitration Act, R.S.M. 1913, ch. 9.

The Act incorporating the Greater Winnipeg Water District is ch. 22, statutes of Manitoba, 1913. Sec. 22 empowers the corporation to expropriate land, requires it to pay reasonable compensation, and provides that in case of disagreement between the corporation and the owners respecting the value of land so taken or as to the damages caused "the same shall be decided by three arbitrators to be appointed as hereinafter mentioned,

namely, the corporation shall appoint one, the owner shall appoint another, and such two arbitrators shall, within ten days after their appointment, appoint a third arbitrator."

The section further provides that in case the owner shall refuse to appoint an arbitrator the Court of King's Bench or a Judge thereof on application of the corporation, shall nominate and appoint three indifferent persons as arbitrators.

The Arbitration Act defines a submission as follows:—"Sec. 2. In this Act, unless the contrary appears—'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

In *Herring and Napanee, etc., R. Co.* (1884), 5 O.R. 349, Herring made an application to set aside an award made under the provisions of the Consolidated Railway Act, 1879, 42 Vict. ch. 9 (Can.), fixing the compensation payable to Herring for lands appropriated by the railway company. An objection was taken that there was no "agreement or submission by consent" to be made a rule of Court within the provisions of sec. 201, the Common Law Procedure Act, R.S.O., 1877, ch. 50, and that the reference was compulsory. The expropriation provisions of the Consolidated Railway Act required the company to serve a notice on the owner containing a declaration of readiness to pay some certain sum, and the name of a person to be appointed as the arbitrator of the company, if their offer should not be accepted. If the owner failed within 10 days to accept or notify to the company the name of his arbitrator then the Judge should on the application of the company appoint a sworn surveyor to be sole arbitrator.

The company sent the required notice and Herring served notice on the company naming his arbitrator and the two arbitrators appointed a third. Rose, J., overruled the objection holding the respective appointments evidenced an agreement or submission by consent. In the course of his judgment he points out that, p. 354, "there is no consent to expropriation; that is arbitrary; but the owner may either consent to refer and nominate his arbitrator, or the Act provides machinery for accomplishing the same end without his consent."

On the other hand, it was held in *In re Credit Valley R. Co. & Great Western R. Co.*, (1880), 4 A.R. (Ont.), 532, that where the arbitrators

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were appointed by the Court the appointment was not a submission.

In this case the corporation by letter dated March 18, 1918, offered Iverson the sum of $2,000 as compensation for the land taken. This offer Iverson refused to accept and by a notice dated September 15, appointed Neil T. McMillan, arbitrator on his behalf. The corporation appointed D. R. Finkelstein its arbitrator and the two arbitrators appointed Joseph Campbell as the third arbitrator.

On the authority of *Herring and Napanee, etc., R. Co.*, *supra*, counsel for Iverson contends that the several appointments together constitute a submission within the meaning of the Arbitration Act and that in consequence the provisions of the Act apply to the proceedings on this arbitration.

Now, it is a well-known principle of construction that where the Legislature has passed a new statute giving a new remedy, that remedy is the only one that can be pursued.

Maxwell on Statutes, 5th ed., p. 653, says: "If the statute which creates the obligation, whether private or public, provides in the same section or passage a specific means or procedure for enforcing it, no other cause than that thus provided can be resorted to for that purpose."

In *Lamplugh* v. *Norton* (1889), 22 Q.B.D. 452, Lord Esher, M.R., at p. 457, said:

> A new obligation is created, and a remedy is given in the same section. It seems to me that under these circumstances the same rule of construction applies, and the section must be treated as a code containing all the law with regard to the recovery in respect of the new obligation and that there can be no other mode of recovery than that specified.

In *Reg.* v. *County Court Judge of Essex and Clarke* (1887), 18 Q.B.D. 704, the question was whether an Act which provided that judgments should carry interest was applicable to a judgment obtained in the County Court which was established by a subsequent Act. At p. 708, Lopes, L.J., said:

> That Act [The County Courts Act, R.S.M. (1913), ch. 44] gave a new jurisdiction, a new procedure, new forms and new remedies, and the procedure, forms and remedies there prescribed must, where they have not been altered by subsequent legislation, be strictly complied with.

In *Wake* v. *Sheffield* (1883), 12 Q.B.D. 142, Brett, M.R., at p. 145, said:

The statute has imposed on certain persons a liability not known to the common law, and has given to other persons powers and duties also not known to the common law; and it seems to me to follow that where that is the case, and where, as here, there is an Act of Parliament which has imposed a new liability, and given particular means of enforcing such new liability, such mode of procedure is the only one to be followed and used for that purpose.

This case, it appears to me, comes squarely within the language of the last-cited judgments. The Act incorporating the Greater Winnipeg Water District, 3 Geo. V., 1913 (Man.), ch. 22, by sec. 22 gives the corporation express power to expropriate lands and impose upon it the liability to pay reasonable compensation to the owner. After making provision for the appointment of arbitrators and the conduct of the arbitration the section goes on to lay down a procedure for attacking any award that may be made in the following words:

> provided always that any award under this Act shall be subject to be set aside on application to the Court of King's Bench in the same manner and on the same grounds as in ordinary cases of arbitration, in which case a reference may be again made to arbitration as hereinbefore provided.

By an amendment, 9 Geo. V., 1919 (Man.), ch. 39, sec. 1, the words "King's Bench" were struck out and "Court of Appeal for Manitoba" substituted.

As this special Act, passed in 1913, provides a specific procedure for attacking the award and does not incorporate within it or even refer to the Arbitration Act, which was passed in 1911, I am of the opinion that it is not applicable. If we were to hold it applicable on the ground that the appointments constituted a "submission" it clearly would not be applicable in a case where the owner refused to appoint an arbitrator and the Court of King's Bench had made the appointment under sec. 22 above quoted. See *In re Credit Valley R. Co. & Great Western R. Co., supra.*

The curious result would follow that in a case where the owner appointed his arbitrator all the provisions of the Arbitration Act would apply while in a case where the Court of King's Bench appointed the arbitrator the Arbitration Act would have no application. I cannot for a moment believe that the Legislature ever intended such a result.

Again, if we were to hold that the Arbitration Act applied here then the application should have been made to a Judge of the Court of King's Bench as under that Act the Court of Appeal has only appellate jurisdiction.

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Section 22 of the Greater Winnipeg Water District Act as amended provides that "any award under this Act shall be subject to be set aside on application to the Court of Appeal for Manitoba *in the same manner and on the same grounds as in ordinary cases of arbitration.*"

I take it that the words above quoted give this Court power to set aside the award on the grounds which would have been available at common law before the passing of the Arbitration Act.

Iverson was the owner of block B as shewn on a plan of survey of part of lot 76 of the parish of St. Boniface, registered in the Winnipeg land titles office as No. 224.

This lot fronts on the Red River and the 20-foot strip which the corporation took for its pipe line cuts diagonally through the property.

The present application is based mainly on two grounds: 1. That the arbitrators have erred in ordering the district to pay the costs of said arbitration and award, and that such order is beyond the jurisdiction of the said arbitrators; 2. That the arbitrators have erred in holding that Iverson is the owner of the bed of the Red River, opposite to or adjoining said Block "B" to the middle line of said river and in taking its value into consideration in arriving at the award.

As to the first ground, the authorities hold that when the submission is silent as to costs the arbitrators have no power to award costs either of the arbitration or award. Russell on Arbitration and Award, 10th ed., p. 572; *Leggo* v. *Young* (1855), 16 C.B. 626; *Firth* v. *Robinson* (1823), 1 B. & C. 277, 107 E.R. 104.

As to the second ground, I find the statement in the award that "both parties have agreed that the award be made on the assumption that Iverson owns the fee in the submerged land." In the face of the above admission, which I must assume to be correct, I cannot see how the question of the ownership of the river bed as appurtenant to Block B can come in question here. The evidence taken before the arbitrators is not before us. This is not an appeal but an application based on certain material which has not been verified in any way by affidavit. I am therefore not in a position, even if I were permitted to do so, to look at the evidence on the question of the above admission. I would

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strike out of the award the item which provides that "the costs of the arbitration to be paid by the Greater Winnipeg Water District," and otherwise dismiss the application.

DENNISTOUN, J.A.:—This is a motion to set aside an award under the Greater Winnipeg Water District Act, 3 Geo. V., 1913 (Man.), ch. 22.

The water district in order to bring its main conduit into the city of Winnipeg have taken a strip 20 ft. wide through Iverson's land situate on the eastern bank of the Red River. The conduit has been laid on the land so appropriated to the water's edge, and thence under the surface of the river to the city of Winnipeg on the western bank.

Two of the arbitrators (the third dissenting as to amount) have awarded Iverson $8,250, based on a valuation of the whole lot on the river bank at $6,000 and of the "land submerged to midstream with all the rights and privileges of the riparian owner" at $9,000. The arbitrators also awarded costs of the arbitration to Iverson.

Motion is made to this Court to set aside the award on two principal grounds: 1. That the arbitrators were wrong in allowing any compensation for lands under the waters of the Red River *ad medium filum*, Iverson having no title thereto; 2. That the arbitrators in the absence of any authority derived from the Greater Winnipeg Water District Act had no power to award costs.

Iverson has title to block B in lot 76 St. Boniface on registered plan No. 224. This lot as it appears by the plan is bounded on its western limit by the Red River, and it has been assumed by the arbitrators that such riparian ownership carries with it the ownership of the alveus or channel of the river to its middle thread.

The point was dealt with in *Patton* v. *Pioneer Navigation and Sand Co.* (1908), 21 Man. L.R. 405, which followed the judgment of the Court of Appeal for Ontario in *Keewatin Power Co.* v. *Kenora*, 16 O.L.R. 184, to the effect that title to the bed of a navigable stream above tide water belongs to riparian proprietors in accordance with the well established rules of the common law in England.

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For reasons which will be given and which have been formerly expressed by this Court in *Re Fenton Estate*, 53 D.L.R. 82, 30 Man. L.R. 246, I am of opinion that the Manitoba statute which introduced the laws of England relating to property and civil rights into this Province, imposes upon our Courts the duty of determining the applicability of English law to conditions prevailing in this new country in 1870.

In Ontario it has been held that the general body of such law was introduced into Upper Canada unless it can be seen that to do so would lead to absurdity: Moss, C.J.O., in *Keewatin Power Co.* v. *Kenora*, 16 O.L.R. 184, at p. 190.

The Judges of Ontario are not called on to perform the difficult duty which is cast upon the Judges of this Province and I am able to arrive at a conclusion which differs from that of the Court of Appeal for Ontario upon grounds other than those upon which that Court relied.

The question of the ownership of the alveus, or channel, of a non-tidal navigable river in Ontario was decided in the case of *Keewatin Power Co.* v. *Kenora*. Anglin, J., at the trial, 13 O.L.R. 237, at p. 258, came to the conclusion that the rules of the common law of England do not apply, and that if they did, being presumptive only, were rebutted by the general history of the priority of public over private rights in this country when contrasted with the history of the rise of public right as against vested private right in England.

His judgment was varied by the Court of Appeal, 16 O.L.R. 184, which decided that in Ontario the Courts are bound by the terms of 32 Geo. III., 1792, ch. 1, to hold that the common law of England relating to riparian rights on navigable streams was introduced into Upper Canada without any reservation or exception; and that the question of applicability does not arise, the statute being silent on that point.

The Act of 1792, 32 Geo. III. R.S.U.C. ch. 1, (R.S.O., 1897, ch. 111), introduced "the laws of England relating to property and civil rights" in the most comprehensive terms into the Province of Upper Canada. It contained no restricting words, such as: "so far as applicable," "so far as local circumstances permit," "so far as such laws can be applied" or "as near as might be."

"Upon such qualifying words Courts have held that certain English statutes, not suitable to young colonies in new countries, were not brought into force by enactments introducing English law in terms otherwise general: *Att'y-Gen'l* v. *Stewart* (1817), 2 Mer. 143, 35 E.R. 895; *Whicker* v. *Hume* (1858), 7 H.L. Cas. 124, 11 E.R. 50; *Jex* v. *McKinney* (1889), 14 App. Cas. 77; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381; *Lyons Corp.* v. *East India Co.* (1836), 1 Moo. P.C. 175, 12 E.R. 782." *Keewatin Power Co.* v. *Kenora*, 13 O.L.R. 237, at p. 258, and see *Re Fenton Estate*, 53 D.L.R. 82, 30 Man. L.R. 246.

The statute which introduced the laws of England relating to property and civil rights into Manitoba (1874), 38 Vict., ch. 12, sec. 1, does not contain the broad enactment of 32 Geo. III. ch. 1, referred to, but restricts the laws introduced to "such as were, existed, and stood on the fifteenth day of July one thousand eight hundred and seventy, so far as the same can be made applicable to matters relating to property and civil rights in this Province."

The applicability of the law is therefore a question for decision by the Courts of this Province, as decided in previous cases, and the reasons given by the Court of Appeal for Ontario in *Keewatin Power Co.* v. *Kenora*, 16 O.L.R. 184, do not assist us in the performance of this duty. *Re Fenton Estate*, 53 D.L.R. 82, 30 Man. L.R. 246.

The judgment of Anglin, J., in *Keewatin Power Co.* v. *Kenora*, 13 O.L.R. 237, at p. 258, is an able and lengthy exposition of the view which I desire to express in the case under consideration and I am much indebted to it in the preparation of the remarks which follow. It deals more fully with this important question than I shall attempt to do.

By the common law of England the bed of non-tidal rivers and streams belongs in the absence of any evidence of ownership to the contrary, by presumption of law, in equal moieties to the owners of the riparian lands. The public may have a right to navigate non-tidal rivers, but there is no common law right to do so. Such right as the public has can only have arisen by grant from the owners of the soil of such rivers, or by immemorial usage, or by Act of Parliament, and the right to navigate is established by evidence similar to that which would raise the presumption of

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a right of way on land. The soil of lakes and pools even when they are so large that they might be termed inland seas, does not of common right belong to the Crown, and the law as to ownership of the soil is the same as that applied to inland non-tidal waters whatever the size of the water space may be. See 28 Hals., pp. 396-399.

Where the owner of the riparian rights in non-tidal waters is also owner of the alveus, the right of navigation in such waters when acquired by the public is simply a right of way similar to a right of way on land. It carries with it no right to the soil, or any right of fishing or fowling or of recreation over the soil. See 28 Hals., p. 406.

"The right of fishery is a *profit a prendre* appertaining to the ownership of the alveus: *Re Jurisdiction over Provincial Fisheries* (1896), 26 Can. S.C.R. 444; *Reg.* v. *Robertson* (1882), 6 Can. S.C.R." 52 *Keewatin Power Co.* v. *Kenora*, 13 O.L.R. 237, at p. 265.

These references to the common law of England indicate clearly to my mind that they are not and never were applicable to conditions in this Province. Here the public right in navigable waters whether under the Hudson's Bay tenure or since 1869 under the title vested in the Crown, was prior to, and superseded all private rights acquired by grant or settlement, upon the banks of a navigable stream. In a country occupied from the earliest days by hunters, trappers, fishers and traders whose main and almost exclusive highways were the rivers and streams, such laws were contrary to the requirements and necessities of the whole community. The presumption that such is the law is clearly rebutted by the facts of which every Court may take judicial notice.

In the patent to the land in question there is no reservation of rights of fishing or shooting in favour of the Crown or of the public. Without such a reservation the rights of fishing, shooting, cutting ice and recreation, would be vested in the grantees of riparian rights under the common law. *Keewatin Power Co.* v. *Kenora*, 16 O.L.R. 184, *per* Moss, C.J.O., at p. 193; *Smith* v. *Andrews*, [1891] 2 Ch. 678, 65 L.T. 175.

That the waters of the Red River from the international boundary to and including Lake Winnipeg, and the waters from thence to Hudson's Bay, a distance of many hundreds of miles,

should be so restricted to public user was, in my judgment, never intended by the Legislature of Manitoba when the Act of 1870 was passed.

The applicability of the common law of England to navigable rivers in respect to the *ad medium* rule may be doubted when it is remembered that the importance of public rights in non-tidal navigable waters was not recognised in England when title to land upon their banks was acquired.

In this country the public right of navigation and of fishery in all navigable waters has always existed and been recognised.

The title to both bed and banks being in the Crown, its grant of the latter may be construed according to the rules which govern the construction of grants made under similar conditions in England. There the nature of the tenure upon which the Crown holds title to the alveus of rivers navigable in law precludes any presumption of an intention to part with any portion of it, unless such portion is granted in express terms. Since in all waters in this country, which are navigable in fact, the interest of the Crown in the bed is precisely the same as that which it possesses in the *fundus* of tidal navigable waters in England, it is a logical deduction that by nothing short of an express grant should the Crown be held to have parted with its title to the alveus of our navigable rivers.

Indeed it may be said that even in England the application of the *ad medium* rule is restricted to rivers in which the alveus had already become the property of private riparian owners before the public right of navigation in such rivers was established. We have no rivers of the latter class in this country. Anglin, J., in *Keewatin Power Co.* v. *Kenora*, *supra*.

In the absence of an express grant I am strongly of opinion that Iverson is not the owner of the bed of the Red River *ad medium filum* opposite his riparian lands, described as block B, lot 76, St. Boniface, on registered plan No. 224, in the Winnipeg land titles office.

But he is clearly a riparian proprietor. His land is bounded by the waters of the Red River, presumably at low water mark.

In my humble judgment all three arbitrators were in error when they assumed the contrary and assessed compensation on the basis of appropriation by the water district of land both above and below the margin of the river.

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Notwithstanding this, I do not think it is open to the water district to object to what has been done by the arbitrators. The award states that both parties *have agreed* that the award be made on the assumption that Iverson owns the fee in the submerged land to mid-stream. That is a finding of fact upon which there is no evidence to the contrary before this Court, and I would not set aside the award in this case even if it were established that the arbitrators were mistaken as to such agreement, for the following reasons:

I respectfully agree with Moss, C.J.O., that the rights possessed by riparian proprietors may in certain cases prove as valuable in a pecuniary sense as would flow from their ownership of the soil. *Keewatin Power Co.* v. *Kenora*, 16 O.L.R., at p. 194. Meredith, J.A., at p. 195, says:

> It may be that the question of the ownership of the bed of the stream in question may become a question of substantial importance in that arbitration, but it may possibly be that, having regard to the undisputed rights of the land owners, the arbitrators may deem the question of the ownership of the bed of the stream of no substantial concern.

Where the riparian proprietor is not the owner of the alveus adjacent to his land, he has no right to place any erection upon it or to interfere in any way with the bed of the stream. His right to the usufruct of the water is restricted by the limitations that he may not place any obstruction in the alveus, and may not except for ordinary purposes, employ the water in any manner which interferes with the rights of adjacent proprietors opposite as well as above and below him on the stream. These riparian rights are of course subject to the public right of navigation and to the right of fishery incident to the ownership of the alveus.

Nevertheless, these limited and incidental rights of usufruct enhance the value of the property which it is proposed to take and the owner of the river bank is entitled to compensation for their forcible taking.

Prospective capabilities of the property having regard to the extent of the rights of the riparian owner must be taken into consideration, as they may form an important element in determining the real value of the lands. *Lefebvre* v. *The Queen*, (1884), 1 Can. Ex. 121.

If this award were set aside and referred back to the arbitrators for amendment upon the ground that they should have allowed

compensation for riparian rights only, and not for ownership of the river bed, they might well strike out all reference to ownership of the alveus and allow the compensation to stand as originally assessed.

Reading the award as I do I am of opinion that it was riparian rights which the arbitrators had in mind and that the ownership of the river bed was only referred to because of the agreement of parties referred to. The question of title was taken as of so little importance that all parties agreed to waive any proof of it. The title to block B. being no doubt strictly proved, the riparian rights which were appurtenant thereto, whether confined to the usufruct of the stream from the banks along the water's edge, or above the bottom of the river were considered to be practically the same and by consent the parties permitted the arbitrators to measure the value of those rights unhampered by any question of title.

Several points raised upon this appeal depend upon the applicability of the Arbitration Act, R.S.M., 1913, ch. 9, to proceedings under the Greater Winnipeg Water District Act, 3 Geo. V., 1913 (Man.), ch. 22, sec. 22.

I am of opinion that it is applicable, and that all the powers conferred upon the arbitrators and upon the Court by that Act may be invoked in connection with the award now under consideration.

The Arbitration Act is applicable to arbitrations under provincial statutes in force on November 1, 1912, as set forth in sec. 33 of the Act. It may be that through inadvertence it is not expressly made applicable to arbitrations under provincial statutes passed subsequent to that date. The Greater Winnipeg Water District Act was not passed until 1913 and contains no reference to the Arbitration Act.

There is no doubt upon the point under similar circumstances in England.

The Arbitration Act (Imp.) of 1889, ch. 49, by sec. 24, applies to every arbitration under any Act before or after, except in so far as the Act regulating the arbitration is inconsistent with the Arbitration Act. The effect of this is to apply, in England, the provisions of the Act to arbitrations under any other Acts except so far as the provisions of those Acts are inconsistent with the provisions of the Arbitration Act.

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Failing legislation of a similar character in this Province it is necessary to resort to the general scope of the Manitoba Arbitration Act in order to ascertain whether it is applicable or not to proceedings under the Greater Winnipeg Water District Act.

It is generally applicable to cases where there is a "submission" to arbitration, and "submission," by sec. 2, means, "a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."

It was held by Rose, J., in *Herring and Napanee, etc., R. Co.*, 5 O.R. 349, that an award under 42 Vict. ch. 9 (Can.), for lands appropriated by a railway company might be made a Rule of Court under the Common Law Procedure Act, R.S.O. (1877), ch. 50, the notices of appointment of arbitrators and the appointment of the third arbitrator constituting "an agreement or submission by consent." The cases upon which he relies are *Lea* v. *O. & Q. R. Co.* (1883), 8 O.R. 222; *Freeman* v. *O. & Q. R. Co.* (1884), 6 O.R. 413; *In re Cruikshank & Corby* (1880), 30 U.C.C.P. 466; and *Rhodes et al.* v. *Airedale Drainage Commissioners* (1876), 1 C.P.D. 402. I agree with his reasoning and am of opinion that the documents signed by the parties to the arbitration under consideration clearly express an agreement to submit their differences to arbitration. Following the taking of Iverson's land by the Greater Winnipeg Water District, he, as owner, on November 15, 1919, signed and served an appointment of an arbitrator, thereby initiating the proceedings under review. On October 16 following the water district appointed their arbitrator; and on October 25 the two arbitrators appointed the third, all of these appointments are in writing and clearly indicate the object and scope of the reference.

Iverson's appointment sets forth the appropriation of his lands by the water district, the disagreement which has arisen as to the value of the said lands and the damages caused, and nominates and appoints N. T. MacMillan to be the arbitrator on his behalf of and concerning the premises.

While the taking of the lands was beyond question authorised by the statute without the consent or concurrence of the owner, the proceedings which followed were instituted and carried through

to an award pursuant to the voluntary submission of the parties concerned, of all their rights and remedies to the tribunal constituted by the statute.

The documents referred to in my humble judgment constitute a written agreement to submit present differences to arbitration within the meaning of the statute and the provisions of the Arbitration Act apply.

This conclusion disposes of the objection that the arbitrators had no power to award costs, the Greater Winnipeg Water District Act being silent as to costs. By sec. 4, sub-sec. *i*, of the Arbitration Act the costs of the reference and award shall be in the discretion of the arbitrators.

It also makes clear the jurisdiction of this Court over the award. It may be reversed, altered, varied or remitted for reconsideration by the arbitrators. See secs. 12 and 22.

True sec. 22 of the Greater Winnipeg Water District Act makes provision for applications to the Court of Appeal to set aside an award "in the same manner and on the same grounds as in ordinary cases of arbitration" and goes on to say "in which case a reference may be again made to arbitration as herein provided." These words possibly make provision for cases in which there has not been a "submission" as above defined. They are not sufficient to indicate that it was the intention of the Legislature to exclude the applicability of the Arbitration Act in cases where its aid might usefully be sought under its general terms, and the expense and delay of beginning *de novo* avoided.

In my view the power is cumulative and ancillary to the powers given by the Arbitration Act. If that Act apply, and I hold it does, the objection as to the allowance of costs by the arbitrators disappears.

In view of these conclusions upon the two principal points relied on, I would dismiss the motion with costs.

I desire to express my agreement with the views of Perdue, C.J.M., which I have had the privilege of perusing.

Motion dismissed.

QUE.

K. B.

THE COUNTY OF QUEBEC v. THE VILLAGE OF LORETTEVILLE.

Quebec King's Bench, Lamothe, C.J., Lavergne, Cross, Martin and Dorion, JJ. June 27, 1919.

MUNICIPAL CORPORATIONS (§ II C—50)—POWER OF COUNTY COUNCIL OF QUEBEC TO CHANGE THE *chef-lieu* OF THE COUNTY.

Since the repeal of arts. 510 and 511 of the old Municipal Code (Que.), there is no power or authority by which a county council by by-law is enabled to change the *chef-lieu* of the county.

Statement.

APPEAL from the judgment of the Superior Court annulling a resolution of a municipal council changing the *chef-lieu* of the county. Affirmed.

Bedard, Prévost and *Taschereau*, for appellant.

Galipeault, St. Laurent, Gagne and *Métayer*, for respondent.

Lamothe, C.J.

LAMOTHE, C.J.:—A resolution of the municipal council of the county of Quebec, changing the *chef-lieu* of the county by transporting it from Loretteville to Charlesbourg, has been attacked by action and annulled by the Superior Court. The principal ground of the judgment is that the power given to the county council to change the *chef-lieu* by art. 511 of the former Municipal Code, does not now exist since this article has not been reproduced in the new Code.

In appeal, reliance is placed upon the following proposition: 1. The right to change the *chef-lieu* is a right inherent in every county corporation and constitutes an act of administration; 2. The two local corporations, plaintiffs, have no interest entitling them to bring the present action.

Upon the first question, I am of the same opinion as the Superior Court. The power to change the *chef-lieu* of a county is not a matter of pure administration; it is a part of the organic law governing the county. The *chef-lieu* of each county was originally fixed by the same Act. See 10-11 Vict., 1847 (Can.), ch. 7, art. 9; subsequently power was given to the county councils to change the *chef-lieu* by by-law (see 18 Vict., 1855 (Can.), ch. 100, art. 19, sub-sec. 1) with certain restrictions. These restrictions were afterwards increased; they are enumerated in art. 511 of the former Municipal Code. By the repeal of this art. 511, the power to change the *chef-lieu* is withdrawn; such a change can now be made only by the Legislature. The establishment of a *chef-lieu* has not

the single object of fixing the place for meetings of the county council, it has purposes much more extensive.

The argument resulting from para. 5 of art. 5, of the new Municipal Code, reproducing the old law, and resulting also from art. 358 of the Code, lacks force, because it is not a question here of a *necessary* power but of a *discretionary* power. A county council can perform its functions and carry out the purpose of its existence by sitting in one place or another.

On the second question (the interest of the two municipalities, plaintiffs) I have had some hesitation. But the study of art. 680 and following of the new Municipal Code has led me to the conclusion that each local municipality has a sufficient legal interest in the matter.

It is apparent that the change of the *chef-lieu* shall involve, either immediately or later, certain necessary expenses of installation, or even the location of a temporary meeting place, the construction of a building, etc., expenses to which the plaintiff corporations will be bound to contribute. The action was brought under art. 50, Code of Procedure, and raises a question of absolute nullity, absence of power on the part of the county corporation (*ultra vires*).

I am of opinion that the judgment should be confirmed.

Cross, J.

Cross, J.:—The appellant's council purport, by the resolution attacked in this action, to have changed the county seat to Charlesbourg. The resolution says nothing about amending or repealing the by-law.

Counsel for the appellant are probably right in their general proposition to the effect that, by art. 354, Mun. Code, a county council can change the place at which its meetings are to be held by resolution, but they are nevertheless confronted by difficulty arising from arts. 359 and 370, Mun. Code, namely, that a by-law cannot be repealed or amended, except by another by-law and notice of submission of a by-law to the council must have been given at a previous meeting.

I would not attach great importance to the mere wording of the instrument in so far as to call it a resolution rather than a by-law, and might therefore hold the one here called in question to have been validly enacted, if a notice of its presentation had been given at a previous meeting.

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Cross, J.

Even if the enactment of a by-law were not strictly necessary to fix the county seat, the subject matter is one for which a by-law is highly appropriate. It is a thing which ought not to be lightly interfered with. There must be great numbers of old by-laws upon matters which were not proper subjects of by-law regulation at all and I consider that these might validly be abrogated by mere resolution, but changing a county seat is different. Restrictions were long ago placed upon the making of such changes.

By C.S.L.C., ch. 24, sec. 26, every county council could make by-laws, for, *inter alia* "appointing the place at which all sessions of the county council, after the first session, shall be held:—and every place so appointed shall thereafter be the county town (*chef-lieu du comté*)," but it was added that if the place at which the first meeting was held was "the place of holding the meeting of the municipal council of a county, the concurrence of two-thirds of the members for the time being of such council shall be necessary for the making of a by-law appointing any other place."

And by sub-sec. 3, it was declared that whenever a registry office had been established or "a public edifice for the use of the county council had been provided at a place appointed by by-law under the said Act for the sittings of such council, such sittings shall continue to be held at the place so appointed until otherwise determined by the Legislature."

I would hold that the resolution attacked was void, because notice of its presentation to the council had not been given at a previous council meeting.

The appeal should be dismissed with costs as of an appeal from the Circuit Court.

Martin, J.

MARTIN, J.:—By the Act 10-11 Vict., 1847 (Can.), ch. 7, art. 9, the *chef-lieu* of the county of Quebec was fixed at Charlesbourg.

The Mun. Code came into force by proclamation on November 2, 1871. It reproduced in art. 258 the provisions contained in 23 Vict., 1860 (Can.), ch. 61 (109 of the present Code), to the effect that if, at the time of the convocation of the first session of a county council by the registrar, the chief place (*chef-lieu*) has not been determined upon, such first session is held at the place chosen by registrar and the council continues to hold its sittings there, until the *chef-lieu* has been fixed upon.

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Martin, J.

By arts. 510 and 511 of the Mun. Code of 1870, every municipal council was empowered to make, amend or repeal by-laws to fix or change the chief place of the county, a by-law changing the *chef-lieu* requiring to be passed with the concurrence of two-thirds of the members of the council in office.

All previous Municipal Acts, whether special or general, were repealed by the provisions of art. 1086 of the Mun. Code of 1870, including the Act 18 Vict., 1855, ch. 100, sec. 19.

The present Municipal Code was adopted by the Act 6 Geo. V. (Que.), ch. 4, in 1916, and came into force on proclamation on June 29, in the same year. By art. 831, all the provisions of the Municipal Code of the Province of Quebec put in force on November 2, 1871, and their subsequent statutory amendments, were repealed. Articles 510, 511 and 512 of the former Code were not reproduced. Articles 513 and 514 of the old Code were reproduced in art. 423.

On June 14, 1911, the appellant's county council by by-law changed the *chef-lieu* of the county of Quebec to the village of St. Ambroise-de-la-Jeune-Lorette, now Loretteville, as it had a right to do under the provisions of arts. 510 and 511 of the old Mun. Code. By the express repeal of these two articles, it does not appear that there exists any statutory power or authority in the appellant to change the *chef-lieu*, and I am of opinion that such power having been expressly repealed, it no longer exists.

It was urged that by the interpretation clause under art. 5, sec. 5 (old Code, art. 4, sec. 4), the corporation can exercise all the powers in general vested in it and which are necessary for the accomplishment of the duties imposed upon it, but I do not think this article can be said to vest in the appellants powers which are specially taken away from it by the Legislature in adopting the present Code, nor do the provisions of art. 16, para. 8, defining *chef-lieu*, give such power.

If there is no power in the appellant to change the *chef-lieu*, it is hardly necessary to decide the second point, whether the proceedings adopted by the appellant should have been by way of by-law instead of resolution, though if it were necessary to decide this point it would appear by the provisions of arts. 6, 370 and 390 of the Mun. Code, that the by-law adopted on June 14, 1911, could only be repealed or amended by another by-law and

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the provisions of art. 354, dealing with the exercise of acts of simple administration, cannot be said to override the express provisions of the articles above cited.

On the question of interest, I should hold that the respondents have a right and interest to complain of illegal and *ultra vires* acts of the appellant. They are liable to be assessed by the latter.

The appeal should be dismissed and the judgment of the Superior Court confirmed with costs.

Appeal dismissed.

N. S.

S. C.

COBB v. ROY.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Chisholm, J. December 18, 1920.

ARCHITECTS (§ I—5)—ENGAGEMENT TO DRAW PLANS AND SUPERINTEND BUILDING—NO AGREEMENT AS TO COMPENSATION—DISMISSAL BEFORE COMPLETION OF WORK—PAYMENT FOR SERVICES—AMOUNT.

An architect engaged to draw plans for and superintend the erection of a building where no express agreement is made as to remuneration for his services, and who is improperly dismissed before the completion of the work, is entitled to charge a percentage on the total value of the work, when completed, for plans, etc.; a percentage on the work actually done and for detail plans furnished from time to time during the progress of the work estimated on the amount actually expended at the date of dismissal, and a further percentage for supervision on the amount of work done to the date of dismissal estimated on the total value of the work, when completed, and a reasonable amount for damages for dismissal. Such percentages should not be based on the estimated cost of the work at first given which is only a rough guess.

Statement.

APPEAL by defendant from the trial judgment in an action for services in preparing plans, details, specifications for defendant's building, for superintending the work of construction and damages for breach of contract in dismissing plaintiff during the progress of the work of construction. Affirmed.

S. Jenks, K.C., for appellant.

J. L. Ralston, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The plaintiff's case is that he was engaged as an architect to draw plans for and superintend the building erected by the defendant on the ruins of the one destroyed by fire in January, 1919; that no express agreement was made as to the remuneration for his services; that the work was to be done as rapidly as possible without any contract for it as a whole; and that in order to finish the plans as speedily as possible the plaintiff increased his office staff and devoted practically his whole time for

2 or 3 months to the service of the defendant. When the work had proceeded so far that $50,000 had been expended, the plaintiff rendered a partial account based on $175,000 as the estimated cost of the structure at 3½% amounting to $6,125, with an intimation that the full charge would be 5% on that estimate.

The defendant was greatly surprised at the amount of the charge and considered that $3,000 would be ample remuneration for the services of the plaintiff, past and future, as I understand, down to the completion of the work. In view of the fact that plaintiff had actually expended $3,091 in payments to his assistants and clerks, not including $826.38 for overhead charges, this seems to have been a very inadequate offer. It was rejected by the plaintiff and his further services were dispensed with by the defendant. The trial Judge has found that the amount justly due the plaintiff for his services, including, I assume, damages for dismissal was $8,000, and from this judgment the defendant appeals.

I cannot see that the defendant has given any evidence to support his contention that the amount should be reduced, beyond his very strong impression that the claim of the plaintiff is excessive. On the other hand, expert witnesses have been called by the plaintiff whose evidence seems to me to strongly support the view taken by Harris, C.J., who tried the case. The evidence of Gates is to the effect that the fair charge for plaintiff's services would be 2½% on the total value of the work for plans, etc., 1% on the work actually done for detail plans furnished from time to time during the progress of the work, and 1½% for supervision on the amount of work done to the date of dismissal. The work instead of being done for $175,000 as estimated by the plaintiff has cost about $250,000. The amount expended at the date of plaintiff's dismissal was $50,000. Gates' figures would therefore be $6,250 for plans, etc., $500 for details and $750 for inspection, making in all $7,500. The damages recoverable for dismissal might easily amount to a balance sufficient to justify the finding of the Chief Justice. Plaintiff, in view of this work, and for the more speedy prosecution of the work, had retained the services of men whom he would properly be unwilling to discharge without full notice or fair compensation. He had to keep them unemployed because of his dismissal by the defendant. He lost the profits

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on their work and his own, and he estimates this loss at $1,200 or $1,600. It is not necessary to scrutinise these figures very closely. Five hundred dollars for damages of this sort would be sufficient to justify the finding of the Chief Justice and even if this element of plaintiff's claim were weaker than it is, there is other evidence which, if accepted, renders it unnecessary to include any damages for an assumed breach by the defendant. Ross says that 3% on the cost of the building would be a fair charge for the preparation of the plans, detailed drawings and specifications, and 2% on the actual work done for the inspection. This would give on a $250,000 valuation of the building, and $50,000 worth of work actually done at the date of the dismissal $7,500+$1,000=$8,500. Roper's evidence as I understand it would sustain a finding for a much larger sum than this.

I think the difference of opinion that has arisen in this case is largely due to the confusion between estimate and actual cost. An architect in making his contract before the work has begun and where no tenders are called for has to base his charge on an estimate of the probable cost, that is to say on a guess. Where tenders are taken and a contract made for the work he bases it on the contract price and he may either gain or lose accordingly as the contract is profitable or otherwise to the contractor. In suing on a *quantum meruit* after the work is done or is so far completed that the actual cost may be fairly estimated where there has been no express contract based on an estimate, or where the contract has been discharged by breach, as in the present case, I see no reason why the estimated value of the proposed work, which at the best is a rough guess, should have anything to do with the question and I understand to be the general tenor of the evidence offered on behalf of the plaintiff.

The defendant seems to be convinced that the existence of some remains of the old building and the fact that there was a plan extant and available of that building as originally constructed should have materially reduced the architect's charge for his services in connection with the new building. But competent witnesses, other than the plaintiff, who have spoken as to this point, are of opinion that the existence of remains of the old building, so far from reducing the labours of the architect, increased them, and the reasons for this opinion that have been given by

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witnesses for the plaintiff and the plaintiff himself seem to me to be very plausible. The new building differs entirely from the old in the materials of which it is constructed, and differs essentially in other respects. I can well believe therefore that the original plans would be of very small service and the original specifications of no service at all.

My opinion is that the decision of the Chief Justice should be affirmed with costs.

Longley, J.

LONGLEY, J.:—The question is simply the amount of the plaintiff's claim against the defendant. The amount which the defendant offered to pay, $3,000, is really not sufficient and it only remains to be seen whether the amount is $8,000 or some sum less. Of all the evidence in the case, and it is pretty voluminous, and general in many respects, there is one piece which I regard as the best foundation for fixing the rate of compensation. It is the evidence of Gates who is himself an architect, and he goes very fully into the matter in dispute. He states that in his case he "would charge 2½% on the cost of the work as near as I could get at it; assuming I am getting out before I know what the actual cost is." That would be exactly $4,375. "And 1% for any details I might have supplied," which would amount to $1,750. "And 1½% on the value, as I thought, of the work up to the time I severed my connection with the building." The value of the work at the time Cobb severed his connection was $50,000, and 1½% on that amount would be exactly $750; making a total of $6,875. I think that amount precisely represents the condition of affairs.

The plaintiff claimed that the building cost $250,000. Suppose it did. Suppose that the plaintiff made all alterations afterwards which increased the cost. Suppose an infinite variety of circumstances. Yet it must be remembered that Cobb was ceasing his connection with the matter, and at that time he estimated the cost of the building at $175,000, and he was entitled to all amounts up to that date upon that basis, and upon that basis only.

I reduce the amount allowed for the plaintiff's services from $8,000 to $6,875 and award costs to the defendant.

Ritchie, E.J.

RITCHIE, E.J.:—I agree with my brother Chisholm.

Chisholm, J.

CHISHOLM, J.:—I see no reason for disturbing the judgment of the trial Judge and I think the appeal should be dismissed with costs.

Appeal dismissed.

CAN.

Ex. C.

THE BILLINGS AND SPENCER Co. v. CANADIAN BILLINGS AND SPENCER Ltd. and CANADIAN FOUNDRIES AND FORGINGS Ltd. (Annotated).

Exchequer Court of Canada, Audette, J. February 28, 1921.

TRADEMARK (§ VI—30) — REGISTRATION — APPLICATION — FALSE STATEMENTS AND MISREPRESENTATION—"WITHOUT SUFFICIENT CAUSE"—EXPUNGING FROM REGISTER—PERSONS AGGRIEVED.

If the registration of a trademark is obtained through false statements and misrepresentations the Court will exercise its discretion to order the removal from the register of the entry as having been made "without sufficient cause" within the meaning of sec. 42 of the Canadian Patent Act, R.S.C. (1906), ch. 71.

Persons who have been using their trademark, both in Canada and the United States, for a great many years to distinguish their goods, and if the trademark left remaining on the register would limit the legal rights of such persons are "persons aggrieved" within the meaning of the Act.

[Review of cases; see Annotation following, at page 220.]

Statement.

APPLICATION, by petitioners, to expunge from the Canadian Register of Trademarks a specific trademark, consisting of the representation of a triangle with the letter "B" inside as applied to the manufacture and sale of machinery, tools and forgings, and registered in Canada, on February 27, 1907, under sec. 23 of the Exchequer Court Act, R.S.C. (1906), ch. 140, and under sec. 42 of the Trade Mark & Design Act, R.S.C. (1906), ch. 71.

Russel S. Smart and *J. Lorn McDougall*, for petitioners.

A. W. Anglin, K.C. and *J. A. Hutcheson*, K.C., for objecting parties.

Audette, J.

AUDETTE, J.:—It appears from the evidence that the petitioners for many years prior to the date of such registration—for a period extending as far back as 1871—were the proprietors of this mark, and made use of it throughout Canada and the United States, in respect of the class of goods above mentioned. They had a large business connection in Canada, and their goods had acquired a large and valuable repute.

In the view I take of the case, based as it is upon the terms of the statute, it will be sufficient without more to say that, notwithstanding the negotiations which took place between the officers of the companies, so far as the evidence before me discloses, there was no formal embodiment in writing of any sale or assignment of the trademark along with the goodwill.

The registration of the trademark was duly made, in February, 1907, upon an application which reads as follows:—

To the Minister of Agriculture,
(Trade Mark and Copyright Branch),
Ottawa, Ont.

We, Canadian Billings & Spencer, Limited, a Company incorporated under the Ontario Companies Act, with head office at the Town of Brockville, in the County of Leeds, and Province of Ontario, hereby furnish a duplicate copy of a Specific Trade Mark to be applied to the sale of machinery, tools and forgings in accordance with secs. 4 and 9 of "The Trade Mark and Design Act" *which we verily believe is ours on account of having been first to make use of same.*

The said Specific Trade Mark consists of an equilateral triangle with a large letter "B" inside of same and we hereby request the said Specific Trade Mark to be registered in accordance with the law.

We forward herewith the fee of $25 in accordance with sec. 10 of the said Act.

In testimony whereof we have caused our Manager and Treasurer (being the duly authorized officers for the purpose) to sign in the presence of the two undersigned witnesses at the place and date hereunder mentioned, and to attach our Corporate seal hereto.

Dated at Brockville this 7th day of February, 1907.

Witnesses
(Sgd) W. S. Buell,
" J. H. Botsford,

(Sgd) R. Bowie,
Treas.
" J. Gill Gardner,
Mgr.

(Seal)

It will be noticed that the application is made upon the representation by the company that they "verily believe (the trade-mark) is ours on account of having been *first* to make use of same."

In support of their application they also filed a letter reading as follows:

Hartford, Conn., Jan. 29th., 1907.

To the Minister of Agriculture,
Ottawa, Canada.

Trade-mark.

Dear Sir:

This is to advise you that we have no objection to the Canadian Billings & Spencer, Limited, registering in Canada the trademark used by this Company in our business, and as shewn by the above letterhead.

Yours respectfully,
The Billings & Spencer Company,
F. C. Billings, V.P. & Supt.

Patent and Copyright Office,
(Copyright and Trade Mark Branch)
Ottawa, Canada, this 6th day of January, A.D. 1921.

Attested,
Geo. F. O'Halloran,
Commissioner of Patents.

This document does not bear the seal of the company, and the vice-president and superintendent who signs it, does not shew any

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Ex. C.

THE BILLINGS AND SPENCER CO. v. CANADIAN BILLINGS AND SPENCER LTD. AND CANADIAN FOUNDRIES AND FORGINGS LTD.

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authority of the company by resolution to F. C. Billings to make this waiver of objection to the defendant company's registration of the mark in dispute. This officer, assuming to represent the American company, was also receiving, as a bonus, a number of shares in the Canadian company. This placed him in the equivocal position of having to decide between his duty and his interest. This document is no more formal than any letter which an officer of the company might have written to a customer relating to the sale or purchase of goods manufactured by the company.

The rights and powers exercisable by the executive officers and servants of a company would appear to end where the exclusive rights and powers of the company, as a corporate body, begin, which are only exercisable by by-laws and resolution.

The officers of a company may extend their bounty and benevolence only to the extent authorised by the nature of their mandate as such officers; they cannot bind the company by anything done in excess of their express or reasonably implied powers. They cannot bind the company by their personal act in a matter where the company, as a corporate body, can alone speak—that is to say, by by-laws and resolutions. In this view it would be idle to contend that an officer of a company—(a vice-president in the present case)—could *ex mero motu* and without a resolution and a document of transfer under the seal of the company sell the company's trademark and goodwill.

However, it is not necessary, in respect of the letter of consent, (Ex. B) to do more than repeat what witness Ritchie—heard on behalf of the objecting parties—said at the trial, that he would have registered the trademark without that letter. The letter was not necessary since the applicants asserted "the trademark was theirs on account of having been first to make use of same." That last allegation was in compliance with the requirements of the law. The letter had nothing to do with the registration.

The Canadian Trade Mark Act, R.S.C. (1906), ch. 71, does not contain a definition of trademarks capable of registration, but provides by sec. 11, that the registration of a trademark may be refused if the so-called trademark does not contain the essentials necessary to constitute a trademark properly speaking. *The Standard Ideal Co.* v. *The Standard Sanitary Mnfg. Co.*, [1911] A.C. 78, C.R. [1911] 1 A.C. 259. This same sec. 11 further

provides, that the applicant should be undoubtedly entitled to the exclusive use of the trademark: *Rogers' Trade-Mark* (1895), 12 R.P.C. 149; *Bush Mnfg. Co.* (1888), 2 Can. Ex. 557.

Section 13 of the Act provides that the applicant may have his trademark registered upon forwarding a declaration that it was not in use to his "knowledge by any person than himself at the time of his adoption thereof."

Then sec. 42 (R.S.C. 1906, ch. 71) provides, among other things, for expunging, at the suit of any aggrieved person, the entry of any trademark, on the register, *without sufficient cause.*

It was alleged at Bar that the petitioners were not persons aggrieved. With that view I cannot agree. The petitioners had been using their trademark both in Canada and the United States for a great many years, to distinguish their goods; and if such registration is allowed to stand the Canadian company would be the ostensible owners of the mark with the right to the exclusive use of the same. Surely the petitioners under such circumstances would be "persons aggrieved." That is the conclusion at which I have arrived, and I think my conclusion is in conformity with the following decisions of *Baker* v. *Rawson* (1890), 8 R.P.C. 89; *The Autosales Gum & Chocolate Co.* (1913), 14 Can. Ex. 302; *In re Registered Trade-Marks of John Batt & Co.*, [1898] 2 Ch. 432.

Now, whatever may be said upon numerous other questions raised at Bar, I have come to the conclusion that when the Canadian Billings & Spencer Co., Ltd., filed their application for registration, they were guilty of making a misrepresentation of fact when they stated to the Minister of Agriculture that "they verily believed that the mark was their own on account of having been first to make use of same." It is inconceivable that anyone knew better than they did that such a statement was untrue, because they were in the most intimate relations with the petitioners during the considerable period that the mark had been used both in Canada and the United States by the petitioners. *Smith* v. *Fair* (1887), 14 O.R. 729. The very document with which they accompanied their application (Ex. B) is cogent proof of this.

They obtained the registration of this trademark through false statements and misrepresentation. Their conduct in doing so was most reprehensible and all arguments at Bar invoking equity cannot avail, because he who seeks equity must come into Court with clean hands.

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EX. C.

THE BILLINGS AND SPENCER CO. v. CANADIAN BILLINGS AND SPENCER LTD. AND CANADIAN FOUNDRIES AND FORGINGS LTD.

Audette, J.

Whatever might have been the demerits of the applicants, the Court in a matter of this kind where the interests of trade, public order, and the purity of the register of trademarks are concerned, should always exercise its discretion to order the removal from the register of the entry made "without sufficient cause." *Bucyrus Co.* v. *Canada Foundry Co.* (1912), 8 D.L.R. 920, 14 Can. Ex. 35; affirmed (1913), 10 D.L.R. 513, 47 Can. S.C.R. 484; *The Leather Cloth Co. Ltd.* v. *The American Leather Cloth Co. Ltd.* (1865), 11 H.L. Cas. 523, 11 E.R. 1435; *Re the Apollinaris Co's Trade-Marks* (1890), 8 R.P.C. 137, Kerly's Law of Trade-Marks, 4th ed., pp. 318, 320, Sebastian's Law of Trade Marks, 5th ed., pp. 236, 403, 520, 600.

Having come to the conclusion that the discretion of the Court should be exercised in the manner above set forth which gives effect to the statutory requirement of ownership as an indispensable condition of the right to register, it becomes unnecessary to labour many questions raised at Bar, and such as to whether or not the fact of this mark having been used in Canada by both parties, to their respective knowledge, did not thereby dedicate the trade-mark to the public, 5 *Official Gazette*, U.S. 337-338.

There will be judgment ordering to expunge from the Canadian Register the trademark in question registered by the Canadian Billings & Spencer Co., Ltd., on February 27, 1907, under No. 48, folio 11715—the whole with costs.

Judgment accordingly.

Annotation.

ANNOTATION.

TRADEMARK—PERSON AGGRIEVED.

by

Russel S. Smart, B.A., M.E., of the Ottawa Bar.

The term "person aggrieved" has been discussed at length in many English cases. (See Kerly on Law of Trade Marks, 4th ed., p. 313, and Sebastian's Law of Trade Marks, 5th ed., p. 621). In one leading case, *In re Apollinaris*, [1891] 2 Ch. 186, at pp. 224 & 225, the matter is put as follows: "The question is merely one of *locus standi*. . . . Whenever one trader, by means of his wrongly registered trademark narrows the area of business open to his rivals, and thereby either immediately excludes or, with reasonable probability, will in the future exclude, a rival from a portion of that trade into which he desires to enter, that rival is an 'aggrieved person'."

In another leading case, *Re Powell's Trade Mark* (1893), 10 R.P.C. 195; 11 R.P.C. 4, Lord Herschell said, 11 R.P.C. at p. 7: "Wherever it can be shewn, as here, that the Applicant is in the same trade as the person who has registered the Trade Mark, and wherever the Trade Mark, if remaining on the Register, would, or might limit the legal rights of the Applicant, so that,

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by reason of the existence of the entry on the Register, he could not lawfully do that which but for the existence of the mark upon the Register, he could lawfully do, it appears to me he has a *locus standi* to be heard as a person aggrieved. *A person who has before registration used the registered trade mark is a 'person aggrieved.'*"

See also *Re Zonophone Trade-Mark* (1903), 20 R.P.C. 450.

In the leading Canadian case, *Re Vulcan Trade-Mark* (1915), 24 D.L.R. 621, 51 Can. S.C.R. 411, affirming (1914), 22 D.L.R. 214, 15 Can. Ex. 265, Davies, J., said, 24 D.L.R. at p. 623: "Any person aggrieved, used in both statutes, embrace any one who may possibly be injured by the continuance of the mark on the register in the form and to the extent it is so registered."

See also *Autosales Gum & Chocolate Co.* (1913), 14 Can. Ex. 302; *Bowker Fertilizer Co.* v. *Gunns Ltd.* (1916), 27 D.L.R. 469, 16 Can. Ex. 520.

RIGHTS TO A TRADEMARK BETWEEN MANUFACTURING AND SELLING AGENT:

In the leading case of *The Leather Cloth Co. Ltd.* v. *The American Leather Cloth Co. Ltd.* (1863), 4 DeG. J. & S. 137, 46 E.R. 868; (1865), 11 H.L. Cas. 523, 11 E.R. 1435, an English company purchased the business of an American company and used the trademark. Wood, V.-C., granted injunction, Westbury, L.C., reversed the decision, and this reversal was confirmed by the House of Lords. Westbury, L.C., delivering the judgment, said (4 DeG. J. & S. at pp. 143, 144 (46 E.R. at p. 871): "But suppose an individual or a firm to have gained credit for a particular manufacture . . . (there being no secret process or invention), could such person or firm on ceasing to carry on business sell and assign the right to use such name and mark . . .? Suppose a firm of A. B. & Co. to have been clothiers, in Wiltshire for fifty years . . . and that on discontinuing business, [they] sell and transfer the right to use their name and mark to a firm of C. D. & Co., who are clothiers in Yorkshire, would the latter be protected by a Court of Equity in their claim to an exclusive right to use the name and mark of A. B. & Co. I am of opinion that no such protection ought to be given. . . . To sell an article stamped with a false statement is *pro tanto* an imposition on the public, and, therefore, in the case supposed the Plaintiff and Defendant would be both *in pari delicto*. This is consistent with many decided cases."

In another leading case of *Re Magnolia Metals Co.'s Trade Marks* (1897), 14 R.P.C. 621, the Court dealt with an agency contract from an American firm to a firm in Great Britain. The business in America was assigned. The question was whether the trademark in Great Britain for the manufactured goods, which were bearings, was transferred when the practice was for the British agent to import the metal in bulk and make the bearings in Great Britain. The judgment, at p. 630, read:—

"But, under each agreement, the agents were in important respects, and particularly with respect to trade marks, really, and in law agents for the American company, and the American company, whilst reserving to themselves all rights in the trade marks, also bargained for an interest in the nature of a reversion in the business that was being built up under a name founded upon their own, and used by their agents because they were agents for them. . . . That the American company did indirectly, during the existence of the agreements referred to, by means of an English partnership trading under their authority, procure the bearings to be made, and had a clear commercial

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interest in their being made, and that they reserved a right in the nature of a reversion in the goodwill of the business so being carried on, the question should, in our judgment, be answered in the affirmative" (*i.e.*, whether business transferred was concerned with metal bearings).

The registration by a foreign importer of the trademark of a foreign producer has been held bad. *Re the Apollinaris Co.'s Trade-Marks* (1890), 8 R.P.C. 137; *Apollinaris Co.* v. *Snook* (1891), 8 R.P.C. 166.

An American trade mark registered by the importer of the goods in England without the consent of the owner of the American mark was struck off the register on the application of the successor of the American owner. *Re The European Blair Camera Co.'s Trade Mark* (1896), 13 R.P.C. 600.

The sole wholesale agents of foreign manufacturers of goods were held to have no right of action for "passing off," the get-up of the goods not being associated with themselves: *Dental Mnfg. Co.* v. *C. de Trey & Co.* (1912), 29 R.P.C. 617.

In Canada, a case of agency relation was dealt with in *Canada Foundry Co.* v. *Bucyrus Co.* (1913), 10 D.L.R. 513, 47 Can. S.C.R. 484.

The judgment of the Supreme Court, 10 D.L.R. at p. 516, reads in part: "To refuse to expunge from the register the trade mark 'Canadian Bucyrus' would be to encourage unfair dealing. The object of a trademark 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."

The above case had to do with the Bucyrus Company who manufactured steam shovels, etc., and who, for a number of years, had an agency agreement with Canada Foundry Co. Ltd., which was finally terminated, and after termination the Canada Foundry Co. Ltd. registered the trademark "Canadian Bucyrus," which was later expunged on petition of the Bucyrus Company.

In the Canadian case of *Gramm Motor Truck Co.* v. *Fisher Motor Co.* (1913), 17 D.L.R. 745, the right of the Canadian company to the word "Gramm" as applied to motor trucks was supported against the American company who were successors of the originator of the truck.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland and Masten, JJ. December 20, 1920.

INSURANCE (§ III E—115)—APPLICATION FOR—REPRESENTATIONS AS TO HEALTH—FRAUDULENT—MATERIALITY—FINDINGS OF JURY—UNREASONABLE, PERVERSE—SETTING ASIDE—JUDICATURE ACT, SEC. 27—DISMISSAL OF ACTION BY APPELLATE COURT.

An applicant for life insurance in his medical examination answered questions put to him as to ailments or diseases by saying that he had never suffered from any one of a number set out. To the question, "Have you consulted a physician for any ailment or disease not included in your above answers?" he answered, "No;" and to the question, "What physician or physicians, if any, not named above, have you consulted, or been treated by, within the last five years, and for what illness or ailment?" he answered, "None." The Court held that as these answers

were known by the applicant at the time of making the application to be false, he having been admitted to a hospital suffering from acute nephrosis and undergoing treatment for nearly a month, only a short time before making the application, and the answers being made with the intention that they should be acted upon, and forming part of the application. The finding of a jury that the answers were not material and that there was no fraud, was unreasonable, perverse and unsatisfactory, and should be set aside, and that under sec. 27 of the Judicature Act, the Court should deal finally with the matter and dismiss the action brought by the beneficiary to recover under the policy, and not direct a new trial.

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APPEAL by defendant from a judgment of Orde, J., with a jury awarding plaintiff the amount payable on life insurance policy. Reversed.

Statement.

The facts of the case are as follows:

The plaintiff is the beneficiary named in a policy of insurance for $3,000 issued by the defendant company, bearing date the 19th April, 1917, on the life of one Joseph Selick, who died on the 30th March, 1918. By their amended statement of defence the defendants admitted that the plaintiff would be entitled to recover the sum of $3,000 and interest, as claimed in the statement of claim, but for certain written representations in the application for insurance, dated the 20th April, 1917, and signed by the insured, which representations the defendants allege to be false and fraudulent. These representations were made by the assured in the presence of the medical examiner of the defendant company, in answer to questions 8 and 9 then propounded to him, and are as follows:—

"Ques. 8. Have you ever suffered from any ailment or disease of:—

"(a) The brain or nervous system? No.

"(b) The heart or lungs? No.

"(c) The stomach or intestines, liver, kidneys, or bladder? No.

"(d) The skin, middle ear, or eyes? No.

"(e) Have you ever had rheumatism, gout, or syphilis? No.

"(f) Have you ever raised or spat blood? (If so give full details.) No.

"(g) Have you ever had any accident or injury? No.

"(h) Have you consulted a physician for any ailment or disease not included in your above answers? No.

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"Ques. 9. What physician or physicians, if any not named above, have you consulted, or been treated by, within the last five years, and for what illness or ailment? None."

At the trial the defendants contended that, upon the admissions contained in the pleadings, the onus was upon them and that they had the right to begin, and the trial Judge ruled in their favour. At the close of the defendants' evidence, counsel for the plaintiff elected to call no evidence, and the case was submitted to the jury on the admissions in the pleadings and the evidence adduced by the defendants.

It appears from the evidence that on the 10th March, 1917, the deceased, suffering from acute nephrosis, with a temperature as high as 103°, was admitted to the Toronto General Hospital, where he received treatment until the 15th March, when he was discharged in an improved condition. The application for insurance is dated the 19th April, 1917, and the medical examination in support of the application is dated the 21st April, 1917—36 days after his discharge from the hospital.

The questions submitted to the jury and their answers are as follows:—

"1. Did Joseph Selick, in connection with his application for insurance, answer 'No' to the following question: 'Have you consulted a physician for any ailment or disease not included in your above answers?' A. Yes.

"2. If so, (a) Was such answer untrue? A. Yes.

"(b) Was it acted upon by the insurance company? A. Yes.

"(c) Was it material? A. No.

"3. Did Joseph Selick, in connection with his application for insurance, answer 'None' to the following question: 'What physician or physicians, if any not named above, have you consulted, or been treated by, within the last five years, and for what illness or ailment?' A. Yes.

"4. If so, (a) Was such answer untrue? A. Yes.

"(b) Was it acted upon by the insurance company? A. Yes.

"(c) Was it material? A. No.

"5. Was Joseph Selick guilty of fraud in answering the above mentioned questions in the way he did? A. No."

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On these findings judgment has been entered for the plaintiff.

The defendants appeal and ask that this judgment should be reversed and judgment pronounced dismissing the action.

D. L. McCarthy, K.C. and *D. B. Sinclair*, for appellants.

T. H. Lennox, K.C., and *R. Lieberman*, for pliantiff.

The judgment of the Court was delivered by

MASTEN, J.:—Before this Court counsel for the defendants, the appellants, urged that they had established a *primâ facie* defence which remained unanswered; that the answers of the jury to questions 2 (c) and 4 (c) were perverse and should be set aside, and that the answers (a) and (b) to questions 2 and 4 establish the materiality of the representations without more; that these same answers establish fraud on the part of the assured; and that the answer to question 5 is also perverse, and should be set aside.

The appellants invoke the provisions of sec. 27 of the Judicature Act, which provides that "the Court shall have power to draw inferences of fact not inconsistent with any finding of the jury which is not set aside, and if satisfied that there are, before the Court, all the materials necessary for finally determining the matters in controversy or any of them or for awarding any relief sought, the Court may give judgment accordingly."

I deal first with the law applicable to this case.

In the Supreme Court of Canada, in the case of *Nova Scotia Marine Insurance Co.* v. *Stevenson* (1894), 23 Can. S.C.R. 137, at p. 141, Mr. Justice King, delivering the judgment of the Court, said: "Then as to the effect of the misrepresentation. If made with intent to deceive the misrepresentation vitiates the policy however trivial or immaterial to the nature of the risk. If honestly made it vitiates only if material and if substantially incorrect."

By sec. 156 of the Ontario Insurance Act, R.S.O. 1914, ch. 183, this principle, so far as it relates to contracts of insurance, is modified, and in every case, whether the misrepresentation is innocent or fraudulent, such misrepresentation must be material in order to avoid the contract: *Dillon* v. *Mutual Reserve Fund Life Association* (1904), 4 O.W.R. 351, at p. 354.

As materiality is a question of fact, it is of little use to refer to the cases, for every case depends on its own particular facts.

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None the less, certain general rules have been declared by eminent Judges, which assist in determining the considerations essential to materiality.

Inducement in fact and materiality (a tendency to induce) are wholly distinct and separate matters, and it is necessary to establish both: *Smith* v. *Chadwick* (1884), 9 App. Cas. 187. At p. 190 Lord Selborne says: "He must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct."

"The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter in weighing the risk and considering the premium: *per* King, J., delivering the judgment of the Court, in *Nova Scotia Marine Insurance Co.* v. *Stevenson*, 23 Can. S.C.R. 137, at p. 141.

In *Smith* v. *Chadwick* (1882), 20 Ch.D. 27, at p. 44, Jessel, M.R., says: "Again, on the question of the materiality of the statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may shew that in fact he did not so act in one of two ways, either by shewing that he knew the truth before he entered into the contract, and therefore could not rely on the misstatements; or else by shewing that he avowedly did not rely upon them, whether he knew the facts or not."

This language was quoted with approval by Lord Halsbury, L.C., in *Arnison* v. *Smith* (1889), 41 Ch.D. 348, at p. 369.

William Pickersgill & Sons Limited v. *London and Provincial Marine and General Insurance Co. Limited*, [1912] 3 K.B. 614, was an action on a marine policy, tried by Hamilton, J., without a jury. At p. 619 he says: "The principle is that the underwriter must have the opportunity of deciding for himself whether the knowledge of the material fact shall in fact influence him or not, and I am clear that the underwriter in question was entitled to have the fact disclosed to him."

In *Traill* v. *Baring* (1864), 4 DeG. J. & S. 318, 46 E.R. 941, Turner, L.J., says at p. 330: "It is impossible to say what course the plaintiffs would have pursued—whether they would or would not have accepted the policy. They might have done so: but it is equally clear that they might not; and we cannot say whether they would or would not: but it was to them the communication should have been made, in order that they might exercise their option upon the subject."

In the recent case of *Yorke* v. *Yorkshire Insurance Co. Limited*, [1918] 1 K.B. 662, the application for insurance contained (*inter alia*) the following question, "What illnesses have you suffered?" Ans. "None of consequence." Among the questions left to the jury was the following: "Had Smith suffered from any illness of consequence prior to December 12, 1916?" (the date of the application) Ans. "Yes, in 1911." Though all the other answers of the jury were in favour of the insured, yet on this answer alone judgment was rendered by the Court in favour of the defendants. The question of materiality was not specifically raised.

In *Smith* v. *Grand Orange Lodge* (1903), 6 O.L.R. 588, Ferguson, J., at p. 590, holds that a false statement as to whether the insured had, during the prior 6 years, consulted a physician, was material.

The case of *London Assurance* v. *Mansel* (1879), 11 Ch.D. 363, though turning on a different answer, throws light on the general principle. The head-note reads as follows: "In a proposal by M. to an assurance office for an assurance on his life, in answer to the question, 'Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?" his answer was, 'Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.' The proposal was accepted, but the office having subsequently ascertained that the life of M. had been declined by several offices: *Held*, that there had been a material concealment, and that the office was entitled to have the contract set aside." At. p. 370, the Master of the Rolls says: "The question is whether this is a material fact? I should say, no human being acquainted with the practice of companies or of insurance societies or underwriters could doubt for a moment that it is a fact of great materiality, a fact upon which the offices place great reliance. They always want to

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know what other offices have done with respect to the lives." And at p. 371: "Now, to suppose that any one who knows anything about life insurance, that any decent special juryman could for a moment hesitate as to the proper answer to be given to the inquiry, when you go to the insurance office and ask for an insurance on your life, ought you to tell them that your proposals had been declined by five other assurance offices? is, I say, quite out of the question. There can be but one answer—that a man is bound to say, 'My proposals have been declined by five other offices. I will give you the reasons, and shew you that it does not affect my life' . . . There can be no doubt, as a proposition to be decided by a jury, that such a circumstance is material . . . Now where it" (the representation) "is to form the basis of the contract it is material, because, as was held in a case in the House of Lords of *Anderson* v. *Fitzgerald* (1853), 4 H.L. Cas. 484, 10 E.R. 551, where it is part of the contract, the other side cannot say it is not material. So here we have the proposal as the basis of the contract. It is impossible for the assured to say that the question asked is not a material question to be answered, and that the fact which the answer would bring out is not a material fact."

Now, applying these principles to the facts of the present case, the jury have found that the answers of the insured were false representations of fact, and that the defendant company acted on them.

It is manifest, without any specific finding, that the answers of the assured, forming, as they do, part of the application for insurance, were made with the intention that they should be acted on by the defendant company, and it is also clear that the assured, at the time he made these answers, knew them to be untrue. But the jury have found that these representations were not material, and have negatived fraud.

Are the answers of the jury to those questions reasonable or are they unreasonable and perverse?

That necessitates an ascertainment of the facts by a consideration of the evidence.

Dr. Moore, the local physician who examined Selick, gave evidence at the trial as follows:—

"Q. Will you tell me what is the significance or the necessity

for the answers made to you as medical examiner? A. In endeavouring to find if the man is in good health.

"Q. That is prior to your examination? A. Yes.

"Q. (by Mr. McCarthy, for the defendants): What is the object in getting that information? A. To see if the man is a fit subject for insurance.

"Q. What is the object in obtaining that information, being as specific as you can? A. To find out if he has or has had illness that might be detrimental or otherwise to the risk.

"Q. Take the answer to the question 'Have you ever suffered from any ailment or disease of the stomach or intestines, liver, kidneys, or bladder?' . . . I see he answers 'no' to that question. A. Yes.

"Q. Please explain, supposing he had answered 'yes?' A. I go into the symptoms of the case, whichever one it was; if it were the stomach, I would ask him the symptoms that he had complained of, and I would form my opinion; and I would send my report to the home office, with probably a confidential letter as to the condition I find.

"Q. What is the effect of the answer 'no' to a question of that kind? A. I presume he has never any had illness regarding the questions that he answers 'no' to.

"Q. Take the last question, 'Have you consulted a physician for any ailment or disease not included in your above answers' —what is the object of that question? A. The object is to find from asking him if there has been any illness that he has had, and he answers 'no.'

"Q. Supposing he answered 'Yes?' A. I ask him what it is, the symptoms or the nature of it, how long he was ill, who attended him.

"Q. You know that question also asks, 'Have you been attended by any physician?' A. Yes.

"Q. What does that imply? A. It implies that he has not had any illness.

"Q. What is the object in asking whether he has ever been attended by a physician? A. To see if there has been any sickness he has had: he would not consult a physician if he were not sick.

"Q. If he answers 'yes' to that question? A. I would ask

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who it was, who the physician was that attended him, and what the nature of the trouble was, and how long he was sick, and if he had any complications with it, and what the result was.

"Q. That, as you have indicated, is the object of getting the answers to these questions? A. Yes.

"Q. To what extent do you rely on his answers to these questions in recommending or refusing the risk? A. I do not have the recommending or refusal of the risk; I simply send the report to the home office.

"Q. What effect have these answers here on your further investigations into the case and your report? A. If there is anything special about it, they may write me to see the applicant a second time with regard to any special information that they may have received.

"His Lordship: I do not think that is the question Mr. McCarthy asked you. What do you do yourself if the answers are 'yes,' what further do you do in the way of any investigation? A. I endeavour to find out what the condition of his trouble was, ask from him the symptoms that he had, how long he was ill, the severity of it, and, if necessary, I would communicate with the physician who attended him.

"Q. Does it occur to you the fact that a man had never had a doctor in his life would make it a better risk or a poorer risk? A. It would make a better risk.

"Q. That is what I have been asking, what effect has that on your report? A. It would make him a good risk, as I say: I would report such."

In re-examination, Dr. Moore said:—

"Q. My friend said if he had given you the name of Dr. Solway and you had gone to Dr. Solway and found out the history of the man's treatment a month before in the General Hospital, what would you have done? A. I would have taken his report and incorporated it in the examination and forwarded it to the home office, Dr. Solway's report to me, and I would forward that with the examination to the home office.

"Q. From your point of view as a medical officer of the company, is the 'yes' or 'no' to these questions asked, having consulted a physician, of any importance? A. Yes, I deem it so, yes.

"Q. For what reason? A. If there has been any illness he would

have consulted a physician and we would find from the physician what the illness had been.

"Q. And might possibly pursue a further investigation? A. Yes.

"Q. As a result of that, would it be within the practice of the company not only to make further inquiries as to what that illness was, but to make a further and exhaustive physical examination of the man himself? A. Yes."

Dr. Shuttleworth, the surgeon who operated on the deceased, on the 21st March, 1918, shortly prior to his death, deposes:—

"Q. My friend just called your attention to your previous evidence in which you say you were conversant with the details as disclosed in the papers from the hospital records, at the time of the operation; you looked up the clinical records; do the clinical records indicate anything to you? A. They do.

"Q. What? A. In the clinical reports of this man's former admission the diagnosis at that time was made of an acute nephrosis, and his condition when he left the hospital was improved; that means that he went out not in perfect health—he was improved, not cured. In the symptoms of his complaint, pain in the right loin, high up on right side, duration two weeks. The man was very ill at the time, and the house surgeon says, 'He appears sick, and he has tenderness over the right kidney.' Those are the clinical records—that his urinalysis shews abnormal condition, that he has albumen in his urine; there is high blood count; that means that he was suffering from acute inflammatory condition; microscopic examination of his urine was not made, so that it was impossible to say exactly what condition of his kidney was present. He was very acutely ill, as his temperature was ranging between 103 and 104, which is more than six degrees above normal, very ill, and it suddenly fell; on the second day after his admission it was nearly normal, and it was normal until on the day he left the hospital; and those facts were very significant and were of importance and of value to me in making the diagnosis in the condition for which he was admitted the second time.

"Q. What do you say as to the diagnosis which was made at the time, in view of subsequent events? A. The diagnosis of acute nephrosis, in view of events which happened a year later,

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would indicate to the surgeon what findings I had at the time of the operation, that this lesion had existed as far back as a year previous, when he was admitted to the hospital for symptoms that were very characteristic to me at that time of the lesions which I treated him for one year afterwards."

Dr. Fraser, the medical supervisor of the defendant company, identifies the application and attached papers, and says he considered and passed upon them for the defendant company; that he approved the granting of the policy after examination of those papers, believing the answers of the applicant to be true; that, if the statement had appeared that the deceased had been operated on at a hospital a year before the application, he would have rejected the application.

He also says that, acting on his approval of the application, the defendant company granted the policy.

The hospital records of the assured at the time of his visit to the hospital in March, 1917, form part of the evidence, and substantiate what has already appeared as to his condition.

In the case here in review, the following facts are established:—

(1) That the assured made two untrue representations which were false to his knowledge.

(2) The representations were made as part of the application for this insurance, and must be taken to have been made for the purpose of inducing the defendant company to assume the risk.

(3) We have direct and uncontradicted evidence that the answers complained of were (along with other answers) an inducing cause to the contract, and that if true answers had been given the risk would have been rejected.

(4) Adopting the words of the Master of the Rolls in *London Assurance* v. *Mansel:* "No human being acquainted with the practice of companies or of insurance societies or underwriters could doubt for a moment that the answers complained of relate to facts of great materiality."

Where, as here, the application incorporating the answers in question forms the basis of the contract, the other side cannot say that the facts which a true answer to these questions would bring out are not facts which the insurance company must have an opportunity of considering, in order to exercise their option to accept or refuse the risk, and are therefore material.

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For these reasons, I am of opinion that the findings of the jury that the answers were not material and that there was no fraud must be set aside as unsatisfactory.

The remaining question is, whether we should direct a new trial, or whether this Court should now deal finally with the matter, by dismissing the plaintiff's action.

Section 27 of our Judicature Act corresponds with Order 58, Rule 4, of the English Act; and, though apparently it is somewhat more limited in its application than the English Rule, I think that the recent English authorities are applicable to the circumstances here existing. I refer to *Skeate* v. *Slaters Limited*, [1914] 2 K.B. 429; *Cooke* v. *T. Wilson Sons & Co. Limited* (1915), 85 L.J. (K.B.) 888; and *Winterbotham Gurney & Co.* v. *Sibthorp and Cox*, [1918] 1 K.B. 625. The effect of those cases is, I think, correctly summarised in The Annual Practice (1920), p. 1091, as follows:—

"Where all the facts are before the Court, and the Court is satisfied that the evidence is such that only one possible verdict could be reasonably given, the Court is not bound to order a new trial, but has jurisdiction under this Rule, and ought to exercise it, by directing judgment to be entered . . . for defendant on the ground that there was no evidence on which jury could find for plaintiff. . . . But such power is only to be exercised where the evidence is so weak that a verdict contrary to the judgment would be set aside as unreasonable."

In the present case, counsel for the plaintiff declined to call evidence in answer to that adduced by the defendants. In so doing, he no doubt acted with judgment. I do not, myself, see what evidence he could have called to negative either inducement or materiality in these representations. The representations are in writing, signed by the assured. The evidence of the witnesses Moore and Fraser regarding their own acts could not be effectively controverted by any witness whom the plaintiff could call, and it thus only remained to deduce the proper inference from undisputed facts. As was said by Lopes, L.J., in *Allcock* v. *Hall*, [1891] 1 Q.B. 444, at p. 447, "I am satisfied that if the case were sent to a new trial, no fresh evidence could usefully be given on behalf of the plaintiffs," and we have all the materials before the Court to enable it to deal finally with the case; and, accordingly, I would dismiss the plaintiff's action with costs.

Appeal allowed.

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Manitoba Court of Appeal, Perdue, C.J.M., Fullerton, and Dennistoun, JJ.A. February 8, 1921.

CARRIERS (§ II M—310)—MANITOBA RAILWAY ACT—LIMITATION OF TIME FOR BRINGING ACTIONS—CONSTRUCTION OR OPERATION OF RAILWAY—ACTION FOR DAMAGES FOR BREACH OF CARRIER'S CONTRACT—LIMITATION NOT APPLICABLE.

Section 106 of the Manitoba Railway Act, R.S.M., 1913, ch. 168, which limits the time for bringing action for damages for injuries sustained "by reason of the construction or operation of the railway" does not apply to actions arising out of breach of a street railway company's contract to carry a passenger safely, and an action based on such carrier's contract is not barred by the statute.

[Review of authorities.]

Statement.

APPEAL by plaintiff from the trial judgment in an action for damages received in a street car collision. Reversed.

A. E. Hoskin, K.C., for appellant; *R. D. Guy*, for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—This action is brought by Laura Aitken, a married woman, to recover damages from the defendant for injuries caused to her by the negligence of the defendant. The plaintiff at the time she sustained the injuries was travelling in one of the defendant's cars and had paid her fare as a passenger. The car had come to a standstill for the purpose of allowing passengers to leave it and the plaintiff was at the time of the accident passing into the vestibule for that purpose. At that moment the car was run into by another of defendant's cars, and the plaintiff was thrown down violently and injured. At the trial the jury found in favour of the plaintiff and assessed the damages at $2,000. The injury complained of was caused on February 6, 1919, and the action was commenced on February 11, 1920. More than a year, therefore, had elapsed between the time of the injury and the bringing of the action. The defendant amongst other defences pleaded that the plaintiff's action was barred by sec. 116 of the Manitoba Railway Act, R.S.M., 1913, ch. 168. They also pleaded "not guilty by statute," referring to the above Act and to their private Acts, 55 Vict. ch. 56, secs. 9, 12, 32, and 34, and 58 & 59 Vict. ch. 54, sec. 2. The question arising upon the statutory limitation of time for the bringing of an action was the only one argued on this appeal. Prendergast, J., held that the limitation applied and he dismissed the action.

By sec. 32 of the defendant's Act of incorporation, 55 Vict. ch. 56, the clauses of the Manitoba Railway Act are applied to the company. Sec. 116 of the last-mentioned Act is as follows:

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116. All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained or, if there be continuation of damages, then within twelve months next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

Prior to the year 1907 the above section was similar to the corresponding section in the Dominion Railway Act of 1888, ch. 29 of Dominion statutes, 1888, sec. 287, and did not contain the words "construction or operation of" in the second line; but in 1907 the section was amended and these words were placed where they are now found in it: see 6-7 Edw. VII. (Man.) ch. 36, sec. 3. The amendment was, no doubt, copied from the corresponding section of the Railway Act, 1903, 3 Edw. VII. (Can.) ch. 58, sec. 242, where the section in its present form first appears, and whence it has been carried into ch. 37 of the Revised Statutes of Canada, 1906, as part of sec. 306. Sec. 116 of the Manitoba statute was further amended in 1913 by changing the period of limitation from 6 to 12 months. It is to be noted, however, that although sub-sec. 3 of sec. 306 of the present Dominion Railway Act (excepting from its operation actions upon breach of contract, express or implied, for or relating to the carriage of traffic, *i.e.*, passengers or goods) had been in force in Dominion railway legislation since the year 1903, the Manitoba Legislature when amending their Act in 1907 omitted it completely.

A provision of a similar character to sec. 116 of the Manitoba statute has been contained in Canadian railway legislation for the past 70 years and has come up for interpretation in many cases and has given rise to considerable diversity of judicial opinion. A summary of these decisions is contained in Mac-Murchy & Denison's Canadian Railway Act, 2nd ed., pp. 512-518.

The decisions bearing upon the enactment in question from its earliest appearance down to the year 1905 were discussed in the learned and carefully considered judgment of the Ontario Court of Appeal delivered by Osler, J.A., in *Ryckman* v. *Hamilton, Grimsby, etc., E.R. Co.* (1905), 10 O.L.R. 419, which I shall discuss later on. The origin of the legislation and the earlier authorities interpreting it are discussed in *Kelly* v. *Ottawa Street R. Co.* (1879), 3 A.R. (Ont.) 616.

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From an early period it has been held that the limitation clause in the Railway Act does not apply to actions arising out of negligence in carrying passengers. This was so held in *Roberts* v. *Great Western R. Co.* (1856), 13 U.C.Q.B. 615. In that case Robinson, C.J., said, p. 616: "We are all of opinion that the . . . section . . . does not apply to an action of this nature but only to actions for damages occasioned by the company in the exercise of the powers given . . . for enabling them to construct and maintain their railway."

In *Auger* v. *Ontario, Simcoe and Huron R. Co.* (1859), 9 U.C.C.P. 164, Richards, J., giving the judgment of the Court, said that the Courts had repeatedly held that the limitation clauses do not apply where the companies are carrying on the business of common carriers.

In *May* v. *Ontario & Quebec R. Co.* (1885), 10 O.R. 70, Wilson, C.J., held on demurrer that the corresponding provision in the Consolidated Railway Act, 1879 (Can.), ch. 9, applied and barred the action of an employee who was being carried free of charge on defendants' railway when he received the injury through their alleged negligence. But in *Ryckman* v. *Hamilton, Grimsby, etc., E.R. Co.*, Osler, J.A., points out that this finding was not necessary for the decision of the case as it appeared from the statement of claim that the plaintiff had no cause of action, the negligence charged being that of a fellow servant. The *May* case stands alone as to the application of the limitation clause.

Section 116 of the Manitoba Railway Act has not been split up as the corresponding section of the Dominion Act was on the revision of 1906. Section 116 is contained in a single sentence and the two parts, separated only by a semi-colon, must be construed together. The first part of the section relates to suits "for indemnity for any damages or injury sustained by reason of the construction or operation of the railway." The latter part declares that "the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon."

The use of the word "thereupon" connects this part of the section with and applies it to the "suits" mentioned in the first line. Now the plea of "not guilty by statute" is applicable to actions for wrongs only and cannot be pleaded to actions on

contracts: Bullen & Leake's Precedents of Pleadings, 6th ed., 886-887; *Peterborough* v. *Midland R. Co., etc.* (1887), 12 P.R. (Ont.) 127; *Scottish Ontario and Manitoba Land Co.* v. *Toronto* (1896), 24 A.R. (Ont.) 208, at p. 217. Clearly therefore the section is intended to apply to suits for wrongs only and not to suits founded on contract express or implied. The last part of the section, "and may prove that the same was done in pursuance of and by authority of this Act and the special Act," enables the defendants to justify under statutory powers things done which would have been wrongful without the protection afforded by the statute.

I think that the Provincial Legislature, when they amended sec. 116 in the year 1907 and again in 1913 so as to make it conform with Dominion legislation on the same subject, did not insert any provision similar to sub-sec. 3 of sec. 306 of the Dominion Act, for the reason that sec. 116 of the Provincial Act provided no limitation of time for the bringing of suits upon any breach of contract, express or implied, relating to the carriage of passengers or goods, and the exception of suits upon contracts was not necessary. Further, the predominant weight of judicial authority was to this effect. Sub-sec. 3 above mentioned is declaratory of the interpretation already placed upon it by decisions of the Courts: *Roberts* v. *Great Western R. Co.*, 13 U.C.Q.B. 615; *Auger* v. *Ontario, etc., R. Co.*, 9 U.C.C.P. 164; *Anderson* v. *C.P.R.* (1889), 17 O.R. 747; affirmed (1890), 17 A.R. (Ont.) 480; *Carty* v. *London, etc., Street R. Co.* (1889), 18 O.R. 122.

Ryckman v. *Hamilton, Grimsby, etc., E.R. Co.*, 10 O.L.R. 419, was an action for damages for injuries sustained by the plaintiff while travelling on an unconditional free pass on the defendants' railway. It was sufficiently shewn that the accident was caused by the defendants' negligence. The action was commenced more than 6 months after the injury was caused. The limitation clause relied on provided that: "All actions for indemnity for damages or injury sustained by *reason of the railway* shall be instituted within six months next after the time of the supposed damage sustained . . . and the defendants, etc.," the rest of the clause being the same in effect as the latter part of sec. 116 of the Manitoba statute. Osler, J.A., delivering the judgment of the Ontario Court of Appeal, gave an exhaustive consideration of the decisions bearing on the subject. It was held

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that the limitation clause did not apply, because the action was based on defendants' common law duty as carriers. It was contended for the defendants in that case that the action did not arise out of contract but was one of tort and negligence of the defendants in running their cars, that it was sustained by the use made of the railway. To that contention Osler, J.A., answered at pp. 431-432:

> It may be conceded that the only consideration for the agreement of the defendants to carry the plaintiff was the trust and confidence she reposed in them when she entrusted herself to their care and that under the old system of pleading the declaration must have been framed *in case* as for a breach of duty and not in contract. But this, I think, can make no difference. Whether the party was a paying, or a gratuitous passenger the substance of the action is a tort for a misfeasance, an act of positive negligence on the defendants' part: *Taylor* v. *Manchester, Sheffield & Lincolnshire, etc. R. Co.*, [1895] 1 Q.B. 134, 138. Even when there was a contract of carriage the plaintiff might have declared simply as for a breach of duty to carry safely, and the application of the limitation clause cannot depend upon the form in which the plaintiff has chosen or been obliged to bring this action if the facts shew that it arises out of the defendants' breach of duty as carriers.

After referring to *Carpue* v. *London & Brighton R. Co.* (1844), 5 Q.B. 747, 114 E.R. 1431, Osler, J.A., proceeded:

> The decisions already referred to shew that the right of a passenger by the railway to be carried safely does not depend upon his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely. This is their common law duty founded on their undertaking in the case of the gratuitous passenger as well as the passenger by contract, and here the plaintiff's injury has arisen from the breach of it, or, as was said by the Court in *Carpue's* case, at p. 757, from "their misconduct as carriers, not as proprietors, though in considering the evidence it is impossible to exclude some reference to the actual state of the railway," or, as in the present case, to the management of the train. To such an action the limitation clause does not apply any more than it applies to a common law action for a tort like that of *Prendergast* v. *Grand Trunk R. Co.* (1866), 25 U.C.R. 193, and in thus holding I think we are not going counter to any decided case which was approved of either in *McCallum* v. *Grand Trunk R. Co.* (1871), 31 U.C.R. 527, or *Kelly* v. *Ottawa Street R. Co.*, 3 A.R. (Ont.), 616.

The *Ryckman* case was followed by the Court of Appeal for British Columbia in *Sayers* v. *B.C. Electric R. Co.* (1906), 12 B.C.R. 102. The defendants in that case had, as in the present case, wide powers of entering into traffic arrangements with other carriers and of supplying electricity. The limitation clause in the Act of incorporation in that case covered "any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company." The plaintiff was injured in stepping

off a movable platform, provided by defendants for the accommodation of passengers. It was held that the limitation did not apply, the case being based on the defendants' duty to carry the plaintiff safely. This decision was approved by Duff, J., in *B.C. Electric R. Co.* v. *Turner & Trawford* (1914), 18 D.L.R. 430, 49 Can. S.C.R. 470, 18 Can. Ry. Cas. 193. Anglin, J., in the same case, while expressing himself as "inclining very strongly to that view" (18 D.L.R. at 450), placed his conclusion on another ground.

In *Traill* v. *Niagara, etc., R. Co.* (1916), 33 D.L.R. 47, 38 O.L.R. 1, 21 Can. Ry. Cas. 165, the *Ryckman* case and the dictum of Duff, J., in *B.C. Elec. R. Co.* v. *Turner & Trawford* were approved by Boyd, C.

C.N.R. v. *Robinson*, [1911] A.C. 739, was an action by Robinson for damages for breach by the railway company of their statutory obligation in cutting off a spur line to his yard. The limitation clause (now sec. 306 of the Railway Act) was relied upon as a bar to the action. In giving the judgment of the Judicial Committee Lord Haldane made the following observations, at p. 745:

> If not barred by these special provisions it is common ground that the action is barred by no other statute of limitations. In the opinion of their Lordships the special provisions do not apply. They are confined to damages or injury sustained by reason of the construction or operation of the railway. The words of exception in the sub-section relate to carriage of traffic and to tolls, and do not require any construction which extends the meaning of the phrase "operation of the railway." Such operation seems to signify simply the process of working the railway as constructed.

It was argued by counsel for the defendant that although the plaintiff's cause of action is put in the form of breach of contract in the statement of claim, the cause of action is really in tort for negligence, and therefore the limitation in sec. 116 applies because the injury was sustained by reason of the operation of the road. The decision of the Court of Appeal in England in *Lyles* v. *Southend-on-Sea Corp.*, [1905] 2 K.B. 1, was relied upon as supporting that proposition. This point was considered and dealt with by Osler, J.A., in the *Ryckman* case, 10 O.L.R. 419, at 432-433.

He points out the distinction between things done by the defendants in the *Lyles* case where they acted as public authorities by virtue of an obligation specifically cast upon them by statute to perform certain public duties, of which carrying passengers was

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one, and things done by a defendant who is not compelled to act as a carrier, but has been enabled to so act and has elected to do so.

The *ratio decidendi* in *Lyles* v. *Southend-on-Sea Corp.*, *supra*, is not applicable to the present case. There the defendants were a municipal corporation who in their corporate capacity owned an electric tramway. They were compelled by law to provide such service of cars as might be reasonably required in the public interests. They were held, therefore, to be entitled to the protection afforded by the Public Authorities Protection Act, 1893, which limited the time within which an action might be brought. But it was pointed out by Vaughan Williams, L.J., citing *Palmer* v. *Grand Junction R. Co.* (1839), 4 M. & W. 749, 7 Dowl. 232, 1 H. & H. 489, 150 E.R. 1624, and *Carpue* v. *London & Brighton R. Co.*, 5 Q.B. 747, 114 E.R. 1431, that railway companies were not entitled to the statutory protection where actions were brought against them for failure in their duty as carriers, and their special Acts did not compel them to become carriers, but merely enabled them to become carriers, if and when they elected so to act. The principle governing the decision in the *Lyles* case [1905] 2 K.B. 1, is not applicable to this case.

The defendant is authorised by statute to act as carrier of passengers by means of conveyance other than, and in addition to, their railway. The defendant is permitted in certain cases to carry passengers by sleighs or busses drawn by horses. See clause 3, sub-clause (c) of Schedule "A" to defendants' Act of incorporation, 55 Vict., ch. 56 (Man.). The defendant is also empowered by the Act to engage in enterprises other than those of street railway proprietor and carrier of passengers and freight. It is given power to produce, sell, lease or dispose of electric light, heat and power (sec. 10). The company may acquire and operate gas works and acquire franchises or make running arrangements or amalgamate with persons or corporations having the right to construct or work street railways, gas or electric light plants (sec. 20). It has exercised these powers and, as well known, supplies electricity and gas to customers as a part of its activities and for its own profit. See *Winnipeg* v. *Winnipeg Electric R. Co.* (1910), 20 Man. L.R. 337, for a history of its amalgamations and undertakings.

By the interpretation clause of the Manitoba Railway Act,

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R.S.M. 1913, ch. 168, sec. 2, sub-sec. *i*, "the expression 'the railway' shall mean the railway and works by the special Act authorised to be constructed." Care must be exercised in applying sec. 116 of that Act to the defendant company and "the railway and works" authorised under its Act of incorporation.

I would allow the appeal, set aside the judgment entered and enter judgment for the plaintiff for $2,000 with costs in both Courts.

Fullerton, J.A.

FULLERTON, J.A. (dissenting):—This action is for personal injuries caused by the negligence of the defendant in the operation of its cars, and the only question in this appeal is whether or not the action is barred by sec. 116 of the Manitoba Railway Act, R.S.M., 1913, ch. 168, the action not having been brought within 12 months.

The section reads as follows: [See *ante*, p. 235].

Under sections somewhat differently worded the Courts of Appeal of British Columbia and Ontario have held that the limitation does not apply in the case of an action by a passenger.

The words in the British Columbia statute are "by reason of the tramway or railway, or the works or operations of the company."

In *Sayers* v. *B.C. Electric R. Co.*, 12 B.C.R. 102, the plaintiff was injured on defendant's tramway in Vancouver, in stepping off a movable platform provided by defendant for the accommodation of passengers transferring at one of the junctions. Duff, J., held that the section did not apply, following the rule laid down by the Common Pleas Division in *Anderson* v. *C.P.R. Co.*, 17 O.R. 747, at pp. 756-757:

> In the present case the defendants had entered into a contract with the plaintiff to carry her baggage safely as common carriers, and it was their duty to see that the railway was in a proper state. In the case cited the defendants were under no obligation to the plaintiff, apart from the public generally; and the clause in question has reference only to such an obligation, not to any special contract.

The judgment of Duff, J., was upheld on appeal.

In Ontario, Osler, J.A., delivering the judgment of the Court in the case of *Ryckman* v. *Hamilton, Grimsby, etc., E.R. Co.*, 10 O.L.R. 419, held that the limitation clause of the general Railway Act of Ontario, R.S.O., 1897, ch. 207, sec. 420, was not applicable

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to the case of a passenger injured while travelling on an unconditional pass because the action was based on the defendants' breach of their common law duty, founded on the undertaking to carry the passenger safely.

It will be observed that while the Courts in British Columbia held the section inapplicable because the action is based on breach of contract, the Courts in Ontario held the section inapplicable because the action is based on a breach of a common law duty.

The words of the Ontario statute are "by reason of the railway."

In his judgment Osler, J.A., admits that the limitation applies in the following cases: 1. Where the damage arises from the execution or neglect in the execution of the powers given to or assumed by the company for enabling them to construct and maintain their railway, as for example in actions for neglect to fence, for cutting timber on land adjoining the right-of-way and for allowing fire to escape. 2. Where in the course of managing the trains upon the railway and by neglect to give the proper signals a collision has occurred at a highway crossing and the plaintiff or his property has been injured. 3. Negligently killing horses which had escaped upon the railway track. 4. Negligently allowing dry wood to accumulate upon the railway which became ignited by fire dropped without negligence from the defendant's locomotive and the fire spread to the plaintiff's adjoining land. 5. Where plaintiff was injured by jumping into a drain to avoid collision with the defendant's car which was being carelessly driven by the place where he was working.

In answer to the contention of counsel for the defendants that the action did not arise out of a contract of carriage or out of contract at all; that the damage was caused by the mere tort and negligence of the defendants in running their cars, that it was sustained, in short, by the use made of the railway, Osler, J.A., admits that (at p. 431) "whether the party was a paying, or a gratuitous passenger the substance of the action is a tort for a misfeasance, an act of positive negligence on the defendants' part. *Taylor* v. *Manchester, Sheffield & Lincolnshire R.W. Co.*, [1895] 1 Q.B. 134, at p. 138," but holds that if the facts shew that the action arises out of the defendants' breach of duty as carriers the limitation does not apply.

He cites and apparently relies strongly on the case of *Carpue*

v. *London & Brighton R. Co.*, 5 Q.B. 747, 114 E.R. 1431. A careful perusal of that case will shew that it has little, if any, bearing. There the wording of the section was entirely different. It provided that no action or proceeding should be prosecuted against any person or corporation for "any thing done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities" given by it, without 20 days' notice in writing. It is quite clear that the phrase "damage or injury sustained by reason of the railway" may apply to many things which are not "done or omitted to be done in pursuance of the Act, etc."

In *Browne* v. *Brockville & Ottawa R. Co.* (1862), 20 U.C.Q.B. 202, which was an action for injury caused to the plaintiff by collision with the defendant's train at a railway crossing owing to neglect to sound the whistle and ring the bell the Court held that the injury, if arising from either cause alleged, was sustained "by reason of a railway."

Robinson, C.J., at p. 207, said:

> The omitting to give the proper signals of approach, that does not come expressly within the words of the clause, because it may be said that the damage was not sustained by reason of the railway, but rather, by reason of the manner in which the carriages on the railway were driven; but we think the substance and effect are the same in the one case as the other. "By reason of the railway" is a very comprehensive expression, and we think extends to an injury sustained on the railway by reason of the use made of it.

It appears to me that this is a reasonable and sensible interpretation to place upon the words there under consideration and the words in our own statute "by reason of the operation of the railway" lend strength to the placing of a similar construction on our own section.

I think the words last quoted include an injury sustained by a passenger by reason of the use made of the railway.

The cases in England hold that an action by a passenger for injuries sustained does not arise out of the contract of carriage but out of the duty which a railway owes to anyone lawfully riding on its cars, to exercise due care. *Kelly* v. *Metropolitan R. Co.*, [1895] 1 Q.B. 944. The Court of Appeal held in this case that an action brought by a passenger against the company for personal injuries caused by the negligence of the servants of the company is an action founded upon tort.

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Lord Esher, M.R., at p. 946, says:

The plaintiff must rely on and prove negligence, and whether that negligence is active or passive seems to me to be immaterial. Omission to do something which the defendants were bound to do, or an act of commission in doing something which they ought not to have done, may both be acts of negligence.

Taylor v. *Manchester, Sheffield & Lincolnshire R. Co.*, [1895] 1 Q.B. 134, is to the same effect.

Lindley, L.J., at pp. 138-139, says:

Contract or no contract, he could maintain an action for that. All that the plaintiff would have to prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case.

Smith, L.J., at p. 140, says:

The fact that the plaintiff happens to have a contract, that is to say, a ticket, is of use in such an action, it is true, for the purpose of shewing that the plaintiff was lawfully where he was when he sustained the injury; but proof of the fact can be given *aliunde*, and proof of a contract is by no means vital to success.

The contention that the action was one of tort and not of contract was evidently set up in the Court of Appeal in the British Columbia case of *Sayers* v. *B.C. Electric R. Co.*, *supra*. Martin, J., in his judgment refers to this contention and to the two English cases last cited (p. 110). These cases, he says, have to do with "the construction to be given to a section of the County Courts Act, and therefore much of the language has no general application and must be read as applicable to the particular facts."

The question and the only question before the Court in those cases was whether the actions were founded on contract or founded on tort. Both actions were brought by passengers for injuries sustained, and I can only deduce from the language of the judgments that the Courts there held that any action by a passenger for injuries sustained was an action founded on tort and not on contract.

Martin, J., further states, at p. 110, that "the remarks of Lord Justice Lindley and Lord Esher shew the two courses open to a passenger for reward," namely, to sue for a breach of contract or to sue in tort. Lord Esher, M.R., however, adds what to my mind makes all the difference, that "the question to be tried is the same in either case. The plaintiff must rely on and prove negligence . . ."

In the *Ryckman* case, 10 O.L.R. 419, as I have already pointed

out, Osler, J.A., regards the English cases referred to as holding that (at p. 431) "whether the party was a paying, or a gratuitous passenger the substance of the action is a tort for a misfeasance, an act of positive negligence on the defendants' part," and he further holds that, (at p. 432), "the application of the limitation clause cannot depend upon the form in which the plaintiff has chosen or been obliged to bring his action if the facts shew that it arises out of the defendants' breach of duty as carriers."

As I understand his judgment, Osler, J.A., holds that the limitation does not apply because the action is based on the defendants' breach of their common law duty to carry the plaintiff safely.

My difficulty is to understand the logical difference in principle between the duty owing by a railway to persons lawfully on their cars and the duty owing to others who may be injured by the negligent operation of their cars.

In *Browne* v. *Brockville & Ottawa R. Co.*, 20 U.C.Q.B. 202, owing to a neglect to sound the whistle or ring the bell the plaintiff was injured at a railway crossing.

In *Kelly* v. *Ottawa Street R. Co.*, 3 A.R. (Ont.) 616, the plaintiff was injured by jumping into a ditch to avoid collision with the defendant's car which was being carelessly driven by the place where he was working.

In both cases it was held that the injury was sustained "by reason of the railway."

In both last-mentioned cases the company owed the plaintiffs a duty not to injure them by the negligent operation of their trains. Wherein lies the distinction between the duty owed by the company to the plaintiffs in these cases and the duty owed to the passengers in the *Sayers* and *Ryckman* cases, *supra*? I confess I can see none. The injury in all 4 cases was caused by the negligent management of their trains. In the *Kelly* case the plaintiff was lawfully working near the railway. The defendants owed him a duty at common law to take due care in the operation of their train not to injure him. Defendant was guilty of a breach of this common law duty and the Court held that the injury was sustained "by reason of the railway." Why under these circumstances the statute should apply and not in the case of a person lawfully riding on the train I am unable to appreciate.

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Fullerton, J.A.

Attempts have been made by Judges to define the meaning of the latter part of the section under consideration and to determine what bearing or relation it has to the earlier words of the section.

Robinson, C.J., in *Roberts* v. *Great Western R. Co.* (1856), 13 U.C.Q.B. 615, at p. 616, says:

> We are all of opinion that the tenth section of 16 Vict., ch. 99, does not apply to an action of this nature, but only to actions for damages occasioned by the company in the exercise of powers given, or assumed by them to be given, for enabling them to construct and maintain their railway.

In *May* v. *Ontario & Quebec R. Co.*, 10 O.R. 70, where it was held that the section did apply in the case of a passenger, Wilson, C.J., expressed the view (at p. 77), that the language in question may mean and probably should be read as meaning, "in the course and prosecution of their business as a railway company constituted in pursuance of, etc."

In the *Ryckman* case, *supra*, Osler, J.A., says (at p. 428) that in his opinion the words "may prove that the same was done in pursuance of and by authority of this Act and 'the special Act' mean no more . . . than 'may prove that the damage or injury was sustained by reason of the railway' as in the earlier part of the section."

If we are to read the whole section together it cannot be said that the words "by reason of the railway" extend only to those acts "done in pursuance of and by the authority of this Act and the special Act."

Such a construction would render the section meaningless because the statute itself would be a complete answer to any claim for anything done "in pursuance and by the authority of this Act and the special Act."

It appears to me that the reasonable construction of the latter part of the section is the one suggested by Wilson, C.J., namely, "in the course and prosecution of their business as a railway company constituted in pursuance of, etc."

In *Greer* v. *C.P.R. Co.* (1914), 19 D.L.R. 135, at p. 137, 31 O.L.R. 419, Middleton, J., says:

> And it is clear that, as the statute is a complete answer to any claim with respect to anything done in pursuance and by the authority of the Act, this limitation must apply to actions in which the Act itself does not constitute a defence, and the difficulty has been occasioned by the attempt of the Court to read into the statute something which will give to this limitation some

meaning without going beyond what the statute really intends. . . . So long as there was, as the basis of the facts giving rise to the action, an intention to carry on the railway in good faith, the limitation was regarded as affording a qualified protection, even though there should be negligence which would destroy the protection otherwise afforded by the sanction of the Legislature to the undertaking.

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In *C.N.R. Co.* v. *Robinson*, [1911] A.C. 739, at p. 745, it is said in reference to the corresponding section of the Dominion Railway Act, R.S.C. 1906, ch. 37, that the limitation is confined to damages or injury sustained by reason of the construction or operation of the railway—such operation seems to signify simply the process of working the railway as constructed.

In *West* v. *Corbett, et al.* (1913), 12 D.L.R. 182, 47 Can. S.C.R. 596, 15 Can. Ry. Cas. 202, Davies, J., speaking of the section in the Dominion Railway Act, says, at p. 185 (12 D.L.R.): "In my opinion they refer to damages the result of negligence in the exercise of statutory powers given for the construction and operation of railways. For damages resulting from the exercise of such statutory powers without negligence no action at all would lie."

In *C.N.R. Co.* v. *Pszenicnzy* (1916), 32 D.L.R. 133, at p. 139, 54 Can. S.C.R. 36, 20 Can. Ry. Cas. 417, Anglin, J., said in reference to sub-sec. 1 of sec. 306 of the Dominion Railway Act: "That actions based on such negligence are within the protection afforded by sub-sec. 1 of sec. 306 has been held in several cases in this Court."

In my opinion the limitation clause in question here is a bar to the action and I would therefore dismiss the appeal.

Dennistoun, J.A.

DENNISTOUN, J.A.:—This action was tried before Prendergast, J., and a jury. The plaintiff sustained injuries by reason of a collision between two street cars on one of the main lines of the defendant company's street railway and the jury assessed her damages at $2,000. The trial Judge found that the action had not been commenced within 12 months from the happening of the accident and was barred by the provisions of the Manitoba Railway Act, R.S.M., 1913, ch. 168, sec. 116.

The plaintiff appeals.

The section of the statute upon which the appeal turns is as follows: [See *ante*, p. 235].

As a number of the cases which will be hereafter referred to are based upon the Dominion Railway Act, R.S.C., 1906, ch. 37,

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sec. 306, it is to be noted that the Manitoba section is almost identical with sub-secs. 1 and 2 of the Dominion section, the only real difference being that by the Dominion Act the provisions as to pleading and evidence are separated from the provision relating to prescription by paragraphs, while in the Manitoba Act they are separated by a semi-colon alone.

In my opinion nothing turns upon this, and I adopt the view of Osler, J.A., in *Ryckman* v. *Hamilton, Grimsby, etc., E.R. Co.*, 10 O.L.R. 419, at p. 428, that the words " 'may prove that the same was done in pursuance of and by authority of this Act and the special Act' mean no more than 'may prove that the damage or injury was sustained by reason of the construction or operation of the railway' as in the earlier part of the section."

It is, I think, clear upon the authorities that two forms of action were open to the plaintiff in this case. She has brought her action in contract alleging that she was a passenger for hire, that the defendant was a carrier, and that it failed in its duty to carry her safely.

Alternatively she might have sued in tort alleging injuries received through the negligence of the defendant's servants in the operation of the railway. This latter form of action must necessarily have been resorted to by injured persons who had no contractual relations with the defendant, but it was open to the plaintiff to make her election, and she has done so by invoking the well-established rules of the common law that the undertaking of a carrier of passengers is to take all due care, and to carry safely as far as reasonable care and forethought can attain that end. *Kelly* v. *Metropolitan R. Co.*, [1895] 1 Q.B. 944, at p. 946.

If the plaintiff had sued in tort she would no doubt have found her action barred by the statute, as she would in such case have relied upon the negligent operation of the railway as the foundation of her right to damages; but suing as she does for breach of the carrier's contract, the method of operating the railway arises only indirectly and not as the decisive factor in determining the liability.

There are cases in which a breach of the carrier's duty may be quite distinct from the operation of the railway, as in *Blain* v. *C.P.R. Co.* (1903), 5 O.L.R. 334, where one passenger assaulted another passenger and the company were held liable for their

breach of duty to use reasonable care and diligence in providing for the comfort and safety of the plaintiff passenger.

That being so I prefer to hold that when an action *ex contractu* may be maintained it is not barred by the limitation in question even though the right of action in tort is so inextricably intermingled with the action in contract as to become part and parcel of it.

To hold otherwise would impose the difficult and at times impossible duty upon the Court of determining which element, tort or contract, entered more largely into the plaintiff's right of action.

Lindley, L.J., said in *Taylor* v. *Manchester, Sheffield & Lincolnshire R. Co.*, [1895] 1 Q.B. 134, at p. 138:

> Every one who has studied the English law will know perfectly well that there is debateable ground between torts and contracts. There are what are called quasi-contracts and quasi-torts; and it is sometimes not easy to say whether a cause is founded on contract or on tort. Very often a cause of action may be treated either as a breach of contract or as a tort.

The Judge was there considering a question of costs, the quantum of which depended upon whether the action was founded on contract or tort and stated that he was obliged to find one way or the other there being no middle course, and he allowed costs on the scale most favourable to the successful party.

In the case at Bar the action in contract is the more favourable to the plaintiff. She has elected to take it and I am not disposed when two courses are open, to construe the limitation given by the statute for the protection of the railway company, a private corporation, so as to deprive the plaintiff of what in the absence of such a limitation would be her undoubted right.

I realise that the point is so narrow as to present considerable difficulty and it is only after much consideration and some vacillation that I have decided to base my judgment upon the reasoning adopted in British Columbia and Ontario cases which will be referred to. There does not appear to be any decision of the Supreme Court of Canada upon a statute in the exact form of the one under consideration, and in view of the differences which exist in the wording of the Provincial Acts upon which the decisions to be quoted are based, there is none which can be referred to as on all fours with the case at Bar.

The present form of the Dominion Act, R.S.C. 1903, ch. 37,

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and recent cases under it give little assistance, for by an amendment added to sec. 306 in 1903 it was expressly declared:

> 3. Nothing in this section, shall apply to any action brought against the company upon any breach of contract, express, or implied, for or relating to the carriage of any traffic, or to any action against the company for damages under the following provisions of this Act, respecting tolls.

By the interpretation clause, sec. 2, sub-sec. 31, "traffic" means the traffic of passengers as well as of goods.

By this amendment the Legislature has itself exempted from the limitation clause, actions brought against the company upon any breach of contract express or implied in respect to claims such as the one at Bar. *Traill* v. *Niagara, etc., R. Co.*, 33 D.L.R. 47, 38 O.L.R. 1, 21 Can. Ry. Cas. 165; *Greer* v. *C.P.R. Co.* (1914), 19 D.L.R. 135, at p. 136, 31 O.L.R. 419.

This sub-section was added to the Act in 1903, and no corresponding provision is to be found in the Manitoba Act, but in my opinion it made no change in the law, but was declaratory of the law as established by a long series of decisions beginning with *Roberts* v. *Great Western R. Co.*, 13 U.C.Q.B. 615, and *Auger* v. *Ontario Simcoe & Huron R. Co.*, 9 U.C.C.P. 164, which are collected and reviewed by Osler, J.A., in *Ryckman* v. *Hamilton, Grimsby, etc., E.R. Co.*, 10 O.L.R. 419.

In *C.N.R. Co.* v. *Anderson* (1911), 45 Can. S.C.R. 355, Idington, J., says, at pp. 368-369:

> The limitation of action contained in sec. 306 of the Railway Act certainly does not seem to have much to do with an action for negligence in operating long after construction of the railway, works in a sandpit. The only change made in amending the old Railway Act was to make the amended section conform to the usual interpretation the Courts had put upon that section.

The case of *Ryckman* v. *Hamilton, Grimsby, etc., E.R. Co.*, was decided by the Court of Appeal for Ontario. The plaintiff was travelling on a free pass when she received injuries through a head-on collision. The limitation clause under consideration was the Ontario general Railway Act, R.S.O., 1897, ch. 207, sec. 42, which had been incorporated into the defendant's special Act. It contains the words "by reason of the railway" where the Manitoba Act has "by reason of the construction or operation of the railway," and the Dominion Act which, prior to 1905, had the words "by reason of the railway" since that date has substituted the phrase found in the Manitoba Act.

It is considered that this variation in phrasing does not alter

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the construction to be placed upon the section when cases which depend upon accident occasioned by negligence in operating the railway are concerned.

It is also to be noted that the Ontario Act did not contain sub-sec. 3 of sec. 306 of the Dominion Railway Act which latter Act makes it clear that the Dominion Legislature has not extended the limitation to cases of contract express or implied, relating to the carriage of passenger or freight traffic. In all other respects the Ontario Act at the time *Ryckman* v. *Hamilton, Gruasby, etc., E. R. Co.*, was decided is very similar to the Manitoba Act as it now stands. That case though not binding on this Court affords a precedent which may be resorted to with confidence. In it the liability of a railway company for injuries to a passenger who was carried gratuitously was much discussed; the point does not arise in the case at Bar for here the plaintiff was travelling upon a ticket which she had purchased from the defendant company. Osler, J.A., who delivered the judgment of the Court, discussed at length the cases bearing on the point. They are so numerous that I will not attempt to review them in detail, but rest content with quoting the Judge's conclusion as follows: [See *ante*, p. 238].

In *Traill* v. *Niagara R. Co.*, 33 D.L.R. 47, Boyd, C., commenting on the limitation clause of the Dominion Act, at p. 47, says:

> The prescription or limitation clauses of the Railway Act have been uniformly held to apply to actions for damages caused or occasioned in the exercise of powers given by the Legislature to the company for enabling them to construct and maintain the line—but not to actions arising out of negligence in the carrying of passengers.

And at p. 48, he continues:

> Both from the force of decision and from the reading of the Act in its present form, I would hold that the Act imposes no time-limit upon an action for injuries sustained by a passenger by reason of the negligence of the company in the safe and proper conduct of his person to its destination.

In *Greer* v. *C.P.R. Co.*, 19 D.L.R. 135, at p. 137, it is said by Middleton, J.: "It is . . . clear that liability upon a contract is not within the statute." He is dealing with the present Dominion Railway Act.

And in the same case in appeal (1914), 19 D.L.R. 140, at p. 143, 32 O.L.R. 104, Meredith, C.J.O., commenting on *Ryckman* v. *Hamilton, Grimsby, etc., E.R. Co.*, says:

> It is, no doubt, well settled that the limitation section does not apply

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to a cause of action for the breach of the duty of a railway company as a common carrier; and all that was decided in that case was that the action was for breach of the duty of the defendant as a common carrier to carry safely; and that the limitation section did not, therefore, apply.

I observe with interest that "from the force of decision" in *Traill* v. *Niagara R. Co.*, the Chancellor reached his conclusion, which I take to mean, that the statutory exemption provided by sub-sec. 3 of the Dominion section did not alter the law, and Anglin, J., in *C.N.R. Co.* v. *Robinson* (1910), 11 Can. Ry. Cas. 304, at 319, 43 Can. S.C.R. 387, says on the same point: "The exception in regard to actions founded on contract is merely declaratory of the construction put upon a corresponding provision of the earlier railway Acts, in a long series of decisions."

I now turn to an examination of two cases in the Courts of British Columbia, one of which reached the Supreme Court of Canada.

In the case of *Sayers* v. *B.C. Electric R. Co.*, 12 B.C.R. 102, a statement of the law in respect to the duty of a carrier of passengers to carry safely was delivered by Duff, J., to the jury and his views were upheld by the full Court on appeal.

The statute under consideration was the Act of incorporation of the company, sec. 60, ch. 55 of the B.C. Statutes of 1896, which enacted that: "All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage was sustained."

These words are, I think, broad enough to embrace the words of the Manitoba Act "by reason of the construction or operation of the railway" though doubt was expressed by Duff, J., whether the phrase "operations of the company" extends to the operation of the tramway. In other respects the section closely follows the wording of the Manitoba Act. The plaintiff was injured while alighting from the company's car by slipping into a large hole not easily observable by passengers.

Duff, J., discussing the section of the special Act which I have quoted, says, it is identical with sec. 42 of the British Columbia Railway Act, R.S.B.C., 1897, ch. 163, and with the section providing the corresponding limitation in the Railway Act of Canada, as it existed prior to the recent consolidation. He proceeds at p. 104 (12 B.C.R.):—

Now the last-mentioned section has not infrequently been the subject of judicial consideration; and one rule for the construction of that section has been laid down in Ontario which, I think, is a sound rule. It was enunciated by the Common Pleas Division in *Anderson* v. *C.P.R.W. Co.* (1889), 17 O.R. 747, at p. 756, in the following terms: "In the present case the defendants had entered into a contract with the plaintiff to carry her baggage safely as common carriers, and it was their duty to see that the railway was in a proper state."

And at p. 106:

I apprehend that on examination of the statute as a whole there is nothing in its provisions inconsistent with the view that persons having contractual relations with the company—who are dealing with the company in the ordinary way of business, whether buying power or electric light, or transmitting freight, or taking passage on the company's trams or trains—were not within the contemplation of the Legislature.

The same section of the British Columbia Act was before the Supreme Court of Canada in *B.C. Electric R. Co.* v. *Turner & Trawford*, 18 D.L.R. 430, 49 Can. S.C.R. 470, 18 Can. Ry. Cas. 193.

Duff, J., 18 D.L.R. at p. 443, after quoting the section says:

In this connection there are two points: First, whether this action, which charges the appellants with causing the death of the late George Trawford, a passenger on their railway (through negligent default in their duty as carriers), is within the contemplation of this provision. That point was dealt with in *Sayers* v. *B.C. Electric R.W. Co.*, *supra*, and I think it is unnecessary for me to do more than to say that, having reconsidered the question, I see no reason to alter the view which was given effect to in that case.

He then proceeded to discuss the other point which concerned the interpretation of Lord Campbell's Act, and the limitation of 12 months provided thereby when in conflict with the limitation of 6 months under the Railway Act.

In the same case at p. 450 (18 D.L.R.), Anglin, J., discussing the limitation clause of the Act says:

The plaintiffs maintain that a claim for damages for personal injuries sustained in a railway accident is not within the purview of that provision. While inclining very strongly to that view, I do not rest my judgment upon it, because I am satisfied that the section invoked is not available as a defence in an action under Lord Campbell's Act.

This case was decided in the Supreme Court on other grounds, and the remarks quoted from the reasons of Duff and Anglin, JJ., which apply to this appeal, are *obiter dicta* only.

The case of *Lyles* v. *Southend-on-Sea Corp.*, [1905] 2 K.B. 1, has been called to the attention of the Court by Mr. Guy, though not referred to upon the argument. With it should be read *Taylor* v. *Manchester, Sheffield & Lincolnshire R. Co.*, [1895] 1 Q.B. 134, and *Kelly* v. *Metropolitan R. Co.*, [1895] 1 Q.B. 944.

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The last two were practice cases dealing with the scale of costs to be taxed which depended upon whether the actions were held to be in contract or in tort. The Court of Appeal held that they were both actions in tort, and not in contract, even though the passenger had taken a ticket.

These cases do not to my mind help the solution of the problem under consideration. Upon the construction of a section of the County Courts Act, R.S.M. (1913), ch. 44, it was necessary to give a decision upon a point of practice. As Lindley, L.J., said in *Taylor* v. *Manchester, Sheffield & Lincolnshire R. Co.*, [1895] 1 Q.B., at p. 138,: "Here we are compelled to draw the line hard and fast and put every one of the actions into one class or the other."

The action could be founded either upon contract or upon tort. The plaintiff was insisting upon having the advantage in the scale of costs which went with the action in tort and the Court declared him entitled to do so.

Similarly in the case at Bar the plaintiff could have founded her action upon contract or tort. She has elected to sue in contract as the more advantageous cause of action, and to escape thereby the limitation imposed upon actions founded in tort. I think she has a right to do so.

Lyles v. *Southend-on-Sea Corp.*, [1905] 2 K.B. 1, was a case of a quite different complexion.

A municipal tramway was held to be operating as a matter of public duty imposed by statutory authority. Passengers were carried not by virtue of a contract entered into with each individual who offered himself for transportation but by virtue of his right to carriage as a member of the general public. The judgment eliminated all contractual rights and held that the company came within the purview of the Public Authorities Protection Act, 1893, and that actions against them for any act done in pursuance, or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any duty or authority should be commenced within six months.

In my opinion the defendants are not in a position to urge successfully that they carry passengers solely as a matter of statutory obligation to the general public, to the exclusion of

contractual liability and duty as carriers of passengers. They are incorporated by 55 Vict., ch. 56, with power to construct and operate a street railway subject to agreement with the municipal corporations within whose boundaries they operate. Incorporated with the statute is a by-law of the city of Winnipeg setting forth classes of fares to be charged and providing for the issue of tickets of various descriptions and subject to varying conditions. The rights of the holders of such tickets appear to depend upon the nature and time of the transportation called for thereby, and to my mind, influenced by the cases above quoted, there are all the elements of contract present as between the holders of such tickets and the company.

I am supported in the view that *Lyles* v. *Southend-on-Sea Corp.* may be distinguished from the case at Bar by Osler, J.A., in *Ryckman* v. *Hamilton, Grimsby, etc., E.R. Co.*, 10 O.L.R. at p. 432, and by Martin, J., in *Sayers* v. *B.C. Electric R. Co.*, 12 B.C.R. at p. 111, and have come to the conclusion that, in any event, the long line of cases in Canada founded upon a breach of the carrier's contract should be followed in preference to making a sudden departure by holding that all elements of contract have been swallowed up by the imposition of a statutory duty for breach of which there is no remedy but an action in tort.

I have arrived at the conclusion that sec. 116 of the Manitoba Act, R.S.M., 1913, ch. 168, is to be construed as if it had appended to it sub-sec. 3 of sec. 306 of the Dominion Act, R.S.C., 1906, ch. 37, and that the statutory exemption from limitation in cases of contract specificially given by the Dominion Act arises by implication under the Manitoba Act.

The plaintiff is suing for breach of the carrier's contract to carry her safely, and her action is not barred by the limitation of 12 months imposed by the statute.

I would, with respect, allow the appeal and direct judgment to be entered for the plaintiff for $2,000 with costs here and below. *Appeal allowed.*

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COOK v. ARCHIBALD.

Quebec King's Bench, Lamothe, C.J., Lavergne, Carroll, Pelletier and Greenshields, JJ. December 27, 1919.

ARCHITECTS (§ I—5)—LIEN BY—TIME FOR FILING—CONSTRUCTION OF BUILDING SUSPENDED FOR DEFINITE PERIOD—ABANDONMENT AT END OF PERIOD.

If the construction of a building is suspended for a definite period, to be continued on such future date, provided the owner has sufficient funds, and if at the end of the period agreed upon the owner has not sufficient funds to carry out the undertaking and definitely abandons the construction, the time for registering an architect's lien commences to run from the date when the construction is definitely abandoned.

[C.C. (Que.), Arts. 1691, 1703, 1214, 2013, 2013b, 2103, 7 Geo. V. 1916 (Que.), ch. 52, considered.]

Statement.

APPEAL from the judgment of the Superior Court in an action to have certain property hypothecated by an architect's lien. Reversed.

The judgment of the Superior Court which is reversed was delivered by Weir, J., on April 19, 1919.

The action was instituted by the respondent to have certain property declared affected and hypothecated by a privilege of architect.

About October 14, 1912, one Maher, who had bought the Savoy Hotel from the appellant, gave instructions to the respondent to prepare a plan for a ten-story building to replace the Savoy Hotel. On January 16 following, the contract for the erection of the building, the plans and specifications prepared by the respondent, was given to one Deakin for $192,500. Owing to lack of funds on the part of Maher, the work was abandoned. The last payment to the contractor was made on August 9, 1913. On September 1, 1916, the property was retroceded by Maher to the appellant Cook.

On December 16, 1916, the respondent registered a notice on the property to the effect that it was affected by his architect's privilege to the amount of $7,851. A second notice to the same effect was given to the registrar for the above claim together with an affidavit.

The action was taken on July 13, 1917. Maher did not appear and was condemned by default.

The appellant contested the privileged claim on the following grounds: (*a*) the registration and service of notice were not made in proper form nor manner, nor in proper time as required by law and are, therefore, null and void; (*b*) the sum of $2,150 has been

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paid to the plaintiff-respondent for his services as architect, which sum is full and ample payment for the services rendered; (c) the plaintiff-respondent first registered his privilege on December 16, 1916, in virtue of the law as it then existed, and subsequent registration under 7 Geo. V., 1916, ch. 52, upon which the action is founded, is null and void.

Amongst other things, the plaintiff-respondent answered that the construction of the building was never abandoned, but was only suspended.

The Superior Court acknowledged the plaintiff-respondent's privilege for $7,851, and condemned the defendant to pay him that sum.

LAMOTHE, C.J.:—Was the lien of the respondent, the architect, registered in proper time against the immovable of the *mis en cause?* Lamothe, C.J.

That is the question to be decided because the lien has been registered. While relying upon the registration of this architect's lien the respondent nevertheless claims that before the Act, 7 Geo. V., 1916, ch. 52, no registration was required; the architect's lien he says is preserved without that. For how long a time? The respondent avoids raising this question. The answer would lead to a consequence irreconcilable with the very idea of our system of registration. This consequence would be that an immovable could be secretly burdened with a lien for several months, and even several years after a definite stoppage of the works without any one being able to find any trace of it in the registry of immovables. The meaning given by the respondent to the law prior to the Act, 7 Geo. V. 1916, ch. 52, cannot be accepted; this meaning is not compatible with the whole text of the law upon the matter. Although the architect was not mentioned by name in the text of the former art. 2013b, this article was applicable to him. The case of the architect was analogous to that of the other persons mentioned in art. 2013b, para. 1; the architect was obliged to give the initial notice to the owner of the land when his services were procured by a contractor; this obligation to give the initial notice within 8 days from the time the contract was signed, involved the obligation to give the final notice within 30 days after the completion of the work—with registration. On examina-

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tion of the general economy of the articles creating liens resulting from the construction of building, one is convinced that it was by inadvertence that the name of the architect was not mentioned in the first paragraph of art. 2013b. Reasoning by analogy is permissible in such a case; the Court of Appeal did so with respect to the furnisher of materials in a case of *Carrière* v. *Sigouin* (1908), 18 Que. K.B. 176. If in the present case the architect insists upon the existence of his lien without registration, that is, that the lien was registered more than 3 years after the stoppage of the work, his obligation to register, results from the new Act, 7 Geo. V. 1916, ch. 52, and he argues that he registered within 30 days after the coming into force of the new Act. As I have said this interpretation of the law cannot be accepted.

The respondent claims also that the stoppage was temporary and that he had registered his lien within the delay of 30 days fixed by the former art. 2013b. On this point the facts are against him. The evidence shews that during the summer of 1913 the work of construction commenced in the spring was stopped by order of the owner Maher for want of money. It had then been agreed in writing that the work would be suspended until March 1, 1914, and that it would only be resumed at the latter date if Maher had procured the necessary funds and given notice thereof in writing. Without this notice the contract of Deakin & Co. could not continue and the sum due the contractors would become exigible. The architect was present at this arrangement; he was notified that on March 1, 1914, the construction would not continue unless there was a special notice from the owner. This notice was not given and the architect was not required to continue the superintendence of the work.

Was not this the end of the construction? The respondent says no; it was but a temporary suspension he claims because Maher had held out vague hopes of being able to continue it later. The hopes of Maher depended on future and uncertain facts. The works were definitely stopped; would they be resumed later? That depended on matters beyond control and absolutely uncertain. From the month of March, 1914, the delay of 30 days to register the lien commenced to run.

Article 2013b was incomplete; the Legislature appeared to have had in view only the most common case, namely, where the

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construction was continued to completion. An interruption, even temporary, was not provided for. It can be seen without much effort that the work of construction can come to an end without the works being completed. The owner of the land can agree with the contractors on the matter; if there is no agreement the owner of the land can use the rights conferred upon him by art. 1691 C.C.; he can stop the construction on indemnifying interested parties. This art. 1691 C.C. was in existence when art. 2013b became a part of our law; these two articles are not contradictory; they should be read together.

If the owner of the land can stop the work by virtue of art. 1691 C.C. and this right is not denied to him, he can manifest his intention in some other manner than by writing; he is not obliged in this respect to give notice in writing nor in any other imperative mode. From the time that his intention to stop the work is sufficiently made manifest the delay of 30 days begins to run just as the delay of one year to make valid the lien against the improved immovable. The evidence shews in this case that the stoppage of the work in March, 1914, was definite; it is not a vague hope of being able to continue in the future which can give a temporary character to this stoppage. Other subsequent facts are equally significant. Upon the foundations laid by Deakin & Co. up to the level of the land an edifice has been erected other than that first contemplated, namely, a garage for automobiles of one story covered by a roof. This garage has, since 1915, been occupied as such. At the beginning of September, 1916, Maher sold the immovable to Cook & Co., the former owners, and this sale was known to the architect shortly after. Even in view of this last fact the registration made in December, 1916, is late.

I am of opinion that the appeal should be maintained and the action dismissed.

A motion made by the respondent to replace by a copy a document the original of which has disappeared should be granted.

CARROLL, J.:—(After having recited the facts at length and explained the pleadings.) Let us pass now to the law which applies to the case and assume that the architect has a lien during the construction of the work without registration of his claim. It is none the less certain that when the work is finished he should register his lien within the 30 days which follow the date at which

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the construction has become complete for the use to which it is destined.

The amendment made by the Act, 7 Geo. V., 1916, ch. 52, art. 2013b, has not in this respect changed the rights of the architect, but the owner is master by his will alone for putting an end to his contract with the contractor; that is what is decreed by art. 1691 C.C. Naturally in this case if the parties do not agree the owner should pay the damages according to the circumstances; *a fortiori* the owner can agree with the contractor to put an end to the contract on conditions agreed to between them. This art. 1691 differs from the corresponding article of the Code Napoleon, art. 1794, in this sense, that under our law the master is obliged, if he acts of his own will, to pay the damages according to the circumstances, while in France he is obliged to indemnify the contractor for all his disbursements, all the costs of his work and all that he would have gained in the enterprise. This provision goes much beyond the common law.

As a general rule a contract cannot be ended by a single will, but this extraordinary provision is based upon equity. After the commencement of the work an owner may find himself financially embarrassed, or he may consider that the enterprise will not bring him any profit; it would be unjust to compel him to continue works which might bring about his ruin. I believe that our article in no case permits us to scrutinise the motives of the owner. He may resiliate his contract even by mere caprice provided that he pays the damages which are allowed according to the circumstances, and it is for the Court to appreciate these damages according to the good or bad faith of the owner.

In this case the condition undertaken by the contractor for the continuation of the work not being realised by March 1, 1914, the contract for the building of ten stories was found to be resiliated, and all the accessory rights to the contract came to an end. The architect had 30 days from March 1, 1914, to register his lien; he only registered it for the first time on December 15, 1916, after the property had passed into the hands of the original vendors.

It is true that art. 2013 grants him his lien provided that he registers within the 30 days which follow the date at which the construction is completed for the use for which it was intended. This article has in view an executed contract and not a contract

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which has come to an end either by the will of the parties or by the will of the owner as the law permits by virtue of the article of the Civil Code which I have cited.

This case suggests an amendment which it would be very important to introduce into our Civil Code. Before the Auger Act, the lien of architects, builders, workmen, and furnishers of material should be registered before the works began. A *procès-verbal* could be drawn up shewing the condition of the premises; and after the completion of the work a second, shewing their valuation. The principle of our legislation is that all real rights should be registered.

However, the liens which I have mentioned under the new legislation exist without registration while under the old legislation publicity was required.

Under the new legislation the construction of a building can continue 2 or 3 years, and during all this time a number of liens will exist without registration and a property will be found in some manner put out of business for no purchaser or lender would wish to deal with the owner for fear of the existence of a lien which would not appear in the registry office. They would not be willing to run the risk of lending upon such poor security.

It appears to me that it would be possible to preserve the liens which are created by the law on account of the nature of the debts without sacrificing the credit of the property.

It was only necessary to modify the mode of publicity if the old mode appeared defective. Thus any one would be able to go to the registry office and deal with certainty if no lien appeared to affect the immovable.

The judgment should be reversed.

Greenshields, J.

GREENSHIELDS, J.:—The first considerant of the judgment *a quo*, after the considerants reciting the facts, is as follows:—

Considering that for the purpose of alienation of real property mandate must be express; and that a copy of the procuration should be registered with the deed; that these conditions having not been fulfilled in this case, the act of ratification of the deed of reconveyance should have set forth the cause of nullity in the said deed and the intention to cover the same and have been duly registered; and in the absence of these conditions neither the said deed of reconveyance nor the said act of ratification affects or prejudices the rights of the plaintiff as privileged on the property in question herein under the provisions of arts. 2013 *et seq.*, C.C.

I do not consider it necessary to enter upon any lengthy

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discussion of this considerant, except perhaps to state that is of questionable utility.

The plaintiff-respondent alleges, that the appellant was at the date of the institution of the action the owner of the property in question upon which he had a valid lien. The appellant says the same thing. The defendant says nothing whatever.

What happened is clear from the record.

On September 1, 1916, Mr. J. C. Cook, K.C., held a power of attorney from the *mis en cause*. Under that power of attorney he appeared before a notary, along with the defendant, and he accepted the retrocession, reconveyance or resale of the property in question made by the defendant to the *mis en cause*, and inasmuch as that did involve the discharge of an indebtedness due by the defendant, it was agreed that his act should be ratified by his principal within three months.

Every one admits that the *mis en cause* became the owner of the property. Every one admits that the defendant has a valid discharge for his indebtedness, and just how the question as suggested by the considerant under consideration could affect one way or the other the rights of the parties before this Court, it is difficult to say, and I dispose of it finally.

The most serious considerant of the judgment, however, is stated as follows:—

> Considering the plaintiff had the right to establish his said privilege up to the end of the 30 days following the date upon which the building on which he was engaged as architect became ready for the purpose for which it was intended, and did so establish his said privilege by the registration thereof on April 13, 1917, to wit, before the expiration of 30 days after the end of the work.

In my opinion, the considerant does not dispose of the case, and for this reason: If an architect knows that the construction of a building for which he has prepared plans and specifications has been abandoned, either owing to the impossibility of the proprietor to construct it, or his desire not to construct it, and knows that it never will be constructed, I do not believe that an architect may wait for 4 years until the property has passed, for value, into the possession of an innocent third party, and then make known, by registration, a claim against that property, the existence of which the innocent holder had no notice. What happened?

As early as May, 1913, the progress of the work came to a full

stop. Only about one-sixth of the work had been done. It was to have been completed on September 15, 1913.

On July 31, 1913, the proprietor, the contractor and the architect (the respondent), met and the proprietor admitted his utter inability to then continue the work, and the architect (the respondent) proceeded to draw up a modified agreement. I have already referred to it. The effect of it was this:—

> The whole work will be suspended until March 1, 1914. It will then be proceeded with, if previous notice of 20 days is given to the contractor, and a satisfactory guarantee is given that the work will be proceeded with and the contractor paid.

That was clearly the condition upon which the work would proceed, so far as the contractor was concerned. The architect was well aware of the condition. It was he who made it. He knew also that the condition was never fulfilled. He also knew that the defendant left this country in the summer of 1916 and up to the date of the trial had never been seen in this country. I have no doubt whatever that the agreement amounted to a final and definite cancellation of the contract. The proprietor was quite entitled to do that, subject to all penalties, 1691, C.C.

He at least saw that another building than that for which he had drawn the plans was being put up. Still he did nothing. In August, 1916, the respondent consulted his lawyer, and he wrote to the defendant, and he got a reply, clearly admitting the utter impossibility on the part of the defendant to complete the building. The respondent then knew as early as August, 1916, that the contract with Deakin had been cancelled; that building operations had been abandoned, and that the defendant, Maher, was endeavouring to sell the property. And yet he did nothing.

I believe that the record would justify the statement, that the respondent learned shortly afterwards that the *mis en cause* had again become the proprietor of the property. Publicity at least was given to that fact by the registration of the deed from the defendant to the *mis en cause* of date of September 1, 1916. The respondent in his action relies exclusively upon the registration of his privilege on April 13, 1917, at the same time submitting the argument in his factum, that he was not bound to register at all. If with the knowledge the respondent had in the month of September, 1916, he could wait until December, 1916, or until April, 1917, to register a valid privilege against the *mis en cause*,

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then it might as well be argued, and in fact it is the logical conclusion, that he could not wait for five years. I cannot believe that that was the intention of the legislators, and much less do I believe that the statute expresses any such intention.

It would, in the final analysis, amount to this: A man might see a property with the foundations for a building and covered up and no work being done for four years. He wishes to buy that property. The registry office shews a clear title, and he buys it, and after his title is registered, an architect registers a claim for $8,000 or $18,000 and seeks then by an action, to enforce this claim upon the property. This would be the effect of the judgment.

It must be observed that registration does not create privileges. The law does that. Registration may preserve or conserve privileges.

I have no doubt the respondent at one time had a privilege upon this property for something; but I have no doubt that he lost that privilege by his tardy registration. It is true that previous to the enactment of the statute, 7 Geo. V. 1916, ch. 52, the architect's name does not appear in the category of those who were required to register. The respondent urges that his right of privilege was not affected by the last mentioned statute. There is no doubt the statute 7 Geo. V. 1916, ch. 52, was a repealing statute. See sec. 11, R.S.Q. 1909.

Admitting the existence at one time of the respondent's privilege after the enactment of the new law, I believe that in order to exercise that privilege he should comply with the registration requirements of the statute 7 Geo. V., ch. 52.

Upon the whole I am of opinion that the respondent's privilege did not effectively exist as against the *mis en cause's* property on the date of the institution of the present action, and I should reverse the judgment.

Judgment:—Seeing that the respondent, an architect, claims to have a lien to the amount of $7,851 upon a property belonging to the appellant; that this property was sold on October 8, 1912, by the appellant to one Maher and that the latter immediately went to work to construct upon the land sold a building of ten stories; that in 1913, Maher not being able to continue the work because of financial difficulties, discontinued it and reconveyed the said property to the appellant Cook; that on July 31, 1913, Maher

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the then owner and Deakin, the contractor, in the presence of Archibald, the respondent, drew up certain agreements by which the work was stopped; that if on March 1, 1914, Maher could not find the funds necessary to continue the work the contractor should receive an amount which had been fixed by the parties; that on March 1, 1914, Maher had not been able, by reason of his financial difficulties, to continue the work which from that time was considered as ended; that Archibald, the architect, could not register his architect's lien, neither on December 16, 1916, nor in April, 1917, more than 30 days after the work was considered to be at an end; that the judgment which declared that the lien existed is not well founded; maintains the appeal, sets aside and annuls the judgment of the Superior Court and proceeding to render the judgment which should have been rendered, dismisses the action of the respondent with costs as well in the Superior Court as in appeal. *Appeal allowed.*

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Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Chisholm, J. December 4, 1920.

COSTS (§ I—2c)—JUDGMENT—APPEAL—ADMISSION BY RESPONDENT THAT VERDICT CANNOT BE SUSTAINED—FAILURE TO AGREE BY CONSENT.

On appeal by defendant in an action for libel, when the plaintiff admits that the verdict cannot be sustained, and the parties cannot agree to a consent order, the appellant will have the costs of motion for new trial and printing expenses, but no brief or counsel fee.

Statement.

MOTION on behalf of defendant to set aside the verdict for plaintiff in an action claiming damages for libel, and for a new trial. Counsel for plaintiff admitted that the verdict could not be sustained and assented to a new trial being ordered, costs to be costs in the cause. The question of costs was reserved.

C. W. Lane, K.C., and *J. B. Kenny*, for appellant.

W. C. McDonald, for respondent.

The judgment of the Court was delivered by

Harris, C.J.

HARRIS, C. J.:—It is admitted that the verdict must be set aside and a new trial granted. The only question is as to the costs. There were letters written by the solicitors looking to a consent order setting aside the verdict, but the plaintiff's solicitor offered too little and the defendant's solicitor asked too much

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and so the case was printed—or rather the balance of it was thereafter printed—part of it had already been done—and when the case was reached on the docket the plaintiff admitted that he could not uphold his verdict.

Under these circumstances we think the defendant must have the costs of the motion for a new trial including the costs of printing, etc., but there will be no allowance for brief or counsel fee.

Judgment accordingly.

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EX. C.

THE WOLFE Co. v. THE KING.

Exchequer Court of Canada, Audette, J. January 5, 1921.

PUBLIC WORK (§IV—65)—NEGLIGENCE—LOSS BY FIRE COMMUNICATED TO ADJOINING BUILDING—EXCHEQUER COURT ACT, R.S.C., 1906, CH. 140—"PUBLIC WORK," DEFINITION—BURDEN OF PROOF—INTERPRETATION OF STATUTES.

In the absence of any definition of a "public work" in the Exchequer Court Act, the phrase as used in sec. 20 thereof must be construed in its plain and literal meaning, and its construction should not be governed by any definition in any Act of the Parliament of Canada, the intendment of which was to limit the meaning of the phrase to the operation of the particular Act.

The phrase "public work" appearing in the Public Works Act, R.S.C., 1906, ch. 39, and in the Expropriation Act, R.S.C., 1906, ch. 143, should not be construed to include a building occupied under the circumstances peculiar to this case, namely: A building, part of which was used and rented as a recruiting station by the Department of Militia and Defence, and solely under its control with the right to vacate at any time upon giving 14 days' notice, and over which the Public Works Department had no control.

The fact that a fire takes place is not of itself evidence of negligence, its occurrence being quite consistent with due care having been taken; there must be some affirmative evidence of negligence, or of some fact from which a proper inference may be drawn.

Where the burden of proof is upon the suppliant and it fails to shew that the fire is the result of negligence on the part of some officer or servant of the Crown while acting within the scope of his duties or employment, the petition cannot be entertained.

Semble: That while the phrase "public work" as used in the Public Works Act and the Expropriation Act, means property vested in and belonging to Canada, yet all classes of property belonging to Canada are not necessarily public works.

Statement.

PETITION OF RIGHT for damages to a stock of merchandise arising from fire alleged to have been caused by the negligence of an officer or servant of the Crown.

A. E. Fripp, K.C., for suppliant. *W. D. Hogg*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $23,245.85, as representing the value of his

stock-in-trade destroyed by fire, on December 13, 1917, under the following circumstances:

On March 5, 1916, the Department of Militia and Defence rented, from A. E. Rea & Co., the Arcade building, at 194 Sparks St., as a recruiting station for soldiers, at $200 a month, with the right to vacate at any time upon giving 14 day's notice. There was no formal lease with covenants subscribed between the parties. The contract between the parties, such as it is, is evidenced by Exs. 1 and 4. While the building was so occupied it was destroyed by fire on the night of December 12 to 13, 1917, as well as the adjoining building to the west which was occupied under tenancy by the suppliant who was carrying on therein the business of milliner and furrier. He now sues for the value of his stock-in-trade then destroyed and which he estimates at the sum of $23,245.85.

It is well to note, however, that by Ex. 1, A. E. Rea Co., Ltd., offered to rent for $200 a month, the premises which the recruiting station *then occupied*, and that is the *ground floor and the basement*, and further that only these two stories were so occupied. The upper stories would not appear to have been covered by such offer and were not in the mind of the owner.

The question of the *quantum* of damages is, by agreement of all concerned, left over until the question of liability has been determined.

The action in its very essence is grounded on negligence and sounds in tort. In such a case there is no liability on the part of the Crown, unless it is made so liable by statute. To succeed the suppliant must therefore bring his case within the ambit of sec. 20 of the Exchequer Court Act, R.S.C. 1906, ch. 140, as amended, by 7-8 Geo. V. 1917, ch. 23, sec 2, whereby sub-sec. (c) of said sec. 20 now reads as follows:

> (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

In approaching the consideration of the case, and in view of a long series of decisions upon the statute as it stood before the amendment, it is well to bear in mind the amendment of sub-sec. (c) above mentioned, which came into force on August 29, 1917; and further, that the injury to this property resulting from the

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fire took place on December 13, 1917. A number of decisions upon the former state of the law, which established the rule that to create liability the injury had to be sustained *on* the public work, are not now applicable.

Moreover, under the decision in *Piggott* v. *The King* (1916), 32 D.L.R. 461, 53 Can. S.C.R. 626, which is a case decided under the law as it existed prior to 1917, it was established that such a claim as the present could not be sustained under paras. (*a*) and (*b*) of sec. 20. It was decided there that these two paragraphs dealt with the question of compensation and not damages, and that, as stated by Fitzpatrick, C.J. (32 D.L.R. at 462), "compensation is the indemnity which the statute provides to the owner of lands which are compulsorily taken in, or injuriously affected by, the exercise of statutory powers."

Does the case come under sub-sec. (*c*) of sec. 20, as amended in 7-8 Geo. V. 1917, ch. 23?

To bring this case within the provisions of sub-sec. (*c*), as amended in 1917, the injury to property must result from *the negligence of any officer or servant of the Crown* while acting within the scope of his duties or employment upon any public work. In other words, the three following requirements are necessary: 1. A public work; 2. Negligence of the Crown officer thereon; 3. The injury must be the result of such negligence.

Now it is contended at Bar, on behalf of the suppliant, that the Arcade building was a *public work* while rented and occupied by the Crown as a recruiting station for soldiers, and that the officers in charge were guilty of negligence in, *inter alia*, building small beaver board partitions and in placing stoves, called Quebec heaters, close to the same, and furthermore in not keeping a watchman or caretaker over night in the building.

The first question to answer is whether or not this recruiting station, under the circumstances, was a "public work" of the Dominion of Canada.

There is no description or definition of a "public work" in the Exchequer Court Act which provides for the liability above mentioned under this amended sec. 20.

On behalf of the suppliant it is then contended that for the determination of what is a "public work," reference should be had to the Public Works Act R.S.C. 1906, ch. 39, sub-sec. (*c*) of sec.

3 thereof which reads as follows: "(*c*) public work or public works means and includes any work or property under the *control of the Minister*." This section, however, must be read conjointly with secs. 9 and 10 of this Act. Section 9 especially qualifies and determines what is to be under the control and management of the Minister by stating: "The Minister shall have the management, charge and direction of the following properties *belonging* to Canada &c." That is, he is to have the control of properties belonging to Canada. That is as a condition precedent the property must belong to Canada.

Then sec. 10, sub-sec. (*c*), enacts that:

Nothing in the last preceding section shall be deemed to confer upon the Minister the management, charge or direction of such public works as are . . .

(*c*) *by or under the authority of this Act or any other Act of the Parliament of Canada, placed under the control and management of any other Minister or Department.*

Now, it has been established by the evidence that the Arcade building used as a recruiting station in 1917, was not at any time under the control and superintendence of the Public Works Department which had nothing whatever to do with it, and that the Department of Militia and Defence, acting either under the War Measures Act, 5 Geo. V. 1914, ch. 2, or under sec. 8 of the Militia Act, R.S.C. 1906, ch. 41, had full control over it.

Therefore, it results that the Public Works Act becomes and is of no help for the determination of the question as to whether these premises were or were not a "public work" within the meaning of the Exchequer Court Act.

Sub-section (*d*) of sec. 2 of the Expropriation Act, R.S.C. 1906, ch. 143, enacts the following definition of a "public work," viz:

(*d*) "Public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging, or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only.

This definition, however, again applies to the Expropriation Act, and the question now before the Court is not one involving the doctrine of eminent domain.

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Whether these descriptions, minute and wide in their scope, can be applied to the present case is one not without controversy. However, it would seem to primarily result from this that a "public work" of Canada, would be a property vested in and belonging to Canada. The jurisprudence upon this point has been quite extensive, and I desire now to cite the most apposite decisions upon the question.

In the case of *The City of Quebec* v. *The Queen* (1894), 24 Can. S.C.R. 420, a case that had to deal with injury to persons under sec. 20 (then sec. 16) of the Exchequer Court Act, it was held that the rock, or land upon which the citadel was constructed, although owned by the Crown, was not a "public work." Taschereau, J., there said at p. 448: "The rock upon which the citadel of Quebec rests is not, in my opinion, *a public work or a work at all within the meaning of the statute.*"

Burbidge, J., in *Macdonald* v. *The King* (1906), 10 Can. Ex. 394, adopted that view and citing the language above mentioned, says:

> The rock on which the citadel of Quebec rests, is not a public work, or a work at all within the meaning of the statute, though it was undoubtedly at the time *public property* vested in the Crown in the right of the Dominion,

and he adds (p. 398):

> The fact that certain property is vested in the Crown in the right of the Dominion *is not*, it appears, conclusive of the question as to whether such property is a public work or not within the meaning of the statute. It constitutes, however, in each case an important consideration and a matter always to be borne in mind.

Then, at p. 399:

> The fact is that there is no ground for any contention that the place where the accident happened was a *public work* within the meaning of the statute because public money had been there expended, etc. In that respect it is not so strong a case as that of *The Hamburg American Packet Co.* v. *The King* (1901), 7 Can. Ex. 150; affirmed (1902), 33 Can. S.C.R. 252, where it was held that the channel of the River St. Lawrence, near Cap a La Roche, between Montreal and Quebec was not a "public work"—after spending money in widening and deepening it, and notwithstanding that sub-sec. (*a*) of sec. 9 of the Public Works Act places under the control of the Minister "works for improving the navigation of any water."

In *Larose* v. *The King* (1900), 6 Can. Ex. 425; affirmed (1901), 31 Can. S.C.R. 206, at p. 208 Taschereau, J., says:

> The property occupied by this range had been *leased* by the Government from . . . under authority of an order . . . The Judge of the Exchequer Court dismissed the action upon the ground that the rifle range *was not a public work* within the meaning of that term as used in the Exchequer Court Act.

In *Brown* v. *The Queen* (1892), 3 Can. Ex. 79, Burbidge J., held that a fish-way in a mill dam constructed by and at the expense of the Crown, was not *a public work* within the meaning of the Exchequer Court Act.

In the case of *Paul* v. *The King* (1906), 38 Can. S.C.R. 126, it was held that a Government steam-tug and a scow, its tow, working in conjunction with a Government dredge, and which caused a collision, while engaged in improving the ship channel of the St. Lawrence, *was not a public work*. Yet it must not be overlooked that sec. 9 of the Public Works Act, R.S.C. 1906, ch. 39, read with sub-sec. (*c*) of sec. 3 thereof, places under the control of the Minister, bringing them under the class defined by sec. 3, "vessels, dredges, scows, tools, implements and machinery for the improvement of navigation . . . and works for improving the navigation of any water." [See sec. 9 (*a*).]

In *Coleman* v. *The King* (1918), 44 D.L.R. 675, at p. 678, 18 Can. Ex. 268, Audette J., says:

> Sir Louis Davies, J., [now Chief Justice], commenting upon this expression "public work," in the *Paul* case, 38 Can. S.C.R. 126, said, at 131: "To hold the Crown liable in this case of collision for injuries to the suppliant's steamer arising out of the collision, we would be obliged to construe the words of the section so as to embrace injuries caused by the negligence of the Crown's officials *not as limited* by the statute 'on any public work,' but in the carrying on of any operations for the improvement of the navigation of *public harbours* or rivers. In other words, we would be obliged to hold that all operations for the dredging of *these harbours* or rivers or the improvement of navigation, and all analogous operations carried on by the Government were either in themselves public works, which needs, I think, only to be stated to refute the argument, or to hold that the instruments by or through which the operations were carried on were such public works.
>
> If we were to uphold the latter contention I would find great difficulty in acceding to the distinction drawn by Burbidge, J., between the dredge which dug up the mud while so engaged and the tug which carried it to the dumping ground while so engaged. Both dredge and tug are alike engaged in one operation, one in excavating the material and the other in carrying it away.
>
> But even if we could find reasons to justify such a distinction, which I frankly say I cannot . . . I think a careful and reasonable construction of the clause 16 (now 20) (*c*) must lead to the conclusion that the public works mentioned in it . . . are *public works* of some definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analogous purposes, not confined to any definite area of physical work or structure.

In *Montgomery* v. *The King* (1915), 15 Can. Ex. 374, following the views expressed by the Judges of the Supreme Court of Canada in the case of *Paul* v. *The King*, 38 Can. S.C.R. 126, it was held

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that a dredge belonging to the Dominion Government is not a "public work" within the meaning of sec. 20 (*c*) of the Exchequer Court Act.

In the recent case of *La Compagnie Generale D'Entreprises Publiques* v. *The King* (1917), 44 D.L.R. 459, at p. 462, 57 Can. S.C.R. 527, Anglin, J., speaking of sec. 20 of the Exchequer Court Act, said:

> It does not seem to me to involve any undue straining of the language of the statute to hold that it covers a claim for injury to property so employed. "Public work" may, and I think should, be read as meaning not merely some building or other erection or structure *belonging to the public*, but any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property.

In *Courteau* v. *The King* (1915), 41 D.L.R. 415, 17 Can Ex. 352, it was held that an injury suffered while taking a Crown vessel on launchways owned and operated by a company on *land leased* from the Crown is not an injury happening on "a public work" of Canada—although the vessel was being hauled at the cost of the Government and upon the latter making all the necessary repairs to the launch-ways for that purpose.

The case of *The King* v. *Lefrancois* (1908), 40 Can. S.C.R. 431, was cited at Bar by the suppliant, but that case has no application because it deals with the Intercolonial Railway which has been made and declared "a public work of Canada" by a special statute, R.S.C. 1906, ch. 36, sec. 55.

Therefore, in the light of the statutes and the long series of decisions above referred to, I have come to the conclusion that it would be doing violence both to the English language and to common sense to hold that the Arcade building was a public work of Canada, while the basement and ground floor thereof were occupied by the Militia Department as a recruiting station for soldiers under an agreement to vacate at any time upon giving 14 days' notice. It was neither in law or fact a public work. To avoid a *reductio ad absurdum* it must be found that it was at no time the intendment or intention of the Parliament of Canada, in enacting the statutes above referred to, any more to make a public work of this building under the circumstances of the case, than it was to make of a pick or shovel belonging to the Crown a public work, because the word "tools" is comprised in the nomenclature to be found in sec. 9 of the Public Works Act,

R.S.C. 1906, ch. 39, which, as I have already said, must be read conjointly with sec. 3 of the same Act. Finding otherwise would be for the Court to overlook and disregard the "true intent, meaning and spirit" (Interpretation Act, R.S.C. 1906 ch. 1, sec. 15), of the legislation enacted by Parliament.

The words "public work" mentioned in sec. 20 of the Exchequer Court Act, R.S.C. 1906, ch. 140, must be taken to be used as verily contemplating a public work in truth and in reality, and not that which is mentioned in the Public Works Act, R.S.C. 1906, ch. 39, or in the Expropriation Act, R.S.C. 1906, ch. 143, for the purposes of each Act. Moreover, each definition given in these two Acts is prefaced by the words: "In this Act, unless the context otherwise requires," that is to say, it is limited to each Act. Indeed for the purposes of each Act that definition is obviously acceptable, because it is used, so to speak, as a key to what comes within the ambit or provision of each Act. However, it does not follow that it can be accepted as a general definition in all cases. It is not because a desk and chair belong to and are used in the Department of Public Works that it must therefore be construed as a public work, any more than the same furniture, the property of the Department of Militia, can be called military works, military engines.

The Crown's liability cannot be enlarged except by express words or necessary implication—*City of Quebec* v. *The Queen* (1891), 2 Can. Ex. 252—and all properties belonging to the Crown are not necessarily public works.

While desirous of doing justice between the parties, I see no reason to condemn the Crown because it is the Crown and thereby mulct His Majesty's liege subjects with large damages.

Why should we depart from the general and plain meaning of these specific words "public work," which are of a common and dominant feature, to endeavour, for the convenience of a case, to extend to them a meaning which, to every one, would appear so strained as to amount to an absurdity on its very face?

Where a statutory definition is found in an Act and that it is said to apply to that Act, it is well to remember that it is not a legal definition forming part of the law of Medes and Persians and that whenever such defined words are met outside of that Act,

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it does not necessarily carry the meaning assigned to it by that special statute.

Moreover, as above mentioned, the trend of decisions in our Courts upon these very words suggests a decision more in harmony *with such* a view.

Having found that the Arcade building was not a public work of Canada, it might be thought unnecessary to go into the question of negligence. However, for the better understanding of the case, as a whole, it is considered advisable to pass also upon that question.

The Militia Department, at the time of the fire, occupied the ground floor and the basement of the Arcade building, which, entering from Sparks St., presented a large door in the centre and two large display windows on each side.

On coming in at the front from Sparks St., there was an open space of about 40 ft. followed by several rooms partitioned off. Then, as described by Major Woodside, from about the centre of the building, travelling south towards Queen St., we enter upon the rear portion of the building, occupied by the medical men, which was partitioned in small stalls between 6 by 8 ft. and 8 by 8 ft., with a table and stove in some of them.

The place was heated by stoves called Quebec heaters. Witness Woodside testified there were six or seven stoves, and witness Sewell said 9 or more. There was a central fire or furnace in the building, but, for one reason or another, it was not being used—it was not in good repair, said witness Woodside.

The south-east corner of the building, on Queen St., deserves some special mention, in view of the testimony of the chief of the fire brigade, the fire inspector, and witness Sewell. On entering the building from Queen St., there is also a door in the centre and display windows on each side, and on coming inside there was a hallway, and to the right hand side a beaver board partition with a door in it leading into one of these small rooms, with beaver board partitions on the north and the west. The main wall of the building formed the eastern side of that room and the window the southern end. In that room, with two sides of beaver board, as above described, there was a large "Quebec heater which stood near the partition against the window—about one foot away

from the partition," as stated by witness Sewell, and 2 ft. as said by witness Lattimer.

Major Woodside, who was in charge and command of the building at the time of the fire, says the "stoves were placed too close to the partition to suit me." However, he was in charge and adds *he had everything in his power to avoid any danger*. He contends that notwithstanding he was in charge that he did not place the stoves in the building, that he did not interfere with the Medical Board's work who laid them out to suit themselves. While he said he did not interfere with the medical gentlemen, he did not let them do as they liked. *He had stoves moved when they were placed too close to partitions*, and asked the contractor to place metal behind. Witness Sewell said he knew of 2 stoves around which there was tin to protect the partition.

Major Woodside thought the place was a fire-trap and complained about it twice to the officer in charge of the district, at Kingston—once to the Public Works Department, and once to the inspector of fires at Ottawa. And he adds, he received no answer from Kingston, and is it to be wondered at? Surely, he was himself in charge—he was the better judge as to whether or not these stoves were not in a proper place, and the Kingston people would not probably, and rightly so, be pestered with such petty questions which should come within the absolute scope of the officer in charge. If he had the courage of his opinion, he should have attended to it himself. Too much seems to have been made of these details.

Now, as many as 200 men or soldiers were passed by the doctors some days, and although smoking was not legally allowed, says witness Woodside, these men were smoking cigarettes, and this is an important point to be borne in mind.

Coming to the question of the engagement of the caretaker Sewell, which was made by Major Woodside, the Major contends that Sewell's duties were to attend to the firing of the stoves, and that he was to remain in and guard the building at night. On the other hand, Sewell contends that he did not accept the occupation of watchman, but that his duties, as assigned to him by Major Woodside, were to look after the heaters, clean the offices at night when the doctors were through with their work and nothing else; but that he was not to stay there over night, that at the time of his engagement nothing was said about his staying over night.

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On the night of the fire, after clearing up and attending to his stoves he left for his home somewhere around midnight, and says that nothing was then different from any other night.

Constable Coombs, who was on duty on Sparks St., noticed the fire somewhere around 3.40 to 3.45 in the morning of the 13th, when he found the front part of the ground floor of the Arcade building on Queen St. was on fire and he gave the alarm. At that time no other building on Queen St. was on fire, and he did not go to Sparks St. at the time.

Constable Feeny, who was on duty on Bank St., noticed the fire also at about 3.45 a.m. on the 13th, and says that when he arrived the fire was flaming out of the ground floor windows on Queen St.—the bottom story, as he puts it, was on fire—and about a quarter of an hour afterwards the fire had spread on each side of the building on Queen St.

We also had the evidence of Chief Graham, who testified he reached the place about three minutes after the alarm had been given, and on arrival found that the Arcade building alone was on fire, and that the fire had then reached the fourth story of the building.

Then he went to Sparks St. and ascertained the fire was still only in the Arcade, and that afterwards the Wolfe and Powers Building, on the western side of the Arcade, took fire from behind.

The chief offers as his opinion and belief that the fire originated on Queen St., on the south-east corner of the building, but adds he does not know the origin of the fire. It is his surmise.

Witness Lattimer, the fire inspector, was heard, and he testified he had been in the building 4 days before the fire, and described the condition of the building and found fault, among other things, with the basement of the building where there was rubbish, cotton and showcases—but there was no fire and no stove in the basement. His surmise of the fire, sharing the chief's view, is that the fire originated in the south-east corner of the building on Queen St. on account of the stove being too close to the window sill—only two feet—but a stove *per se* is not defective, and there is no evidence that any of these stoves were defective.

However, the inspector further testified that after the fire was over, the floor where that stove stood, in the south-east corner, was not burnt—"that part of the floor was all right and

the woodwork around there was there still. The woodwork, excepting a piece of the ledge of the window, was intact."

Now, under these circumstances, and with the above evidence can it be found that the fire resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon the premises?

Would it be reasonable to jump at a conclusion based upon the mere conjecture of the chief of the fire brigade and the inspector, and find that the stove in the south-east corner of the building, on Queen St., did set the fire, when it was placed at two feet distance from the partition and that when after the fire is over the floor and the woodwork around the stove is still intact, with only a small portion of the ledge of the window being burnt?

Asking the question is answering it.

Had Sewell been in the building on that night, would the fire have been avoided? The answer again can only amount to a mere conjecture. It might and it might not. Fires in a number of cases occur every day in buildings where there are caretakers or watchmen, and even in homes where whole families sleep. He might perhaps or perhaps not have headed the constable in giving the alarm.

The fact that the fire took place is not of itself evidence of negligence, because its occurrence is quite consistent with due care having been taken. To find negligence under the circumstances, there must be some affirmative evidence of negligence, or of some fact from which a forcible inference of negligence may be drawn. The conjectures or surmises built in this case are too aleatory and uncertain.

We are told that as many as 200 men were passed in a day by the doctors, and that smoking was not stopped. There is as much possibility or probability that the fire might have originated from a stub of a cigar, or from a cigarette thrown somewhere in a corner, as is customary especially with an irresponsible class of young men, and that the fire had started even in day time and was smouldering for quite a while before spreading out. That possibility or probability is just as fair an inference as the other conjecture that the fire would have originated from stoves that had been there for months and had given perfect and entire satisfaction.

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Or again, the fire might have originated from the wiring for the electric light or otherwise. There is no knowing. It was an accidental fire and no one knows how it started.

The burden of proving negligence was upon the suppliant who has failed to do so.

Under the circumstances I am unable to find negligence as required by the statute.

There will be judgment finding that the suppliant is not entitled to the relief sought by his petition of right.

Judgment accordingly.

QUE.

K. B.

OTTAWA VALLEY R. Co. v. CENTRAL R. Co.

Quebec King's Bench, Lamothe, C.J., Lavergne, Carroll, Pelletier and Martin, JJ. June 26, 1919.

COURTS (§ III—196)—EXCHEQUER COURT—JURISDICTION—RAILWAYS PASSING BEYOND LIMITS OF A PROVINCE—RAILWAYS WITH DOMINION CHARTERS SITUATED EXCLUSIVELY IN PROVINCE—CONCURRENT JURISDICTION OF SUPERIOR COURT.

The Exchequer Court has jurisdiction respecting every railway company which passes beyond the limits of a Province, and which otherwise owes its existence to the legislative power of the Dominion of Canada, but in case of a railway exclusively situated within the limits of the Province of Quebec, which has received its charter from the Federal Parliament, the jurisdiction of the Superior Court of Quebec has not been taken away by the Exchequer Court Act, R.S.C., 1906, ch. 140, and in such cases the Superior Court and the Exchequer Court have concurrent jurisdiction.

Statement.

APPEAL from the judgment of the Superior Court of Quebec declaring that the Exchequer Court alone had jurisdiction to appoint a receiver and authorise him to sell the rails, ties and accessories of a certain railway company. Reversed.

Hibbard, Gosselin and *Moyse*, for appellant.

Cook, Duff, Magee and *Merrill*, for respondent.

Lamothe, C.J

LAMOTHE, C.J.:—Article 171 Code of Civil Procedure does not apply to litigation such as that submitted to us. The Superior Court of this Province is not incompetent *ratione materiæ*.

Without wishing to define in what cases the Exchequer Court of Canada can have exclusive jurisdiction and in what cases it can have jurisdiction concurrent with the Provincial Courts, I can say that in the present case the jurisdiction of the Exchequer Court depends upon a preliminary question: Is the company (the Central Railway Company) owner of the rails and other

assets mentioned in the declaration? If it is not owner the receiver appointed to wind up this company cannot claim any right as to them and the Court of Exchequer cannot authorise the receiver to sell these assets. This question is raised in the present litigation. The plaintiff, appellant, claims that the contract of sale between the two companies was never approved by the Board of Railway Commissioners, nor by the Governor-General-in-Council. Without this double approval the sale remains without effect. This question should be decided by the Courts of the place where the assets, the possession of which is contested, are found.

I am of opinion that the declinatory exception should have been dismissed.

The view that I take relieves me from the necessity of discussing the dismissal of the case by the Exchequer Court. Is this dismissal allowed by the terms of art. 171 C.C.P.? Is the Exchequer Court which is a Federal Court one of the Courts by which this dismissal of the cause can be made? An interesting question from some points of view, a question upon which I express no opinion at present.

Carroll, J.

CARROLL, J.:—The receiver wishes to sell these rails by virtue of a judgment of the Exchequer Court, dated September 10, 1918.

The order in question was evidently made pursuant to a contract between the two companies, on October 18, 1911, by which the appellant sold its property as well as its rights and privileges to the respondent. This contract, however, was only to come into force after being sanctioned by the Governor-in-Council as provided in sec. 361 of the Railway Act, R.S.C. 1906, ch. 37.

This sanction should be preceded by the approval of the Board of Railway Commissioners, but permission to give effect to the contract was refused by the Board on March 17, 1919. Consequently this contract is really without effect.

The Judge of the Exchequer Court when he made his order must have been under the impression that this sanction had been given or that it certainly would be given, because failing this sanction the order was without value as against the appellant company since Williamson was only appointed receiver for the respondent company.

In these circumstances this order appears to me to be void.

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The Court of first instance, however, sent back the record to the Exchequer Court which would have jurisdiction if the contract had been executed.

The Exchequer Court has jurisdiction respecting every railway company which passes beyond the limits of a Province and which otherwise owes its existence to the legislative power of the Parliament of Canada.

The two railways in question in this case have received their respective charters from the Federal Parliament, but if they are both exclusively situated within the limits of the Province of Quebec does it follow that the Superior Court has no jurisdiction?

The principle is that the general jurisdiction of the Superior Court can only be taken away by an express provision or by the establishment of a new tribunal whose jurisdiction would be incompatible with that of the Superior Court.

There is *a priori* a repugnancy in the fact that two Courts, the one instituted by the Federal Parliament and the other the Superior Court, should have jurisdiction over the same matter. However, when the Exchequer Court Act, R.S.C. 1906, ch. 140, was passed, it was not intended to take away the competence of the Superior Court in matters over which that Court previously had jurisdiction, and it was provided by sec. 28 as follows:—

> Nothing in the two last preceding sections contained shall affect the present jurisdiction of any Court of a Province in any such matters as aforesaid, affecting railways, or sections thereof, wholly within the Province, and the Superior Courts of a Province now possessing such jurisdiction shall continue as regards such railways and sections of railways to have concurrent jurisdiction with the Exchequer Court in all matters within the purview of this Act.

Did the Legislature intend to reserve to the Superior Court matters exclusively of civil right, or also to give concurrent jurisdiction over all matters respecting railways?

In view of the provisions contained in sec. 28 of the Act, R.S.C. 1906, ch. 140, establishing the Exchequer Court, it appears to me evident that the concurrent jurisdiction is general. This solution will naturally involve some conflict when it is a question of administering these laws but they can be settled by agreement between the two Courts.

The respondent in this case tells us that the appellant acquiesced in the judgment of the Exchequer Court because it applied to the latter Court for rescission of the order concerning the sale of the rails.

I cannot see any acquiescence in this application. It can be said that it was made to prevent a conflict of jurisdiction and to prevent the Exchequer Court from continuing these proceedings which, in the circumstances, would be *ultra vires*.

I would maintain the appeal with costs.

PELLETIER, J.:—The respondent claims that the plaintiff sold and conveyed all its assets to it but to make this sale and conveyance valid the approval of the Railway Commission and of the Governor-in-Council was necessary.

It has been proved that so far from approving the conveyance in question the Railway Commission refused its approval.

The parties are then in the *statu quo ante*.

I do not believe that our Code of Procedure ever intended to permit a Provincial Court to refer back a record to a Federal Court, and on this ground the judgment *a quo* would be erroneous.

However, I go much farther and believe that the Superior Court had, in the present case, complete jurisdiction to decide the question which is presented since it arises from effects exclusively situated within the limits of the Province of Quebec and, therefore, I believe that the declinatory exception should have been dismissed.

I would therefore reverse the judgment with costs.

MARTIN, J.:—The Central Railway Co. of Canada was, by its incorporating Act and amendments, given power to lease or acquire from the appellant its property or to amalgamate the two companies upon the approval of the shareholders of the companies and the sanction of the Governor-in-Council.

An agreement of sale between the two railway companies was made on October 18, 1911, in which it is recited that the appellant had agreed to sell to the Central Railway Co. and the latter had agreed to buy, the undertaking and railway of the appellant. The sanction of the Governor-in-Council to such sale was never obtained.

We are not called upon to decide the merits of this case on this issue and the interesting questions as to the effect of the agreement of sale without the sanction of the Governor-in-Council, whether or not the obligation to procure same was on the appellant and whether or not the appellant can invoke the absence of such sanction and keep the consideration, if any, it received, are all questions for future consideration and decision.

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The only question to be decided on this issue is whether the Superior Court has jurisdiction to entertain a demand by the appellant, accompanied by conservatory attachment, to prevent the respondents from disposing of the rails and ties alleged to be the property of the appellant, it appearing that Williamson as receiver of the Central Railway Co. of Canada is taking steps to sell these rails, ties and other material now on or adjacent to the right of way of the appellant company between St. Andrews and Lachute, in the Province of Quebec, in virtue of an order of the Exchequer Court of September 10, 1918.

No receiver has been appointed to the appellant, and I fail to see how the Exchequer Court has exclusive or any jurisdiction over it or its property.

Counsel for the respondent says:—

It is contrary to common sense that an insolvent railway operating or purporting to operate between the different Provinces of the Dominion should be subject to any jurisdiction other than that of the Dominion Courts. It is equally impossible to imagine that the receiver of such a railway property appointed and an officer of the Exchequer Court should not be subject to the orders of that Court.

That may be true as regards the Central Railway Co. of Canada and its receiver Williamson and as regards any property of that company, but we are not here dealing with the property of the Central Railway Co. of Canada.

The appellant says it is its property and that it is not within or under the jurisdiction of the Exchequer Court at all. The extent of the jurisdiction of the Exchequer Court and the procedure therein are regulated by the Exchequer Court Act, R.S.C. 1906, ch. 140. It is a Court of Federal jurisdiction and it is doubtful if the Superior Court had any right to refer to that Court a case pending in the Superior Court.

I am of opinion that the Exchequer Court has no jurisdiction as regards the appellant's claim and action and that the Superior Court has jurisdiction.

I would maintain the appeal and reverse the judgment of the Superior Court of March, 1919.

JUDGMENT:—Seeing that upon the declinatory exception the Superior Court ordered the return of the record in this case to the Exchequer Court; and considering that by virtue of sec. 28 of the Exchequer Court Act, R.S.C. 1906, ch. 140, the latter Court and

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the Superior Court have concurrent jurisdiction respecting railways, or branches of railways, exclusively situated in a Province and that the jurisdiction of the Superior Court of this Province has not been taken away, expressly or impliedly, by the said Exchequer Court Act;

Maintains the appeal, annuls the judgment which maintained the declinatory exception and rejects the said exception, the costs of this Court and those of the Superior Court to be paid by the respondents. *Appeal allowed.*

MAGER v. BAIRD RANCH AND Co. Ltd.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. January 7, 1921.

SALE (§ II C—35)—OF TRACTOR—ACTION TO RECOVER PRICE—WRITTEN WARRANTY—FAILURE OF MACHINE TO COMPLY WITH—VERBAL WARRANTY—EFFECT OF—MEASURE OF DAMAGE FOR BREACH—RIGHTS OF ASSIGNEE OF LIEN NOTE.

Where a sales order for the sale of a tractor and a written warranty published by the makers of the machine both declare in explicit terms that there is no other warranty or guaranty than the ones in writing, no effect can be given by the Court to a verbal warranty given by the sales agent, at the time the sales order is signed.

On proof that the machine did not comply with the written warranties the Court held that the purchaser was entitled to set off the difference between the value of the tractor, after certain parts had been replaced by the vendor, and its value if it had complied with the warranties.

[*Mager* v. *Baird Ranch and Co.* (1919), 48 D.L.R. 724, affirmed; *Case Threshing Machine Co.* v. *Mitten* (1919), 49 D.L.R. 30, followed.]

Statement.

APPEAL by plaintiff from the judgment of the King's Bench (1919), 48 D.L.R. 724, in an action to recover the balance of the purchase price of a Cleveland tractor. Affirmed.

A. C. Campbell, for appellant.

F. M. Burbidge, K.C., for respondent.

The judgment of the Court was delivered by

Fullerton, J.A.

FULLERTON, J.A.:—The plaintiff sues as assignee of a certain lien note or agreement dated March 30, 1918, under the terms of which the defendant promised to pay to Guilbaults, Ltd., the sum of $750 at their office in St. Boniface, with interest at 8% per annum till due, and 10% per annum after due till paid. This lien note was given in settlement of the balance due on a Cleveland tractor purchased by the defendant company from Guilbaults, Ltd., on March 26, 1918, for the price or sum of $1,500.

The sale was arranged on March 26 between Victor Guilbault,

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the president of the Guilbaults, Ltd., and S. G. Baird, the president of the Baird Ranch and Co., Ltd. Baird, on behalf of his company, on that date signed a sales order and also a lien note for $750 in favour of Guilbaults, Ltd., the agreement being that a new lien note for $750 was to be subsequently signed by the defendant company and guaranteed by the defendant Elsie K. Baird, and delivered to Guilbaults, Ltd., in the place of the note signed on March 26.

This arrangement was subsequently carried out and the lien note sued on herein was substituted for that of March 26. These facts are set up in the statement of claim.

In para. 3 of their defence the defendant company allege that the sale was conditional on the tractor being able to pull three ploughs and to do such other work as the defendant company in farm operations required to be done, that it was agreed that the defendant company would deposit $775 in cash and sign a note for $775 in favour of Guilbaults, Ltd., and the latter would deliver a Cleveland tractor which Guilbaults, Ltd., warranted would pull three ploughs and do such other work as the defendant company required to the entire satisfaction of the defendant company, and that if the tractor so delivered did not fulfil the warranty and conditions on which it was delivered, then Guilbaults, Ltd., would take the tractor back and refund the $775 already paid and return the note given for $775 on the delivery of the tractor.

Paragraph 4 alleges that the tractor delivered did not fulfil the warranty and the defendant company notified Guilbaults, Ltd., of the fact and demanded a return of the cash payment of $750 and the return of the note sued on. The relief claimed is to set off against the plaintiff's claim:

(a) Loss of time of the defendants in endeavouring to make the tractor work, $300; (b) Loss of profit on land which would have been put in crop had the tractor fulfilled the warranty and conditions upon which it was delivered, $1,000; (c) Moneys expended in connection with repairs on said tractor and loss of time in connection therewith, $100.

The plaintiff filed a reply in which in answer to paras. 3 and 4 of the defence he sets out the clause in the sales order which provides that the tractor is subject only to the warranty published by the Cleveland Tractor Co., and that no other warranty is given

and says that the defendants are not entitled at law to contradict such writing.

On these pleadings the parties went down to trial. It will be observed that the defendants make no reference to the warranty contained in the written order for the tractor but rest their whole case on a verbal undertaking alleged to have been given by Victor Guilbault on the day the sales order was signed. The plaintiff, as part of his case, put in the sales order which contains the following provisions:—

It is understood that the tractor above ordered is subject only to the warranty published by The Cleveland Tractor Company, and that no other warranty or guaranty is or will be given, and that there is no understanding or agreement whatsoever between the undersigned and Guilbaults Limited or its dealers with respect to the above order, except such as are embraced in the terms therein.

The warranty indorsed on the back of the order reads as follows:—

WARRANTY.

The Company warrants the tractors to be well made and of good material and to do good and serviceable work if properly adjusted and operated by a competent person.

The Company guarantees its tractors against defective material and will replace F.O.B. cars, Euclid, Ohio, within a period of sixty days from date of sale any portion shewing manifest defects, provided such defective parts are returned to the factory of The Cleveland Tractor Company at Euclid, Ohio, charges prepaid, properly tagged, etc.

No dealer of the Company has any authority to alter or to add to the above warranty and agreement, or to waive compliance therewith at any time and the purchaser understands and agrees that there are no oral implied warranties.

S. G. Baird, who was called at the trial by the defendants, deposed to the verbal agreement made with Victor Guilbault on the day the sales order was signed substantially as set out in the third paragraph of the defence. Victor Guilbault, who was called by the plaintiff, did not contradict Baird's evidence in any material particular.

Curran, J., found (1919), 48 D.L.R. 724, at 727:—

"That the tractor did not answer or fulfil the representations or verbal warranties given by Victor Guilbault to Baird at the time of the sale . . . ; that the tractor did not answer or fulfil the warranty published by the Cleveland Tractor Co., printed upon the back of the sales order"; and (p. 729), that the consequential damages suffered by the defendant company "due

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to the breach of warranty far exceeds the value or cost of the tractor itself."

After pointing out the difficulty he has in giving effect to his findings owing to the failure of the defendants to plead the written warranty and its breach he proceeds (p. 729):—

> The two warranties, one verbal and one written, cannot stand together. The writing must prevail . . . An amendment to the statement of defence setting up the written warranty and its breach, followed by loss and injury to the defendant company should in my opinion have been pleaded, and is necessary to enable me to do justice in this case.

He gave judgment against the defendants for the sum of $775, with interest at 5% since the first day of November, 1918, and finds the defendant company entitled upon its set-off to judgment against the plaintiff for an amount equal to the plaintiff's claim with interest.

I think Curran, J., was right in refusing to give effect to the verbal warranty.

In *Case Threshing Machine Co.* v. *Mitten* (1919), 49 D.L.R. 30, 59 Can. S.C.R. 118, a contract for the purchase of "one Case 40-horse power gas engine" contained the following clause: "There are no representations, warranties, or conditions, expressed or implied, other than those herein contained."

The Court below (1918), 44 D.L.R. 40, 12 S.L.R. 1, held that the description of the engine in the order was ambiguous, and that evidence was admissible to shew what type of engine was intended.

The Supreme Court of Canada allowed the appeal (49 D.L.R. 30, 59 Can. S.C.R. 118), holding that the purchaser was bound by the written contract, notwithstanding certain verbal representations that had been made by the vendor's agent.

Duff, J., said (49 D.L.R., at p. 31):—

> The written contract declares in explicit words that the terms of the agreement between the parties are to be found in the writing and in the writing exclusively. In face of this provision it is not, in my opinion, competent for a Court of law to resort to contemporary conversations or prior conversations or even to the legend on the article for the purpose of discovering a contract differing in its terms from that expressed in the unambiguous language of the instrument.

Now, in the case before us, the plaintiff warrants: (1) "The tractor to be well made and of good material; (2) And to do good and serviceable work if properly adjusted and operated by a competent person."

On the evidence there can be no question whatever that the tractor delivered did not comply with the first above-mentioned warranty. Guilbaults, Ltd., however, from time to time supplied and attached to it parts to replace those which had proved defective, amounting altogether, according to the finding of the trial Judge, to the value of $748.34. In fact, as late as October, 1918, one Johnson was sent out by Guilbaults, Ltd., to put new trucks on the tractor, but as defendant company declined to sign a written assurance that it would continue to use the tractor the trucks were taken away.

As to the second warranty that the tractor would do good and serviceable work the evidence appears to me to be all one way and to shew conclusively that the tractor did not comply with this warranty.

Since the argument I have carefully read every line of evidence in the case and the conclusion I have arrived at is that the tractor in question is of very little if any value for practical farm work. It was admittedly a new type and an experiment and in spite of the changes made from time to time could not be made to do "good and serviceable work."

I think the defendant company is entitled to set off against the claim of the plaintiff the difference between the value of the tractor after the parts had been replaced by Guilbaults, Ltd., and the value it would have had if it had answered the warranty that it would do "good and serviceable work." I think the difference far exceeds the claim of the plaintiff.

Before concluding I must briefly refer to a contention raised by counsel for the plaintiff upon which he strongly relied. He says that in an action for the price of goods the defendant can only set off the difference in value between the goods actually delivered and goods which fulfilled the warranty, and that in respect of consequential damages he is driven to a cross-action. In support of this position he cites *Mondel* v. *Steel* (1841), 8 M. & W. 858, 151 E.R. 1288.

This case simply holds that because a defendant in an action for goods sold and delivered has obtained an abatement in the price by reason of a breach of warranty, he is not precluded from recovering consequential damage in an action against the vendor.

In view, however, of the conclusion at which I have arrived,

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C. A.

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Fullerton, J.A.

it is unnecessary to decide this point. I would dismiss the appeal.

By the formal judgment entered in this action it is adjudged that the plaintiffs do recover from the defendants $810 and costs of action including proving claim at trial and that the defendant company on their set-off $810, together with their costs of defence connected with set-off only.

The judgment should have been entered at the trial for the defendants, which would have disentitled the plaintiff to any costs. The defendants, however, have not appealed against the direction of the trial Judge giving the plaintiff the costs of the action. I see, therefore, no ground for interfering with the costs so awarded.

The defendants will have the costs of the appeal.

Appeal dismissed.

MAN.

C. A.

HIGGINS v. MITCHELL.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. December 13, 1920.

BROKERS (§ II B—10)—REAL ESTATE AGENT—LAND LISTED FOR SALE—PURCHASER READY, WILLING AND ABLE TO BUY—TERMS AGREED TO BY OWNER—FORMAL AGREEMENT SUBMITTED—CHANGE OF MIND OF OWNER—SALE CALLED OFF—RIGHT OF AGENT TO COMMISSION.

A real estate agent with whom land is listed for sale who introduces to the owner a purchaser who is ready, willing and able to buy the property, on terms which are agreed to by the owner, is entitled to his commission, although on sending the formal agreement to the owner for signature, she insists on changing the date of giving possession until a later date, and the sale falls through on account of the owner's change of mind.

[See Annotation, Brokers—Real Estate Agent's Commission, 4 D.L.R. 531.]

Statement.

APPEAL by plaintiff from the trial judgment dismissing an action for commission on the sale of land. Reversed.

H. W. H. Knott and *J. R. Higgins*, for appellant.

C. L. Monteith, for respondent.

The judgment of the Court was delivered by

Perdue, C.J.M.

PERDUE, C.J.M.:—This plaintiff is a real-estate agent doing business in Winnipeg. The defendant, a married woman, was the owner of a house which she listed with the plaintiff for sale. He obtained and introduced to her a purchaser who was ready, willing and able to buy the house. The terms of sale were set out by the plaintiff in an unsigned document, dated April 9, 1920, which was submitted to the defendant and her husband. These

terms were agreed to by her after some changes had been made in them by her husband. One of these terms was that possession should be given to the purchaser on May 1, 1920. A formal agreement was afterwards drawn up and sent to the defendant to be executed. She insisted that the time for giving possession should be changed to June 1. The purchaser who was in urgent need of a house refused to agree to this change. The defendant insisted upon retaining possession until the later date and the sale was declared off. It is clear upon the evidence that the sale fell through by reason of the defendant's change of mind and for no other reason.

The County Court Judge entered a nonsuit on the ground that "there was no mutual agreement concluded." But the question involved is whether the plaintiff had earned his commission by introducing to the defendant a purchaser who was ready, willing and able to buy the defendant's house at the price and on the terms stated to him as acceptable by her. The evidence established that he did this and that the defendant refused to complete the transaction. The plaintiff, on these facts, had earned and is entitled to his commission.

The selling price of the house was $13,250, and the plaintiff claims a commission of $457.50. This is higher than the commission allowed in the Courts of this Province for many years past. There is no evidence that any special rate was agreed upon by the parties. I think the plaintiff will be sufficiently remunerated if he receives $350. The appeal will be allowed and judgment for that amount with costs will be entered in the County Court. The plaintiff will also be entitled to the costs of this appeal.

Appeal allowed.

B. C.

C. A.

REX v. DOBIE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

INTOXICATING LIQUORS (§ III A—59)—HOTEL OWNER AND OCCUPANT—GUEST AND FRIEND CONSUMING LIQUOR IN ROOM—LACK OF KNOWLEDGE OF OWNER—"PERMITS" OR "SUFFERS," INTERPRETATION—B.C. PROHIBITION ACT, 6 GEO. V. 1916, CH. 49, SECS. 24, 38.

The owner and occupant of a hotel is improperly convicted of an offence under sec. 24 of the B.C. Prohibition Act, 6 Geo. V. 1916 (B.C.), ch. 49, the evidence being that a guest of the hotel and his friend being drunk did consume liquor in the room of the guest, but without the knowledge, connivance, carelessness, or wilful blindness of the accused. The construction of the word "suffers" is not distinguishable from "permits" and a conviction cannot be upheld where there is no proof of knowledge, connivance or carelessness on the part of the accused. [*Somerset* v. *Wade*, [1894] 1 Q.B. 574; *Rex* v. *Creighton* (1917), 29 Can. Cr. Cas. 161, referred to; *Whimster* v. *Dragoni* (1920), 51 D.L.R. 503, 33 Can. Cr. Cas. 39, distinguished.]

Statement. APPEAL by the Crown from a judgment of Morrison, J., quashing a conviction under the British Columbia Prohibition Act. Affirmed.

H. S. Wood, for appellant; *R. L. Maitland*, for respondent.

Macdonald, C.J.A. MACDONALD, C.J.A.:—I would affirm the judgment of Morrison, J., quashing the conviction.

The offences charged against the accused were that being the owner and occupant of the Vernon Hotel he did "permit and suffer drunken persons to consume liquor therein" and did "permit and suffer drunken persons to assemble or meet therein" contrary to sec. 24 of the Prohibition Act, 6 Geo. V., 1916 (B.C.), ch. 49.

Two persons, a guest in the hotel and his friend being drunk, did consume liquor in the room of the guest but without the knowledge, connivance, carelessness or wilful blindness of the accused, as was clearly proven in the proceedings before the magistrate and so found by him.

It was argued that there was duplicity in these charges, but in my view of the case I am not concerned with this phase of it. The magistrate, in making the conviction, relied upon sec. 38 of the Act, but in my opinion that section has no application to the offences charged in the information. Shortly stated, sec. 38 provides that the occupant shall be personally responsible for the illegal sale or act of another, proof of which shall be conclusive evidence against the occupant. It is the other person's offence which may be saddled upon the occupant.

Now, what was the offence committed by the other person or

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persons in this case? Clearly not the offences charged here, but offences embraced within the provisions of secs. 11 and 12 of the Act. The offences charged in the information are laid under sec. 24 of the Act; they are chargeable only against the owner, tenant or occupant of a house or premises. Could the guest and his friend commit the offences by suffering and permitting themselves to assemble and to consume liquor? If not, then we cannot apply the provisions of sec. 38 to this prosecution.

The question therefore is, was the accused properly convicted under the provisions of sec. 24? I think he was not. He did not "permit" or "suffer." The construction to be put upon these words is to be found in *Somerset* v. *Wade*, [1894] 1 Q.B. 574. It was there held that a person could not be convicted of "suffering" gaming in the absence of knowledge, connivance or carelessness on his part and that "suffers" is not distinguishable from "permits." A like decision was rendered by Hyndman, J., in *Rex* v. *Creighton* (1917), 29 Can. Cr. Cas. 161.

During the trial the magistrate gave utterance to some observations condemnatory of the Prohibition Act, and I think I ought to say that Judges and magistrates are not at liberty to criticise the justice of the legislation which they are called upon to interpret. I also notice that the magistrate reserved his decision for the purpose of obtaining the opinion of the Attorney-General upon the construction of the statute. Now, while the Attorney-General may properly advise executive officers of the Government, he cannot be appealed to for advice by judicial officers.

Martin, J.A.

MARTIN, J.A., would dismiss the appeal.

Gallihe, J.A.

GALLIHER, J.A.:—Section 38 of the Prohibition Act, 6 Geo. V., 1916, ch. 49, does not, in my opinion, apply, and therefore we are not within *Whimster* v. *Dragoni* (1920), 51 D.L.R. 503, 33 Can. Cr. Cas. 39, recently decided in this Court.

I agree with the views expressed by Macdonald, C.J.A., and would dismiss the appeal.

McPhillips, J.A. Eberts, J.A.

MCPHILLIPS, and EBERTS, JJ.A., would dismiss the appeal.

Appeal dismissed.

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YUKON GOLD Co. v. MOREAU.

Yukon Territorial Court, Black, J., pro tempore. February 2, 1921.

ARBITRATION (§ II—12)—MISCONDUCT OF ARBITRATOR—PRIVATE INTERVIEWS WITH WITNESSES—INVALIDITY OF AWARD.

If an arbitrator, after the close of the hearing and before rendering his award, holds private interviews with one of the witnesses at the hearing, he is guilty of misconduct sufficient to invalidate the award, although such interviews were held only for the purpose of checking up certain figures so as to enable the arbitrator to more correctly arrive at the proper amount to be awarded, and were without any dishonest or fraudulent intention.

[*Walker* v. *Frobisher* (1801), 6 Ves. Jun. 70, 31 E.R. 943; *Dobson* v. *Groves* (1844), 6 Q.B. 637, 115 E.R. 239; *Plews* v. *Middleton* (1845), 6 Q.B. 845, 115 E.R. 319; *Williams* v. *Roblin* (1858), 2 P.R. (Ont.) 234; *Pardee* v. *Lloyd* (1879), 26 Gr. 374; *Race* v. *Anderson* (1886), 14 A.R. (Ont.) 213; *Hamey* v. *Shelton* (1844), 7 Beav. 455, 49 E.R. 1141, referred to. See Annotation Arbitration—Conclusiveness of Award, 39 D.L.R. 218.]

Statement. APPLICATION by the Yukon Gold Company to set aside an award on the ground of misconduct on the part of two of the arbitrators. Award set aside.

C. E. McLeod, for applicant; *C. B. Black*, for Moreau.

Black, J. BLACK, J.:—This matter is now before the Court on an application by the Yukon Gold Co. to set aside the award on the ground of "misconduct" on the part of the arbitrators Brown and Robertson.

The motion was heard and evidence taken before me on December 22, 1920, and adjournment was had until January 4, 1921, when argument by counsel for both parties was presented.

The only material before the Court and used on the application is the notice of motion and the affidavit of W. J. Rendell. The judgment or decision of the arbitrators, however, is filed pursuant to the Yukon Placer Mining Act, R.S.C. 1906, ch. 64, in the office of the mining recorder, and I find from it that Yukon Gold Co. and Edward Moreau are admittedly co-owners of the mining claims known as the "Mason" and "Smith" bench claims situate below Discovery on Bonanza Creek, in this Territory, each owning an undivided one-half interest therein; that the company required the privilege of depositing upon a portion of said Mason and Smith bench claims the leavings and tailings and water from a number of adjacent bench claims belonging to or being worked by the company in their hydraulic mining operations, and, being unable to agree with their co-owners upon the value of such dumping privilege applied under sec. 74, R.S.C. 1906, ch. 64, for the

appointment of a Board of Arbitrators to hear and determine the matter, and such Board was duly appointed as follows:—T. A. Firth, by the company, J. A. Brown, by the owner, Moreau, and D. C. Robertson, chosen by the two so appointed; that the arbitrators Brown and Robertson made an award fixing the amount to be paid by the company at the sum of $5,870.28, with costs of the arbitration, in which award Firth refused to concur, stating reasons for his refusal.

The misconduct complained of, which may be termed "legal misconduct," is set forth in the notice of motion in general terms and is, in effect, as follows:—

As to the arbitrator Robertson, that subsequent to his appointment as an arbitrator he examined witnesses in the absence of the Yukon Gold Co. or its counsel and in the absence of other members of the Board, and without notice; that he discussed the matter freely about the streets of Dawson while filling the office of arbitrator and before the award was made; and that he conferred with the arbitrator Brown in the absence of Firth, the other arbitrator;

As to the arbitrator Brown, that subsequent to his appointment as an arbitrator, and before the award was made, and without notice, and in the absence of the two other members of the Board, the said Brown had many interviews and consultations with Moreau, one of the parties, at the house of said Brown and elsewhere; that said Brown was guilty of further misconduct in having had consultations relative to the matter in dispute, with the arbitrator Robertson, in the absence of the third member of the Board, and without notice, and in having discussed the matters in dispute with other persons, in the absence of and without notice to the Yukon Gold Co.; the notice further charges bias, partiality and unfairness on the part of Brown arising out of his personal hostility to Yukon Gold Co.

It is difficult to fully define what amounts to misconduct on the part of an arbitrator, for so much depends upon what actually has occurred in each case and how far the evidence adduced establishes "misconduct."

There are many grounds upon which an award will be set aside for "misconduct," as, for instance, if the arbitrator fails to decide all matters included in the reference; if there has been

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irregularity, such as failure to give notice to the parties of the time and place of hearing; if there is a refusal to hear the evidence of material witnesses; where the arbitrator takes instructions from or talks with one party in the absence of the other; if he takes or receives the evidence of a witness in the absence of the parties, or one of them, and without notice. All these are defined by Lord Halsbury as constituting such misconduct as will vitiate an award.

Russell, the recognised authority on the law of Arbitrators and Awards, in referring to the duty of arbitrators to receive no evidence unless both parties are present, says, at pp. 133, 134:—

> An arbitrator can hardly be too scrupulous in guarding against the possibility of being charged with not dealing equally with both parties. Neither side can be allowed to use any means of influencing his mind which are not known to and capable of being met and resisted by the other; that he should take care that no kind of communication concerning the points under discussion be made to him, without giving information of it to the other side. However immaterial an arbitrator may deem a point to be he should be very careful not to examine a party or a witness upon it except in the presence of the opponent. If he err in this respect he exposes himself to the gravest censure and the smallest irregularity is often fatal to the award.

Numerous cases are referred to, a number of which were cited on the argument on both sides.

I have gone very carefully into all the cases cited and have given the matter the fullest consideration.

The broad principle that in the administration of justice no party to a cause can be allowed to use any means whatsoever to influence the mind of the Judge, is jealously adhered to, and such an obviously essential principle, to be followed by the Courts in dealing with the rights of parties, must not be departed from.

In *Walker* v. *Frobisher* (1801), 6 Ves. Jun. 70, 31 E. R. 943—the leading case upon the subject, where the award was set aside, the arbitrator deposed that after he had examined all the witnesses some circumstances were mentioned to him by other persons in the absence of the parties of which he believed he made some minutes but that at the same time he told them he had previously satisfied his mind on the subject and that he should proceed to make his award. The affidavit further stated that nothing which passed had the least weight with him and that the award contained his decided opinion arrived at previously to the incident referred to.

Eldon, L.C., in his judgment says, in part, at p. 72 (E.R. p. 944):—

This award cannot be supported. The arbitrator, having been named by the late Lord Chancellor, is, I am well assured, a most respectable man, but he has been surprised into a conduct which upon general principles must be *fatal to the award*. . . . He had examined different witnesses at different times in the presence of the parties. He recommended them not to produce any more witnesses. . . . After this he hears these other persons and he admits he took minutes of what was said. It did not pass as mere conversation. It does not appear that he afterwards held any communication with the other party or disclosed what passed to him; but the arbitrator swears it had no effect upon his award. I believe him. He is a most respectable man, but I cannot for respect for any man do that which I cannot reconcile to general principles. A Judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice, but upon general principles it cannot be supported.

Dobson v. *Groves* (1844), 6 Q.B. 637, 115 E.R. 239, is also referred to. Here a witness, whom attorneys for both parties declined to call, was examined by the arbitrator who refused to allow cross-examination by defendant's attorney. On a subsequent date one of the plaintiffs discovered the arbitrator with the witness referred to and a special pleader who had acted against plaintiffs in matters affecting the subject of the arbitration, together in a room at an inn perusing papers and plans connected with the arbitration. The arbitrator refused him permission to remain although the parties were not represented and the plaintiffs' attorney had not been notified. Lord Denman, C.J., in delivering judgment of the Court, after reference to the facts, says, at pp. 647, 648 (E.R. 243, 244):—

The arbitrator said that nothing which passed on that meeting would influence his decision, but I think that no information ought to be received at all under such circumstances. . . . The proceeding is quite different from that of consulting a legal friend on the framing of the award; that is legitimate; but here the conference is on something to be done by the consulting party as arbitrator . . . When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection.

In *Plews* v. *Middleton* (1845), 6 Q.B. 846, 115 E.R. 319, it was shewn that interested and material witnesses were examined by one arbitrator apart from the others and in the absence of parties, whereas such examinations should have been conducted by the arbitrators jointly in the presence of the parties.

In *Williams* v. *Roblin* (1858), 2 P.R. (Ont.) 234, the agent of one of the parties sent letters to two of the arbitrators containing statements and arguments in favour of his principal, which the other party did not see and had no opportunity of answering.

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Pardee v. *Lloyd* (1879), 26 Gr. 374. Here it is held that any communication between one of the parties to an arbitration and an arbitrator on the subject of the reference, of which the other party and the other arbitrators are not aware and at which they are not present, is illegal and renders the award invalid, an arbitrator being a judge whose duty it is to be indifferent between the parties. It was shewn that one of the arbitrators had held several interviews with the defendant pending the reference and that the arbitrator in at least one of such interviews consulted the defendant as to the mode in which the award might be framed and asked the defendant which he preferred, these facts being withheld from the other arbitrators [p. 379].

In *Race* v. *Anderson* (1886), 14 A.R. (Ont.) 213. After the evidence had been closed and the matter argued one of the parties to the reference who had been examined as a witness, sent, by mail, to the arbitrator his affidavit explaining portions of his evidence but which was not received until after the arbitrator had written out his view in accordance with which he subsequently made his award. The County Court Judge set aside the award and on appeal his judgment was sustained.

I find some difficulty, however, under the evidence, in coming to the conclusion that the facts in the case as to the conduct of the arbitrator Brown bring us within the principle referred to. The Court must guard against working any injustice by too narrow an application of the principle. It will be found upon a close examination of all the cases cited (to some of which I have referred at length because I feel that parties should have opportunity of observing what the law is), that it has been established by the evidence that there has been some communication affecting the matter in question, or some material examination of a witness had in the absence of and without notice to one or both of the parties to the arbitration. I shall deal first with the alleged "misconduct" on the part of the arbitrator Brown.

Brown is a man of excellent reputation in this community where he has lived and been actively engaged in mining for a number of years and is by practical experience a competent person to judge of the matters involved in the reference and who, I feel, has acted conscientiously throughout the whole proceeding. I believe his testimony. The evidence is that after his appointment

as arbitrator and before the third arbitrator was appointed, Brown had some conversation with the owner, Moreau, in the absence of the other party. It is not shewn what actually passed between them, but Brown says he then "told Moreau he would have to go by the evidence and to get all the evidence he could." He says: "I had no discussion with him. I put him right; told him I could not take anything, only the evidence." When asked if Moreau ever made any suggestions as to the course of action he should take on the Board, Brown says: "As I told you up there he started to talk a little while, I put him right; I righted him up. I didn't take any suggestions from Moreau at all." To the question: "All I wish to find out is whether he began to talk to you?" Brown says: "I thought by the way he talked that he had an idea of getting more than I would give;" and when further questioned by McLeod he says: "No amount was mentioned. I thought he might expect too much and I put him right."

By the evidence of Brown and also that of Moreau it appears that Moreau called at Brown's house in Dawson on several evenings, probably 5 or 6 evenings, during the time the arbitrators were considering their award which was spread over a number of days. Brown says that Moreau would come in and inquire how the Board was progressing; that nothing was said by Moreau on the occasion of any of these visits concerning the case except to ask what progress was being made; that Moreau "did not talk about the case; he was vetoed at the start." Brown admits that he told Moreau how they were progressing, telling him on one occasion "they had split up the ground;" but insists that no talk or discussion was had between them about the case and no statement made by Moreau. It appears by the evidence of Brown that the first night Moreau came to his house he wanted to accompany Brown and be present during the deliberations of the Board and that they walked together from Brown's house to the building where the Board met. When asked if they had any conversation while walking along together, Brown answers: "Not a thing. I was just considering how to get at him to tell him he would not be allowed to appear." This, I think, shews Brown's attitude and reveals to some extent the importunities he was subjected to by Moreau. From my knowledge of Moreau's peculiarly anxious

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temperament and simple lack of understanding, I can quite appreciate that he may have so acted without any intention of wrong-doing.

It appears, and the fact is, that Brown and Moreau have for a number of years been living as near neighbours on Bonanza Creek in the immediate vicinity of the property which is the subject of the reference. It is, to say the least, regrettable that Moreau does not appear to appreciate the impropriety of his calling on Brown at all pending the reference. Private communications under such circumstances are always objectionable and should be avoided as much as possible. Brown says that he could not well turn Moreau out of his house, and, knowing, as I do, Moreau's peculiarities and the custom of neighbours in this country, I can make some allowance for the indiscretion. There is, of course, the first conversation between the arbitrator Brown and Moreau which took place after Brown's appointment and before the other arbitrators were appointed, at which something was said by Moreau which led Brown to think that Moreau was expecting more than he might be willing to allow him, and here Brown at once shuts off further conversation and, as he puts it, Moreau "was vetoed at the start." I believe Brown's statement in regard to what took place, and though these happenings are clearly very objectionable, I have, for the reasons stated, some doubt as to whether the evidence in respect thereto is sufficient, under the authorities, to bring Brown's conduct within the principle referred to.

The charge of bias, partiality and unfairness of Brown arising out of personal hostility to Yukon Gold Co. is not in any way sustained by the evidence; nor is there any evidence to sustain the allegations that he conferred with the arbitrator Robertson in the absence of Firth or that he discussed the matter with other persons in the absence of parties and without notice.

As to the alleged misconduct on the part of the arbitrator Robertson, there is absolutely no evidence to sustain the charge that Robertson "discussed the matter freely about the streets while he was filling the office of arbitrator and before the award was made" or that he conferred with the arbitrator Brown in the absence of Firth, the third member of the Board, all of which is denied by Robertson in his evidence. Robertson is a person of the

highest integrity and reputation in the community and amply qualified by his long experience in placer mining in this country to judge of the matters involved in the reference. There can be no doubt from the evidence that he acted conscientiously and that in seeking information from Rendell as to the proper method of making certain calculations, he did so with the sole object of arriving at a just and proper conclusion in making his award. The evidence is that he had no conversation or discussion concerning the case with any one except Rendell. Rendell, who is a civil engineer, was called as a witness on behalf of Moreau and gave evidence before the Board of Arbitrators as to the correctness of certain calculations. Rendell in para. 2 of his affidavit read on the motion, says that after the close of the hearing he "had several interviews with Mr. Robertson with reference to the subject-matter of the arbitration, no one else being present at such interviews," and para. 3 of Rendell's affidavit is as follows:—

At the said interviews I was asked by said Robertson for advice and suggestions as to the proper manner of determining average values in the said ground and gave the said Robertson text books on that subject to read, pointing out to him pertinent passages bearing upon the matter, which passages he read, and I afterwards shewed him the formula.

Sections 4 and 5 of Rendell's affidavit are as follows:—

4. At the request of the said Robertson I checked for him certain figures which he gave me having to do with computations of areas and average values.

5. I told the said Robertson that to compute the values in the ground in question per square foot of bedrock in distinction to cubic measure, was impossible from the data he had given me.

Robertson in his examination says:—

I considered I was dealing with other people's money. If I was dealing with my own I would not have gone into fractions of a cent at all. I spent many nights myself, and I got there just the same. But I wanted Mr. Rendell to check the figures over for me to be fair and just to both parties. In fact, at one time if I had met Mr. Ogburn (Mr. Ogburn is an engineer in the employ of the applicants) I would have asked him to check some figures too, but I was not so well acquainted with him.

Robertson admits that he asked Rendell "what rules were generally used in averaging up samples," and that Rendell shewed him one or two books on the subject and pointed out passages which he read; that the interviews with Mr. Rendell were not concerning the case generally and were confined to the particular matter stated. The mere checking up of certain figures is not seriously objected to, but it is urged on behalf of the applicants that this conversation with or examination of the witness Rendell

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in the absence of the parties and of the other members of the Board dealt with the vital points of the case and that they should have had the opportunity of offering expert testimony upon the question as well.

It is to be regretted that Robertson in his honest endeavour to arrive at a just award did not have the witness Rendell examined on the point referred to in the presence of all the arbitrators and after notice to the parties, or that he did not, at least, notify both parties of the information he had obtained from Rendell, before completing the award. His not having done so brings the case within the principle referred to and followed in the cases cited and must be held to be fatal to the validity of the award. To quote the language of Lord Langdale in *Harvey* v. *Shelton* (1844), 7 Beav. 455, 49 E.R. 1141, at p. 464 (E.R. 1145):—

> This is not a matter of mere private consideration between two adverse parties, but a matter concerning the due administration of justice, in which all persons who may ever chance to be litigant in Courts of justice, or before arbitrators, have the strongest interest in maintaining that the principles of justice shall be adhered to in every case.

Upon the motion counsel for Moreau urged that, in the event of its being held that such examination of Rendell by the arbitrator Robertson renders the award invalid, there should be a reference back to the Board upon the matter concerning which Rendell had been so examined, rather than that the award should be set aside.

I have no doubt as to the authority of the Court to make such reference back, but I cannot bring myself to the conclusion that it would be the proper course. If the examination of Rendell were the only objection I might take a different view. But there is some doubt as to whether the first conversation or interview between Brown and Moreau, revealing, as it does, the fact that there must have been some statement by Moreau concerning the extent of the damage, does not bring the whole case within the principle by which the Court is bound. The setting aside of the award in this case may seem to be somewhat of a hardship, but the leading principles that govern references to arbitration must be preserved inviolate.

It has not been shewn, however, that there has been any intentional "misconduct" and under all the circumstances of this case I do not feel that costs should be awarded.

There will be an order setting aside the award, but without costs. *Award set aside.*

O'BRIEN v. ROYAL GEORGE.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 8, 1921.

MUNICIPAL CORPORATIONS (§ II C—113)—BY-LAW CLOSING TEMPERANCE BAR OVER SUNDAY—VALIDITY OF—CRIMINAL LAW—SUNDAY OBSERVANCE.

A provision in a municipal by-law that: "Every person licensed to keep a temperance bar shall close his premises at the hour of eleven o'clock on every Saturday night, and keep them closed until six o'clock on the Monday morning thereafter, and shall on other nights of the week close such premises at midnight and keep them closed until six o'clock on the following morning," is not invalid as dealing with criminal law and the observance of Sunday which is beyond the power of a Provincial Legislature. The by-law not being for the moral conduct of the persons required to observe it but for the quiet and rest of the persons affected by it.

[*Ouimet* v. *Bazin* (1912), 3 D.L.R. 593, 20 Can. Cr. Cas. 458, 46 Can. S.C.R. 502; *Hodge* v. *The Queen* (1893), 9 App. Cas. 117, referred to.]

Statement.

APPEAL from the judgment of McCarthy, J., refusing to quash a conviction for breach of a by-law of the city of Edmonton. Affirmed.

H. A. Friedman, for appellant.

J. C. F. Bown, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—The defendant held a license from the city for a temperance bar. The by-law under which the license was granted and for a breach of which the conviction was made, provides that a temperance bar, *i.e.*, premises on which liquor containing more than ½ of 1% of alcohol is sold, shall not be maintained without a license therefor. The by-law contains certain provisions regarding the character of the premises and the persons to be employed and provisions respecting closing, the last of which are as follows:—

> Every person licensed to keep a temperance bar shall close his premises at the hour of 11 o'clock on every Saturday night and keep them closed until 6 o'clock on the Monday morning thereafter, and shall on other nights of the week close such premises at midnight and keep them closed until 6 o'clock on the following morning.

The substantial ground of appeal is based on the argument that the foregoing provision is in reality a requirement for the observance of Sunday, which has been held not to be within the power of a Provincial Legislature as being criminal legislation. Numerous authorities are cited but as McCarthy, J., points out the regulations in those cases had express and special reference to the observance of Sunday and apparently were limited to that while in the present case Sunday is excluded along with other portions of the week from the hours on which the premises may be kept open.

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O'BRIEN v. ROYAL GEORGE.

Harvey, C.J.

Before the present Liquor Act, 6 Geo. V., 1916 (Alta.), ch. 4, in this Province there was a liquor license law which had been in force by virtue of territorial and provincial legislation for many years. Under it, and I have no doubt under a similar law at some time in force in every Province of this Dominion, provision was made for keeping closed during certain times premises licensed for the sale of intoxicating liquors. Such Acts no doubt still exist in some or one of the Provinces.

In our Act and probably in all the others the provision was very similar to that of the by-law under consideration, the premises being required to be closed all of Sunday and parts of other days. It is a rather startling thing to be told that these were all invalid as dealing with criminal law.

In *Ouimet* v. *Bazin* (1912), 3 D.L.R. 593, 20 Can. Cr. Cas. 458, 46 Can. S.C.R. 502, in which a statute of Quebec was held invalid on this ground, Duff, J., at p. 606 (3 D.L.R.) says:—

> It is perhaps needless to say that it does not follow from this that the whole subject of the regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion Parliament. It is not at all necessary in this case to express any opinion upon the question and I wish to reserve the question in the fullest degree of how far regulations enacted by a Provincial Legislature affecting the conduct of people on Sunday but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion Parliament; but it may be noted that since the decision of the Judicial Committee in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, it has never been doubted that the Sunday closing provisions in force in most of the Provinces affecting what is commonly known as the "Liquor Trade" were entirely within the competence of the Provinces to enact.

In *Hodge* v. *The Queen*, 9 App. Cas., at 130, it was stated that: "Subjects which in one aspect and for one purpose fall within sec. 92 may in another aspect and for another purpose fall within sec. 91."

It may seem peculiar that the purpose rather than the effect of legislation should be the guide for determining its validity, but it is too late now to doubt that legislation may be valid and effective if ancillary to a proper subject which would be invalid as principal legislation.

In my opinion the provisions of this by-law have no regard to Sunday observance at least by the persons who are subject to its direction. There are times when the public at large wish to be quiet. The requirement is not for the moral conduct of the

persons required to observe it but for the quiet and rest of the persons affected by it.

There is no doubt that if Sunday were not mentioned the by-law could not be questioned. In my opinion there is no reason for thinking that the purpose for requiring the closing on Sunday is at all different from that for closing at other times and it is therefore not essential Sunday legislation in the sense that it is included under the heading of "criminal law."

I would dismiss the appeal with costs.

Harvey, C.J.

STUART, J.:—I concur.

Stuart, J.

BECK, J. (dissenting):—In my opinion the conviction ought to be quashed. I think the by-law so far as it deals with the whole day of Sunday is obviously dealing with it as a question of morals from the same point of view as the Lord's Day Act, R.S.C., 1906, ch. 153, that is, as a part of the criminal law of Canada. That Act was passed in 1906. It did not come into effect until March 1, 1907. The cases prior to this latter date are of no value on a consideration of the question whether the by-law invades the field occupied by the Lord's Day Act. *Rex* v. *Wells* (1911), 24 O.L.R. 77, is of no assistance because what was under consideration there was the Provincial Lord's Day Act. It remained effective in consequence of a proviso in the Dominion Act, R.S.C. 1906, ch. 153, sec. 16, saying that "nothing herein shall be construed to repeal or in any way effect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any Province of Canada."

Beck, J.

In re Karry and City of Chatham (1910), 21 O.L.R. 566, Meredith, J.A., dissented (at p. 573) and I prefer the opinion which he expressed.

The two cases in the Supreme Court of Canada of *Ouimet* v. *Bazin*, 3 D.L.R. 593, 20 Can. Cr. Cas. 458, 46 Can. S.C.R. 502, and *St. Prosper* v. *Rodrique* (1918), 40 D.L.R. 30, 56 Can. S.C.R. 157, and the case in the Court of King's Bench of the Province of Quebec of *Drapeau* v. *Recorder's Court* (1918), 43 D.L.R. 309, 30 Can. Cr. Cas. 249, 27 Que. K.B. 500, are instances of provincial statutes or municipal by-laws somewhat similar to the by-law in question here with respect to which it was held that the statute or by-law trespassed upon the ground taken up by the Dominion Lord's Day Act.

Appeal dismissed.

N. S.

S. C.

THE KING v. NOLAN.

Nova Scotia Supreme Court, Longley, J., Ritchie E.J., and Chisholm, J. December 9, 1920.

EVIDENCE (§ IX—675)—ADMISSIONS OF THEFT EXTENDING OVER PERIOD OF TIME—AUDIT—FURTHER ADMISSIONS—WRITING—FURTHER EVIDENCE UNNECESSARY.

When the accused is charged with stealing various sums of money, and admits in writing the theft of a certain sum, and subsequently assists in an audit the result of which shews that even a larger sum is missing, and admits that the audit is correct, it is a clear admission that he stole the amount shewn in the audit, and it is immaterial how and when he stole it. No further evidence is required for a conviction.

Statement.

DEFENDANT, an accountant in the employ of the Dominion Express Co. at Halifax, was indicted and convicted on a charge that he did at Halifax aforesaid, during the years 1919 and 1920, steal $3,000 of lawful current money of Canada, the property of the Dominion Express Co. aforesaid. Questions were reserved for the opinion of the Court as set out in the opinion of Ritchie, E.J.

James Terrell, K.C., for prisoner.

A. Cluney, K.C., for Attorney-General.

The judgment of the Court was delivered by

Ritchie, E.J.

RITCHIE, E.J.:—Nolan was tried before my brother Russell and a jury for stealing money from the Dominion Express Co., and convicted.

The Judge granted a reserved case and the following are the questions therein submitted for the opinion of the Court:

1. Does the evidence disclose the offence charged in the original indictment? 2. Having regard to the evidence should I have granted the amendment to the indictment? 3. Does the evidence disclose an offence as charged in the amended indictment? 4. Was I right in admitting evidence of various thefts between the dates covered by the amended indictment to make up the sum alleged to have been stolen, namely, $1,596.54? 5. Should I have directed the jury to acquit the defendant? 6. Was I right in admitting the letter signed by the defendant, dated April 10, 1920, as evidence in the case?

I answer the first, second, third, fourth and sixth questions in the affirmative, and the fifth question in the negative.

The point raised by the fourth question was most relied on by the prisoner's counsel. It is, I think, clear that it is not well taken. The prisoner made a voluntary and clear admission in writing that he was short in his accounts $1,377.86, and also that there was another shortage of $80.00 and that another shortage of about $1,800 would turn up later. The writing is a clean cut admission that he stole the several amounts named from the

Dominion Express Co. But an audit was made in the presence of and with the assistance of the prisoner, and the present shortage found to be $1,596.54 and he admitted this to be correct. Nolan stole this amount in small sums extending over a considerable period of time. It is contended that each amount stolen should be the subject of a count and that under subsection 2 of section 857 of the Code he could not be tried for stealing the $1,596.54 because it is made up of more than 3 distinct charges of theft not alleged to have been committed within 6 months from the first to the last of such offences. The charge is that Nolan stole $1,596.54; the evidence of his guilt comes from himself; he goes over the accounts with the officers of the company; is confronted with the shortage of $1,596.54; admits it is correct which is, in effect, a clear admission that he stole a certain sum, to wit, $1,596.54.

It is quite immaterial how or when he stole it when he admits he stole $1,596.54; no other evidence is required.

The other objections raised are so absolutely without foundation either in law or fact that I do not discuss them.

Conviction affirmed.

MARSHALL v. THE RYAN MOTORS Ltd.

Saskatchewan King's Bench, MacDonald, J. January 25, 1921.

SALE (§ II A—25)—OF AUTOMOBILE—EXPRESS WARRANTY—LIMITATION—VENDOR LIVING UP TO—IMPLIED WARRANTY UNDER SALE OF GOODS ACT—PURCHASER NOT RELYING ON SKILL OR JUDGMENT OF VENDOR.

A written contract for the sale and purchase of an automobile contained on its face a clause as follows: "It is understood that the standard warranty as printed on the back hereof applies and that no other warranty, guaranty or representation whatever has been made." The warranty on the back limited the obligation to furnishing, free of charge at the factory, duplicate part or parts to replace any part or parts covered by the warranty and adjudged to be faulty either in material or workmanship. The Court held, in an action for rescission, or in the alternative, damages for breach of an implied condition that the car would be reasonably fit for the purpose for which it was intended to which the plaintiff claimed the sale was subject, that as the vendor had lived up to this obligation the plaintiff could not recover under the express warranty, nor could he recover on an implied condition under sec. 16 of the Sale of Goods Act, R.S.S. 1920, ch. 197, because he had not from the evidence relied upon the skill and judgment of the vendor.

[*Preist* v. *Last* (1903), 2 K.B. 148; *Wallis* v. *Russell* (1902), 2 I.R. 585; *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, 150 E.R. 1484, referred to.]

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K. B.

MARSHALL v. THE RYAN MOTORS LTD.

MacDonald, J.

ACTION for rescission of an agreement for the sale and purchase of an automobile or in the alternative damages for breach of an implied condition under the Sale of Goods Act R.S.S. 1920, ch. 197. Action dismissed.

W. F. A. Turgeon, K.C., and *A. W. McNeel*, for plaintiff:

F. W. Turnbull, for defendant.

MACDONALD, J.:—By contract in writing, dated May 8, 1920, the plaintiff purchased from the defendant one new Overland Roadster automobile for the price of $1445, and the purchase price was paid and the automobile delivered on said date.

From the outset, the automobile did not work well. The car was purchased on a Saturday, and on the following Monday the plaintiff took it back to defendant's garage where some work was done on it. The next day plaintiff started for Gravelbourg in the car. The car again developed trouble on the road. Plaintiff took it to a garage in Gravelbourg. Returning to Regina May 22 he took car to defendant's garage May 25 and it remained there until May 29, undergoing repairs and adjustments. When then taken out it shewed some improvement, but a day or two later the old troubles—of which many were specified in the evidence—again developed, and it was again returned to the defendant's garage June 1 and remained there until June 12, when one Albert Moore drove the car to Moose Jaw for plaintiff. There plaintiff got it and drove it to Gravelbourg on June 14. Plaintiff had so much trouble with the car on the road that he put the car up in a garage at Gravelbourg, and on June 15, wrote defendant that he was refusing the car and demanding either a new car, or a return of his money. He got neither, so brings this action for rescission, or, in the alternative, damages, for breach of an implied condition that the car would be reasonably fit for the purpose for which it was intended to which he claims the sale was subject, or for breach of an express warranty in the contract.

The contract, on its face, contains the following:—

It is understood that the standard warranty as printed on the back hereof, applies, and that no other warranty, guaranty or representation whatsoever has been made.

On the back of the contract appears the following:—

WARRANTY.

Effective February 1st, 1919.

This warranty supersedes and cancels all previous warranties applying to Overland Willys-Six and Willys-Knight motor cars.

We warrant each new motor vehicle manufactured by us, whether passenger car or commercial car, against defects in material and workmanship, under normal use and service, for a period of three months after delivery of such motor vehicle to the original retail purchaser; our obligations under this warranty being limited to furnishing free of charge at the factory duplicate part or parts to replace any part or parts covered by this warranty, which may be adjudged by our authorised inspectors to be faulty either in material or workmanship.

This warranty shall not apply to any vehicle which shall have been repaired or altered outside our factory or branches so as, in our judgment, to effect its stability or reliability; nor which has been subjected to misuse, neglect or accident, nor to a speed exceeding the factory rated speed, or loaded beyond the factory rated loaded capacity.

We make no warranty whatever with respect to tires, rims, ignition apparatus, horns or other signalling devices, starting devices, generators, batteries, speedometers or other trade accessories, inasmuch as they are warranted separately by their respective manufacturers.

The right is reserved to change or modify this warranty without notice.

WILLYS-OVERLAND LIMITED,
West Toronto, Ontario.

It will be observed that under the warranty appears printed the name "Willys-Overland, Limited," the manufacturers of the car in question, and it was contended that the warranty was that of the manufacturers, and not of the defendant. I am, however, of opinion that by using said form the defendant made said warranty its own and is bound thereby. On its face, where the contract was signed on behalf of defendant, the warranty is expressly referred to.

It will, however, be noticed that the obligation under the warranty is limited to furnishing free of charge at the factory duplicate part or parts to replace any part or parts covered by the warranty, and adjudged to be faulty either in material or workmanship. There is no evidence of any failure on the part of defendant to live up to said obligation, so plaintiff cannot recover under the express warranty.

Plaintiff also relies on an implied condition which he claims arose under sec. 16 of the Sale of Goods Act, R.S.S. 1920, ch. 197, under the circumstances surrounding the purchase.

Said sec. 16 reads in part as follows:—

16. Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:

1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill or judgment and the goods are of a description

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which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose . . .

Defendant contends that the implied condition is excluded by the provision in the express warranty "that no other warranty, guaranty or representation whatsoever (than the standard one printed on back of contract) has been made."

I am of opinion that the express warranty would not exclude the implied condition. "Condition" is not mentioned at all in the above quoted provision; moreover, the use of the words "has been made" would indicate that only express warranties, guarantees and representations were intended to be excluded.

Merely asking for an automobile would in my opinion sufficiently make known to the seller the particular purpose for which it was required. *Preist* v. *Last*, [1903] 2 K.B. 148.

Whether the purchaser relied on the skill and judgment of the seller is a question of fact. *Wallis* v. *Russell*, [1902] 2 I.R. 585.

In this case I must conclude from his own evidence, that plaintiff did not rely on the skill and judgment of the defendant, and, if he did not in fact do so, he necessarily could not *shew* defendant that he did so rely.

In his evidence plaintiff says that on Saturday, *when he decided he would buy an Overland car* he went to the Willys-Overland Co. Ltd's. showroom. By said company he was referred to the defendant, and met McCullough. He told the latter *he wanted a light 2 seater Overland*. After some discussion not material on this point he got the car. In the light of this evidence it is impossible for me to find as a fact that plaintiff relied on the skill and judgment of defendant; on the contrary he went to the defendant with his mind fully made up as to the kind of car he wanted. I cannot distinguish this case from *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, 150 E.R. 1484. In that case the defendant sent to the plaintiff, the patentee of an invention known as "Chanter's Smoke Consuming Furnace" an order, "Send me your patent hopper and apparatus to fit up my brewing copper with your smoke consuming furnace." The furnace and apparatus were sent and proved a failure in the defendant's brewery. It was held that there was no implied condition that the furnace would be reasonably fit for the purpose for which it was required. Parke B., said, at p. 406 (E.R. 1487):—

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"The purchase is of a defined and well known machine. The plaintiff has performed his part of the contract by sending that machine."

In Benjamin on Sale, 5th ed., p. 625, it is stated:—"The buyer buys on his own judgment if he selects or defines the specific chattel or class of goods he requires although he may state the purpose for which he is buying."

Counsel for the plaintiff called attention to the fact that the Sale of Goods Act of this Province does not contain the provision in the English Act 56-57 Vict., 1893, ch. 71, to the effect that in the case of a contract for the sale of a specified article under its patent or other tradename there is no implied condition as to its fitness for any particular purpose.

In my opinion the omission from the Saskatchewan Act of that provision still leaves open the question whether in any particular case there *is* such implied condition, and this is to be determined by a consideration of whether the facts bring the case within sec. 16 (1) of the Sale of Goods Act. Referring to said provision in the English Act, a proviso to sec. 14 (1), 25 Hals. 159, note (h) says: "The proviso is a branch of the larger rule that a buyer buys on his own judgment where he defines the thing he requires for his stated purpose."

I am therefore of opinion that in the case of the sale of the automobile in question, there was no implied condition that it would be fit for any particular purpose. The action will be dismissed with costs. *Action dismissed.*

REX v. SCOTT.

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S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Magee, J.A., Riddell, Middleton and Masten, JJ. December 20, 1920.

THEFT (§ I—1)—EMPLOYEE OF FIRM OF BROKERS—OBTAINING CREDIT BY FALSIFICATION OF BOOKS—FIRM BUYING AND SELLING SHARES ON STRENGTH OF FICTITIOUS CREDIT—LOSS OF MONEY—THEFT OF SMALLER SUMS MADE POSSIBLE BY FICTITIOUS CREDIT GIVEN.

An employee of a firm of brokers who deposits cheques drawn by persons dealing with the firm, and made payable to and endorsed by the firm, in the bank to the credit of the firm, but who credits the amounts to the account of a fictitious person instead of to the accounts of the drawers of the cheques, and on the strength of this fictitious credit shares are bought and sold by the firm on supposed orders of the fictitious person, who is in fact the employee, and money is lost, is not guilty of the theft of the money whatever the offence may be. But if the employee draws cheques upon the bank account of the firm, the cheques being payable to cash, has them signed by the firm and charges them in the books of the firm to the account of the fictitious person which by virtue of the fictitious credits appears to have a balance, and cashes the cheques, he is guilty of theft.

[*Regina* v. *Gale* (1876), 2 Q.B.D. 141, referred to.]

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REX v. SCOTT.

CASE stated by the Chairman of the General Sessions of the Peace for the County of York, upon the indictment, trial, and conviction of the defendant for the theft of about $7,800 in money, the property of McMillan Nicholson & Co.

The facts are fully set out in the dissenting judgment of MASTEN, J., which, for convenience, is published first, the judgment of the majority of the Court being delivered by MAGEE, J.A.

Keith Lennox, for defendant.

Edward Bayly, K.C., for the Crown.

Masten, J.

MASTEN, J. (dissenting):—Appeal from the General Sessions for the County of York, upon a case stated by the Chairman as follows:—

"The following case is reserved and stated under sec. 1016 of the Criminal Code by me, Emerson Coatsworth, Chairman of the General Sessions of the Peace for the County of York.

"At a Sittings of the Peace in and for the County of York, holden on the 14th, 15th, and 16th days of January, 1920, Maxwell Scott was tried before me and a jury upon the following indictment:—

"In the Court of General Sessions of the Peace in and for the County of York. The jurors for our Lord the King present that Maxwell Scott, at the city of Toronto, in the county of York, on or about in the year of our Lord one thousand nine hundred and nineteen, did steal about seven thousand eight hundred dollars in money, the property of McMillan Nicholson and Company, contrary to the Criminal Code.

"And your jurors aforesaid do further present that the said Maxwell Scott, at the time and place aforesaid, did receive or retain in his possession about $7,800 in money, the property of McMillan Nicholson and Company, knowing the same to have been stolen, contrary to the Criminal Code.

"And was convicted of the offence charged in the first count, and judgment on the said conviction was postponed until application had been made for a stated case upon the question hereinafter stated.

"The said Maxwell Scott has been discharged on recognizance of bail to appear and receive judgment.

"Pursuant to the direction of the Appellate Division, I reserve the following question of law:—

"Was there evidence upon which the said defendant could properly have been convicted?

"And I make the indictment and the evidence part of the reserved case."

The indictment is for stealing a certain definite sum of $7,800. A perusal of the evidence and of the Judge's charge makes it plain and certain that the sum of $7,800, for stealing which the prisoner was tried and convicted, was the amount of three cheques which form part of exhibit 1, viz.:—

Cheque May 29th, 1919, J. G. Beaty & Co.....	$1,000.00
Cheque June 25th, 1919, J. P. Bickell & Co.....	2,000.00
Cheque Aug. 7th, 1919, J. G. Beaty & Co.....	4,835.00
	$7,835.00

Each of these cheques is payable to the order of McMillan Nicholson & Co.; each bears the endorsement of McMillan Nicholson & Co.; and each was, in the ordinary course of business, deposited in the Dominion Bank to the credit of McMillan Nicholson & Co.

It thus appears that neither these particular cheques nor the immediate proceeds of any of them were stolen by the accused.

What actually did happen was this. McMillan Nicholson & Co. are brokers doing business in Toronto, Nicholson being a member of the Toronto Stock Exchange. The accused Scott was their bookkeeper. He represented to the firm that J. P. Barron was a near neighbour and friend of his, and induced the firm to open an account with J. P. Barron. Believing Scott's representation, they opened the account and bought and sold stocks for J. P. Barron. There was no such person as Barron. Barron was in reality a pseudonym for the accused Scott, but of this the firm of McMillan Nicholson & Co. were ignorant.

The cheques above mentioned, though properly deposited in the Dominion Bank to the credit of McMillan Nicholson & Co., were credited in the books of the firm to the account of Barron, instead of being credited (as they should have been) to J. G. Beaty & Co. and to J. P. Bickell & Co.

On the strength of the fictitious credit thus supposedly established with McMillan Nicholson & Co. by Barron, stocks were bought and sold by the brokers, McMillan Nicholson & Co.,

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on supposed orders of Barron (really Scott), and money was lost. There was undoubtedly falsification of accounts by Scott, the person in charge of the books, and the facts may shew other breaches of the criminal law; but the $7,835 representing the three cheques, which is evidently the money referred to in the indictment, was not stolen, for it was properly deposited in the Dominion Bank to the credit of McMillan Nicholson & Co.

But it is said that, whether there was or was not a theft of the whole $7,800 mentioned in the indictment, there was certainly a theft by Scott of $755, represented by the five cheques shewn by exhibit 6, signed by McMillan Nicholson & Co., payable to cash, and admittedly cashed by the accused, and that this sum of $755 is part of the $7,800 mentioned in the indictment. It may be that this $755 was stolen by Scott, but I am unable to follow the reasoning which would make it part of the $7,800 mentioned in the indictment. When the cheques aggregating $7,835 were deposited in the Dominion Bank to the credit of McMillan Nicholson & Co., the bank became a debtor to McMillan Nicholson & Co. for that sum, and this chose in action formed a general and undistinguishable part of the sum standing to their credit in that account.

It is not as if Scott had received on account of McMillan Nicholson & Co. $7,835 in gold, had locked it in the safe, and subsequently stolen $755 out of the gold so placed in the safe. The procuring by Scott of McMillan Nicholson & Co. to give him cheques drawn on their account for $755 was an act distinct in itself and separate from the dealings with the original $7,800. In my opinion, it is in no way covered by the charge laid in the indictment set forth in the special case.

The falsification of the books was undoubtedly the means which enabled the accused Scott to procure these cheques, but a perusal of the evidence and of the Judge's charge shews plainly that the accused has never been indicted or tried for the theft of this $755.

For these reasons, I would answer in the negative both the questions submitted by the special case.

Riddell, J.

RIDDELL, J., agreed with MASTEN, J.

Magee, J.A.

MAGEE, J.A.:—The facts of this case are set forth in the judgment of my brother Masten, and I agree with his opinion that the accused could not properly be convicted upon this indictment for

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theft of money in respect of his dealing with the three cheques in favour of McMillan Nicholson & Co. for $1,000, $2,000, and $4,835, on which he stamped the special endorsement by the firm to the order of the Dominion Bank, and which he deposited in that bank to the firm's credit. It is true that in the day-book of the firm he entered similar amounts to the credit of his own account in the fictitious name of the non-existent J. P. Barron, and gave no credit to the makers of the cheques, and that the entry of the deposit appears in each case after the dishonest credit, and therefore it was open to the jury to infer that the dishonest intent of misappropriation was formed before the deposit. But, whatever might be the result if a servant, having received money for his employer from a debtor, delivers the same money to his employer as a loan, payment, or deposit from himself, concealing the fact of payment by the debtor, and whether there would in such case be fraudulent conversion before the delivery (as to which see *Regina v. Gale* (1876), 2 Q.B.D. 141), it cannot here be said that the accused Scott ever had control of any of the three cheques. They were at all times when in his custody payable either to the firm's order, or, when he applied the stamp, to the order of their bankers, and he had no means of applying them to his own use, and they never were money in his hands.

Upon the strength of the dishonest credits to the Barron account he was enabled to carry on speculation for that account in New York in the firm's name with results getting worse; and, when discovery came in December, 1919, the losses in New York on Barron transactions then shewn in the ledger, and others not there shewn, exceeded $30,000 from first to last, which the firm was called upon to pay. But, in all that, he handled no actual money, and had not at his disposal anything representing money, and, though criminal, it could not be called theft. What he had done was to make those three entries of fictitious credits which he was enabled to have appear genuine under cover of the fact that he received the three cheques for similar sums on those days from others, and concealed such receipts from others from his employers, though properly depositing them to his employers' credit. The fictitious entries, if not followed by something else, were in themselves innocuous, and were in fact but the preparatory acts for the subsequent frauds and thefts and to enable them to be carried out; and it should be borne in mind that during this period no other

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sums appeared as received from Barron. A sum which had been credited to him upon the opening of the account had been drawn by Scott within a few days and before the credit of $1,000.

But Scott did not stop there. On the 11th August, 23rd August, 23rd October, 27th October, and the 7th November, respectively, he drew five cheques for $155, $100, $175, $300, and $25, respectively, making in all $755, each payable to "cash," and each, except the first, marked "Barron on account." Each of them was charged to the Barron "Long account," in which the credits had been made. They all bear the signatures of McMillan, and are countersigned by Newton; but, even if they were not cheques signed in blank by them, neither of them knew that a cheque for Barron was really a cheque for Scott, or that Barron's account, which appeared to have a margin at its credit, was fictitious and really owed the firm. The five cheques were, at the best, obtained by false pretences, and not intended for Scott; but the evidence is that Scott cashed each of them and used the money for his own purposes. As soon as he had the money so obtained in his hands, it was not his money and not intended for him. It was the money of the firm as much as any moneys in their cash-box, and in misappropriating those sums he was guilty of theft upon each occasion. See *Regina v. Gale*, 2 Q.B.D. 141.

The question is: did these proven facts warrant a conviction upon the first count? The indictment does not allege any date for the theft other than the year 1919. The opinion of this Court is not asked as to the form or sufficiency of the indictment or any objection to it or the evidence. No particulars were asked or delivered. The learned Chairman of the Sessions had endorsed his consent to the presentation of the bill, so that even the evidence on the preliminary examination before the committing magistrate would throw no light on the questions to be tried. On the face of the indictment, it was open to prove any theft in the year 1919. The amount charged as being stolen, $7,835, no doubt corresponds with the total of the three credits; but if, instead of five cheques amounting to $755, the accused had cashed one, two, or three cheques for, say, $7,000 in all, three days after the fraudulent entries, could it be said that, although his act amounted to theft, proof could not be given of it? What the Crown set out to prove, as I venture to think, is that Scott's employers had been defrauded out of $7,835, or some greater or less sum, by some act

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which amounted to theft. The evidence might fail to shew theft of all. It would be sufficient if part were stolen. The Criminal Code, sec. 857, allows proof of three distinct charges of theft.

The Crown counsel persisted, as I think he was entitled to do (apart from any question of multiplicity or admissibility of evidence), in putting in as evidence all the five cheques and shewing that they were cashed. He had to shew something more than improper credits to the Barron account, which would be innocuous if there were nothing else done, and he was entitled to shew, if he could, that $7,835 was actually stolen or that $7,000 was dishonestly used in New York and $835 actually stolen. He did prove the theft, as I think, of these five sums, and any one of them was sufficient to convict. It was in effect the same as if he had been accused of stealing eight cows, and the proof was that he had stolen two and set fire to the stable so that six were burned. There was of course never a single theft of $7,835. The Crown might fail as to part of the sum and succeed as to another part.

If, on the day after the first fictitious credit of $1,000, Scott had got and cashed a cheque for $950, and made a loss of $50 in New York on the Barron account, it appears to me not open to doubt that on an indictment for stealing $1,000 in the year 1919 he would have been liable to conviction—or similarly if he had drawn five cheques for $4,835 in all, on five successive days after the entry of the $4,835, and were charged with stealing $4,835 in that year. It does not appear to me to make any difference that the five cheques are smaller when based on the same fictitious credit.

If the accused were now discharged and again indicted for theft of the amount of any of those five cheques, he would, in my opinion, be entitled to plead *autrefois acquit:* Criminal Code, sec. 907. It could not, as I venture to think, make any difference that the learned Chairman in his charge to the jury did not refer to the five cheques, the reason evidently being that he considered that there was proof of the theft of the amount of the three cheques. None the less, the accused was in peril as to the five smaller sums.

I would answer the question by saying that there was evidence upon which the accused, Maxwell Scott, could properly have been convicted of the theft of the amount of any one of the five sums already mentioned.

MULOCK, C.J. Ex., and MIDDLETON, J., agreed with MAGEE, J.A. Mulock, C.J.Ex. Middleton, J.

Verdict sustained.

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McLEAN v. DRYSDALE.

Nova Scotia Supreme Court, Harris, C.J., Russell and Longley, JJ., Ritchie, E.J. and Chisholm, J. January 11, 1921.

ELECTIONS (§ IV—91)—PETITION TO SET ASIDE—POLL BOOK AS EVIDENCE OF PETITIONER'S QUALIFICATION—ABSENCE OF OTHER PROOF—ACCEPTANCE OF, BY COURT.

The entry in the poll book for the district is evidence that a petitioner asking to have the election of a municipal councillor set aside on the ground of bribery is qualified to present the petition as being qualified to vote, and in the absence of proof to the contrary the Court will accept such evidence.

Statement.

APPEAL from the judgment of Wallace, Co. Ct. J., dismissing a petition under the Municipal and Town Controverted Elections and Corrupt Practices Act, R.S.N.S. 1900, ch. 72, seeking to have the election of respondent set aside for bribery and the respondent disqualified under the provisions of the Act. Reversed.

W. J. O'Hearn, K.C., for petitioner; *R. H. Murray*, K.C., for respondent.

The judgment of the Court was delivered by

Ritchie, E.J.

RITCHIE, E.J.:—The respondent, Drysdale, was elected councillor for District No. 13, in the municipality of the county of Halifax. A petition against his return was presented by McLean. The petitioner charges bribery, and it was clearly proved at the trial that the respondent was guilty of personal bribery. After the evidence for the petitioner was in, counsel for the respondent announced that he did not intend to call witnesses and he took the objection that there was no proof that the petitioner was qualified to present the petition because it was not shewn that he had a right to vote. The Judge below permitted this objection to prevail and dismissed the petition.

In view of the opinion which the Judge had as to the validity of the objection, I do not see why he did not recall Mr. Archibald and clear up the difficulty. I think the day has gone by when Courts permit justice to be defeated by a mere technical slip which can easily be remedied. I have reached the conclusion that there was no slip. It is of course very clear that the burden of proof rests on the petitioner to make out his qualification just as it rests on him to prove any other material allegation in his petition. He has, however, in my opinion, sustained the burden of proof as to his qualification. The original list of qualified voters for the District 13 for the year 1919 and the poll book for the district for that year were put in evidence. The election was held in 1919.

The name Dan McLean of Bay Road appears in the poll book. The residence of the petitioner was on the St. Margaret's Bay Road within the district. I look at the entry in the poll book, Dan McLean of Bay Road, and I am perfectly satisfied that this is Daniel McLean of St. Margaret's Bay Road mentioned in the petition. I see no reason why this Court should be astute to permit a man guilty of personal bribery to escape the consequence of his misconduct. I think there was some legal evidence that the McLean in the poll book and on the list of qualified voters is the McLean who signed the petition. Even slight evidence in the absence of contradiction becomes cogent proof. It was held by this Court in *Blackburn* v. *The King* (1919), 49 D.L.R. 482, 32 Can. Cr. Cas. 119, 53 N.S.R. 292, that a certificate with a person of the same name mentioned as having been convicted in a locality is some evidence of the identity of the defendant and in the absence of proof to the contrary the magistrate was justified in taking this as evidence of a previous conviction. On this evidence of identity Blackburn was imprisoned for 4 months. The *Blackburn* case follows like decisions in Ontario and New Brunswick. [*Rex* v. *Leach* (1908), 14 Can. Cr. Cas. 375; *Ex parte Dugan* (1893), 32 N.B.R. 98.]

In my opinion the appeal should be allowed with costs; and it should be decreed and adjudged that the respondent was not duly elected or returned and that his election was and is void; that it should be further decreed and adjudged that the respondent was at the said election guilty of corrupt practices and that he should be disqualified pursuant to sec. 55 of the Municipal and Town Controverted Elections and Corrupt Practices Act.

Appeal allowed.

ADAMS v. WINDSOR TRUCK AND STORAGE Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland and Masten, JJ. December 20, 1920.

APPEAL (§ VI B—287)—GROUNDS NOT MENTIONED AT TRIAL OR IN APPEAL BOOK—RULE 493—DISMISSAL.

In Ontario an appeal will not be allowed on grounds which have neither been mentioned at the trial nor set out in the appeal book as required by Rule 493.

[*Wilson* v. *United Counties Bank*, [1920] A.C. 102, followed.]

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Statement.

Appeal by the defendants from the judgment of a Co. Ct. Judge in favour of the plaintiff, upon the verdict of a jury at the trial. The action was brought for damages for the sale by the defendants of the plaintiff's goods stored with the defendants. The goods were left with the defendants in 1913, and in 1916 were sold by the defendants without notice to the plaintiff. The jury found a general verdict for the plaintiff for $500, and the Judge directed that judgment should be entered for the plaintiff for that sum and costs.

D. L. McCarthy, K.C., for appellants.

H. J. Scott, K.C., for respondent.

Masten, J.

MASTEN, J.:—The notice of appeal does not ask for any specific relief, but complains at large of the judgment. It neither asks that the judgment be set aside nor that a new trial should be directed. But, on the hearing of the argument before us, counsel for the defendants sought a new trial and complained of the trial Judge's charge to the jury.

On the main question, I think the appeal fails because neither at the trial nor in the notice of appeal were any of the grounds on which the appeal was argued before us set forth. The case certainly presents many elements of doubt and confusion; and, as was said by the Lord Chancellor in the case of *Wilson* v. *United Counties Bank Limited*, [1920] A.C. 102, at p. 105, "the difficulties were by no means inherent in the nature of the case, which, though a little complicated, presented no very unusual features: they arose, in my opinion, from the manner in which the matter was dealt with in the Court of first instance . . . Indeed, it is difficult even now to feel sure that every consideration was placed before the jury which was useful and relevant to their decision."

But no objection was taken at the trial to the charge of the learned trial Judge; no such objection was set out in the notice of appeal, as required by Rule 493; and I refer again to the judgment in the *Wilson* case, *supra*, where the Lord Chancellor at p. 106 says: "I think it necessary to point out that, unless the circumstances are wholly exceptional, appellants must be strictly held to the grounds of appeal which they think proper to set forth in the formal documents which are demanded from them. The object of indicating in detail the grounds of appeal, both to the Court of Appeal and to your Lordships' House, is that the respond-

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ent parties may be accurately and precisely informed of the case which they have to meet. Their efforts are naturally directed to the contentions which are put forward by the appellants. They are entitled to treat as abandoned contentions which are not set forth. If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal. In the present case, both in the Court of Appeal and before your Lordships, entirely new contentions have been submitted on behalf of the defendants. The practice is extremely inconvenient and ought in my judgment to be discouraged in every possible way."

In the same case, at p. 139, Lord Parmoor says: "Having come to this conclusion, it is unnecessary for me to dwell on the absence in the notice of appeal to the Court of Appeal of the points relied on before that Court and this House, but I desire to express my entire agreement with the view that where the rules as to the giving of the notice of appeal are not observed, it is only in exceptional cases, and on special grounds, that relaxation should be allowed."

And at p. 141 Lord Wrenbury says: "The difficulty here is that the defendants' counsel accepted the questions which the Judge proposed to put to the jury, and I feel with the Lord Chancellor that, however unsatisfactory the results may be, litigants must, to a large extent, be bound by the conduct of their case, even if the result be to give away its merits."

This rule was acted on by the Appellate Division in *Lowry* v. *Robins* (1919), 45 O.L.R. 84.

I think that the rule so expressed should be applied by us in the present case, and that this appeal should be dismissed on the ground above stated.

The damages appear to me to be excessive; but, as there is some evidence to support the finding of the jury, we cannot interfere.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed with MASTEN, J.

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

RIDDELL, J.:—The plaintiff was the owner of certain household goods which he stored with the defendant company, a storage company in Windsor, in 1913; in 1916 the company sold the goods by auction without notice to the plaintiff. The plaintiff sued in the County Court of the County of Essex for damages for the

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sale of these goods. At the trial, with a jury, a general verdict for $500 was rendered. The defendants appeal.

There were several questions upon which the jury should pass. In the first place, the defendants contended that the goods were received and stored under a written agreement which authorised the sale, without notice, to pay charges when storage accumulated for one year. This is not admitted. It is obvious that, if no such contract was entered into, the defendants would be liable as in trover for the value of the goods at the time of their sale, less (if claimed) the amount of storage charges.

If, on the contrary, such a contract was in fact entered into, the defendants would be liable as bailees for special damages if it were proved that the goods were not sold with ordinary care and reasonable means adopted to obtain the best price possible.

We have no way of determining the view of the jury; questions were not asked.

The charge of the learned County Court Judge does not seem to have drawn the attention of the jury to the first alternative at all, but is almost entirely on the second.

"So, if you find under the circumstances such a contract was entered into, whether by writing or by word of mouth, then that contract is binding. If there is such a contract, what is the duty of the storage company in regard to any sale they may make under the contract? It is their duty to act in a reasonable way, to make a reasonably good sale. They are supposed to get the best prices for such goods they can. Now they say that they did what is customary. They say they did the same thing that is done by the original owner of goods of that class when he wants to sell them, namely, they sent them to the public market of the City of Windsor, and had them sold at the market by a duly qualified auctioneer; the auctioneer was here, you heard him give his evidence. He says: 'I do all the selling for the Windsor Truck and Storage Company. I sold this load the same as I did all other loads. I know I got the best prices I could, because I try to do my duty'—perhaps not in those words but that is the effect. He said, 'I turned over to the Windsor Truck and Storage Company every cent I got for the goods, less 10 per cent. commission, my proper charges, and less expenses I had to pay out.' Do you believe him, is there any reason for you, gentlemen, doubting all that that man tells you? What can be suggested

that should have been done in connection with the sale different to that? . . . Now, if the defendants had a right to make the sale, and they made the sale in a reas... ble manner without negligence, they are not responsible to this plaintiff . . . If you come to the conclusion that it was a fair sale, that under the circumstances the company had the right to make that sale, then your verdict must be for the defendants. The old gentleman has suffered no wrong at these men's hands. These men are still entitled to receive from him the $18 and some cents, balance owing to them. If the sale was not a proper sale or a careless sale, then you are entitled to fix the amount, the extra amount, which they should have gotten if it had been a proper sale, and that would be the amount of the damages sustained by the old gentleman, and you would have to deduct the $18 balance from that amount of damages and give him a verdict for the difference . . . I have intimated to you, I think, all the points of view from which this case can be viewed. It is for you now to go to your jury-room, consider the evidence and all the circumstances in the case, and come back and let me know by your verdict whether under the circumstances this old gentleman is entitled to damages from this company and if so how much. If he is not entitled to damages, bring in a verdict in favour of the defendants . . ."

It will be seen that nothing was said of the effect if there was in fact no agreement. While the result is technically unsatisfactory for that reason, the defect is not to the advantage of the plaintiff, who is satisfied with the verdict, but of the defendants, who are not. The defendants cannot complain that they are not saddled with the whole value of the goods, but only the value of the part thereof which was lost by an improper sale.

If then there was evidence upon which the jury could reasonably find damages of $500, the verdict cannot be disturbed. I have read and re-read the evidence, and have finally come to the conclusion that it cannot be said that there was no such evidence. The damages are large, but not so large as to shock the conscience of the Court.

I would dismiss the appeal with costs. A trial Judge, in my opinion, would be well advised to submit questions to the jury in such cases as this, when the quantum of damages depends on the view the jury take of the facts. *Appeal dismissed.*

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THE KING v. DOYLE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

ARREST (§ I B—7)—WITHOUT WARRANT—WHEN AUTHORISED—SASKATCHEWAN TEMPERANCE ACT—CRIMINAL CODE, SEC. 30.

The fact that a peace officer may arrest without warrant any person whom he finds drinking liquor on a public street under sec. 34 of the Saskatchewan Temperance Act, 7 Geo. V. 1917 (1st sess.), ch. 23, does not authorise him under sec. 30 of the Criminal Code to arrest without warrant in any case in which he has reasonable and probable cause for believing that any person has committed that offence. The power to arrest without a warrant is given in the cases specifically mentioned in a series of sections of the Criminal Code, beginning at 646, and none of them apply to an offence under a provincial statute, which is neither a felony, misdemeanour or breach of the peace.

Statement. CASE STATED for the opinion of the Saskatchewan Court of Appeal, the accused being charged with assaulting a peace officer engaged in the execution of his duty.

H. E. Sampson, K.C., for the Crown.

G. W. McPhee, K.C., for accused.

Haultain, C.J.S. HAULTAIN, C.J.S.:—The following case is stated for the opinion of the Court:—

The accused was charged, "For that he did on or about the 24th day of August, A.D. 1920, at the town of Yorkton, in the Province of Saskatchewan, assault a peace officer engaged in the execution of his duty." The evidence shewed that immediately prior to the arrest a peace officer observed the accused in company with another man sitting on a pile of piping in a public street in Yorkton aforesaid at about 10 o'clock p.m., on the date mentioned. The accused appeared to be under the influence of liquor and was drinking from a bottle but there was no evidence as to what the accused was drinking. The peace officer attempted to arrest the accused without a warrant.

Assuming that the peace officer had reasonable and probable grounds for believing that the accused had committed an offence under the Saskatchewan Temperance Act, 7 Geo. V., 1917, (1st sess., Sask.), ch. 23, *i.e.*, drinking in a public place, was I right in holding as I did, that sec. 30 of the Cr. Code does not apply to an offence under a provincial statute and that therefore the peace officer had no right to arrest without a warrant and that therefore he was not at the time of the alleged assault engaged in the execution of his duty?

Section 30 of the Criminal Code, R.S.C. 1906, ch. 146, referred to above, enacts as follows:

30. Every peace officer who, on reasonable and probable grounds believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

In order to support the charge in this case, it must be clearly proved that the peace officer was acting strictly within his lawful

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power and duty. It is therefore necessary to shew that he had power to arrest without a warrant under the conditions set forth in the stated case. As the case deals with an offence or a probable offence under a provincial statute which is neither a felony, misdemeanour or breach of the peace, there can be no power of arrest at common law.

Under the Cr. Code the power to arrest without a warrant is given in the cases specifically mentioned in a series of sections beginning at sec. 646. None of the cases mentioned include any other than a criminal offence in the strict sense of the term. No power of arrest without warrant is given to a peace officer who has only reasonable and probable grounds for believing that any criminal offence has been committed, except by sec. 649, which only applies to cases of "fresh pursuit." Sections 646 and 647 only authorise the arrest without warrant of any one who has committed any of the enumerated offences. Section 654 provides for the issue of a warrant where any one has reasonable and probable grounds for believing that an indictable offence has been committed.

It was argued on behalf of the prosecution that as a peace officer may arrest without warrant any person whom he finds drinking liquor on a public street, under sec. 34 of the Saskatchewan Temperance Act, 7 Geo. V. 1917 (1st sess., Sask.), ch. 23, he is authorised by sec. 30 of the Cr. Code to arrest without warrant in any case in which he has reasonable and probable cause for believing that any person has committed that offence. But sec. 30 does not give authority to arrest. It only provides that if an arrest is made under those conditions the arrest will be held to be justified, that is, the peace officer will escape from any of the civil or criminal consequences of doing an act which is not authorised by the law. Section 30 is one of a number of sections grouped under the heading "Justification or Excuse," which provide that a number of acts which otherwise might be unlawful are, under the circumstances set out, either excusable or justifiable, or protected from criminal responsibility.

It is not necessary to consider the question whether the word "offence" in sec. 30 of the Cr. Code includes an offence under the provincial Act. If it does, the only effect of the section is to justify an arrest made under the conditions set out, and to relieve the

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peace officer making the arrest from civil and criminal responsibility. The arrest in question in this case was not, in my opinion, authorised by law, and sec. 30, even if it applies, cannot change the character of the assault alleged to have been committed. I would answer the question in the affirmative.

Newlands, J.A.

NEWLANDS, J.A., concurs with HAULTAIN, C.J.S.

Lamont, J.A.

LAMONT, J.A.:—As the subject matter of the Saskatchewan Temperance Act falls within the class of subjects over which the Provincial Legislature has exclusive legislative jurisdiction, it follows that the Legislature has exclusive jurisdiction over the manner in which the Act shall be enforced: subject, however, to the right of the Parliament of Canada in the exercise of its criminal jurisdiction to designate what shall constitute a crime and be punishable as such.

In the exercise of its jurisdiction the Legislature has enacted, as one of the means of enforcing the provisions of the Act 7 Geo. V. 1917 (1st sess.), ch. 23, sec. 34, that: "A constable, police or peace officer may arrest without warrant any person whom he finds drinking liquor at any place or in any building contrary to the provisions of this Act."

The Legislature, had it seen fit so to do, could have enacted that a peace officer might arrest without warrant anyone whom he believed on reasonable grounds had been guilty of an infraction of the Act. It, however, did not do so. It only gave the right to arrest without warrant in cases where the officer finds the person drinking liquor contrary to the provisions of the Act. As the officer in this case did not so far as the evidence shews find the accused drinking liquor contrary to the provisions of the Act, he had no authority to arrest him without a warrant, and, while doing do, he was not engaged in the execution of his duty.

Elwood, J.A.

ELWOOD, J.A., concurs with HAULTAIN, C.J.S.

Judgment accordingly.

PETERSON v. BITZER.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A. December 10, 1920.

CONTRACTS (§ I E—80)—VENDOR AND PURCHASER—ORAL AGREEMENT—MEMORANDUM IN WRITING—SUFFICIENCY OF—STATUTE OF FRAUDS.

A memorandum of agreement and a cheque in the following words: "Kitchener, Ont., December 29th, 1919. Received from Clayton Peterson the sum of $100 on deposit for house at No. 62 St. George street—$1,400 payable 1st May 1920, and balance of $2,300 on five year mortgage. Adeline Bitzer." "Kitchener, Ont., December 29th, 1919. To Canadian Bank of Commerce, Waterloo, Ont. Pay to the order of Mrs. Adeline Bitzer $100, one hundred dollars, deposit on 62 St. George street at purchase-price of $3,800—$1,400 payable May 1st, 1920, and assume a 5 yr. mtg. of $2,300. C. Peterson," the cheque not being endorsed or cashed is not a sufficient memorandum of the whole bargain between the parties, the terms of the mortgage, the rate of interest, and the date or terms of giving possession, not being stated, to satisfy sec. 5 of the Statute of Frauds, R.S.O., 1914, ch. 102.

[Review of authorities. See Annotation, Oral Contract—Statute of Frauds, 2 D.L.R. 636.]

Statement.

Appeal from the judgment of MASTEN, J., in an action for specific performance of an alleged agreement between the plaintiff and defendant for the sale by the defendant and purchase by the plaintiff of a house property in Kitchener. Reversed.

The judgment appealed from is as follows:—At the close of the hearing I found as a fact that the misrepresentation alleged by the defendant had not been established, and I now find as a fact against the contention of the defendant that the parties were never *ad idem*.

I find that the defendant intended to sell and the plaintiff intended to buy the premises No. 62 St. George street, in Kitchener, and that the reason of the defendant's refusal to carry out the contract is correctly stated in her examination for discovery, where she says that she refused to carry out the agreement because her son was returning from the war, and the house would be needed for his occupation.

The remaining defence is the Statute of Frauds. On that question numerous points were raised on behalf of the defendant. The agreement relied upon by the plaintiff is as follows:—

"Kitchener, Ont., December 29th, 1919. Received from Clayton Peterson the sum of $100 on deposit for house at No. 62 St. George street—$1,400 payable 1st May, 1920, and balance of $2,300 on five year mortgage. Adeline Bitzer."

There is also a cheque signed by the plaintiff as follows:—

"Kitchener, Ont., December 29th, 1919. To Canadian Bank of Commerce, Waterloo, Ont. Pay to the order of Mrs. Adeline

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Bitzer $100.00, one hundred dollars, deposit on 62 St. George street at purchase-price of $3,800—$1,400 payable on May 1st, 1920, and assume a 5 yr. mtg. of $2,300. C. Peterson."

The cheque is not endorsed.

I think that these two documents are sufficiently connected by means of dates, name of place, and description of the terms, to entitle them to be read together as evidence of the contract for the purpose of satisfying the requirements of the statute.

I deal with the various points raised in support of the defence in the order in which they were presented in the argument.

First, it is contended by the defendant that the documents do not say whether Peterson is buying the freehold of the house or some lesser interest, e.g., an assignment of a lease. But it has been held that a contract to sell a house simply, implies that the interest sold is the fee simple: *Hughes* v. *Parker* (1841), 8 M. & W. 244, 151 E R. 1028. See also Fry on Specific Performance, 5th ed., para. 372.

Second, that the house No. 62 St. George street is insufficiently described. That, as it seems to me, is answered by the decision of my brother Middleton in the case of *Canadian Dyers Association Limited* v. *Burton* (1920), 47 O.L.R. 259. The receipt and the cheque being dated at Kitchener, I think that the plain meaning of the documents is that the property described as No. 62 St. George street is property in the town of Kitchener.

Third, that the purchase-price is insufficiently set forth, referring to the case of *Fenske* v. *Farbacher* (1912), 2 D.L.R. 634. In that case the payments set forth in the memorandum were $300 short of the total purchase-price. In this case the payments as set forth cover the whole of the purchase-price.

Fourth, that the receipt does not mention on what property the balance of the purchase-price is to be secured. If there is otherwise an enforceable agreement, the vendor has a lien for the balance of the purchase-price, $2,300, and I think that the plain implication from the agreement is, and I so find as a fact, that, no other provision being made, the balance of $2,300 was to be secured by a five-year mortgage on the premises forming the subject-matter of the purchase.

The fifth and most serious point raised is in regard to the question of interest, namely, that the documents did not deal

with the rate of interest to be paid on the mortgage of $2,300. It is plain law, well settled, that a mortgage, being a debt, carries interest; consequently this mortgage would carry interest at the legal rate of 5 per cent. With regard to the subsequent offer made by the purchaser to the vendor to pay 6 per cent. interest, that was not a rate agreed upon before the bargain was made; on the contrary, it is clear from the evidence on both sides that the rate of interest was not mentioned or discussed. The offer of the plaintiff to pay 6 per cent. was never accepted and has no bearing, as I see it, on the rights of the parties. The cases of *Rogers* v. *Hewer* (1912), 8 D.L.R. 288, and *Reynolds* v. *Foster* (1913), 9 D.L.R. 836, are clearly distinguishable on the facts. In the first case there was an agreement that interest should run at the rate of 8 per cent. on the balance of the purchase-price, and all reference to that was omitted from the memorandum. In the latter case it was a term of the agreement that a mortgage on other property should be given to secure the balance of the purchase-price, and this was not set out in the memorandum. The memoranda were therefore incomplete and did not cover the agreement entered into between the parties. The judgment of Mr. Justice Strong in the case of *Williston* v. *Lawson* (1891), 19 Can. S.C.R. 673, appears to me to be in the plaintiff's favour. With respect to the case of *Martin* v. *Jarvis* (1916), 37 O.L.R. 269, 31 D.L.R. 740, I think I am bound to follow the views expressed by the Chancellor in that case. It was not a hasty judgment, and embraces a full review of the earlier cases in our own Courts, and it is my duty to follow the Chancellor's interpretation of them.

For these reasons, I am of opinion that the plaintiff is entitled to the usual judgment for specific performance with costs.

R. McKay, K.C., for appellant; *V. H. Hattin*, for respondent.

Magee, J.A.

MAGEE, J.A.:—The defendant appeals from a judgment directing specific performance by her of an alleged agreement by her to sell a house and lot in Kitchener to the plaintiff. She sets up two grounds of defence; (1) that there was not in fact a completed certain bargain; and (2) that there is no writing sufficient to bind her under the Statute of Frauds.

That the parties had, in December, 1919, verbally agreed upon $3,800 as the price for the land, if sold, is clear, and that the sale, if made, would be closed and possession given on the 1st May, 1920.

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It is also clear that the price was not to be paid in cash, but part of it was to be paid at some time not later than five years, but in how many payments and when was not discussed; and, although the parties contemplated that interest would be payable at some rate, the rate of interest was not arrived at or mentioned between them.

The property adjoined other land of the defendant, and a roadway over the adjoining property led to it, and was in fact used with it, but was not a way of necessity, and by reason of the common ownership it had not the character of an easement. The way was not dealt with in the verbal arrangement, but the defendant has by the judgment been ordered to convey a right to it.

The defendant maintained that, even apart from these questions, no final verbal agreement was arrived at, but only a provisional basis of sale if she finally decided to sell. This, however, has been found against her by the learned trial Judge, on the disputed evidence, and his finding must be accepted.

The property was at the time subject to a mortgage for about $2,000, bearing interest, which the defendant thought she could pay off.

Under the Statute of Frauds the action does not lie against the defendant unless the agreement or some memorandum or note thereof be in writing and signed by her. The only writing of any sort signed by her is a receipt which reads thus: "Kitchener, Ont., December 29th, 1919. Received from Clayton Peterson the sum of $100 on deposit for house at No. 62 St. George street—$1,400 payable 1st May, 1920, and balance of $2,300 on five year mortgage. Adeline Bitzer."

At the time she gave this receipt and as payment of the sum thereby acknowledged to be received, the plaintiff's cheque of the same date was given to her, reading as follows: "Pay to the order of Mrs. Adeline Bitzer $100.00, one hundred dollars, deposit on 62 St. George street at purchase-price of $3,800—$1,400 payable on May 1st, 1920, and assume a 5 yr. mtg. of $2,300. C. Peterson."

This cheque was not cashed, used, or endorsed by the defendant, and was subsequently sent back to the plaintiff with a letter from the defendant's son declining to make a sale. The letter was written with defendant's authority, but of course not by an agent authorised to contract, as it refuses to sell. The question is, whether these writings are sufficient to bind the defendant under the statute.

It was argued for the plaintiff, but contested for the defendant, that the cheque could be read along with the receipt, although not endorsed by the defendant, in order to eke out, if necessary, the full memorandum required by the statute. It is well-recognised in cases under the statute that if in a writing signed by the party to be charged reference is made to another or to a subject-matter, parol evidence to identify what is referred to so as to connect the two is admissible. Here the receipt is for "the sum of $100." A cheque for $100 may be payment of that sum. I see no more reason why the cheque should not be identified as that which was paid than bank-notes or gold pieces if payment were made thereby. If it is identified as being the payment which was received, then it appears to me that the receipt would be read as if it said, "Received from C. Peterson his cheque for $100." Therefore I am of opinion that the receipt and cheque can be read together.

But without the cheque the receipt itself would, in my view, be a sufficient memorandum—apart from the question of its correct representation of the true understanding of the parties—and the cheque, I think, only throws difficulties in the plaintiff's way.

The receipt shews that something is to be paid "for a house at No. 62 St. George street"—$100 is a "deposit," $1,400 is "payable" on the 1st May, 1920, and how much the total is is indicated by the "balance" being $2,300—and that balance is to be on 5-year mortgage. If the parties had agreed and the receipt had stated that it was to be on a mortgage payable in 5 years or in 5 yearly instalments, with interest yearly at 5 per cent. per annum, it appears to me that it would be, not a complete contract, but a sufficient memorandum of the complete contract—sufficiently indicating its terms to enable the Court to enforce it. No ordinary person, I think, would dream—and I do not see that the Court should assume—that the $1,400 "on mortgage" could mean "by a mortgage" on other property. The memorandum then would imply that a mortgage was to be given, which implies a conveyance which the purchaser would be entitled to when the purchase-money other than the mortgage is given along with the mortgage, that is to say, the purchaser would be entitled to give both on the 1st May, 1920, and the conveyance implies possession at the same time. No mention is made of the existing mortgage for $2,000, but that the vendor would be bound to remove.

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The cheque would not, in this view, add anything to the value of the receipt, except the words "purchase-price" of $3,800. It gives no more indication than the receipt that C. Peterson is the purchaser, and it renders the whole written transaction of less value, by adding the untrue words "assume a 5 yr. mtg. of $2,300." The existing mortgage, even if to be assumed, was only $2,000, and thus the cheque makes no provision for the other $300, and only adds confusion by shewing that the existing mortgage is to be assumed, instead of being removed by the vendor, as would be called for by the receipt. The two documents, therefore, on which the plaintiff relies, are contradictory.

But it appears to me that these parties never had really made a definite bargain. They had not decided how the mortgage-money would be payable, nor what rate of interest would in these financially varying days be called for—though both intended interest. It would be a gross fraud upon the defendant to say that she should get no interest. It would be only less unfair to say that she should get only the legal rate of 5 per cent., when neither she nor the other side contemplated leaving it to the law or doing otherwise than make their own bargain if they could, or part if they could not. It was simply an uncompleted bargain in respect to two very important matters which the parties on both sides intended at the time to settle for themselves, but did not.

Specific performance should not be granted so as to force upon either party a bargain which was not contemplated by either.

I would allow the appeal.

Hodgins, J.A.

HODGINS, J.A.:—I am satisfied that the cheque is sufficiently referred to in the receipt signed by the respondent to enable the Court to read it as part of the memorandum of the bargain. The words in the receipt, "Received.....$100 on deposit for house at No. 62 St. George street," are enough, in my judgment, to allow reference to the cheque, which was the form in which the deposit of $100 was made. It would be, I think, a reproach to our law if, under the circumstances, the cheque used in making the deposit, containing, as is often the case, conditions or terms on which it is payable, was excluded because it was not sufficiently referred to in the receipt. In any case it becomes available as evidence through its return some time later on, in a letter signed by the duly authorised agent of the respondent. See, on the question of reference, *Studds* v. *Watson* (1884), 28 Ch. D. 305, *per* North, J., at pp. 308, 309.

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But, when read with the receipt, there does not seem to be constituted a sufficient memorandum of the whole bargain between the parties. One very important part of the agreement, in view of the fact that the house was then tenanted, was the date at which and terms on which possession would be given to the respondent. No doubt the date, the 1st May, 1920, mentioned in the receipt and cheque, was fixed because on that date possession was to be given. But nowhere is anything found in either document which deals with the time for the transfer of actual possession, although this was an essential part of the verbal bargain.

The importance of it is obvious, but it has a bearing on the other part of the case. Had it been inserted in the memorandum, it would have settled the question of interest on the balance of purchase-money, of which no mention is made in writing.

In *Birch* v. *Joy* (1852), 3 H.L. Cas. 565, 10 E.R. 222, the doctrine of equity is thus stated by Lord St. Leonards, L.C. (pp. 590, 591):—

"From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase-money, and that purchase-money not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A Court of Equity, as a general rule, considers this to follow."

The head-note further states that an agreement which appears to prevent the application of this rule will be examined in a Court of Equity, and will or will not be enforced according to circumstances.

In the case in hand, the presence in the documents of a provision as to the date at which possession was to be given would have enabled the Court to say that interest must be paid from that date upon the unpaid purchase-money, at the legal rate.

In this connection it may be noted that in *Gould* v. *Hamilton* (1855), 5 Gr. 192, parol evidence was allowed to be given shewing that interest was intended to be paid on the balance of purchase-money, where the contract made no mention of interest. But that evidence was admitted so as to shew that it would have been inequitable to grant specific performance without interest, in face of an understanding that interest should be paid.

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Here the circumstances indicate a tacit agreement to pay interest; and, if specific performance were given to the respondent, it could only be on terms of paying interest on the unpaid purchase-money.

Upon the whole, I think the appeal should be allowed.

FERGUSON, J.A.:—Appeal by the defendant from a judgment of Masten, J., dated the 27th May last, whereby he decreed that the plaintiff had established an agreement between himself and the defendant for the purchase and sale of 62 St. George street, Kitchener, and directed specific performance of the agreement.

The learned trial Judge found that the parties were *ad idem*; that the defendant intended to buy 62 St. George street, Kitchener; that the underwritten receipt and cheque might be read together; and that, read together, the two documents constituted a memorandum of the agreement and all its essential terms, sufficient to satisfy the requirements of the Statute of Frauds. The receipt and cheque read:—

"Kitchener, Ont., December 29th, 1919. Received from Clayton Peterson the sum of $100 on deposit for house at No. 62 St. George street—$1,400 payable 1st May, 1920, and balance of $2,300 on five year mortgage. Adeline Bitzer."

"Kitchener, Ont., December 29th, 1919. To Canadian Bank of Commerce, Waterloo, Ont. Pay to the order of Mrs. Adeline Bitzer $100.00, one hundred dollars, deposit on 62 St. George street, at purchase-price of $3,800—$1,400 payable on May 1st, 1920, and assume a 5 yr. mtg. of $2,300. C. Peterson."

The appellant contends: (1) that, read by itself, the receipt is not a sufficient memorandum, in that it does not shew any contract of purchase and sale; (2) that the cheque is not referred to in the receipt signed by the defendant and cannot be read along with the receipt to supplement any terms that are missing from the receipt; (3) that the evidence establishes that the parties agreed that adjustments were to be made and possession was to be given as of the 1st May, 1920, yet that the receipt and cheque, read together, do not shew when the purchase was to become effective, when possession was to be given, when the mortgage was to be dated, or on what date adjustments were to be made; (4) that the proper conclusion, on the oral evidence, is that the parties agreed that the mortgage referred to in the receipt and

cheque should bear interest, and that that term is omitted from both the receipt and cheque; (5) that the plaintiff alleges a term entitling him to a conveyance of a right of way over property other than that described in the receipt and cheque; and that, for these reasons, the plaintiff has not proven a memorandum of the whole or real agreement between the parties, as is required by the Statute of Frauds.

It appears necessary to a satisfactory consideration of the appellant's contentions that we should first inquire, determine, and state the agreement between the parties and the terms thereof. A careful perusal of the pleadings and exhibits has led me to the following conclusions:—

On the 29th December, 1919, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to purchase, house No. 62 St. George street, Kitchener, for $3,800, the transaction to be closed and possession given and adjustments made as of the 1st day of May, 1920; the purchase-price to be payable $100 as a deposit on the 29th day of December, 1919, $1,400 on the date of closing, the 1st May, 1920, and the balance of $2,300 to be secured by a mortgage on the premises sold, payable in 5 years from the date of closing; and, though the interest was not mentioned between the parties, it was intended and well understood by both parties that interest was to be paid on the mortgage-moneys during the currency of the mortgage; and, though the rate of interest was not discussed, the proper inference and conclusion in the circumstances is that both parties intended and understood that the defendant would pay off an existing mortgage of $2,000, bearing interest, and that a mortgage for $2,300 should be substituted therefor, and that the substituted mortgage should carry interest at the same rate, payable yearly or half-yearly, as was provided in the mortgage to be paid off.

It seems to me to be well-settled that where it is sought to read together, for the purpose of meeting the requirements of the Statute of Frauds, two or more documents, the connection between the documents must be physical, such as the connection between a letter and the envelope enclosing it: *Pearce* v. *Gardner*, [1897] 1 Q.B. 688; or that the paper into which the other document is sought to be incorporated must refer to the document which it is sought to read: *North Staffordshire R.W. Co.* v. *Peek* (1860),

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El., Bl. & El. 986, at p. 1000, 120 E.R. 777; also that parol evidence is admissible to identify the document referred to or to shew that what may be a reference to a document is so in fact: *Long* v. *Millar* (1879), 4 C.P.D. 450; *Doran* v. *McKinnon* (1916), 31 D.L.R. 307, 53 Can. S.C.R. 609.

What constitutes physical connection between documents, or a sufficient reference in one document to another document, within the meaning of the foregoing authorities, has been discussed and considered in many cases, a number of which are reviewed and considered in the recent case of *Stokes* v. *Whicher*, [1920] 1 Ch. 411. The plaintiff relies on the *Stokes* case; but, after careful study of it, I am of the opinion that Mr. Justice Russell did not intend to carry the law beyond the statement thereof by Baggallay, L.J., in *Long* v. *Millar*, at p. 455, where he says: "The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence;" and by Thesiger, L.J., at p. 456, where he says: "If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway* v. *Wharton* (1857), 6 H.L. Cas. 238, 10 E.R. 1287; there 'instructions' were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to shew that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified."

Taking the foregoing quotations from *Long* v. *Millar* as an accurate statement of the law, as I see it, the questions for our consideration are: is there any statement in the receipt signed by the defendant which does, or can, refer to the cheque signed by the plaintiff so as to make the cheque and all its terms part of the transaction referred to in the receipt?

It may be argued that the receipt acknowledges a payment, and that the payment so acknowledged can refer to a payment by cheque, and that the cheque may be identified as the payment

received, and that thereupon it is proved that not only the payment acknowledged in the receipt was made by cheque but made on the terms set out in the cheque. On the other hand, it may be argued that the receipt does not on its face acknowledge the cheque as a payment, or the receipt of the cheque as cash, but simply the receipt of cash, and not the receipt of cash on terms, or on the terms set out in the cheque. Also that in *Long* v. *Millar* it was not the acknowledgment of the receipt of £31 that admitted evidence of the purchase agreement referred to, but the words in the receipt "deposit on the purchase of 3 lots" that allowed in evidence to identify the purchase agreement. I cannot satisfy myself that, had these words "deposit on the purchase of 3 lots" been omitted from the receipt in *Long* v. *Millar*, it would have been held that the remaining words of the receipt constituted a sufficient reference to the agreement so as to allow it to be identified and read into the receipt for the purpose of establishing a memorandum to satisfy the requirements of the Statute of Frauds.

On a consideration of all the documents and circumstances, I incline to the opinion that there is not in the receipt, in the case at bar, sufficient to enable us to read the cheque and its terms into or along with the receipt, for the purpose of making out a memorandum to satisfy the Statute of Frauds. It seems clear that if the two documents cannot be read together the wording of the receipt is consistent with the defendant's view that there was not to be a sale but only a right to purchase, depending on contingencies, and that the deposit was only a deposit on an option, and that the receipt does not in itself contain evidence of the agreement of purchase and sale, which it has been found was the true transaction entered into between the parties, sufficient to satisfy the requirements of the statute. But, as I read the evidence, it is not necessary to base my judgment on an opinion that the receipt and cheque cannot be read together, or into one another, for I am of opinion that, read together, the receipt and cheque do not constitute a memorandum of the agreement and all its essential terms. True, these documents may evidence an agreement, but I think the law is clear that the memorandum must evidence the agreement and that evidence of *an* agreement is not sufficient. That proposition is stated by Lord Selborne in *ervis* v. *Berridge* (1873), L.R. 8 Ch. 351, at p. 360, in these words:—

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"The Statute of Frauds . . . is a weapon of defence, not offence, and . . . does not make any signed instrument a valid contract by reason of the signature if it is not such according to the good faith and real intention of the parties."

The same proposition is stated in other words by a Divisional Court in *Green* v. *Stevenson* (1905), 9 O.L.R. 671, in which case Anglin, J., in delivering the judgment of the Court, at p. 679, said:—

"He (the defendant) shews a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus completed. By no known process can those terms not so evidenced be put into a writing signed by the defendant. Nothing else can constitute an enforceable agreement so long as the Statute of Frauds prevails."

See also *Scott* v. *Melady* (1900), 27 A.R. (Ont.) 193, where the Court of Appeal for Ontario adopted and followed the same principle.

Now I am clearly of the opinion that the memorandum of the agreement of purchase and sale evidenced by reading together the receipt and cheque—if that may be done—omits two, if not more, of the essential terms which, according to the good faith and real intention of the parties, form part of their agreement: (1) that the transaction was to be closed, possession given, and adjustments made, not, as might be inferred from the documents as of the date of the making of the agreement, the 29th December, 1919, but as of the 1st May, 1920; (2) that the mortgage to secure the unpaid purchase-money should bear interest from the 1st day of May, 1920. That the omitted term numbered (1) was agreed to is, I think, admitted: see the transcript of evidence at pp. 1, 4, 5, 7, and 12. The omitted term numbered (2) is not admitted; in fact, both parties say that it was not mentioned; but, on the evidence, it is clear that the parties did discuss the mortgage which was then on the property, the amount thereof, the assumption thereof by the purchaser, the payment thereof by the vendor, and the substitution therefor of a mortgage for $2,300, either to be made or assumed by the purchaser; and I think it should be inferred from what was done and said by the parties, considered in the light of the surrounding circumstances, that, though interest was not expressly mentioned, yet, according to the good faith and true intention of the parties, interest was to be paid on the $2,300 mortgage-moneys from the date fixed for the closing, that is, the 1st May, 1920.

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Counsel for the plaintiff did not seriously contend that such was not the true intention of both parties. On the contrary, he and the learned trial Judge assumed that it was the intention of both parties that interest should be paid on the mortgage-moneys during the currency of the mortgage, and that the rate thereof was fixed by the Interest Act, R.S.C. 1906, ch. 120, sec. 3.

On this point the position taken by the respondent is stated by his counsel in these words:—

"It was not necessary to discuss the question of interest on the mortgage between the parties because both of them knew what a mortgage was and both of them believed that a mortgage carried interest, and they had a common idea as to what a mortgage was; and I therefore suggest that the use of the word 'mortgage,' in the circumstances under which the word was used, raises an inference that the parties intended interest; and therefore I claim that, both by law and by intention of the parties, which might be termed tacit agreement, interest is payable, and that rate of interest is the legal rate fixed by the Interest Act, R.S.C. 1906, ch. 120, sec. 3.

"If you look at the pleadings, you will see that the defendant offered to pay cash for the property, and by the pleadings still offers to pay cash. I beg leave to suggest that the right to give back a mortgage is a term of the contract simply and solely for the benefit of the purchaser; and, being such, is one that he could waive and still obtain judgment for specific performance of the rest of the contract—see Fry on Specific Performance, 5th ed., p. 185, para. 374."

It seems to me that the foregoing argument misses the point and makes against the plaintiff rather than in his favour, in that it admits that an essential term of the agreement has been omitted, not from the actual agreement of the parties, but from the memorandum which the Statute of Frauds says is necessary to the enforcement of the contract.

For these reasons, I am of the opinion that the plaintiff has failed to establish a memorandum in writing of the agreement between the parties sufficient to satisfy the requirements of the Statute of Frauds; and that the appeal must be allowed and the action dismissed.

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Meredith, C.J.O.

MEREDITH, C.J.O. (dissenting):—The question for decision is, whether or not the agreement between the parties, or a memorandum or note of it, is "in writing and signed by the party to be charged therewith . . ." as is required by sec. 5 of the Statute of Frauds, R.S.O. 1914, ch. 102, to enable an action to be brought upon the agreement.

There is nothing to prevent it from being shewn by parol what the agreement is; but, unless it is evidenced as the statute requires, an action cannot be brought upon it.

The first step in the inquiry is to ascertain what the agreement was in fact, and then to ascertain whether it is in writing or there is a memorandum or note of it in writing "signed by the party to be charged" with it.

The cases establish that all the material terms of the agreement must be evidenced as the statute requires. See *Green* v. *Stevenson*, 9 O.L.R. 671, and cases there cited.

What then was the agreement? It was that the appellant should sell and the respondent should buy the property in question for $3,800; that a deposit of $100 should be paid down and $1,400 be paid on the 1st May following, and that the remainder of the purchase-money should be paid in 5 years and be secured by mortgage of the property; that the mortgage-money should bear interest, though that part of the agreement was not expressed in words; and that possession should be given on the 1st May following.

In my opinion, subject to the question as to the interest and the time for taking possession, the receipt signed by the appellant is a memorandum of the agreement, signed by her, sufficient to satisfy the provisions of the Statute of Frauds.

The only reasonable construction of the receipt is that the deposit is a deposit on the purchase of the house; the provision that $1,400 is to be paid on the 1st May, 1920, and "balance of $2,300 on 5 year mortgage," makes it clear, I think, that the deposit was upon a sale and that the price to be paid was $3,800.

While it is unnecessary in this view to decide whether the cheque which the respondent gave to the appellant for the $100 is so connected with the receipt given by the appellant that the two documents may be read together, I am of opinion that they may. The receipt acknowledges payment of a deposit of $100,

and the cheque, which was given by the respondent and was handed to the appellant when the receipt signed by her was given, was in fact for the deposit, as is stated on the cheque, and I see no reason why the receipt may not be looked at to identify the deposit which is referred to in the cheque; the case falls, I think, within the principle of the recent decision in *Stokes* v. *Whicher*. [1920] 1 Ch. 411, and of such cases as *Long* v. *Millar*, 4 C.P.D. 450,

It is beyond question that the two documents were signed on the same occasion and as parts of one and the same transaction; indeed it is a reasonable inference that the cheque was drawn first and handed to the appellant, and that the receipt is and was intended to be a receipt for the money paid by the cheque.

The appellant must have seen what the cheque stated, and acquiesced in it as a correct statement of what the money was paid for.

It was, however, argued that two material terms of the bargain are not evidenced by the writing, viz., the term as to possession and the term as to interest, and that therefore the documents do not constitute a sufficient memorandum of the agreement to satisfy the Statute of Frauds.

It is well-settled law that the absence from the memorandum of terms which are implied by law does not render the contract incomplete: Fry on Specific Performance, 5th ed., para. 372, and cases there cited.

"The Court, however, will not imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied."

The documents do not in terms fix a time for the completion of the purchase, but the fair inference from what is stated in them is that the 1st May, 1920, is that time. The sum of $1,400 is to be paid on that day, and a mortgage is to be given for the balance of the purchase-money. In the absence of any provision to the contrary, and having regard to what was the oral agreement as to the time for giving possession, it must have been intended that the purchase should be completed on the 1st May, 1920; and that term is, I think, to be implied.

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When the time for completion is fixed, that time, *primâ facie*, and in the absence of stipulation, is the time from which the purchaser is liable to the payment of interest and is entitled to the rents or to be given possession.

There is no stipulation that the mortgage-money is not to bear interest; and, having regard to what has just been said as to the time from which the purchaser is liable to pay interest, the fair meaning of the documents is, I think, that the $2,300, the balance of the purchase-money, is to bear interest, and the mortgage for it is to bear interest from its date until its maturity, and if necessary that term should, I think, be implied.

If the $2,300 had been payable on the 1st May, 1920, the interest for which the purchaser would have been liable, there being no stipulation to the contrary, would have been at the rate of 5 per centum per annum: Interest Act, R.S.C. 1906, ch. 120, sec. 3; and I see no reason why, when the time for payment is postponed for 5 years, the rate of interest during that period should not be the same.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

Appeal allowed.

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Re PROHIBITION ACT AND TOSEY.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

INTOXICATING LIQUORS (§ III H—90)—AUTOMOBILE EMPLOYED IN CARRYING —DISPOSAL IN FOREIGN COUNTRY—RIGHT OF PROVINCE TO CREATE PENAL OFFENCE EXCEPT FOR BREACH OF ITS OWN STATUTE—EVIDENCE—FORFEITURE OF AUTOMOBILE—JURISDICTION OF MAGISTRATE.

Evidence that liquor being carried in an automobile is for the purpose of being disposed of in a foreign country, or where there is no evidence as to the disposal to be made, does not disclose an offence under the B.C. Prohibition Act, 6 Geo. V. 1916, ch. 49, sec. 52, and (1920) ch. 72, sec. 27, which justifies a magistrate in declaring the automobile forfeited under the Act, neither is an automobile "employed in carrying liquor for the purpose of selling or disposal of same illegally" unless the automobile is with the knowledge of the owner employed, or permitted by him to be employed in the illegal disposal, and there can be no forfeiture of such automobile except on notice and with opportunity to the owner of the automobile to be heard.

Statement.

APPEAL from an order of Hunter, C.J.B.C., quashing a forfeiture under the B.C. Prohibition Act. Affirmed.

G. E. Martin, for appellant.

A. Henderson, K.C., for respondent.

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MACDONALD, C.J.A.:—I would dismiss the appeal and uphold the order appealed from on the ground that there was no evidence whatever that the liquor was being carried for the purpose of selling or disposing thereof illegally. It is the purpose to *dispose* of the liquor *illegally* which is the gist of the offence.

Macdonald, C.J.A.

The only purpose was to take it into the United States. To dispose of it in the foreign country, assuming that that was the purpose, and there is no evidence of it, is not an offence under the Prohibition Act, 6 Geo. V. 1916 (B.C.), ch. 49. The Province cannot create these penal offences or quasi-crimes except for breach of its own statute. Moreover, the intention to take the liquor across the line was abandoned before the seizure of the car and at that time the purpose was to take it back to Vancouver, but there is not a fact in evidence from which an inference can be drawn that it was the purpose of those in charge to dispose of it or part with it in any way when they got it there. The section of the statute relied on to support the forfeiture must be read in the light of the whole Act. The transporting of the liquor is not the gist of the offence, the taking of it from one place to another. The offence committed in doing this is elsewhere dealt with in the Act. The onus of proof is on the prosecution to prove the purpose. The case does not fall within those in respect of which the onus is by the Act placed on the alleged offender. On the face of the proceedings, as I read them, no facts appear to give the magistrate the right to order a forfeiture of the car.

MARTIN, J.A. (dissenting), would allow the appeal.

Martin, J.A.

GALLIHER, J.A. (dissenting):—Section 52 of the Prohibition Act, 6 Geo. V. 1916 (B.C.), ch. 49, gives to the magistrate trying the case, the discretionary power to order a vessel (and under the amendment, 1920), an automobile employed in the carrying of liquor for the purpose of selling or disposing of the same illegally to be forfeited if it is proved before him that such vessel or automobile was so illegally employed.

Galliher, J.A.

The only objection raised here is that the magistrate should have given notice to the owner of the automobile in order that he might be heard before declaring the same forfeited.

Hunter, C.J.B.C., from whose order this appeal is taken, gave effect to this objection. With great respect, I take a different view.

It seems to me the section lays down the proof necessary to

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enable the magistrate to exercise his discretion and while in a case where the car was not the property of the man in whose custody it was found, it might seem desirable that the owner if known, should be notified, yet the car becomes liable to confiscation so soon as proof of the illegal use to which it is put is established in my opinion irrespective of who the owner may be.

I think the order of the magistrate was right and that the appeal should be allowed.

McPhillips, J.A.

McPHILLIPS, J.A.:—This appeal calls in question the forfeiture of a certain automobile by the Police Magistrate of the city of New Westminster (H. L. Edmonds), in the claimed exercise of powers conferred by sec. 52 of the Prohibition Act, 6 Geo. V. 1916, ch. 49, and ch. 72, sec. 27 (1920), which reads as follows:—

> If it is proved before any Police or Stipendiary Magistrate or two Justices of the Peace that any automobile or that any vessel, boat, canoe, or conveyance of any description, upon the sea-coast or upon any river, lake, or stream, is employed in carrying any liquor for the purpose of selling or disposal of the same illegally, such automobile, vessel, boat, canoe or conveyance so employed may be seized and declared forfeited and sold, and the proceeds thereof paid into the Consolidated Revenue Fund or to the municipal treasurer, as the case may be.

Apart from the fact that the evidence does not disclose an offence which would entitle the magistrate to proceed under sec. 52 and declare a forfeiture of the automobile—and in that view I am in agreement with my brother the Chief Justice—there is the further insurmountable difficulty in the way of forfeiture (even if an offence was established), that the automobile was not "employed in carrying any liquor for the purpose of selling or disposal of the same illegally." This legislation, as all legislation, must be read reasonably and unless it be that the language is intractable, it follows that the illegal purpose must be connected with the owner of the automobile, *i.e.*, the automobile is, with the knowledge of the owner thereof, employed or permitted by him to be employed in the illegal disposal of liquor. Now in the present case there is no evidence whatever of this being the situation, in fact, everything points to the contrary, and what has been done cannot be characterised as other than a denial of natural justice.

It is a monstrous thing that this automobile should be declared to be forfeited, when it is apparent that the owner thereof was not even heard in the matter. It is unthinkable that the Legislature

ever intended that the legislation should be so construed. It has been said that the Courts are the last bulwark of the people and in my opinion it is rightly said, and unless the Courts are confronted with not only apt but intractable words, there can be no forfeiture of property, even where there is jurisdiction to adjudicate, save upon notice and with opportunity to the owner of the property to be heard, otherwise there is the denial of natural justice.

McPhillips, J.A.

I do not consider it necessary to refer to the authorities upon this point—they are many. It follows that in my opinion, Hunter, C.J.B.C., was right in quashing the forfeiture. The appeal should be dismissed.

EBERTS, J.A., would dismiss the appeal.

Eberts, J.A.

Appeal dismissed.

THE KING v. SECTOR.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. December 23, 1920.

FALSE PRETENCES (§ I—6)—BY CONDUCT—PROMISE TO SEND CHEQUE TO RELEASE AUTOMOBILE IN GARAGE—CHEQUE POST DATED—BANK NOTIFIED NOT TO PAY.

If a person promises to send a cheque for the amount due for repairing his automobile in order to get it out of the garage where it is held for the repair bill, and sends a cheque which the repairman accepts not noticing that it is post-dated and afterwards notifies the bank not to pay the cheque, his action constitutes false pretences by conduct.

[See Annotation, False Pretences, 34 D.L.R. 521.]

RESERVED CASE on a conviction for obtaining goods under false pretences. Conviction affirmed.

Statement.

H. E. Sampson, K.C., for the Crown.

T. A. Lynd, for accused.

NEWLANDS, J.A.:—The accused was convicted of obtaining goods under false pretences. He now asks for a reserved case on the ground that the cheque he gave for same was a post-dated cheque and, therefore, under the authority of *The King* v. *Richard* (1906), 11 Can. Cr. Cas. 279, was not a false pretence.

Newlands, J.A.

The facts in this case were that accused left a motor car with Ralph Chisholm to be repaired. After the repairs were completed, Chisholm took Sector for a drive in the car and then took it back to his garage. The next morning he took Sector his account for the repairs. Sector says he mentioned the settling up of an old account he claimed there was between them. Chisholm denies

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this. Apart from this old account, Sector says Chisholm said, "'I want a cheque,' and I said, 'You want a cheque?' and I told him to 'go back to the shop and I will send you a cheque just as wanted.'" He then made out a cheque for $130, the amount agreed upon for the repairs, dated it 1930, wrote across it "not negotiable," attached it to the account and sent his man over with it to get the car. His man took it to Chisholm, who receipted the account and gave it with the car to the messenger. He never noticed that the cheque was post-dated, nor that it had the words "not negotiable" on it. Before it could be presented, Sector notified the bank not to pay it. When he gave the cheque he had no personal account in the bank, and the bank would not have paid it without being authorised by him to do so.

I am of the opinion that this was a false pretence by conduct. Chisholm before giving up the car, on which he had a lien for repairs, wanted a cheque which would be paid on presentment. The accused told him he would send him a cheque just as wanted. He post-dated the cheque and told the bank not to pay it. He, however, intended that Chisholm should take the cheque as the one he promised to send him, and give up the car and his lien on it. He hoped that Chisholm would not notice that it was post-dated and so deceive himself, and this is what happened.

In false pretences by conduct, the accused must so conduct himself as to lead the other party to believe that a state of facts exists which does not exist. This is what happened in this case. Sector so conducted himself that Chisholm would believe that he was getting a cheque for which the bank would give him $130. Chisholm was deceived and gave up the car. The state of facts as represented by Sector's conduct was false and false to his knowledge; it was done to deceive Chisholm and did deceive him, and in consequence thereof he parted with the car in which he had a special property on account of his lien for work.

The cases cited on post-dated cheques do not apply to this case. There the parties knew the cheques to be post-dated, and it was held not to be a false pretence that there would be funds to meet the cheque when due.

I am therefore of the opinion that the conviction should be confirmed.

Lamont, J.A.

LAMONT, J.A.:—The accused was indicted on the following charge:

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For that he the said David Sector on or about the 3rd day of August, 1920, at the village of Denzil, in the Province of Saskatchewan, by false pretences, did obtain from Ralph Chisholm of Denzil aforesaid one Ford Automobile, in which the said Ralph Chisholm had a special property or interest of the value of $130.00 with intent to defraud, contrary to sec. 405 of the Cr. Code of Canada.

The jury found him guilty. A case was reserved for this Court, and the question is: Do the acts of the accused as disclosed by the evidence amount to false pretences?

The accused states that he and the witness Chisholm had, some time prior to August, 1920, been carrying on an ice-cream business together; Chisholm running the business and the accused furnishing money; that on winding up the business there were, according to his figuring of the accounts, certain moneys coming to himself from Chisholm for which he could not get settlement. After that business was wound up, Chisholm went into the garage business, and the accused gave him his automobile to repair. The accused was out of the city for some time, and when he returned he saw Chisholm, who told him that his car was repaired. The two of them took the car out to test it. The accused suggested that Chisholm send the car home, but Chisholm said he would keep it in his garage. The accused asked Chisholm if he had the bill for the car made out. Chisholm replied in the negative, but next morning made out the bill and took it to the accused. It amounted to $131.80, but Chisholm said he would make it $130, even. The accused testified that he then said to Chisholm, "I think we will settle up other things"—referring to the accounts of the ice-cream business. To this he says Chisholm replied, "I want a cheque." The accused then said to Chisholm, "go back to the garage and I'll send you a cheque just as wanted." A short time afterwards he sent his servant to Chisholm with a cheque drawn in his favour for $130, and pinned to Chisholm's bill for repairs. But the cheque instead of being dated with the year 1920 was dated 1930. When his servant left with the cheque for Chisholm, the accused went to the bank and directed the manager not to pay the cheque without further instruction from him. When Chisholm received the cheque and saw that it was in his favour for $130, he gave the servant the accused's car. He did not notice that it was dated 1930. On presentation, the bank refused payment of the cheque. The accused frankly

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admits that his object in dating the cheque 1930 and in stopping payment thereof was to obtain the car, and to keep Chisholm out of his money until he would arrange for a settlement of accounts of the ice-cream business. Under these circumstances, was the accused guilty of obtaining the car under false pretences?

On the argument, I was under the impression that the offence of which the accused had been guilty was that of theft by means of a trick, and not of obtaining goods under false pretences, as the facts seemed to be similar to those in *The Queen* v. *Russett*, [1892] 2 Q.B. 312. In that case the prisoner agreed at a fair to sell a horse to the prosecutor for £23, of which £8 was to be paid to the prisoner at once and the remainder upon the delivery of the horse. The prosecutor handed the £8 to the prisoner. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it. It was argued that the offence of which the prisoner had been guilty was of obtaining the £8 under false pretences, and that he had not been guilty of larceny. The Court, however, held that he had been rightly convicted of larceny of the £8 by means of a trick, on the ground that the prosecutor had no intention of parting with his property in the £8 until the prisoner had delivered the horse, which he never intended to do.

On further consideration, however, I have reached the conclusion that the accused in the present case was guilty of obtaining the car by false pretences. The distinction between the *Russett* case, [1892] 2 Q.B. 312, and the present case is, that in the *Russett* case the prosecutor did not intend to part with his property in the £8 until the horse was delivered, while in this case Chisholm did intend to part with all his property in the automobile, and he did so because he believed that he had already received payment therefor.

A false pretence is defined as:

> A representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

It is charged against the accused that his statement to Chisholm that he would send him a cheque just as wanted, followed by his

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sending the cheque in question, constituted a representation that Chisholm would be paid the amount of the cheque on presentation at the bank on which it was drawn, and that, by dating the cheque 1930, intending that it should not be paid, and by telling the bank not to pay it when presented, he knew such representation to be false.

For the accused it was argued that, whatever representation he may have made by his conduct, the cheque, on its face, by being dated 1930, negatived any representation that it would be paid forthwith.

Although he dated the cheque 1930, the accused intended and hoped that Chisholm would not notice it. If the accused had said to Chisholm, "you want a cheque for $130; here is your cheque," at the same time handing him a cheque; and if Chisholm under those circumstances took the cheque without examining it, relying upon the representation that it was a cheque for $130, and parted with his property in the car on the strength of the representation, the accused would clearly be guilty of false pretences. What difference is there between a representation made under those circumstances and the representation actually made by the accused? The accused knew that Chisholm was not going to part with his property in the car unless he got $130. He said he would send him a cheque, "just as wanted." He did send him a cheque for the correct amount. He intended that Chisholm should take this cheque believing it would be payable on presentment at the bank, and on account of this belief would give up the car. He knew and intended that the cheque should not be paid. His representation, in my opinion, was both false and fraudulent. To my mind it was, in effect, the same as if the accused had personally handed the cheque to Chisholm and had said, "Here is the cheque you want."

The conviction in my opinion should be affirmed.

ELWOOD, J.A., concurred with LAMONT, J.A.

Elwood, J.

Conviction affirmed.

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CORPORATION AGENCIES Ltd. v. HOME BANK OF CANADA.

Quebec Superior Court, Maclennan, J. February 11, 1921.

BANKS (§ IV A—60)—PAYMENT OF COMPANY'S CHEQUES—POWER OF DIRECTOR TO DRAW FOR COMPANY PURPOSES—MISAPPROPRIATION TO OWN USE—KNOWLEDGE OF BANK—SUSPICIOUS TRANSACTIONS—INQUIRY—LIABILITY.

A bank paying cheques drawn by one of the directors of a company and signed by the secretary-treasurer of the company who has authority to sign cheques for the company's business and affairs, is liable for the amount of cheques fraudulently drawn by such director and secretary-treasurer and misappropriated by the director to his own use, the nature of the transactions being such that the bank should have been suspicious and put upon inquiry.

[*Kennedy* v. *Green* (1834), 3 My. & K. 699, 40 E.R. 266; *In re Riches* (1865), 4 DeG. J. & S. 581, 46 E.R. 1044; *Ross* v. *London County Westminster & Parr's Bank*, [1919] 1 K.B. 678; *Anderson* v. *Kissam* (1888), 35 Fed. Rep. 699; *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201; *John et al.* v. *Dodwell & Co.*, [1918] A.C. 563, referred to.]

Statement. ACTION to recover the amount of ninety-four cheques, drawn on plaintiff's account by one of the plaintiff's directors and the secretary-treasurer of plaintiff company and misappropriated by the director to his own use. Judgment for plaintiff.

C. M. Cotton, K.C., for plaintiff.

A. Geoffrion, K.C., for defendant.

Maclennan, J. MACLENNAN, J.:—This is an action to recover from the defendant, Home Bank of Canada, the amount of 94 cheques drawn on the plaintiff's account in the Merchants Bank of Canada, Montreal, by C. H. Cahan, Jr., one of plaintiff's directors and B. F. Bowler, secretary-treasurer of plaintiff, who had authority to sign cheques for plaintiff's business and affairs. Six cheques were payable to the order of the Home Bank of Canada, six were payable to an agent of Cahan Jr., three of which he also endorsed, and the balance 82 were all payable to his order. The cheques to the order of Cahan Jr. were endorsed by him, and 71 of them as well as the cheques to the order of defendant were all deposited to the credit of the account of Cahan Jr. with the defendant, and the remaining cheques were presented to defendant by Cahan Jr. or his agent, and defendant paid the cash therefor over its counter. The 94 cheques were all presented by defendant to plaintiff's bank and were paid to defendant by it and charged to plaintiff's account. the moneys placed by defendant to the credit of the personal and private account of Cahan Jr. in the defendant's bank as the proceeds of the cheques deposited there by him were from time to time drawn out by said Cahan Jr. and applied to his own use and

benefit. The cheques drawn and signed by Cahan Jr. and B. F. Bowler on plaintiff's account were so drawn without plaintiff's authority, knowledge or consent, without consideration, were a fraud upon the plaintiff and were all drawn for the personal benefit and use of Cahan Jr., and he received the proceeds of the cheques from the defendant either in cash over the counter or through his personal account. The cheques were issued in the period from March 29, 1919, to December 20, 1919. When the cheque of March 29, 1919, made in plaintiff's name by Cahan Jr., director, and B. F. Bowler, secretary-treasurer, payable to the order of Cahan Jr. for $500, was delivered to the bank defendant, the account of Cahan Jr. was overdrawn and said cheque was accepted by the defendant in payment of its debit charge against said Cahan Jr. for his overdrawn account. The same applies to the second cheque sued on for $300. dated April 4, 1919, which was also received by the bank defendant and deposited to the credit of Cahan Jr. in payment of the debit balance of his overdrawn account. The same also applies to a cheque for $298.15 bearing date April 28, 1919, and in all 27 out of the 94 cheques sued on and representing over 23% of the total amount sued for were received by the bank defendant to cover overdrawn debit charges in the account of the said Cahan Jr. in said bank defendant.

The plaintiff claims that defendant had notice and knowledge in respect to each of said several transactions, that the authority of Cahan Jr. to sign the said cheques was limited, that his title to said cheques was defective, that, as director of plaintiff, he was not acting therein in the usual course of plaintiff's business, that the plaintiff was the true owner of said cheques and of the proceeds thereof and that he, as such director, was wrongfully and fraudulently appropriating the funds or property of plaintiff to his personal and private use and benefit, and that, under the circumstances, the defendant shut its eyes to the facts of which it had notice and knowledge and abstained from making any inquiry as to the nature or extent of the power or authority of said Cahan Jr., as plaintiff's director, to carry out the said several transactions, that defendant took each and all of said cheques in bad faith and with notice of the defective title of the said Cahan Jr., and defendant received the proceeds of said cheques with notice and know-

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ledge, that they were plaintiff's property, and defendant, without the authority of plaintiff, wrongfully placed said cheques to the credit of Cahan Jr. and permitted him to draw the proceeds thereof for his own personal and private use and benefit in respect to some of said cheques and, as to the balance, defendant, without plaintiff's authority, wrongfully paid to said Cahan Jr., or to his agents, the cash therefor, and that the defendant, with knowledge of said wrongful acts of Cahan Jr., knowingly participated in his said wrongful acts.

The principal defence in this action is, that defendant in every instance took the cheques sued on in the ordinary course of its business as a bank in good faith and without notice or knowledge of any defect in the title of Cahan Jr., from whom or for whose account said cheques were received under the honest belief that the cheques had been issued in strict conformity with plaintiff's authority and for the purpose of its affairs, and that defendant had no ground for suspecting that said cheques had been wrongfully and fraudulently issued.

The important question here arises:—Did the Home Bank of Canada have notice or knowledge that Cahan Jr., director and agent of the plaintiff corporation, was appropriating its funds for his own use and benefit? It is claimed that the bank defendant had such notice on the face of each of the several transactions.

In the case of *Kennedy* v. *Green* (1834), 3 My & K. 699, 40 E.R. 266, Brougham L.C., at p. 721 (E.R. 275), said:—"Every unusual circumstance is a ground of suspicion and prescribes inquiry."

In Re Riches, Ex parte Darlington District Joint Stock Banking Co. (1865), 4 DeG. J. & S. 581, 46 E.R. 1044, which was a case where a partner (Kay) in a firm fraudulently negotiated a bill of exchange which was partnership property, it was held that the transaction shewed on its face a conversion by the customer of partnership property to his own purposes and that his bankers had cheques *per pro* the plaintiffs for the purposes of their business, gave cheques *per pro* the plaintiffs to the defendant in payment of his (A's) racing debts, and it was held that, the plaintiffs were entitled to recover the amount of the cheques from the defendant, inasmuch as the defendant must be taken to have had notice that the cheques were signed for purposes outside the plaintiffs' busi-

ness, and that A had only power to draw cheques confined to that business, and inasmuch as there was no evidence that the plaintiffs had held out A as having authority to sign the cheques in question.

In *Ross* v. *London County Westminster & Parr's Bank Ltd.*, [1919] 1 K.B. 678, where a private customer (De Volpi) of the bank, paid into his account for collection cheques which bore upon their face the fact that they were payable to an officer of a public department and not to a private person and the indorsements shewed that they were being negotiated by that officer, the employees of the bank who received the cheques were put upon inquiry, as to whether the customer was entitled to the cheques, and Bailhache, J., at p. 686, said:—

> Each of the cheques in question was drawn payable to "The Officer in charge, Estates Office, Canadian Overseas Military Forces," and was indorsed by that officer under the same description. Each cheque bore upon its face the fact that it was payable to the officer of a public department and not to a private person, and the endorsement on each cheque shewed that it was being negotiated by that officer. It is not in accordance with the ordinary course of business that a cheque so drawn and endorsed should be used for the purpose of paying the debt of a private individual. It was highly improbable that the officer in charge of the Estates Office would hand to De Volpi cheques in this form, with the intention that the latter should pay them into his private account. It therefore seems to me that when De Volpi presented these cheques with a view to having them credited to his private account, a cashier of ordinary intelligence and experience should have been put on inquiry whether or not the credit ought to be made.

In *Anderson* v. *Kissam* (1888), 35 *Fed. Rep.* 699, in which the cashier of a bank drew in his official capacity the cheques of his bank upon another bank which he paid in to his brokers for his account, it was held that, at p. 706:—

> A purchaser of commercial paper made by an agent cannot acquire any title to it as against the principal, unless he can shew that it was made by the agent upon due authorisation; and when he has information that the agent who has made the paper has made it in the name of the principal for his own use, he must be prepared to shew that special authority in that behalf has been delegated by the principal, and cannot rely upon the implied authority of the agent to make such paper in the ordinary business of the principal.

In *Rochester and Charlotte Turnpike Road Co.* v. *Paviour* (1900), 164 N.Y. Rep. 281, in which Briggs, the treasurer of the company, drew a cheque in the name of the company as its treasurer upon the Central Bank of Rochester, payable to the order of the defendant to whom he gave it as agent for Warren to pay a debt owing

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by Briggs, and in an action to recover the amount of the cheques from the defendant, Vann, J., in delivering judgment of the Court of Appeals, at p. 284, said:—

The checks themselves gave notice of a suspicious fact and invited inquiry in relation thereto. They shewed upon their face that Briggs was apparently using the money of the plaintiff for his own purposes, since they were not his checks but the checks of a corporation issued by him as its treasurer. In the absence of express authority, or of that which may be implied from past conduct known to the corporation, he could not lawfully use the checks, which stood as its money, for such a purpose, as the defendant is presumed to have known. There was no express authority and nothing to indicate that Briggs was impliedly authorised to thus use the money of the plaintiff and the presumption was the other way. . . .

The facts known to the defendant should have aroused his suspicion and led him, as an honest man, to make some investigation before he accepted the money of a corporation, which owed him nothing, in payment of a claim that he held against some one else. If he had such confidence in Briggs that he was willing to trust him without inquiry, under suspicious circumstances of a substantial character, he must stand the loss, for he failed to discharge a duty required by commercial integrity. He could not confide in Briggs at the expense of the plaintiff, after notice of his irregular and doubtful conduct.

And at p. 289:—

In the case now before us the question of notice is supreme. The checks, when read in the light of the facts known to the defendant, were notice to him that he was apparently accepting money from one to whom it did not belong, and this cast upon him the duty of inquiring into the matter so as to see whether the facts were in accord with the appearances; for, if they were, he knew that he could not honestly take the checks.

In *Ward* v. *City Trust Co. of New York* (1908), 102 N.Y. Rep. 61, where the president of a company procured a cheque payable to its order, endorsed in the corporate name by himself as president and general manager and delivered it in payment of his personal debts, presumption arose from the face of the cheque that it belonged to the company and that the president had no right to use it to pay his personal debt, and Vann, J., p. 69, said:—

The form of the cheque in question was notice to the Trust Company that Umsted was using the property of the corporation, of which he was President, to pay the personal debt of himself and Kiefer in apparent violation of its rights. The effect of such notice was to put the Trust Company upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim.

The fact that the cheques sued on are also signed by another officer of plaintiff, other than its defaulting director Cahan Jr.,

makes no difference: *Squire* v. *Ordemann* (1909), 194 N.Y. Rep. 394; *Havana Central Railroad Co.* v. *Central Trust Co. of New York* (1913), 204 Fed. Rep. 546; *West St. Louis Savings Bank* v. *Shawnee County Bank* (1877), 95 U.S. Rep. 557; *National Bank* v. *Insurance Co.* (1887), 104 U.S. Rep. 54; *Santa Marina Co.* v. *Canadian Bank of Commerce* (1916), 242 Fed. Rep. 142.

In the case of the cheques drawn payable to the order of the Home Bank of Canada a slightly different principle applies. In *Sims* v. *U.S. Trust Co. of New York* (1886), 103 N.Y. Rep. 472, the plaintiff's testator delivered to one Crowell a cheque on the People's Bank of New York, payable to the order of the defendant, with verbal directions to deposit the same to his credit with defendant. Crowell instead requested a certificate of deposit payable to himself as trustee for the amount of the cheque on which he shortly afterwards drew the money and converted it to his own use. The defendant collected the cheque at the People's Bank and in an action by Sims' executor, to recover the amount from the defendant, it was held that the defendant was liable, that the cheque imported ownership of the money in Sims and he desired to transfer it from the People's Bank to defendant, and that while defendant could have refused to receive the deposit or to act as the agent of Sims in transferring the fund, having accepted the office it was bound to retain the moneys until it received his instructions as to paying them out.

In the action now before the Court, Cahan Jr. requested the Home Bank to place the amount of the cheques payable to its order to the credit of his private and personal account, and defendant did so instead of retaining the moneys until it received instructions from the plaintiff as to paying them out. The cases of *Lanning* v. *Trust Co. of America* (1910), 137 N.Y. App. Div. 722, and *Bischoff* v. *Yorkville Bank* (1915), 170 N.Y. App. Div. 679, and on appeal (1916), 218 N.Y. Rep. 106, are authorities to the same effect.

The cheques which were cashed over the counter by defendant and the money paid either to Cahan Jr. or to his agent are governed by the same principles as the cheques deposited in his private and personal account with defendant, and the proceeds of which were afterwards withdrawn on his own cheques for his private and personal use and benefit.

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The principles of law contained in the above citations, regarding notice and knowledge to be inferred from the form of the cheques, were approved and followed by the Privy Council in the case of *John et al.* v. *Dodwell & Co. Ltd.*, [1918] A.C., 563. The respondents, a company incorporated and registered in England, had a branch in Ceylon, of which Williams was manager. Williams, under a general power of attorney, drew cheques on respondents' account in favour of the appellants for private transactions of his own in fraud of the respondents. The appellants took the cheques honestly in the ordinary course of business. On the discovery of the fraud the respondents brought an action against the appellants to recover the amount of the cheques so drawn, and it was held that under the prescription ordinance of Ceylon they could only recover the amounts of such of the cheques as were drawn within three years before the commencement of the action. Viscount Haldane, at p. 568, said:—

> With Williams the appellants, like other brokers, had had many transactions, and none of them had resulted in any difficulty. What he was doing might have been loose practice, and not in the ordinary course of business, but it was not uncommon for employers to allow considerable latitude, as regards drawing cheques, to their confidential agents. However, it is none the less clear that, innocent of fraud as the appellants were found to be, they, by the action of their clerks, took an unmistakable and grave risk in the transactions in question. On the face of these Williams was, without shewing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was *primâ facie* a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction; for when an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property, with knowledge of a breach of duty committed by him in making the transfer, holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal.

The Home Bank of Canada took the cheques sued upon from Cahan Jr. without any inquiry whatever as to his right to issue or negotiate them, relying upon the endorsation and financial credit of Cahan Jr., knowing that he was using the proceeds of the cheques in his activities as a promoter of companies, but

without having ever made any inquiries as to whether these alleged promotions were financially successful or otherwise. A number of the cheques sued on came to the personal knowledge of defendant's manager before being deposited to the credit of Cahan Jr. and some of them bear the manager's initials. The first information which plaintiff had that anything was wrong was on the morning of December 27, 1919, when C. H. Cahan, president of plaintiff, obtained some information from the manager of the Merchants Bank of Canada regarding cheques drawn by C. H. Cahan Jr. and B. F. Bowler and deposited in the Home Bank of Canada, after which C. H. Cahan had an interview with Mr. Scott, defendant's manager, and in answer to inquiries was told that a very considerable number of these cheques had been going through the bank defendant, when he immediately informed Mr. Scott that all such cheques must be fraudulent as there were no cheques of that kind which these men were authorised to draw and he testified that Mr. Scott, defendant's manager, stated:—"I told your son some time ago that this sort of thing had to cease." Scott, when examined on this interview, was asked by defendant's counsel:—"Did you tell Mr. Cahan that you had told him he (C. H. Cahan Jr.) had to cut out this business—something of that description?" and his answer is:—"No sir, I did not." Scott's denial of the statement attributed to him by Cahan is not categorical or specific, and having heard the evidence at the trial and having to decide whose testimony should be given credence, and not overlooking the fact that one of these witnesses is the president of the plaintiff and that the other is the local manager of the bank defendant, who had personal knowledge, as he admits, of some at least of the cheques at the time they went through his bank, I accept Cahan's evidence, that at some time—the evidence does not shew when—the defendant's manager informed Cahan Jr. that the deposit of plaintiff's cheques drawn to his own order and the proceeds of which were put to the credit of his own account with the defendant had to be discontinued. The form of the cheques, the gradual increase in their number and in the amounts for which they were drawn from March to December, 1919, would naturally excite the suspicion of a bank manager of ordinary experience and intelligence. Lord Herschell, in *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201 at 221, said:—

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If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

In this case it is established that the issue of the cheques sued on was unauthorised, none of them being for plaintiff's affairs and business, and that they were affected with fraud from their inception, that the form of the cheques on the face of each of them was notice to the defendant of the defect in the title of Cahan Jr. and should have sounded a note of warning to defendant that he was appropriating the funds and moneys of his principal for his own purposes and put defendant upon inquiry as to his authority to issue and use said cheques for his own benefit. Had defendant made any inquiries, instead of relying upon the financial responsibility of Cahan Jr., it would have found out definitely that said cheques were unauthorised and fraudulent and that Cahan Jr. had no title to them. Instead, the defendant took the cheques at its own risk and peril and received their face value from plaintiff's bank with the knowledge, which inquiry would have disclosed, that Cahan Jr. was wrongfully and illegally appropriating plaintiff's property to his own use, and the bank defendant by so doing participated and aided in the commission of said wrongful acts. The failure of the defendant in these circumstances to make inquiries regarding the right of Cahan Jr. to use the funds and moneys of his principal is inconsistent with good faith on defendant's part. In my opinion, the defence based upon sections 56 and 58 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, that defendant was the holder in due course in good faith and for value and without notice of any defect in the title of Cahan Jr., has not been established. Even if there was good faith on the part of the defendant, the principles laid down by the Privy Council in *John et al.* v. *Dodwell & Co.* [1918], A.C. 563, entitles the plaintiff to succeed, unless some other defence prevails.

The defendant pleads that plaintiff is by law estopped from exercising any right of action with reference to the cheques forming the basis of the present action, because during the years 1918 and 1919 the directors and shareholders of plaintiff abstained from attending to the administration of its affairs and left the same to said Cahan Jr. and to Bowler and, further, never caused

any audit to be made of its books and accounts during 1918 and 1919, and because the signing of cheques by officers of the plaintiff in their own favour was a practice authorised and tolerated as well to its director Cahan Jr. as to its other directors and officers.

The plaintiff owed no duty to defendant with which it had no contractual or business relations, and the failure to have an audit made of its books and accounts is not the proximate cause of the loss. The plaintiff had no cause to doubt the honesty or business integrity of either Cahan Jr. or said Bowler until after the fraudulent transactions were discovered on December 27, 1919: *People* v. *Bank of North America* (1879), 75 N.Y. Rep. 547 at p. 561; *London Joint Stock Bank* v. *Macmillan* and *Arthur*, [1918] A.C. 777. The suggestion that there was an authorised practice of plaintiff's directors signing cheques in their own favour is not established.

The defendant also pleads that plaintiff did not have assets to represent in whole or in part the sum sued for and that the full amount of the cheques upon which plaintiff's action is based have been directly or indirectly accounted for, returned or repaid to plaintiff by and for the account of said Cahan Jr., and by reason of said accounting, return and repayment plaintiff's claim cannot be maintained. There is evidence in the case that Cahan Jr., as the agent and attorney of his father C. H. Cahan, fraudulently and wrongfully withdrew from the Bank of Montreal and from the Guarantee Trust Co. of New York funds and moneys belonging to C. H. Cahan, which were deposited to the credit of the plaintiff at the Merchants Bank of Canada, that similar amounts were wrongfully and fraudulently withdrawn by Cahan Jr. from his father's funds and moneys, were deposited by Cahan Jr. in his personal account in the bank defendant, and that cheques were drawn by Cahan Jr. upon his personal account in the bank defendant and were deposited to the credit of plaintiff's account in the Merchants Bank of Canada. The cheques upon which plaintiff's action is based were all drawn in plaintiff's name and were paid to the defendant by the Merchants Bank of Canada out of funds and moneys on deposit in the Merchants Bank of Canada in the name of the plaintiff. It is obvious that it would be impossible in the present action to enter into the matter of accounting. The proper parties for such an accounting are not before the Court. The claims of C. H. Cahan and of C. H. Cahan Jr.—and prob-

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ably some other parties—would have to be taken into consideration in such accounting. The source from which plaintiff received the moneys which paid the cheques sued upon is irrelevant on the issue between plaintiff and defendant, although plaintiff may later have to account for a portion of its claim.

Upon the authority of *C.P.R. Co.* v. *Banque d'Hochelaga* (1908), 18 Que. K.B. 257; *North and South Wales Bank* v. *Macbeth*, [1908] A.C. 137, and *British American Elevator Co.* v. *Bank of British North America*, 46 D.L.R. 326, [1919] A.C. 658, there can be no accounting in the present action, and the evidence in the record and the evidence tendered of alleged repayment cannot now avail defendant.

The plaintiff has, in my opinion, established its right to recover from defendant the sums represented by the 94 cheques in question, the defences put forward by the Home Bank of Canada fail and there will be judgment in favour of plaintiff for $205,960.37 with interest from the date of the institution of the action, and costs.

Judgment accordingly.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 24, 1921.

BILLS AND NOTES (§ V B—130)—PROMISSORY NOTE—COLLATERAL AGREEMENT WRITTEN ON SAME PAPER—NO PART OF INSTRUMENT—RIGHT OF HOLDER IN DUE COURSE.

The holder of a promissory note in due course is not affected by a collateral agreement, written on the same paper and following the note, which is no part of the instrument sued upon and which by its express terms is not to qualify the absolute obligation of the promissor or to affect the contractual rights of the parties in such a way as to impair the negotiability of the note.

Statement.

APPEAL by defendant from the Supreme Court of Alberta in an action to recover the amount due on certain alleged promissory notes. Affirmed.

W. L. Scott, for appellant; *A. B. Hogg*, for respondent.

Idington, J.

IDINGTON, J.:—The appellant signed what are in due form two ordinary promissory notes for $700 each. That was followed on each of the same sheets of paper at the respective heads of which each of said promissory notes had been written and signed by appellant, by an agreement purporting to be made between said appellant and Dygert, the payee of each of the said promissory notes.

Each of these agreements was signed by appellant but not by Dygert.

Each of same has endorsed on it an affidavit, purporting to have been sworn to by Dygert; first stating that he is the owner or bailor of the goods mentioned in the written agreement; that said copy of agreement is a true and correct copy of the agreement of which it purports to be a copy, and that

3. The said agreement truly sets forth the agreement between myself and the said F. V. Killoran the parties thereto, and that the said agreement therein set forth is *bona fide* and not to protect the goods in question mentioned therein against the creditors of the buyer or bailee.

These promissory notes were indorsed to another party who re-indorsed to respondent who sued to recover same.

The trial Judge treated each of these promissory notes, and what followed, as one document, and together as an ordinary lien note.

He then applied or sought to apply secs. 9 and 22 of the Sales of Goods Ordinance of Alberta, Con. Ord. N.W.T. 1898, ch. 39, thereto and found that the effect thereof, in the event of the death

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of the stallion (which was the property agreed to be sold), and which event took place before payment of the said promissory notes, was that the obligation to pay ceased, and dismissed the action.

In the Court of Appeal this judgment was reversed and judgment given for the respondent for the amount of the said promissory notes and interest with costs.

Against that judgment this appeal is taken.

The said alleged promissory notes I must hold to be in law promissory notes, and the respective agreements following each, a merely collateral agreement which may or may not have some operative effect between the parties thereto, but cannot affect even with notice thereof to the respondent taking them in due course, its rights to recover.

In each of these agreements was a clause designed to estop the appellant from denying that indorsees in due course could be otherwise than such.

In my view it is not necessary to follow up all the manifold views that may be taken of the curiously worded agreement.

The appellant was not a party thereto. There was no proof of failure of consideration, nor could there be under such very peculiar circumstances.

The whole contrivance of each of the said supplementary documents and all that followed each, may, if persisted in as a mode of doing business, lead to much litigation, and may result in disappointment to those using it when that has run its course, but for the present case all that has to be determined is that each of the documents firstly signed is a promissory note, to the suit, upon which no effectual answer has been set up.

Of the curiosities I have found in my search for what might be an answer, I may refer to the cases cited in Byles on Bills of Exchange etc., 17th ed., p. 251. And of these the case *Salmon* v. *Webb* (1852), 3 H.L. Cas. 510, 10 E.R. 201, in its essential features, including the non-execution of the agreement by the promisee, alike to this, determines in principle how a mere collateral agreement may fail to operate against those holding in due course.

I need not enlarge but may, in deference to the argument presented by counsel for appellant, say that I doubt if his contention for the narrow meaning he claimed for the phrase "any

equities existing between the subscriber and the promisee" used in the said agreements, so called, is tenable.

I think the appeal should be dismissed with costs.

DUFF, J.:—I have no difficulty in concurring with the view of the Appellate Division that the instruments sued upon are promissory notes. In each case there is, it is true, on the same piece of paper, one of these instruments and a collateral agreement, but the collateral agreement is no part of the instrument sued upon. By its express terms, indeed, it is not to qualify the absolute obligation of the promissor or to affect the contractual rights of the parties in such a way as to impair the negotiability of the note.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN J.:—Assuming in the appellant's favour, but without so deciding, that although there is much in the terms of the documents to support the contrary view, the instruments sued upon were not promissory notes, the agreements in my opinion make it clear that the respondent, as a holder with whom the notes had been discounted, is entitled to all the rights which would have attached to its position were the instruments promissory notes of which it was the holder in due course. I cannot understand for what other purpose it was stipulated that

> No holder of said notes by or to whom . . . said notes . . . have been discounted . . . shall be affected by the state of accounts between the subscriber and the promisee or by any equities existing between the subscriber and the promisee, but shall be and shall be deemed to be a holder in due course and for value of the notes held by him.

As "a holder in due course," the respondent is, in my opinion, entitled to recover, whatever might have been the rights of Dygert had the notes remained in his hands.

On this ground I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR J.:—Killoran agreed to purchase from a man named Dygert a horse for $1,700 on which he made a part payment of $300 and signed for the balance of the purchase price two instruments which I might, for the sake of this decision, call lien notes. There is a difference of opinion in the Courts below as to whether these instruments should not be considered as promissory notes. But I do not feel obliged in view of the conclusion I have reached to decide this point.

These instruments stipulate that the property of the horse would not pass until the balance of the purchase price would be paid and they contain the following clause:

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These notes . . . may be discounted, pledged or hypothecated by the promisee and in every such case payment thereof is to be made to the holder of the notes instead of the promisee, and *no holder* of the said notes . . . shall be affected by . . . any equities existing between the subscriber and the promisee, *but shall be, and shall be deemed to be a holder in due course* and for value of the notes held by him.

Dygert endorsed these instruments and besides made a written assignment of them to the plaintiff who now sues Killoran, the purchaser of the horse, who signed them.

Killoran contends that the sale of the horse has been avoided under the provisions of the Sale of Goods Ordinance, Cons. Ord. of N.W.T., 1898, ch. 39, which declares, in sec. 9, that

> Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

and in sec. 22:—

> Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.

In the present case, the goods were delivered, but the property thereof remained with the vendor; they are at his risk and between the vendor and the purchaser the sale should be considered as avoided since the horse sold died before it became the absolute property of the purchaser. *Res perit domino.*

But as far as the transferee is concerned, the situation is different, in view of the provisions of the contract made by the appellant. The latter has agreed that the notes could be transferred and that the holder should be considered as a holder in due course in spite of the notice he might have of the contract between the vendor and purchaser. He contracted himself out of the right of resorting as against the assignee of the creditor to his equities against the creditor himself. (Leake on Contracts, 6th ed., p. 865.)

This holder should then be considered in the light of this agreement as if he were a holder in due course without notice under the provisions of the Bills of Exchange Act, R.S.C. 1906, ch. 119. He can recover the payment thereof, though the sale of goods which has brought the signature of these instruments is avoided.

I am of opinion that the plaintiff is entitled to recover.

The appeal fails and should be dismissed with costs.

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Mignault, J.

MIGNAULT J.:—I have duly considered all that Mr. Scott said in his very able argument for the appellant and in the memorandum which he since filed. Nevertheless, in my opinion, the appeal cannot be sustained.

The promissory notes sued on, although printed on the same sheet of paper as the agreement for the sale of the stallion, are, I think, severable from this agreement, and constitute perfectly valid promissory notes which could be transferred, as was done here, by endorsement. Consequently, even if the contract was terminated between the parties by the death of the stallion, the rights of the respondent as holder in due course of these notes are unaffected thereby.

I also concur in the reasons for judgment of my brother Anglin, as a further ground for the dismissal of this appeal.

I would dismiss the appeal with costs.

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. February 1, 1921.

SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND—VAGUE AGREEMENT—PART PERFORMANCE—CONSTRUCTION—NEW AGREEMENT BY COURT.

When asked to decree specific performance of a vague contract which has been partly performed the Court should endeavour to ascertain the terms and enforce complete performance of the contract, but in doing so it cannot make a new contract for the parties where they have never agreed upon the material terms and where this has been done the judgment decreeing specific performance will be set aside.

[*Kelly* v. *Watson*, (1920), 55 D.L.R. 278, 15 Alta. L.R. 587, reversed. See Annotations, Specific Performance—Vague and Uncertain Contracts, 31 D.L.R. 485; Grounds for Refusing the Remedy, 7 D.L.R. 340.]

Statement.

APPEAL by plaintiff from the Supreme Court of Alberta, Appellate Division (1920), 55 D.L.R. 278, 15 Alta. L.R. 587, decreeing specific performance of a contract for the sale of land. Reversed.

C. C. McCaul, K.C., for appellant.

H. R. Milner, for respondent.

Davies, C.J.

DAVIES, C. J.:—I have had the opportunity of reading the reasons for judgment on this appeal prepared by my colleagues Anglin and Mignault, JJ., and find that they have expressed very clearly the views which I had myself formed after hearing the argument and carefully reading and considering the reasons for judgment of the trial Judge and Beck, J., speaking for the Court of Appeal, 55 D.L.R. 278, 15 Alta. L.R. 587.

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It is one thing, and no doubt commendable, for a Court in cases where there has been part performance of an agreement to struggle against the difficulty ensuing from vagueness in the terms of the agreement and, if possible, without creating a new agreement, to spell out one which they conclude from the evidence represents the real intention of the parties. It is quite another thing, however, to make a new agreement for the parties as to which they themselves were never *ad idem*.

With great respect for the Appellate Division I cannot help concluding after reading over the evidence that they have done the latter in this case and have made an agreement for the parties which they themselves never intended. It may be, I do not doubt it, a very fair agreement and one calculated to do justice to both parties, but it is not the agreement the parties themselves reached or intended.

I concur in the proposed judgment allowing the appeal with costs throughout and restoring the judgment of the trial Judge.

Idington, J.

IDINGTON, J. (dissenting):—This is an action of ejectment in which respondent counterclaimed asking for specific performance of a contract of sale and purchase under which the vendor put the respondent in possession of the land in question, and the latter, in reliance upon the good faith of said vendor, made substantial improvements in way of buildings and fencing and cultivation.

The appellant admittedly has no higher rights than the vendor, who was her father.

He admits negotiating with the appellant for a sale of the premises to him and gave a written memorandum which defined the land accurately, named the price and the cash deposit to be paid on a stated date, and the rate of interest for the balance, and induced respondent to enter into possession and make the said improvements in question.

Walsh, J., held that as the parties differed in some of the minor details as to later payments, there was no enforceable agreement.

The Court of Appeal, 55 D.L.R. 278, 15 Alta L.R. 587, unanimously reversed that judgment and by accepting respondent's version as to the first crop to be reaped that year, and the vendor's version as to those details relative to later payments, properly, as I hold under the circumstances, declared the respondent, on assenting thereto, to be entitled to specific performance.

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I have no doubt that according to what was within the common knowledge of the Judges in appeal, so deciding, there was nothing very substantial in the possibly different results likely to be reaped from the operative effect of either version relative to these details.

And the vendor's repeated assertion that the terms of payment, which he was to become bound to observe in the contract with his vendor, should govern those he was to receive from respondent, seems to furnish, if believed, a clear ground for the completion of the contract in an enforceable form.

Those terms had been fixed and never were changed but the original vendor had stipulated he was not to be bound until a third party, then abroad, had assented to such terms of payment.

That party might have made some change but in the ultimate result he did not. That detail of the contract was in suspense, as it were, but all else was settled absolutely, and the result I have adverted to effectually disposed of that suspensive condition.

Indeed, if respondent had been as astute as the Court of Appeal, and had, on the development of this unsubstantial difference in the probable result of these details in evidence, simply said to the trial Judge: "This is a quarrel about nothing, I am, though literally correct in my version, content to accept that of the other party to the contract, and be bound thereby," I incline to think the result might have been satisfactorily settled at the trial. At least I can see no answer there would have been to the counter-claim for specific performance within the principles upon which the Courts of Equity have long rested their judgments in cases dependent upon part performance of the contract.

Unfortunately the conduct of the respondent's vendor had been so wanting in straightforward dealing as to so provoke the former into an insistence on his version of the details being correct and what should be observed.

I think the Court of Appeal has taken a view that is quite maintainable and that this appeal should be, for the reasons it has assigned, dismissed with costs throughout.

Duff, J.

DUFF, J.:—Equity has gone very far in affording relief to a person who, occupying land, has spent money in making improvements or in connection with his occupation under the belief created or encouraged by the owner of the land that an interest would be granted to the occupier sufficient to enable him to enjoy

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the benefit of his expenditures. Relief is not afforded on the ground of agreement but on the ground that it would be unjust to permit the owner to dispossess the occupant in the circumstances without at all events making compensation. The cases are discussed and summed up in the judgment of Lord Hobhouse in *Plimmer* v. *Corp'n of Wellington* (1884), 9 App. Cas. 699. The respondent is not entitled to stand upon this ground in this appeal because a claim to relief upon this ground was never put forward and no such claim has been the subject of investigation.

The Courts would also give effect to a properly founded inference arising from the conduct of the parties that possession of land was taken or continued under an understanding amounting to an agreement for sale either upon terms ascertained in fact or upon reasonable terms as to price and otherwise to be determined in case of dispute by the judgment of a competent Court.

I think the judgment of the trial Judge was right that the parties never arrived at an agreement in terms and I think moreover that the facts disclosed in the evidence are not sufficient to support an inference that they proceeded upon such an understanding as that just indicated.

It follows that the appeal should be allowed and the judgment of the trial Judge restored.

Anglin, J.

ANGLIN, J.:—With very great respect I am of the opinion that the trial Judge reached the correct conclusion upon the evidence in this record and that what the Appellate Division has done, under the guise of exercising to its fullest extent or even straining its power and duty to ascertain the terms and to enforce the complete performance of a somewhat vague contract of which there had been part performance (*Wilson* v. *The West Hartlepool R. Co.* (1865), 2 De G. J. & S. 473 at p. 494, 46 E.R. 459 at p. 466), amounts in fact to the making of a new contract for the parties.

In regard to the amount of the second instalment it is no doubt common ground that some agreement was reached. The memorandum, however, is indefinite, Raymer, who made the contract with the defendant and is a witness for the plaintiff, deposes that it was to comprise the whole, the defendant that it was to consist of half of the proceeds of the 1918 crop. In view of this direct contradiction in the evidence the trial Judge was unable to determine which story should be accepted. The appel-

late Court, however, has seen fit to accept that of the defendant and to reject that of Raymer, fixing the value of one-half of the 1918 crop at $500. While that may not be making a contract but merely determining what one term of a contract actually made really was, the sufficiency of the ground for rejecting the conclusion of the trial Judge on this branch of the case seems to me to be questionable.

As to the remaining instalments, however, the only provision of the memorandum signed by Raymer is that the balance of the purchase money should be payable yearly with interest at 8%. The defendant's story is that it was agreed that each of these instalments was to be one-half the proceeds of the annual crop whatever it might amount to. On the other hand, Raymer says that the amounts of the instalments were to be arranged after the terms of his own purchase of the land from Symington had been agreed upon, that they were to be of fixed sums, and were to be paid out of the proceeds of the annual crops so far as they might suffice, but that any deficiency was to be supplemented in cash. Here again the trial Judge was unable to decide to which version credence should be given. The appellate Court, however, has entirely rejected the defendant's story on this branch of the case and has determined that there shall be 5 equal annual instalments of $800 each payable with interest at 8% on the balance from time to time remaining unpaid, making the dates of those payments syncronise with those of the 5 payments of $700 each to be made to Symington, thus accepting in part Raymer's story of what it was his intention to exact when the final agreement should be made. It seems to me, with great deference, that this is nothing else than making an agreement for the parties in respect to matters which they themselves had left open for future settlement and goes beyond any powers that Courts of Equity have ever asserted —great and wide as those powers undoubtedly are. This is not the case of a completed agreement couched in general terms and omitting only some details which the law will supply. Neither is it a case of nothing being left to be done except the embodiment in a formal instrument of terms fully agreed upon and sufficiently evidenced. Here essential elements are left open to be made the subject of future agreement. The language of Kay, J., in *Hart* v. *Hart* (1881), 18 Ch. D. 670 at p. 689, and that of Turner, L.J., in

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Wood v. Midgley (1854), 5 De G. M. & G. 41 at p. 46, 43 E.R. 784 at p. 786, cited by Mr. McCaul, seems closely in point.

I would allow the appeal with costs in this Court and in the Appellate Division and would restore the judgment of the trial Judge.

MIGNAULT, J.:—In this case, although the trial Judge (Walsh, J.), found that Raymer and the respondent had agreed for the purchase and sale of the property here in question conditionally on Raymer acquiring it from Symington, the total sale price being $4,800, he also found that they never were *ad idem* as to the terms of payment and that therefore there never was any agreement which could be enforced. This judgment was reversed by the Appellate Division, 55 D.L.R. 278, 15 Alta. L.R. 587, Beck, J., with whom the other Judges concurred, stating, after having cited the conflicting versions given by Raymer and the respondent Watson as to the terms of payment, that he accepted the respondent's evidence that the first payment was to be $300 and half of the 1918 crop (which would give $500, the respondent having valued this crop at $1,000). Beck, J., also expressed the opinion that the balance, $4,000, was to be apportioned so as to accord with the terms of the sale agreement between Symington and Raymer's daughter, the appellant, and should be paid at the same dates at 8% interest. He proceeds to determine the issues between the parties as follows, at p. 286 (55 D.L.R.):—

> The judgment will contain a declaration to the effect that the contract is one for the payment of $300 on July 10, 1918, and for the payment of one-half of the proceeds of the crop of 1918, the value of the one-half being fixed (on the defendant's evidence) at $500; and for the payment of the balance $4,000 of the purchase money in five equal annual instalments with interest at 8%, on February 25 in each of the years 1919-23; interest on the purchase price of $4,800 (except the $300 which was refused by the plaintiff) to be calculated from April 8, 1918.
>
> The judgment should also provide in some form for the protection of the defendant against the plaintiff's non-payment to Symington. It should allow the defendant one month from the date of his acceptance of this judgment for the payment of the arrears owing to the plaintiff.
>
> These amounts can be calculated and inserted in the formal judgment.
>
> If the defendant declines to accept this judgment his counterclaim will be dismissed with costs, and the judgment for the plaintiff will stand. If the defendant accepts this judgment he will have his costs of the action, and the plaintiff's action will be dismissed with costs. If the defendant accepts this judgment he will have his costs of the appeal, otherwise the appeal will be dismissed with costs.

In view of the finding of Beck, J., that the contract is as stated in the first paragraph of the above excerpt it seems strange (may I say so with all deference) that the defendant is left free to decide whether he will accept or refuse the judgment. However, he accepted it and the plaintiff now asks that this judgment be set aside and the judgment of the trial Judge restored.

Recognising to the fullest extent that where a contract has been partly performed, the Court, when asked to decree specific performance, will struggle against the difficulty ensuing from the vagueness of the contract, still it is obvious that the Court cannot make a contract for the parties if the latter have not agreed on its material terms. So the proper inquiry on this appeal is whether what the Appellate Division declares to be the contract was really what the parties had agreed on, for if they had not agreed on these terms the contract contained in the judgment is one made by the Court for the parties and obviously cannot be sustained.

A careful reading of the evidence has convinced me that the terms of payment stated in the judgment were agreed to by neither Raymer nor Watson.

They had made and signed a memorandum stating their agreement as far as it had gone, viz., a sale of the property for $4,800; a cash payment of $300 on or before July 10, 1918; a further payment to be made from the proceeds of the crop to be grown on the land; an agreement for sale to be executed during the season; and the balance of payments to be payable yearly at 8% interest. It would really be difficult to imagine anything more indefinite than this memorandum (the wording of which I have followed as closely as possible) in so far as the terms of payment are concerned, and the confusion becomes greater still when we refer to the testimony of Raymer and Watson.

The former says he was to get $300 in cash; the entire crop for 1918, and the balance of the payments were to be governed by the contract he would make with Symington.

According to Watson he was to pay $300 in cash, make a half crop payment in 1918, and give half the crop from that on.

In view of this testimony I must find that the contract, as stated by the judgment of the Appellate Division, 55 D.L.R. 278, 15 Alta L.R. 587, agrees with neither of the versions of the parties. It takes from Watson's story the half crop payment of 1918 and

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from Raymer's evidence the division of the balance of the sale price so as to fit in with the payments to be made to Symington. This in my opinion could not be done.

We have therefore this result that the parties by their testimony contradict each other as to the material terms of their contract and that the terms contained in the judgment of the Appellate Division are inconsistent with either of their versions. It follows that the judgment really makes a contract for the parties, and unless I do the same, I find it impossible, on my consideration of the evidence, to state what the agreement between Raymer and Watson really was. Under these circumstances, the conclusion of the trial Judge that the parties were never *ad idem* in respect of the terms of payment seems inevitable.

With some reluctance, for the good faith of Raymer of whom the appellant is merely the nominee seems open to suspicion, I have therefore come to the conclusion that the appeal must be allowed and the judgment of the trial Judge restored. Costs will go to the appellant here and in the Court below.

Appeal allowed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 8, 1921.

1. EVIDENCE (§ VI G—556)—PROPERTY BOUGHT IN NAME OF ANOTHER—TRUSTS, "DECLARED" OR "CREATED"—PAROL EVIDENCE—STATUTE OF FRAUDS.

Where a person purchases property in the name of another, and a trust arises out of clearly proven facts and circumstances in the way of agreement and negotiation between the parties before the defendant has acquired title or concurrently therewith, such as the payment of the purchase-money, the trust is not one "declared" or "created" by the defendant, but one arising or resulting by implication or construction of law, and comes within sec. 9 and not sec. 7 of the Statute of Frauds, and parol evidence may be admitted to prove the trust notwithstanding the statute.

[See Annotation, Evidence—Statute of Frauds, 2 D.L.R. 636.]

2. PRINCIPAL AND AGENT (§ II C—20)—PURCHASE OF LAND—PURCHASED IN NAME OF ANOTHER—DECLARATION OF AGENCY—STATUTE OF FRAUDS—ORAL EVIDENCE.

When a defendant has merely entered into a contract to purchase lands it is quite open to a plaintiff who has made the initial payment to come into Court and allege that the defendant did so as his agent, and to ask for a declaration of the agency in which case neither sec. 7 or sec. 9 of the Statute of Frauds would apply.

[Review of authorities.]

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APPEAL by defendant from the trial judgment in an action for a declaration that the defendant holds a certain agreement in writing for the purchase of certain land as trustee for the two parties in equal shares as partners or as joint owners. Affirmed with a slight variation.

J. Vaselenak, for appellant; *A. G. Virtue*, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The chief claim made by the plaintiff against the defendant, his brother, is for a declaration that the defendant holds a certain agreement in writing between the Alberta Railway and Irrigation Co. and the defendant for the purchase of certain land, as trustee for the two parties in equal shares as partners or joint owners. It was a quarter section of land and the purchase price was $7,200, payable $720 down and the balance in nineteen equal annual payments. The agreement was entered into in March, 1918, and the down payment only was made. The action was begun in October, 1920.

The trial Judge upheld the plaintiff's claim and the defendant has appealed.

In his oral judgment the trial Judge said this:

All of the facts of this case except the outstanding one that the agreement of purchase is in the name of the defendant alone point so irresistibly to the conclusion that this land was bought on joint account by the plaintiff and the defendant that I have no hesitation in holding that it was so bought. The plaintiff admittedly made out of his own funds by cheque drawn on his own bank account the only payment that has ever been made on it, namely, the down payment of $720. It is oath against oath as to whether or not the defendant gave him $375 of this amount. The evidence does not satisfy me that he did, and the inference to be drawn from the plaintiff's bank account and the defendant's circumstances is that he did not and I so find. The plaintiff was the more active of the two men in acquiring this property. He did everything that the defendant did by way of examination of it and enquiry of the local agent and in addition came to Calgary and apparently at his own expense to get from headquarters the information which enabled them to locate and afterwards to buy it. His activities in connection with the working of it after it was bought were until this year greater than those of the defendant and in this year were quite as great. His brotherly interest in the defendant might reasonably explain some of this activity but not all of it. The purchase of the tractor by these men in partnership, practically at the same time, when this was the only land which they had to work (for I do not accept the defendant's story that the plaintiff had in view a renewal of the Norton lease), lends strength to the view that the plaintiff was interested in this property. The story of the defendant and his nephew to the effect that the plaintiff did no work on this land either in the seed time or harvest of 1920 is in such point

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blank contradiction of the evidence not only of the plaintiff and his wife but of four apparently reputable and disinterested neighbours that it is not only impossible for me to believe it but it makes me exceedingly suspicious of the honesty of their evidence in other respects. The plaintiff's building, though apparently of no great value, went on to this property and is still occupied as one of the farm buildings. The plaintiff admittedly got money from the defendant after this, at least two sums of $118 and $200 respectively and other sums of varying amount, but the plaintiff's two cheques of $720 for the land and $835 on the price of the tractor were payments by him out of his own money on joint account, which called for contribution by the defendant and fully explain these payments. I am only attempting to give here the outstanding features. There are many minor things, such as the borrowing on joint account, which strengthen my opinion of the honesty of the plaintiff's claim, though I do not go into detail over them. There are some things requiring explanation on the plaintiff's part such as the putting of the agreement in the name of the defendant alone and the changing of the assessment from his name to that of the defendant, but I am satisfied with the explanation he has given of them. My conclusion from the evidence and from the opinion that I formed of the parties after seeing and hearing them is that the plaintiff's contention is right on the facts and I so find.

The appellant made no real attempt to set aside this finding of fact but he contended that the Statute of Frauds prevented the Court from acting upon this oral testimony.

It is now, however, well settled that "where a person purchases property in the name of another or in the name of himself and another jointly or gratuitously transfers property to another or himself and another jointly, then unless there is some further intimation or indication of intention at the time to benefit the other person, the property is, as a rule, deemed in equity to be held on a resulting trust for the purchaser or transferor." 28 Hals., p. 54-55.

The question of oral testimony is discussed in Lewin on The Law of Trusts, 12th ed., pp. 188-189, where it is said:—

> As the Statute of Frauds extends to creations or declarations of trusts by parties only, and does not affect, indeed expressly excepts, trusts arising by operation or construction of law, it is competent for the real purchaser to prove his payment of the purchase-money by *parol*, even though it be otherwise expressed in the deed.
>
> In *Kirk* v. *Webb* (1698), Prec. Ch. 84, [24 E.R. 41], the Court refused to admit evidence, and the decision was followed in subsequent cases; however, the doctrine, though supported by numerous precedents, has since been clearly overthrown by the concurrent authority of the most distinguished Judges.
>
> [In *Bartlett* v. *Pickersgill* (1760), 1 Eden 515, [28 E.R. 785], it was held that the rule would not] warrant the admission of parol evidence where an estate was purchased by an *agent* and no part of the consideration paid by the

employer; for though an agent was a trustee in equity, yet the trust was one arising *ex contractu* and not resulting by operation of law, and though the agent was indicted for perjury on denying his character and convicted, yet the Court had no power to decree the trust. [But this decision seems to be inconsistent with the authorities which proceed on the footing that the Court will not allow the Statute of Frauds to be made an instrument of fraud and it has now been distinctly overruled], (*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196).

Parol evidence, where admitted, must prove the fact very *clearly*, though no objection lies against the reception of *circumstantial* evidence, as that the means of the pretended purchaser were so slender as to make it impossible he should have paid the purchase money himself.

And should the nominal purchaser *deny* the trust by his answer, the solemnity of the defendant's oath will of course require a considerable weight of evidence to overcome its impression.

There is no doubt that this view, as expressed by Lewin, is now generally accepted. It has been assumed and acted upon repeatedly in many cases in all jurisdictions although upon the facts the decision in some cases has been against the plaintiff. I refer to the following cases: *Campbell* v. *Dearborn* (1872), 109 Mass. 130; *Goldstein* v. *Harris* (1908), 12 O.W.R. 797; *McKinnon* v. *Harris* (1909), 14 O.W.R. 876; *Gordon* v. *Handford* (1906), 4 W.L.R. 241; *Bishop* v. *Bishop* (1906), 8 O.W.R. 877 and (1907), 10 O.W.R. 177; *Wells* v. *Petty* (1897), 5 B.C.R. 353; *McLeod* v. *Lawson* (1906), 7 O.W.R. 519; *Hull* v. *Allen* (1902), 1 O.W.R. 151; *Cole* v. *Deschambault* (1914), 26 O.W.R. 348; *Cadd* v. *Cadd* (1909), 9 Comm. L.R. 171; *James* v. *Smith*, [1891] 1 Ch. 384; *Heard* v. *Pilley* (1869), L.R. 4 Ch. 548; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, and *Haigh* v. *Kaye* (1872), 41 L.J. (Ch.) 567; *Groves* v. *Groves* (1828), 3 Y. & J. 163, 148 E. R. 1136; *Gascoigne* v. *Thwing et al.* (1685), 1 Vern. 367, 23 E. R. 526.

Rochefoucauld v. *Boustead* and *Haigh* v. *Kaye* were said by counsel for the appellant to be distinguishable on the ground that in both the defendant admitted the fact of the trust but relied simply upon the statute. In the former, as I read it, there was only an absence of an express denial of the trust in the dealings between the parties. It does not appear that at the trial the defendant admitted the trust. It does, however, appear that the defendant in *Haigh* v. *Kaye* practically admitted the trust.

But there is no doubt that in none of the cases has it been held that the defendant *must* admit the verbal trust before the statute can be disregarded.

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The real point of the defendant's contention seems to be that the evidence must be very clear and satisfactory and that such was not the case here. But in view of the very strong opinion expressed by the trial Judge, as above quoted, in which he speaks of the weight of the evidence in favor of the plaintiff being "irresistible," it seems to me that we should have to discover some very grave misapprehension on the part of the trial Judge before we could say that the evidence is not clear and satisfactory. I have examined the evidence and I am bound to say that it makes the very same impression on my mind as it did upon the trial Judge and for the reasons which he gives.

It must be remembered also that the trial Judge has found that the plaintiff paid the purchase price out of his own funds, a circumstance which the cases shew to be almost conclusive in his favor or at least one which would require a better explanation on the part of the defendant than was given by him.

Counsel for the appellant suggested that this principle only applies where all the purchase money has been paid by the plaintiff and that such was not the case here. But this is a misapprehension. There was no conveyance of the legal estate by the vendor to the defendant. The defendant acquired an equitable estate, if it may be so called, consisting of a right to purchase upon making nineteen further payments. It was necessary in order to secure this right to make a down payment of $720. This, as the Judge finds, was paid by the plaintiff out of his own money. In truth, therefore, the plaintiff did pay the whole purchase money for all that was really secured, viz:—a right to purchase on the condition of making all the subsequent payments.

This absence of a final conveyance from the vendors to the defendant makes the case of *Heard* v. *Pilley* (1869), L.R. 4 Ch. 548, very much in point. There the plaintiff actually sued the vendor for specific performance joining the other defendant, who raised the Statute of Frauds, for the purpose of establishing as against him an agency by parol. The Court there upheld the plaintiff's claim and distinguished *Bartlett* v. *Pickersgill*, 1 E. Eden. 515, 28 E.R. 785, on the very ground that in that case there had been an actual conveyance by the vendor. It would therefore seem from *Heard* v. *Pilley* that the present plaintiff could have sued the company for specific performance on behalf of himself and his brother, joining

the latter as defendant if he refused to be plaintiff, and that in such an action the present defendant could not have prevented oral proof of his agency for himself and his brother, the plaintiff, in taking the agreement in his own name.

In *McKinnon* v. *Harris*, 14 O.W.R. 876, Meredith, J.A., made an earnest protest against the extreme application of the doctrine that the Statute of Frauds must not be used to protect and sustain a fraud. With this protest I feel somewhat inclined to sympathise although there is no doubt that the Court of Appeal in England in *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, did affirm the doctrine in very strong language.

I prefer decidedly to base the admissibility of the parol evidence upon a different ground, viz., the words and interpretation of the statute itself. Section 7 says that:—

> All declarations or creations of trust or confidence of any lands, tenements or hereditaments shall be manifested and proved by writing, signed by the party who is by law entitled to declare such trust, or by his last will in writing or else they shall be utterly void and of no effect,

and sec. 9 says:—

> Where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law, then in every such case such trust or confidence shall be of the like force and effect as the same would have been if this Act had not been made.

There is here no suggestion of what may properly be called a *declaration* or *creation* of trust. It seems to me that those words must be held to refer to a declaration or creation made *after* the declarant or creator has acquired title. But where the trust arises out of clearly proven facts and circumstances in the way of agreement and negotiation between the parties before the defendant has acquired title or concurrently therewith, such as the payment of the purchase price, then the trust is not one "declared" or "created" by the defendant but one arising or resulting by implication or construction of law and it will therefore come within the words of sec. 9 and not of sec. 7.

Up to this point I have treated the case as if it were one which really raised the question of a trust under the statute inasmuch as that is the way it was presented to us on the argument. But I think this is due to some extent to the circumstance that the plaintiff in his statement of claim rested his case on that ground.

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There is, however, another view of the matter suggested by *Heard* v. *Pilley*, *supra*, which leads to the same conclusion but on a quite different, and, as I think, more satisfactory ground. It seems to me that where the defendant has merely entered into a contract to purchase lands it is quite open to a plaintiff to come into Court and allege that the defendant did so as his agent and to ask for a declaration of that agency. In one sense, of course, an agent is a trustee but I do not think secs. 7 and 9 of the Statute of Frauds contemplate such a case at all. The plaintiff might have joined the vendor so as to bind him as was done in *Heard* v. *Pilley*. But the omission to do so cannot prevent the plaintiff from obtaining as against the defendant a declaration of the agency with respect to the making of the agreement. Of course, if the facts proven shew that the agreement was that the defendant should, *first buy and then sell to the plaintiff* we would have a relationship *ex contractu* with respect to a sale and it would be sec. 4 of the statute that would be brought into operation. But no such agreement of sale from the defendant to himself and the plaintiff jointly is suggested by the evidence and it is shewn to be a case of agency simply. In this view, which, as I have said, appears to me to be really the most satisfactory one, secs. 7 and 9 have no application. Perhaps a slight change in the pleadings might be necessary but in the circumstances that is quite unimportant.

I am of opinion therefore that the defendant's appeal should be dismissed with costs.

It appears, however, that the trial Judge omitted to deal with certain questions raised in the pleadings of both parties. The statement of claim referred only to the quarter section purchased from the company and asked for an accounting in respect of the farming operations carried on thereon. The defendant's defence consisted of general denials but he brought a counterclaim asking for an accounting in respect of farming operations carried on by the two of them upon certain other lands leased in the name of the plaintiff. The plaintiff in his reply practically asked for the same thing.

The judgment is confined entirely to the question of the quarter section bought from the company. I think the judgment should be amended so as to direct two separate accountings, one

in respect of this quarter and another in respect of the leased lands. I would amend the formal judgment as follows:—

The first two paragraphs to stand as they are.

The third paragraph should be amended so as to read: It is adjudged and declared that each of the said parties is entitled to one-half of the net value of the crops grown on the said lands in the years 1918, 1919 and 1920, after allowing for all expenses and costs of seeding, harvesting, and marketing the said crops, including a proper allowance for the use of horses, machinery and equipment belonging to either party, and making all other proper allowances as between the parties; that each party is liable to be charged with one-half the net loss of such operations; and that an account be taken to ascertain generally the state of account between the parties with respect to the said land, and operations thereon. Then a fourth paragraph should be inserted declaring that the parties carried on farming operations with respect to the leased lands in partnership in equal shares, and directing an account to be taken of such farming operations to ascertain the state of the accounts between the parties with respect thereto, with all proper allowances as in the other case.

Then the original fourth paragraph should be amended so as to give to the party in whose favour the balance is found in the first accounting in respect of the purchased land a lien upon the interest of the other in respect of such balance, but if such balance is reduced by any debit as the result of the accounting in respect of the leased land, then the lien should be only for the balance, if any, remaining after such debit.

The sentence in the original fourth paragraph in respect of the referee should stand as should also the rest of the formal judgment following thereafter.

Appeal dismissed with a slight amendment.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. February 1, 1921.

CONTRACTS (§ I C—15)—OPTION AGREEMENT UNDER SEAL, TO PURCHASE LAND—CONSIDERATION MENTIONED AS BEING RECEIVED AND ACKNOWLEDGED NOT PAID—AGREEMENT TENTATIVE TO BECOME OPERATIVE ON CERTAIN CONDITIONS—SPECIFIC PERFORMANCE.

Where it is clearly proved that at the time of signing an option agreement under seal for the purchase of land the parties clearly understood that it was to be a tentative one only, and not to become operative or effective

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until a future date and upon certain conditions, the non-payment of a comparatively small sum, mentioned as having been paid, and the receipt acknowledged, does not affect the binding force of the agreement if it is included with other payments which have been promptly made as soon as the conditions have been complied with and the option has become operative. [*Norstrant* v. *Davidson* (1920), 51 D.L.R. 205, 15 Alta. L.R. 252, reversed.

Statement.

APPEAL by the plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division (1920), 51 D.L.R. 205, 15 Alta. L.R. 252, in an action for specific performance of an option agreement and for damages. Reversed and judgment of the trial Judge restored with the substitution of an accounting for the reference to assess damages.

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

C. C. McCaul, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—The only question for us to determine is the effect of the non-payment of the $100 at the time the agreement for the purchase by Davidson of the undivided half interest in the lands of the respondent Norstrant was signed by the parties.

The written agreement expresses the sum as being "now paid" that is, at the time of its execution, and it being agreed upon and not in controversy that it was not then paid, the respondent contends, and the Appeal Court found, that this action for the enforcement of the agreement would not lie and dismissed it accordingly.

After careful reading of the evidence and the opinions of the Judges of the Appeal Court (1920), 51 D.L.R. 205, 15 Alta. L.R. 252, I am of the opinion that the conclusion of Harvey, C.J., who dissented from the judgment and concurred with the trial Judge, was correct and that this appeal should be allowed and the judgment of the trial Judge restored, substituting however for the reference to assess damages as directed by him an order for an accounting.

I am strongly inclined to think, after careful reading of their evidence, that both parties regarded the down payment of the $100 as immaterial and negligible, and looking at the very large sum involved in the sale of the one half of Norstrant's interests in the lands, the kind and character of the transaction and the conduct of the parties, that the down payment was waived.

I desire however to rest my judgment upon the fact, as clearly proved and not challenged or denied, that at the very time the

agreement was being signed by the parties it was agreed and fully understood that it was not to become operative or effective unless and until Davidson, who was the agent for the owners and as such had sold the lands to Norstrant, had seen these owners and obtained their consent to his becoming a part purchaser of the lands with Norstrant.

It is quite clear that without such a consent on the part of the owners it would be alike inequitable and unjust for Davidson to become a part owner with Norstrant to whom, as agent for others, he had sold the lands.

The evidence on this point is clear, undisputed and unchallenged. Davidson's statement, not denied, is as follows:—

Q. Will you give a history of the matter so as to explain why the agreement was put in a lateral form as it is? A. Well, Mr. Norstrant had been considering for some time the purchase of these lands and I had discussed, I had charge of the sale of the lands, and I had discussed the purchase of the lands with him, at the time when my associates were here a few months prior to this, they had set the price on these lands of around twenty-five dollars an acre. After discussing the subject with Mr. Norstrant he informed me that, as the total amount was some eighty-seven or eighty-eight thousand dollars, that he thought the deal was too large for him, and at his home near Beiseker, when this matter was discussed, he said to me, "Don't you want to take a half interest with me in them?" and I informed him at the time that I thought the purchase was a good purchase for him and would be and would interest me, but that owing to the fact that I was operating the company for the estate and for Mr. Beiseker, I would not agree to close any transaction of that nature without first having an opportunity of consulting with them and getting their approval. I told him, however, that I thought . . . that I felt quite sure there would be no trouble, that they would be quite willing for me to take this interest, because they had already established the price which Mr. Norstrant was paying and that they would have no objection to my going in, and I informed them I . . . and I informed him I wanted to take it up with them personally, and I would be going down to Minneapolis in the early spring and that, therefore, we could arrange some agreement that would give me until May. That was along the line of the understanding.

The conclusion, and I think the only reasonable conclusion, to be drawn from the evidence is that, while the terms on which Davidson was to purchase the half interest were agreed upon, put into writing and signed by the parties, it was at the same time clearly understood and agreed that, inasmuch as Davidson had acted as the agent of the owners in selling the lands to Norstrant, he could not purchase back a half interest in the same lands from Norstrant without the consent of those for whom he had acted in selling the lands.

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As Davidson said in his evidence, he could not "close the transaction" without such consent.

The signed agreement, therefore, was merely a tentative one, depending for its coming into effect and becoming operative upon Davidson obtaining the consent of those for whom, as agent, he had acted in selling Norstrant the lands.

Davidson, accordingly, went to Minneapolis, obtained the necessary consent of the parties spoken of, and without any delay, on his return home, on March 14, 1918, wrote respondent defendant, Norstrant, that he had, a week before, "returned from the States," and that the parties whose consent was necessary to his becoming a purchaser of a half interest in the lands were quite agreeable to his becoming such a purchaser and asked respondent whether he should send his cheque for the $5,000 (which included the down payment of $100) to Norstrant's residence or deposit it to his credit in some bank in Calgary.

On March 19, not having received any reply to the letter of March 14, Davidson again wrote enclosing the cheque for $5,066.16, the $66.16 being interest at 7% up to date. On March 23, Norstrant replied to Davidson's letter of March 14, explaining the delay as having been caused by the "miscarriage somewhere" of Davidson's letter and further stating that he "had plenty of cash on hand" "having made arrangements to get $10,000" and on April 9 replied to Davidson's letter of March 19 forwarding him the cheque for $5,066.16, returning the cheque and saying; "I don't need the money now as I have to pay interest on the money which I borrowed when the deal was made anyway, and this money would only be idle here."

On April 23, Davidson again wrote Norstrant formally notifying him that he accepted the offer contained in the agreement of December 8 and was "prepared to pay him forthwith the $5,000 and interest and the other amounts specified," for the purchase of the undivided half share of the lands and enclosing marked cheque for $5,100.91, being the $5,000 with interest from Dec. 4, 1917. In this letter he also asks for an accounting of any of the lands Norstrant has sold. On April 25, Norstrant replied simply returning the marked cheque, having in his previous letter stated why he did not want the money, and saying he "would be in at your meeting the first of the month."

Other correspondence followed but not the faintest hint was given by Norstrant at any time or in any letter or otherwise that he repudiated the agreement or claimed it was not binding on him because of the non-payment of the $100 at the time of the signing of the agreement.

I repeat that the proper conclusion, and I think, the only proper conclusion to be drawn from the evidence, conduct and correspondence of the parties is that they mutually had agreed at the time the agreement was signed, it was not to become operative or effective unless and until Davidson had obtained the consent of the necessary parties to his entering into it.

In this view of the case, the non-payment of the $100 on the date of the signing of the agreement December 5, 1917, was not imperative or necessary. The "transaction was not closed" and was agreed not to be closed, nor was the agreement to become operative, unless and until such consent was obtained. When it was obtained, there was no unreasonable or undue delay on Davidson's part in notifying Norstrant or in tendering to him the necessary monies stipulated by the agreement, including the down payment of $100 and interest.

Under these circumstances and for these reasons, I would allow the appeal with costs here and in the Appeal Court and restore the judgment of the trial Judge, with the substitution of an accounting for the reference to assess damages.

Idington, J.

IDINGTON, J.:—The appellant sues upon an option agreement under seal whereby the respondent agreed to give appellant the opportunity of bearing half the burden and reaping half the profits to be derived from a contract he, the respondent, was entering into for the purchase of 5 sections of land in Alberta.

The total price, on the basis fixed of $27 an acre, amounted to $86,400, of which $10,000 had to be paid in cash. The respondent was almost appalled at the magnitude of the undertaking and the appellant, on behalf of his employers, was endeavouring to induce him to make the purchase, when respondent asked him if he would join him in the undertaking.

The appellant in answer properly said he could not do so without the express assent of his employers, who were in Minneapolis, and he would not be able to explain to them fully, without a personal interview, all that might bear on such a question, for

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which he could not hope till visiting Minneapolis in the early spring.

To overcome that these parties hereto agreed that the respondent should give the appellant an option until May 1 following, to become a partner in the purchase by paying the respondent, meantime, the half of the cash payment and assuming in all other respects the burdens, direct and incidental to the carrying out of the contract.

A Calgary solicitor drew up for them a long written agreement, providing for everything that might be likely to arise in the carrying out of such a contract.

That was dated December 8, 1917, and made between said parties, and began by witnessing that:—

In consideration of the sum of $100 (one hundred dollars) of lawful money of Canada now paid by the purchaser to the vendor, receipt whereof is hereby acknowledged, the vendor covenants and agrees to and with the purchaser to sell and assign to the purchaser on or before the 1st day of May, 1918, one undivided one-half share or interest in sections fourteen (14), fifteen (15), nine (9), ten (10) and eleven (11), in township twenty-eight (28), in range twenty-eight (28), west of the Fourth Meridian, in the Province of Alberta, subject to the covenants and conditions contained in the agreement of sale thereof from the Calgary Colonization Company, Limited, to the vendor, for the price or sum of five thousand ($5000) dollars, on which shall be credited the sum of one hundred ($100) dollars, with interest at six (6%) per cent per annum from December 4th, 1917, and an undivided one-half (½) share or interest in all necessary equipment purchased by the vendor for the operation of the said farm prior to the first day of May, 1918, for the price or sum equivalent to one-half (½) of the actual cash paid for or on account of same by the vendor, subject to the payment of any unpaid purchase money remaining against the same, together with a sum equivalent to one-half the cash price by the vendor prior to the said first of May, 1918, in the cultivation of the said lands, together also, with one-half of the actual cash cost of any necessary buildings which may be erected by the vendor on the said lands prior to the said date.

The remainder of the contract provided for numerous details, needless to repeat as not now in dispute.

The parties executed this agreement under their hands and seals. The respondent then proceeded to complete the original proposed purchase agreement and paid $10,000. The hundred dollars was never in fact paid or afterwards referred to until the appellant tendered the $5,000 in March, and repeated it in April following, in more formal terms.

The appellant had gone, as expected, to Minneapolis in March, and wrote after his return from there on March 14, 1918, to respondent as follows:—

March 14th, 1918.

James Norstrant, Esq.,
Rockyford, Alberta.

Dear Jimmie:—

I returned a week ago from the States, and consulted with Mr. Beiseker and Mr. Smith of the estate, and they are quite agreeable to the contract which I made with you in regard to the purchase of half interest in the five sections.

Please inform me whether you desire me to send you my check for $5,000 to Rockyford, or shall I place it to your credit in some bank in Calgary.

If you are not coming in to Calgary again within a week or so, wish you would let me know some day that I could meet you at Rockyford, and I will run out to see you.

Yours truly,
(Sgd.) James W. Davidson.

Getting no reply he wrote him again on 19th March, enclosing his cheque for $5,066.16, to cover the $5,000 and interest at 7%.

On March 23, 1918, respondent wrote, saying as follows:—

Rockyford, Alberta.

Mr. J. W. Davidson,
Calgary, Alta.

Dear Mr. Davidson:—

Received your letter of March 14th. This letter must have been mislaid somewhere, and then the roads have been so very bad, our teams have not been to town this last week.

I have plenty of cash on hand. I made arrangement at Drumheller, to get ten thousand dollars.

Mr. Davidson, if you could let me know about a week ahead and I will meet you at Rockyford, or I expect to be in the 29th March for the Bull Sale, if that will be satisfactory to you. Kindly let me know.

Yours truly,
J. G. Norstrant.

And on April 9 he wrote as follows:—

Rockyford, Alberta.
Apr. 9th, 1918.

Mr. J. W. Davidson,
Calgary, Alta.

Dear Mr. Davidson:—

Enclosed find your cheque for $5,066.16 which I am returning. I don't need the money now as I have to pay interest on the money which I borrowed when the deal was made anyway, and this money would only be idle here.

Am very busy getting at the seeding now. Will try and get in to see you as soon as I can find a few days to spare.

Yours truly,
(Sgd.) J. G. Norstrant.

Respondent not having appeared as promised, appellant wrote, enclosing a marked cheque for $5,100.71, explaining at length what it was for and desiring information on the subject

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of what had been done relative to the land, and to this the respondent replied as follows:—

Rockyford, Alta.
April 25th, 1918.

Mr. Jas. W. Davidson,
Calgary, Alta.

Dear Sir:—

Enclosed find your cheque which you left with me yesterday. I will be in at your meeting the first of the month.

Yours truly,
(Sgd.) J. G. Norstrant.

The appellant wrote on April 30, 1918, a long letter recounting the history of their dealing and also returning the cheque.

In my view of this case this correspondence, apart from being evidence of the tender or waiver thereof, is only of importance in regard to an aspect of the case which I will refer to presently.

No dispute arises here or below, so far as I can see, as to the tender.

The trial Judge gave judgment for the appellant after having heard both him and respondent as to such collateral or subsidiary facts as were relevant or irrelevant.

The Appellate Division, by a majority, reversed that judgment, 51 D.L.R. 205, 15 Alta. L.R. 252, Harvey, C.J., dissenting and upholding the judgment of the trial Judge.

The majority of the Court seem to hold, notwithstanding the contract being under seal, that unless and until the hundred dollars named therein as consideration had been paid, the contract was void. I wholly dissent, with great respect, from such view of the law.

I agree that a unilateral offer of an option without consideration can be revoked at any time, unless under seal as this contract was.

I am of the opinion that if the offer is made under seal and not accepted it may be withdrawn within a reasonable time and that the measure of such time might under certain circumstances be very brief indeed.

I am further of opinion that if there is no other consideration than mutual promises, an agreement for an option without seal, may be enforceable.

Such promissory consideration may be in shape of a promissory note, or a promise to give one, or something else of value. And

when the contract for an option, as here, is under seal and purports to bind for a specific time, assented to by the covenantee, it binds without the payment of any consideration.

And the binding effect thereof cannot be affected by any mere omission to pay what is named as the consideration which has been declared to have been received, unless and until the offeror has demanded from him bound to pay such consideration, and been refused.

None of the said several propositions of law for the most part need, I respectfully submit, any citation of authority to support them or any of them.

The distinction between the efficacy of contracts under seal and those not, so far as consideration therefor is concerned, still stands good, I think.

The man contracting under seal to give an option to the other party thereto, and stipulating for a consideration named, is entitled to have it paid, but even if it is not paid, it stands as a debt due and, by oral evidence, can be so shewn despite the acknowledgment of its receipt.

That debt, or price of consideration, remaining due and owing by virtue of the bargain attested by such debtor executing the contract, is sufficient consideration even if he owing it never accepts the option.

That alone would uphold the validity of the contract even if a more simple contract not under seal; so far as the elements of need of consideration for such like contract is concerned. How can its being made under seal render it less?

There is presented in argument here, as has been elsewhere, what, if I may be permitted to say with respect, seems to me a mere metaphysical train of thought, which suggests its payment is a condition precedent, inherent in the contract so framed, to render its becoming at all operative. Where is that condition precedent to be found? It certainly is not expressed, and I repeat it never has been successfully invoked in the case of a simple contract.

I have not found in the numerous English and Canadian and other authorities cited, anything to support such a proposition. I find in the judgment of Cowan, J., in the case of *McCrea* v. *Purmort* (1836), 30 Am. Dec. 103, at pp. 113-114, two sentences which

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express more neatly than I have seen elsewhere, what is my own view of the relevant law on the subject, as follows:—

> Looking at the strong and overwhelming balance of authority, as collectable from the decisions of the American Courts, the clause in question, even as between the immediate parties, comes down to the rank of *primâ facie* evidence, except for the purpose of giving effect to the operative words of the conveyance. To that end, and that alone, is it conclusive.

The case is taken from 16 Wendell, 460.

If the case presented were a mere simple contract expressed to be in consideration of the promise to pay one hundred dollars it would be *primâ facie* binding. And if the acknowledgment of its receipt were therein expressed that could not be held to be in any way destructive of the vitality of the contract.

It might well be that if and when payment had been demanded and refused such refusal would end the force of the contract.

Such being, as I take it, the condition of things under a simple contract, I repeat, how is it changed by adding a seal? It seems, I respectfully submit, a confusion of thought which should not have existed if the common use of such a form of expression had been borne in mind.

I respectfully submit that this alleged implication of a condition has no foundation in law to rest upon in any aspect of the case.

And the citation in support of respondent's case, of decisions such as *Dickinson* v. *Dodds*, [1876] 2 Ch. D. 463, or *Davis* v. *Shaw* (1910), 21 O.L.R. 474, in which respectively an unaccepted offer of an option for which there was no consideration was properly held null or revocable at will, does not help to commend the curious theory of an implied condition precedent in a case where the offeror is bound both by his seal and the acceptance of a promised consideration which he never demanded before his breach of contract. Had he done so and been refused payment I should have held him released.

In truth there is no English or Canadian authority, or American either when correctly interpreted, directly supporting such a proposition of an implied condition precedent, as claimed herein.

On the contrary we have the dictum I quote above from the judgment in the *McCrea* case, 30 Am. Dec. p. 103, neatly expressing the law, as I view it, applicable to this case.

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The Cushing v. *Knight* case (1912), 6 D.L.R. 820, 46 Can. S.C.R. 555, has in it the element of demand and refusal, on unjustifiable grounds, of payment. Then we have the insurance cases, beginning with *Xenos* v. *Wickham* (1867), L.R. 2 H.L. 296, followed by numerous English decisions as well as many American cases which in principle seem to refute this theory of an implied condition precedent as operative, unless and until payment of the consideration.

Of the latter numerous cases *Basch* v. *The Humboldt Mutual Fire & Marine Ins. Co.* (1872), 6 Vroom (N.J.) 429, is typical.

The decision in *Morgan* v. *Pike* (1854), 14 C.B. 473, 139 E.R. 195, holding that the covenantee was entitled to recover on a deed although obviously the consideration therefor was his covenant in same deed, which he had never executed, seems to cover the whole ground. And when we come to the actual facts surrounding the contract and the conduct of the parties in relation thereto, so fully illuminated by the correspondence above quoted, there seems not the slightest ground for reliance upon such a theory, and, if it ever had a possible existence, seems to have been clearly waived.

I would, therefore, allow the appeal with costs. I agree however with Beck, J's suggestion that a judgment for an account would be much more appropriate than an assessment for damages, for this is an action for the sale of a share in the contract. If the parties, or either of them, desire such an amendment it should be granted as the judgment the Court should have given.

Duff, J.

DUFF, J. (dissenting):—I am unable to perceive any difficulty in the point of construction which was the principal point argued and the principal point discussed in the Court below, 51 D.L.R. 205, 15 Alta. L.R. 252. The contract of December 8, 1917, professes to create an option, to vest an option in the appellant and it is a long settled rule that in the exercise of an option for the purchase of land the terms as to time of payment and otherwise of the contract under which it is created must in all respects be strictly pursued, *Master* v. *Willoughby* (1705), 2 Bro. Parl. Cas. 244, 1 E.R. 919; *Brooke* v. *Garrod* (1857), 2 De G. & J. 62, 44 E.R. 911.

In the contract now before us it is, I think, quite clear that the sum mentioned, $100, as the consideration for the option

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is a sum the payment of which is one of the essential conditions of the constitution of the option, one of the facts which the plaintiff, relying upon the existence of the option, must establish in the absence of circumstances dispensing with the performance of the condition. It is not necessary to consider the effect of *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555. I see no reason to depart from the view I expressed there or indeed to reconsider the subject, but the arguments in favour of the view that the sum nominated to be paid upon the execution of the instrument is a condition of the constitution of the vendor's obligation are much stronger here than in that case by reason of the circumstance that the instrument we are here dealing with is a unilateral instrument, and I repeat, I can entertain no doubt that the payment of the sum mentioned is, by the terms of the instrument, a condition precedent upon the performance of which at the time specified any right of the appellant derived from the instrument alone must rest. I can only add that I am unable to agree with the suggestion that the consideration named can be treated as a merely nominal consideration.

The question which occupied much attention on the argument —it now proves not to be open as I shall explain presently—is one which does not appear to have been considered in the Courts below, and it is this: Has the conduct of the parties been such as to preclude the respondent from relying upon the nonfulfilment of the condition precedent, the point upon which he succeeded in the Appellate Division, 51 D.L.R. 205, 15 Alta. L.R. 252?

The appellant's contention is twofold: 1st: It is said, the whole of the consideration of the purchase, the sum of $5,000 with interest from the date of the agreement was paid by the appellant and accepted by the respondent and this I shall consider after discussing the second branch of the argument. 2nd: It is said the respondent by his conduct waived the stipulation of the contract requiring the immediate payment of $100 as a condition of the option. It should be noticed that the payment is not a condition of the instrument going into effect; the instrument was unquestionably validly executed and went into effect as a deed but the payment was a condition named in the deed upon the performance of which the appellant's rights under the deed are based. It seems quite clear that the option if validly created would vest

in the optionee an interest in land. The decision of the Court of Appeal in *London and South Western R. Co.* v. *Gomm* (1882), 20 Ch. D. 562, seems to be conclusive. Each one of the three Judges, Jessel, M.R., Sir James Hannen, and Lindley, L.J., explicitly hold that the grant of an option has the effect of creating an interest in land and these opinions are not mere dicta, they are the foundation of a distinct ground upon which the judgment of the Court was based. It has often been held that where the judgment of a Court is based on two distinct grounds it is not competent to another Court bound by that decision to disregard one of them as being unnecessary to the decision.

True the interest of the optionee is not the same as that of a purchaser but it is real and substantial and is not revocable and here I must take leave to dissent from the observation made by the trial Judge in the course of the proceedings to the effect that the giver of the option might lawfully disregard it and pay damages. An option given for valuable consideration is not revocable, *Bruner* v. *Moore*, [1904] 1 Ch. 305 at 307, *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352 at 364. And in *South Wales Miners' Federation* v. *Glamorgan Coal Co. Ltd.*, [1905] A.C. 239 at 253, Lord Lindley points out that to break a contract it is an unlawful act and that in point of law a party to the contract is not entitled to break it on offering to pay damages. Any attempt on the part of the grantor to withdraw the option would be disregarded by a Court administering equitable principles.

Since the option, if validly constituted, vested in the optionee an interest in land the contract embodied in the instrument under discussion was a contract within the 4th sec. of the Statute of Frauds; and it is, I think, settled law that neither the plaintiff nor the defendant could at law avail himself of a parol agreement to vary or enlarge the time for performing a "contract previously entered into in writing" and required so to be by the Statute of Frauds; and moreover that in equity when a contract falling within the Statute of Frauds is once made no conduct or verbal waiver can be relied upon to substitute a different agreement from the one appearing in the contract itself unless the case can be brought within the equitable principles on the subject of part performance. *Stowell* v. *Robinson* (1837), 3 Bing. (N.C.) 928 at pp. 936-937,

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132 E.R. 668. *Morris* v. *Baron*, [1918] A.C. 1 at pp. 16-17. It does not at all follow that one of the parties to the contract may not estop himself by his conduct or by his conduct put himself in a position in which he is precluded from denying that the other party has observed in a particular case the time or manner designated by the contract for the performance of one of its stipulations. *Hartley* v. *Hymans* (1920), 36 T.L.R. 805 at pp. 810-811.

Where one party to a contract is under an obligation to pay the other is under a correlative and concurrent obligation to accept and if the party in whom the obligation inheres prevents the performance of it by failure to observe his own concurrent obligation or otherwise by any wrongful act, he will not be allowed to take advantage of the non-performance of the first party; and this principle is comprehensive enough to prevent any person on whom the incidence of the contractual obligation falls, justifying or excusing his default in performance of it by setting up the promisee's non-performance of a condition precedent where the promisee's non-performance is due to conduct of the promissor should he rely upon such non-performance, *MacKay* v. *Dick* (1881), 6 App. Cas. 251 at pp. 263-270. These principles have been applied in a series of cases relating to contracts for the sale of goods where at the request of the buyer or seller there has been a forbearance to deliver at the time named for delivery in the contract. Where the postponement of delivery took place at the request of the buyer made before the date fixed for delivery, it was held in *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598, that the buyer was estopped from averring that the seller was not in truth ready and willing to deliver on the contract date (p. 607). And the principle of the decisions which are summed up in the judgment of Lindley, L.J., in the case just mentioned was stated in the judgment of Brett, J., in *Plevins* v. *Downing* (1876), 1 C.P.D. 220 at pp. 225-226, in these words:—

> It is true that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the Court cannot give effect, in favour of either, to such attempt; if the parties make an arrangement as to the second, though such arrangement be made only by words, it can be enforced. The question is what is the test in such an action as the present, whether the case is within the one rule or the other.

Where the vendor, being ready to deliver within the agreed time, is shewn to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shews that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such a case it is said that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it. But, if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shews that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman* v. *Haynes*, L.R. 10 C.P. 598.

There appears, it is true, to be some point in the criticism upon this judgment made in a note at pp. 690-1 of the 5th ed. of Benjamin on Sale, to the effect that the distinction drawn by Brett, J., between a postponement at the request of the plaintiff and a postponement at the request of the defendant is not consistent with the decision in *Tyers* v. *The Rosedale and Ferryhill Iron Co. Ltd.* (1875), L.R. 10 Ex. 195; and that the view of Blackburn, J., expressed *arguendo* in that case, gives the true rule, namely, that a postponement of delivery by a seller in consequence of the assent of the buyer to his request stands in the same position as a postponement at the request of the buyer. In neither case, it is suggested, does the plaintiff rely upon a binding contract to postpone delivery but upon a voluntary forbearance brought about by the conduct of the other party in either case, it is suggested, the plaintiff, if in truth he would have performed the condition, had he not been induced to refrain from doing so by the conduct of the other party, is in a position to aver and prove his readiness and willingness to perform it.

This criticism, it will be observed, really leaves untouched the principle stated in the judgment of Brett, J. It is rather directed to his concrete application of it by which it may at least be plaus-

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ibly contended the scope of the principle is not adequately recognised.

The principle upon which Courts of Equity have acted is stated by Lord Cairns in *Hughes* v. *The Directors etc. of The Metropolitan R. Co.* (1877), 2 App. Cas. 439, in a passage applied by Farwell, J., in *Bruner* v. *Moore*, [1904] 1 Ch, 305, to the effect that stipulations as to time in a contract constituting an option may be waived by conduct having the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced "where to enforce them would be inequitable having regard to the dealings which have . . . taken place between the parties."

I am discussing, it will be observed, the waiver of conditions precedent. As regards waiver of conditions subsequent somewhat different considerations apply, in the majority of cases at all events, as usually the right affected by the condition is made defeasible at the option of the party entitled to enforce the condition. In such cases the right continues to subsist until the party has declared his election to avoid it which he may of course do by unilateral act, the matter being entirely in his own hands. In dealing with conditions precedent were the act designated as one of the things which enter into the constitution of the right the existence of which is in dispute and consequently if the act is not performed no right arises under the strict terms of the contract, obviously something more than a declaration of intention either by words or by conduct is required to fill the gap. Obviously also the gap is filled if the party entitled to enforce the condition is either estopped by law or on equitable principles precluded from disputing that the other party has done everything required to be done on his part; and there seems to be no reason in principle why the estoppel of the corresponding equitable plea should be rested upon facts or upon conduct subsequent to the time fixed for the performance of the condition. As Lord Chelmsford said in *Roberts* v. *Brett* (1865), 11 H.L.Cas. 337 at p. 357, 11 E.R. 1363 at p. 1371:—

> I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of a condition precedent but who allows the other side to go on and perform the subsequent stipulations has waived his right to insist upon the unperformed condition precedent as an answer to the action.

Bentsen v. *Taylor Sons etc. Co.*, [1893] 2 Q.B. 274; *Panoutsos* v. *Hadley Corporation of New York*, [1917] 2 K.B. 473; *Hartley* v. *Hymans*, 36 T.L.R. 805 at 810-11; *Leather Cloth Co.* v. *Hieronimus* (1875), 10 Q.B. 140.

Always observing, however, that in those cases in which the Statute of Frauds comes into play the plaintiff must fail if in substance he is relying, not upon the written agreement, but upon a verbal agreement or an agreement by conduct substituted for the written agreement in whole or in part, *Stowell* v. *Robinson* 3 Bing. (N.C.) 928, 132 E.R. 668; *Noble* v. *Ward* (1867), L.R. 2 Ex. 135; *Bruner* v. *Moore*, [1904] 1 Ch. 305 at 312-13; *Corn Products Co. Ltd.* v. *Fry & Sons, Ltd.*, [1917] W.N. 224; *Morris* v. *Baron & Co.*, [1918] A.C.1, and subject always, moreover, I repeat, to this, that the plaintiff has been put in position by the conduct of the other party to aver that he was at the time designated (when the provision as to time is imperative) ready and willing to perform his part of the contract. With the plaintiff "readiness and willingness" where he is seeking to enforce an obligation in which he is involved concurrently with the defendant, is always a condition precedent, and this is so even in a case in which if he had been the defendant he might have succeeded in resisting the claim against him on the ground that he was absolved from performance by the conduct of the other party. "Whichever party is the actor" said Lord Halsbury in *Forrestt & Son Ltd.* v. *Aramayo* (1900), 83 L.T. 335 at p. 338, "and is complaining of a breach of contract he is bound to shew, as a matter of law, that he has performed all that was incident to his part of the concurrent obligations. The averment that he was always ready and willing to perform his obligation is a necessary averment. *Hickman* v. *Haynes*, L.R. 10 C.P. 598; *Plevins* v. *Downing* (1876), 1 C.P.D. 220; *Hartley* v. *Hymans*, 36 T.L.R. 302.

Applying these principles to the circumstances disclosed in the present appeal I should be disposed, as I intimated more than once in the course of the argument, to think that a vendor and purchaser accustomed to deal with one another and on such a footing as the parties to this appeal were having executed an instrument such as that before us and having separated without a word being said as to the payment of the consideration for the option, the sum being comparatively trifling, there "was sufficient

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primâ facie evidence of a request for forbearance and compliance with that request to constitute an estoppel within the meaning of the cases discussed in *Hickman* v. *Haynes*." One circumstance, however, deprives this view of relevancy; the evidence shews quite plainly that the appellant's attention was not drawn to the circumstance that this sum of $100 was to be paid on the execution of the instrument and points rather directly to a similar conclusion as touching the respondent's state of mind. The appellant, who never thought of the condition precedent as he states himself, cannot, of course, be heard to say that his default was due to anything done by the respondent who, as far as one can see, was in the same state of inattention as himself. Not only does he not aver readiness and willingness; such an averment if made would be conclusively negatived by his own evidence.

The subsequent conduct of the parties gives no additional support to the appellant's contention on this point and indeed a perusal of the case makes it quite clear that neither estoppel nor the corresponding equitable plea is a defence which the appellant is entitled to rely upon in this Court. There is no suggestion of it in the pleadings; it was not touched upon by either the trial Judge or the Judges of the Appellate Division, 51 D.L.R. 205, 15 Alta. L.R. 252, it was barely mentioned in the appellant's factum and the cross-examination which at first sight might seem to have been directed to it appears on a closer examination to have been aimed at the respondent's plea of mistake on his part and overreaching on part of the appellant.

As to the contention that the purchase price was accepted by the respondent the correspondence establishes that the respondent had no intention of accepting the appellant's cheque and there is nothing in the respondent's conduct calculated to convey to the mind of the appellant the idea that such was his intention. I concur with the judgment of Stuart, J., 51 D.L.R. 205 at p. 208, as regards the appellant's knowledge of the sales made by the respondent. I do not doubt that the appellant was aware of these sales when he wrote the letter of March 19. In making the sales the respondent had committed himself to a series of contracts involving a repudiation of any obligation to sell to the appellant; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37 at 51, and *Metropolitan Eecl. Supply Co. Ltd.* v.

Ginder, [1901] 2 Ch. 799 at 807; he was asserting openly (and there is no doubt with the knowledge of the appellant acquired anterior to any offer of payment) his right to deal with the property as owner; and I can find in the appellant's conduct thenceforward only a persistent though unsuccessful effort to coax or trick the respondent into a position in which he could aver that his cheque had been accepted.

The appeal should be dismissed with costs.

ANGLIN, J.:—A defence of misrepresentation having failed at the trial, the only question now before us is the effect on the rights of the parties of the non-payment by Davidson at the time the agreement sued upon was executed of the sum of $100, receipt whereof is thereby acknowledged as the consideration for the vendor's covenant to sell.

Harvey, C.J., in his analysis of the opinions delivered in this Court in *Cushing* v. *Knight* (1912), 6 D.L.R. 820, 46 Can. S.C.R. 555, so much relied on for the respondent, has, I think, satisfactorily distinguished that decision from the case at Bar. Yet, if the question now presented were merely one of interpretation of the written agreement, while an implied promise by the respondent to pay the sum of $100 to the appellant as the consideration for which the latter undertook to keep his offer of sale open from December 8, 1917, to May 1, 1918, may be found in it, I should think it also clear that actual payment of that sum was thereby made a condition precedent to the instrument becoming effective as an option. Nor do I find in the terms in which it is couched any latent ambiguity in this respect such as might justify resort to evidence of conduct or negotiations to aid in construction. I cannot assent to the contention that the facts that the agreement is under seal, and that it contains a recital of the payment of the sum of $100 are conclusive in the appellant's favour. Neither can I regard that sum as merely a nominal consideration.

But, as Bramwell, B., said in *White* v. *Beeton* (1861), 7 H. & N. 42, at p. 50, 158 E.R. 385 at p. 389, "that which was at one time a condition precedent (may) by my own conduct become no condition precedent. . . . The performance of an act may be at one time a condition precedent and not at another." The reasonable inference from the circumstances immediately following the execution of the agreement and the subsequent letters of the respondent—unless we

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are to attribute to him bad faith in writing them amounting almost to dishonesty—seems to be that, without relinquishing his right to insist upon actual prepayment of the $100 he voluntarily forebore from doing so and made it apparent that he was satisfied to rely upon the undertaking or liability of the appellant to pay that sum either as part of the $5,000 payable on May 1, or before the time for making that payment should expire. Parol evidence of the facts warranting this inference is admissible since it does not amount to such a variation of the terms of the contract that verbal proof of it would offend either against the rule in regard to contracts reduced to writing or the Statute of Frauds. It does not involve the substitution of a promise to pay for actual payment as the consideration. Such a case would present great difficulty: *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634. It is merely a withholding by the respondent of the exercise of his right to insist upon the performance at the date thereby fixed of a promise to pay stipulated in the written contract, *Tyers* v. *Rosedale & Ferry-hill Iron Co.* (1873), L.R. 8 Ex. 305, at 319, *per* Martin, B., and (1875), L.R. 10 Ex. 195—a substituted mode of performance assented to without release of the original obligation. *The Leather Cloth Co.* v. *Hieronimus* (1875), 10 Q.B. 140, 146; *Plevins* v. *Downing* (1876), 1 C.P.D. 220. The principle taken from Lord Cairns' judgment in *Hughes* v. *The Directors of The Metropolitan R. Co.* (1877), 2 App. Cas. 439, 447, as applied in *Bruner* v. *Moore*, [1904] 1 Ch. 305, at p. 312, may perhaps also be invoked. That the appellant assumed liability to pay the $100 is, I think, sufficiently evidenced by his execution of the agreement which would otherwise seem to have been purposeless. I incline to the view that there was a binding option, if not from the execution of the instrument, from March 14, or, at all events, from the date of the tender in April.

In any event, however, the document of December 8, 1917, may, in my opinion, be regarded as an offer to sell a one-half interest in the lands in question upon the terms therein stated. There was never any express revocation of that offer and nothing had transpired which would imply a revocation before the appellant intimated his intention to accept and tendered the amount which would be due to the respondent on May 1, including the $100 and interest thereon.

Resale of the land was contemplated by the parties. Resale at a profit was the chief object of the venture. The sales made by Norstrant did not imply a revocation of his offer to sell to Davidson an undivided one-half interest in his purchase from the Calgary Colonization Co. Knowledge of those sales by Davidson, therefore, would not amount to notice of revocation of that offer such as would preclude an effective acceptance of it. Moreover, Davidson was in fact unaware of Norstrant's sales when he sent the letter of March 14, 1918, intimating his intention to carry out the agreement. No other act or revocation is suggested. Davidson might have some recourse in damages against Norstrant if he exceeded his authority and his sales were unsatisfactory. But he can in any event hold Norstrant accountable for his share of their proceeds.

Assuming in favour of Norstrant that the prepayment of the sum of $100 remained a condition precedent to the document becoming binding as an option and that it was therefore open to him at any time before acceptance of the offer to sell to have withdrawn it, communication of such a withdrawal to the appellant was necessary in order to terminate his right of acceptance and preclude him by exercising it from converting the offer into a firm contract of sale.

While the delay in Davidson's acceptance might, apart from the special circumstances, have been so unreasonable as to render it inefficacious, the evidence here shews that such delay as was required to enable the appellant at his convenience in the early spring to interview the members of the firm of Beiseker and Davidson at Minneapolis was contemplated and provided for. Davidson communicated the result of that interview to the respondent by his letter of March 14, written promptly on his return from the trip on which it took place, and informed him of his intention to take up the option and become the purchaser of a one-half interest in the lands. He formally accepted Norstrant's offer and tendered all the money due on May 1, by his letter of April 23, receipt of which in due course has been proved.

I would, for these reasons, with great respect, allow this appeal and restore the judgment of the trial Judge, substituting however for the reference to assess damages directed by him an order for an accounting as indicated by Beck, J.

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MIGNAULT, J. (dissenting):—That this case presents some features of considerable difficulty is shewn by the division of opinion in the Courts below. And the respondent, who lost in the first Court but succeeded in the Appellate Division, 51 D.L.R. 205, 15 Alta. L.R. 252, Harvey, C.J., dissenting, relies on legal principles of an elementary character, the great difficulty not being as to the principles themselves but rather on the question whether a proper case has been made out for their application.

The agreement signed by the parties on December 8, 1917, gave rise to this litigation. This agreement, in so far as it is material to the present controversy, states that in consideration for the sum of $100 "now" paid by the appellant to the respondent, the receipt of which is acknowledged, the respondent agrees with the appellant to sell and assign to him, on or before May 1, 1918, one undivided half share or interest in certain farm land which the respondent purchased on the same day from the Calgary Colonization Co., subject to the covenants and conditions contained in the agreement of sale from the latter company to the respondent, for the price of $5,000 on which was to be credited the said sum of $100 with interest at 6% per annum from December 4, 1917, and an undivided one-half share or interest in all necessary equipment purchased by the respondent for the operation of the farm prior to May 1, 1918, for a price equivalent to one-half of the actual cash paid for the same by the respondent, subject to the payment of any unpaid purchase money remaining against the same, together with a sum equivalent to one-half the cash paid by the respondent prior to May 1, 1918, in the cultivation of the said lands, together also with one-half the actual cash cost of any necessary buildings erected by the respondent on the said lands prior to the above date. In the event of the appellant availing himself of the respondent's agreement, certain stipulations were made as to the farming operations to be carried on by the respondent which are not material to the present enquiry. The document witnessing the contract was made under seal and was signed by both parties.

Although by this instrument the respondent acknowledged receipt of $100 stated to be the consideration of the agreement, it is common ground that this sum was not paid nor was it even demanded by the respondent. The reason the appellant desired

to obtain an agreement in this form, was that one Davidson, then deceased, and one of whose executors the appellant was, had had an equitable interest in the property, and the appellant very properly did not wish to enter into the venture before consulting his co-executors, which he expected would require some time. He went to Minneapolis with this object in view, and after his return he wrote, on March 14, 1918, to the respondent informing him that he had obtained the consent of his co-executors and asking the respondent if he desired that he should send him a cheque to Rockyford or place the money to his credit in a bank in Calgary. On March 19, the appellant sent the respondent his cheque for $5,066.16, being the half of the cash payment made by the latter to the Calgary Colonization Co. with interest at 7% from January 10. The respondent answered on March 23, acknowledging receipt of the letter of March 14, stating however that he had plenty of cash on hand. On April 19, the respondent wrote to the appellant returning the cheque for $5,066.16, saying that he did not need the money then as he had to pay interest on the money which he had borrowed when the deed was made, and the appellant's money would only be idle in his hands. The appellant wrote again, on April 23, insisting on the respondent's acceptance of the half of the cash payment made by him, notifying him that he accepted the offer contained in the agreement of December 8, and enclosing a marked cheque for $5,100.71, being the $5,000 with interest from December 4. This cheque the respondent returned without assigning any reason on April 25.

When this action was taken by the appellant, the respondent contested it, denying the tender of $5,100.71 and any notification of acceptance by the appellant of the offer contained in the agreement of December 8. It was only at the trial that the respondent amended his statement of defence by setting up total failure of the consideration mentioned in the agreement.

It is on this plea of failure of consideration that the Appellate Division dismissed the appellant's action, 51 D.L.R. 205, 15 Alta. L.R. 252.

Reliance was placed in the Appellate Division on the decision of this Court in *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, but it seems to me that the fact that in that case a demand was made for the money consideration, which had not been paid although its receipt was acknowledged in the agreement, with

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notification that if it were not paid within 4 days, the contract would be treated as rescinded—sufficiently distinguishes *Cushing* v. *Knight* from the present case where no such demand was made.

Some discussion took place at Bar and in the Courts below on the question whether the $100 mentioned as consideration could be regarded as a purely nominal consideration, the more so as the agreement was under seal and therefore, it was contended, would stand without consideration. Independently of the question whether the sealing of the agreement rendered it enforceable without consideration, I have not been able to satisfy myself that failure of consideration, where a valuable consideration is requisite for the existence of a contract, can be met by saying that the consideration mentioned in the contract is a merely nominal one and can therefore be disregarded. For this would be equivalent to holding that although consideration is required, no consideration at all is necessary. In other words, if this contention is sound, where the parties mention a merely nominal consideration, instead of a substantial one, the contract would stand without payment of this consideration, and, if so, it would be valid without any consideration. If the sum mentioned as consideration be so insignificant that it can be disregarded, then there is no consideration whatever. I may add that even were it open to the appellant to urge that a nominal consideration can be disregarded, here the sum of $100 appears sufficiently substantial, the more so as it was to be credited on the purchase price, to prevent us from holding that it was in any way purely nominal.

Nor is it any answer to say that the agreement being under seal no consideration at all is necessary, for the agreement itself states that it was entered into in consideration of the then and there payment of $100, and if this sum was not paid, the sealing of the agreement would not protect it from the total failure of the consideration it expressly mentions.

Coming now to the objection that the sum of $100 was not paid and therefore that the agreement sued on is void for want of consideration, I think it must be conceded, on the construction of the agreement, that the payment of this sum was a condition precedent to the existence of any contract or option between the parties. It is said that the respondent waived this stipulation

as to the mode or time of performance, but I have been unable to find any evidence of such waiver. It is true that when the appellant sought to tender the sum which had to be paid before May 1, the respondent alleged that he was not then in need of money to carry out his purchase from the Calgary Colonization Co. But while the respondent may have thought that he was bound by the agreement, still the fact remains that he could not be bound unless the money consideration mentioned in the deed was paid. I cannot see my way to find in the agreement both an option contract conditioned on the prepayment of the consideration and, if the consideration failed, an offer open to acceptance so long as it was not withdrawn. The agreement is either an option contract binding on the respondent from its date, or it is no contract at all, certainly not a mere offer which the appellant could accept before May 1, 1918, provided the offer had not been withdrawn before that date. The intention clearly was that the respondent should be bound until May 1, to sell a half share of the property to the appellant, if he accepted the option, but the respondent could not be so bound unless the money consideration mentioned in the deed was paid, for the granting of the option to purchase was based on this payment. The answers made by the respondent to the appellant's letter are consistent with the fact, which I think probable, that, not having, as he swore, a copy of the agreement, he was unaware of the existence of the clause requiring the prepayment of the $100, and the appellant himself says that he read over the contract without noticing this clause. But then if the respondent was without such knowledge, it certainly cannot be said that he waived this stipulation. The position in fine appears to me to be this. The appellant sues on this agreement and must therefore shew that he fulfilled the condition subject to which it was entered into. This he has not done and he has consequently not made out a case entitling him to succeed.

I would therefore dismiss the appeal with costs.

Appeal allowed.

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C. A.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 1, 1921.

MINES AND MINERALS (I A—7a)—PLACER MINE CLAIM—HYDRAULIC LEASE—ORDER IN COUNCIL—ABANDONMENT OF CLAIM—RELOCATION—RIGHTS OF PARTIES

A placer mining claim which had been granted and was in good standing at the time Hydraulic Lease No. 18 was granted, and which was kept in good standing for some time after the granting of the said lease, and which is in the immediate vicinity of other placer mining claims which are being profitably operated, is expressly excluded from the ground covered by the said hydraulic lease, by the Order in Council of August 25, 1900. The subsequent reversion of the claim to the Crown does not change its location, and it becomes vacant Dominion land open for location under the Placer Mining Act, R.S.C. 1906, ch. 64.

[*Smith* v. *Canadian Klondyke Mining Co.* (1911), 19 W.L.R. 1, followed; *Re Application of Anna A. Boyle* (1920), 52 D.L.R. 651, affirmed.]

Statement.

APPEAL from the judgment of Macaulay, J. (1920), 52 D.L.R. 651, of the Territorial Court of the Yukon Territory, directed to the appellant, the Mining Recorder of the Dawson Mining District, Yukon Territory, commanding him to accept the application of the respondent for a grant of Creek Placer Mining Claim No. 3 on Crofton Gulch in the Dawson Mining District in accordance with the Yukon Placer Mining Act. Affirmed.

E. P. Davis, K.C., for appellant.

J. B. Pattullo, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This appeal, in my opinion, is governed by the decision of the Supreme Court of Canada in *Canadian Klondyke Mining Co.* v. *Smith*. The appeal should therefore be dismissed.

Martin, J.A.

MARTIN, J.A., would dismiss the appeal.

Galliher, J.A.

GALLIHER, J.A.:—Notwithstanding the able argument of Mr. Davis I am unable to distinguish the present case in principle from *Smith* v. *The Canadian Klondyke Mining Company*, reported first in (1910), 16 W.L.R. 196, in appeal, (1911), 19 W.L.R. 1.

Appeal was then taken to the Supreme Court of Canada and although the case was not reported we have been furnished with copies of the reasons for judgment in that Court. This case is of course binding on us.

Mr. Davis seeks to distinguish that case on the ground that there the ground was recorded as a quartz claim and an interest in land was acquired by the locator under the statute while here it was the grant of a right only and not an interest in land. That point was not dealt with by the Supreme Court. The Supreme

Court was unanimous in its decision and two of the Judges, Duff and Anglin, JJ., based their decision on the ground that the incorporation of the regulation of August 25, 1900, excluded all areas previously granted from the limits of the land demised notwithstanding that the areas as defined in the hydraulic lease embraced the same lands.

I would dismiss the appeal.

McPHILLIPS, J.A. (dissenting):—This appeal is from the judgment of Macaulay, J., of the Territorial Court of the Yukon Territory, 52 D.L.R. 651, directed to the appellant, the Mining Recorder for the Dawson Mining District, Yukon Territory, commanding him to accept the application of the respondent for a grant of Creek Placer Mining Claim No. 3 on Crofton Gulch in the Dawson Mining District in accordance with the Yukon Placer Mining Act, R.S.C. 1906, ch. 64. McPhillips, J.A.

The appellant had refused to issue the grant, contending that Crofton Gulch was within the limits of Hydraulic Lease No. 18 and was land lawfully occupied for placer mining purposes as described in sec. 17 of the Yukon Placer Mining Act. The Hydraulic Lease No. 18 is in the form of an indenture of lease dated November 5, 1900, made between Her Majesty Queen Victoria, represented by the Minister of Interior of Canada, as lessor, and one Boyle as lessee, whereby a certain tract of land in the valley of the Klondyke River was leased for a period of 20 years from the said November 5, 1900, to be worked by hydraulic or other mining process, being an exclusive right of taking and extracting all royal or precious metals, there being the right of renewal for a second term of 20 years. . . . The lease is stated to be a demise of the lands and the lands are described by metes and bounds; the lease in terms is stated to be subject to certain exceptions, restrictions, provisoes and conditions, *i.e.*, *inter alia*, to the rights or claims only of all persons who may have acquired the same under the regulations of any order of the Governor-General-in-Council up to the date of the lease. Now, it is to be observed that the exemptions and reservations would appear to be confined to the existing conditions at the time of the execution and delivery of the lease and the lease was authorised by an order of the Governor-General-in-Council. There is a specific provision that if it should be that the demised premises

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include any location demised to any other person under the regulations of any order of the Governor-General-in-Council, the application first recorded should have priority and a general clause that the demise is subject to all other regulations set forth in the Order in Council of December 3, 1898, as amended by subsequent Orders in Council.

It would appear that at the time of the execution and delivery of the lease, there was an existent placer mining claim within the area demised covering the same area that the respondent made application for on March 9, 1920, but it had lapsed and the respondent's application was for that area—being for a grant of—Creek Placer Mining Claim No. 3 on Crofton Gulch. The answer of the appellant to the respondent was that the desired area was within the limits of Hydraulic Lease No. 18, commonly known as the Boyle concession, and was not open for location as a placer mining claim. Creek Placer Mining Claim No. 3 on Crofton Gulch would appear to have been at a time anterior to the lease, viz., on February 17, 1899, held by one Patton under the provisions of the regulations governing placer mining as approved by order of the Governor-General-in-Council of January 18, 1898, and as amended by subsequent Orders in Council, and that the claim was in good standing until February 17, 1902, when the claim lapsed.

It would appear that the area in question in this action, viz., Creek Placer Claim No. 3, Crofton Gulch, after its lapse on February 17, 1902, was never deemed to have become vacant Dominion lands and open for record, but ever since that date in the Dawson Mining District, Yukon Territory, the area was deemed to be and treated as being included in the demise covered by Hydraulic Lease No. 18 and at least two applications for record were refused on that ground, one in March, 1902, and one in May, 1913, and of course as well, the application of the respondent was refused upon the same ground. That is, for 18 years the area has been considered to be comprised in the description and within the limits of Hydraulic Lease No. 18, which in fact always was the case according to the metes and bounds description as contained in the lease. Hydraulic Lease No. 18, by assignment, is now the property of the Canadian Klondyke Mining Co., Ltd.; it was first assigned by Boyle the lessee, to one McGiverin, and

by subsequent assignments became, on June 26, 1913, the property of the company. The files of the company relative to the lease shew the following correspondence relative to existent and outstanding claims within the area comprised in the lease from McGiverin (to whom as we have seen the lease had been assigned) to the Minister of the Interior of Canada and the answer thereto from P. G. Keyes, secretary to the Minister of the Interior:—

Ottawa, Canada, November 22nd, 1900.

To the Honourable,
The Minister of the Interior,
Ottawa, Ont.

Sir:

Regarding any placer mining claims existing within the limits of the area leased for hydraulic purposes, on record in the Timber and Mines Branch of the Interior Department as Lease No. 18, File No. 55466, I beg to state that while the intention is clearly apparent that when abandoned these claims are to revert to and become a part of the leasehold, it appears to be necessary that the lessee should have a letter from your Department to this effect.

Will you kindly look into this matter at your earliest convenience and have a letter issued to me covering this point.

I have the honour to be, sir,

Your obedient servant,
H. B. McGiverin.

File 55466 T. & M.
Department of the Interior
Ottawa, 12th December, 1900.

Sir:

I beg to acknowledge the receipt of your letter of the 22nd ultimo, addressed to the Minister of the Interior, with respect to Hydraulic Mining Lease No. 18, issued in favour of Mr. Joseph W. Boyle, of Dawson, of a tract of land situated on the Klondike River, in the Yukon Territory, and in reply to inform you that all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease, but which may be abandoned or forfeited for any cause, will at any time during the currency of the lease revert to the lessee.

Your obedient servant,
P. G. Keyes,
Secretary.

H. B. McGiverin, Esq.,
Barrister, &c.,
Ottawa, Ont.

That on 19th March, 1920, I received from H. H. Rowatt, Controller Mining Lands and Yukon Branch, Department of the Interior, Ottawa, a telegram, of which the following is a copy:

Ottawa, Ont., Mch. 18-1920.

Andrew Baird, Dawson.

Department letter twelfth Dec. nineteen hundred to McGiverin written under instructions Deputy Minister re placer claims in Boyle Concessions

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Hydraulic Lease Eighteen in good standing when lease issued states if such claims are abandoned or forfeited during currency of lease they revert to Lessee stop Assignment this lease Boyle to McGiverin registered seventeenth November nineteen Hundred.

H. H. Rowatt.

In accordance with the practice of the Department of the Interior at Ottawa, a copy of the letter of December 12, 1900, from Keyes, the secretary to the Minister, above set forth, was sent to the Gold Commissioner's office at Dawson and in further pursuance to practice it was stamped, "Department of the Interior" and bears the date of its receipt and that date as stamped, is January 8, 1901, and it has been on file in the Administration Building at Dawson ever since.

Further, the Gold Commissioner as well as the Mining Recorder refused to issue grants for placer mining to any persons locating ground for placer mining purposes within the limits of the premises described as Hydraulic Lease No. 18. It would also appear that the company or its predecessors in title of the said Hydraulic Lease No. 18, have been in occupation of the tract of land comprised in the lease since November 5, 1900, the date of the lease, and that in 1907 and in each year since 1907, the lessees made expenditure in excess of $5,000 in actual money operations in compliance with the terms of the lease, and the Hydraulic Mining Regulations, and the rentals have been duly paid, aggregating a very large outlay, and work of great magnitude has been done upon the faith of the lease and the assurances given by the Crown.

The application as made by the respondent is not only inclusive of Creek Placer Mining Claim No. 3, Crofton Gulch, but also include Creek Placer Mining Claim No. 4, which lapsed in the year 1901, and the trial Judge in his reasons for judgment, has held that by reason of the lapse of these claims the ground covered by them reverted to the Crown and held against the contention of the appellant made in the Court below, and as well submitted here, that the ground applied for by the respondent was not occupied ground but ground open to location under the provisions of sec. 17 of the Placer Mining Act, R.S.C. 1906, ch. 64, notwithstanding that it is ground within the limits and boundaries of Hydraulic Lease No. 18. The trial Judge held that the applicant, the respondent in the appeal, had no *status* to attack the Hydraulic Lease No. 18 if the Canadian Klondyke Mining Co. was in posses-

sion of the ground covered by Creek Claim No. 3, Crofton Gulch, with the consent of the Crown, or if the ground was lawfully occupied for placer mining purposes, the applicant must fail, and that in any case the applicant to contest the lease would have to have the aid and interposition of the Attorney-General, and as to this latter requirement, the Attorney-General is not a party to these proceedings. The trial Judge in his reasons for judgment called particular attention to the following:—

The said Hydraulic Lease No. 18 contains many provisoes, exceptions, conditions and prohibitions, and among them is the following: "Provided also that this demise is subject to all other regulations contained and set forth in the said Order in Council of the third day of December, A.D. 1898, as amended by subsequent Orders in Council, as fully and effectually to all intents and purposes as if they were set forth in these presents."

And when we turn to the amendments made in the said regulations by an Order in Council of the 25th of August, 1900, we find the following prohibition:

"No application for a lease for hydraulic mining purposes, however, shall be entertained for any tract which includes within its boundaries any placer, quartz or other mining claim acquired under the regulations in that behalf, or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated, and also that the Gold Commissioner shall, in addition to furnishing the reports above referred to, be required to furnish a certificate that the location applied for does not contain any such placer, quartz or other mining claim, nor have any such claims been granted in the immediate vicinity of such location."

It was pressed strongly in the Court below, 52 D.L.R. 651, as well as at this Bar, by counsel for the applicant, the respondent in the appeal, that the decision in *Smith* v. *Canadian Klondyke Mining Co.*, 19 W.L.R. 1, was absolutely determinative of the question requiring consideration, in that upon appeal to the Supreme Court of Canada the judgment of the Court *en banc* of the Territorial Court of the Yukon Territory was affirmed (the judgment of the Supreme Court of Canada has never been reported), and that the ground covered by Placer Claim No. 3, Crofton Gulch, was excluded from the ground covered by the lease by the terms of the lease itself, and that the ground was therefore vacant Dominion lands open for location consequent upon the lapse of the claims although subsequent to the grant of the lease, the same having lapsed, as we have seen, in the years 1901 and 1902, the lease having issued in the year 1900.

It would appear upon perusal of the judgments of Idington,

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Duff and Anglin, JJ., that there is language capable of it being concluded that areas covered by other claims existent at the date of Hydraulic Lease No. 18, although within the boundaries of the demise, were absolutely and physically withdrawn areas, *i.e.*, excluded areas and that the lease would be in no way operative as to such areas. Yet it was not necessary to so hold to decide the case. The situation clearly upon the facts differs altogether from the facts of the present case, and were the facts the same in the present case, the *Smith* case would unquestionably support the judgment of the Judge in the Court below and be decisive of this appeal and require its dismissal, as admittedly if the areas of the existent claims at the time of the making of the lease were still in good standing, it would be idle to contend that the lease was operative or affected such areas. If however the claims lapsed at any time within the term of the lease, then it is contended the areas would fall to the lessee and that is the contention advanced by the appellant upon this appeal, and in my opinion there is merit in the contention. Further, and with great respect, to the Supreme Court of Canada, I venture to interpret the judgment of the Court as not laying down any principle of decision that would extend beyond the facts of the case then before it, and the facts are not the facts we have before us in this appeal. Here we have a very different situation; the existent claims at the time of the granting of the lease have lapsed and have been non-existent for nearly 20 years. Is it reasonable to suppose that it ever was the intention of the Crown, that isolated placer claim areas falling in in this way and within the boundaries of hydraulic leases later granted, should be deemed to be areas unaffected by those leases? In my opinion with this different state of facts presented the whole situation changes and that occurs which was in the contemplation of the Crown—the lessees under the Hydraulic Lease No. 18 became the lessees as well of the lapsed areas—in short, Hydraulic Lease No. 18 was in its legal effect operative as to the whole area comprised in the description, save that as to any existent claims at the time of the demise the lease was subject to those prior claims. As a matter of conveyancing this is a well known and well understood position, and I cannot see anything in the facts nor in the law as applied to the facts which inhibits one from coming to this conclusion which to me seems to be the

manifest and right conclusion. I only come to this conclusion after the most anxious consideration, especially in view of the decision in the *Smith* case, which of course is absolutely binding upon this Court, if it can be said to have determined the point this Court has now to pass upon. I may say though that the present case is very different, and I hesitate to apply the decision and say that it is determinative of this appeal. Unquestionably the appeal would be idle if the facts were the same as in the *Smith* case. But they are radically different, the existent claims at the time of the demise lapsed within 2 years of the issuance of Hydraulic Lease No. 18, as against the continued existence of the quartz claim in the *Smith* case, and that being the situation, I cannot bring myself to the belief that the *Smith* case, decided upon an entirely different state of facts, can be said to be conclusive in this appeal. At this stage I would refer to what Lord Dunedin said in *Davidson & Co.* v. *M'Robb*, [1918] A.C. 304, at p. 322:—

> I now turn to the point of whether I am bound to take the view which I personally do not hold in respect of decisions of this House. My Lords, I apprehend that the dicta of noble Lords in this House, while always of great weight, are not binding authority and to be accepted against one's own individual opinion, unless they can be shewn to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case. Now, the dicta I have quoted were not as dicta agreed to by Lords Macnaghten and Mersey.

I would also refer to what the Lord Chancellor (Earl of Halsbury) said in *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506:—

> Now, before discussing the case of *Allen* v. *Flood, etc.*, [1898] A.C. 1, and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the gen rality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision in the case of *Allen* v. *Flood*.

With unfeigned respect to the Supreme Court of Canada and absolute loyalty to the undoubted position of that Court's judgments, and their binding effect upon this Court, I have ventured,

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possibly wrongly, to hold the opinion that the *Smith* case is not determinative of this appeal.

It is to be noted that a placer holding is from year to year, and each year is a new grant, and unquestionably when the placer holding lapsed the area covered became the property of the Crown and Hydraulic Lease No. 18 is from the Crown. See *Nelson & Fort Sheppard R. Co.* v. *Jerry et al.* (1897), 1 M.M.C. 161, McCreight, J., at pp. 178, 179, 180, also see *The Queen* v. *Demers* (1894), 22 Can. S.C.R. 482, at p. 486. It cannot be said that the lease contains any apt words of exception of placer mining claims, at least not where same have lapsed. See *Pearce* v. *Watts* (1875), L.R. 20 Eq. 492. An insuperable barrier, in my opinion, in any case stands in the way of the respondent in this appeal. Shortly, the position is this: Hydraulic Lease No. 18 admittedly in terms covers the area in question in this appeal and for which the respondent is the applicant and the lease in the way is a lease from the Crown, of admittedly Crown lands. In the face of this and without the intervention of the Crown, how can any claim be advanced or given effect to, even if it were conceded that the lease transcends the statute? That is, the respondent cannot be accorded any rights which would interfere with the lessees' possession. In *Osborne* v. *Morgan et al.* (1888), 13 App. Cas. 227, Lord Watson, at pp. 236-237, says:—

> Lands let by the Crown for gold mining purposes, whether before or after the proclamation of a gold-field, are not Crown lands within the meaning of the Act of 1874, and against these sec. 9 gives no right whatever to the holder of a miner's license. That is hardly disputed by the appellants, but they contend that the provisions of sec. 9 give them a title to try the validity of leases bearing to be granted by the Governor in terms of the statute, in a question with the lessees, and in the absence of the Crown, with the view of restoring the areas let to the category of Crown lands. It appears to their Lordships that the Act does not, expressly or by necessary implication, confer any such right. It is, in their opinion, sufficient to exclude the holder of a miner's right that the land is *de facto* occupied in virtue of a lease granted and recognised by the Crown. Their Lordships do not doubt that, in cases where reasonable grounds can be shewn for interfering with the lessee's possession, the Crown will lend its assistance in terminating the lease, and that it will refuse its aid to any attempt to disturb his possession merely for the purpose of giving the holders of miners' rights the benefit of his outlay and operations.

Also see *Quesnel Forks Gold Mining Co.* v. *Ward etc.* (1918), 42 D.L.R. 476; 50 D.L.R. 1, [1920] A.C. 222.

It is clear in my opinion that Hydraulic Lease No. 18 could

only be said to be subject to the existing mining locations at the time of the issuance of the lease and that the respondent cannot be admitted after the lapse of nearly 20 years of any outstanding claims at the time of the demise, come in against this lease from the Crown and be accorded a placer claim from and out of the area admittedly described in the lease; *North Pacific Lumber Co.* v. *Sayward* (1918), 25 B.C.R. 322. To summarise my view the area occupied by existing mining locations at the time of the granting of Hydraulic Mining Lease No. 18, was not physically excluded and set apart; the whole intention and effect of the lease was to merely make the same subject to any then existing mining locations, *i.e.*, subject to all prior mining locations, but when they lapsed unquestionably the lease would have complete operation over the area as the description by metes and bounds fully covers the lapsed area.

In *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. 475, Lindley, L.J., at p. 483, said:—

> A right to work mines is something more than a mere license: it is a *profit â prendre*, an incorporeal hereditament lying in grant. The distinction between a license and a *profit â prendre* was pointed out in *Wickham* v. *Hawker* (1840), 7 M. & W. 63, [151 E.R. 679], a leading case on rights of sporting.
>
> Counsel for the appellant contended that the reservation clause ought to be construed as an exception of the mines and minerals. But this, we think, would be to violate well-settled rules of conveyancing. The words used are not apt for the purpose. No conveyancer intending to except mines and minerals from a conveyance of lands would express his intention by reserving a liberty to get minerals. If, indeed, it were plain from recitals or other clauses in the deed that an exception was intended, possibly effect might be given to it. But here there is nothing *aliunde* to shew what was intended, and the intention can only be inferred from the wording of the clause in question.

When the mining locations existing at the time of the lease lapsed upon the authority of *Rajapakse* v. *Fernando*, [1920] 3 W.W.R. 218, the lessee under Hydraulic Lease No. 18 became entitled to the possession of the lapsed area, it being within the description of the lands as described in the lease from the Crown. Lord Moulton, in the *Rajapakse* case, at p. 220, said:—

> Their Lordships are of opinion that by the Roman-Dutch law as existing in Ceylon, the English doctrine applies that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee or as it is usually expressed "feeds the estoppel." When, therefore, on February 22, 1912, Thomas Carry acquired from the Government the title to the lands which he had conveyed by the deed of December 11, 1909, the benefit of that title accrued to the grantees under that deed, *i.e.*, the respondent's predecessors in title.

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Finally, in this case we have the unquestioned representations made by the Government of Canada by and through the Department of the Interior, the letter of the secretary, reading that "all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease but which may be abandoned or forfeited for any cause, will at any time during the currency of the lease revert to the lessee." In view of this something that the lessee was entitled to rely upon, I cannot persuade myself that the respondent has any enforceable position or can successfully uphold the judgment of the Court below. In this connection I would refer to what Lord Davey said in *Ontario Mining Co. and Att'y-Gen'l for Canada* v. *Seybold, and others, and Att'y-Gen'l for Ontario*, [1903] A.C. 73, at pp. 83-84:—

> The learned counsel of the appellants, however, says truly that his clients' titles are prior in date to this agreement, and that they are not bound by the admissions made therein by the Dominion Government. Assuming this to be so, their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view. But it was contended in the Courts below, and at their Lordships' Bar was suggested rather than seriously argued, that the Ontario Government, by the acts and conduct of their officers, had in fact assented to and concurred in the selection of, at any rate, Reserve 38B, notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose was read to their Lordships; but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the Province cannot be bound by alleged acts of acquiescence on the part of various officers of the Departments which are not brought home to or authorised by the proper executive or administrative organs of the Provincial Government, and are not manifested by any Order in Council or other authentic testimony. They therefore agree with the concurrent finding in the Courts below that no such assent as alleged has been proved.

In the present case there is no doubt about the intention of the Crown, the representation made and the assent on the part of the Crown, that when the prior mining claims (prior to the lease) were abandoned or forfeited, the beneficial property in the area covered by them should pass to the lessee and as that did occur it would seem to me that the title of the lessee—now the assignee from the lessee—is incontestable, certainly incontestable on the part of one holding no interest in the area in question whatever, and no interposition upon the part of the Crown.

I would, for the foregoing reasons, therefore, allow the appeal.

Eberts, J.A.

EBERTS, J.A.:—I feel bound to give effect to the decision rendered by the Supreme Court of Canada in *Smith* v. *Canadian*

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Klondyke Mining Co., decided in 1912. This is an unreported case but copies of the judgment were furnished the members of this Court. That case is one which, in my opinion, must govern my decision in the present case.

The appeal should be dismissed.

Appeal dismissed.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 17, 1920.

TAXES (§ I A—1)—WHAT TAXABLE—STANDING TIMBER—RIGHT TO CUT—IMMOVEABLE PROPERTY—MUNICIPAL CODE (QUE.), ART. 651—PROPERTY TAXABLE—MUNICIPAL CODE ARTS 16 AND 688.

Although standing timber is part of the land on which it stands the incorporeal right to cut such timber is not parcel of the land, and is therefore not "immoveable property" within the meaning of the term as used in art. 651 of the Municipal Code (Quebec), as defined in para. 27 of art. 16, and is not therefore "property taxable" in the name of the owner or holder of such right under art. 688.

[See application to quash appeal from the judgment of the King's Bench, 55 D.L.R. 53, 60 Can. S.C.R. 302.]

Statement.

APPEAL by plaintiff from the judgment of the Court of King's Bench (1919), 29 Que. K.B. 309, reversing the judgment of the Superior Court in an action to have annulled certain entries on a valuation roll which described them as proprietors of the right to cut wood on certain lots of land. Reversed.

L. St. Laurent, K.C., for appellant; *E. Roy*, K.C., for defendant.

Idington, J.

IDINGTON, J.:—This appeal raises the point of whether or not the possessor of a right to cut standing timber for a term of 30 years can be placed on the valuation roll which is the first step taken under the Municipal Code of Quebec in the way of imposing taxes to be borne by the owner of any land, or part thereof.

The taxes in the rural municipalities of Quebec are borne by the owner of the land, or parts thereof.

The right to cut standing timber was at one time, as we held in the case of the *Laurentide Paper Co.* v. *Baptist* (1908), 41 Can. S.C.R. 105, a mere personal right.

No matter whether the right was in perpetuity or merely for a term of years, such, by reason of the peculiar angle at which lawyers sometimes will look at things and arrive, by what to them seems to be a sound process of reasoning, at conclusions that determine the quality of the ownership of anything, was the ultimate result reached.

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When that case was decided, and for a very long time before the view taken in that case, and in which I agreed, no doubt was settled law in Quebec.

It might be that the timber growing on the land was the only thing of value thereon or therein or that could be produced thereby; and that the unsophisticated might be unable to appreciate the difference between the conclusive right to enter and cut same as, and when from time to time the possessor of such right might see fit, and by means of the law protect such right absolutely; and the absolute legal ownership thereof as part of the entire property in the land. Perhaps even the sophisticated were at times puzzled to maintain the nature of the subtle distinction between the right to cut and carry away, and the absolute ownership of a dismembered part of the entirety, even though the former, at least, had not acquired a universally recognised legal designation or definition of it.

I suspect it was by reason of the results reached in said case, that shortly after the declaration thereof the common sense of the Legislature of the Province saw fit to try and make the legal conception of juristic right, so far as legislative power could do so, conform with the common sense conception of ownership of land, or part therein or thereof or thereout, and accordingly enacted 2 Geo. V. 1912 (Que.), ch. 45, amending art. 381 of the Civil Code, as follows:—

1. Article 381 of the Civil Code is amended by inserting, after the word "habitation" in the second line, the words: "the right to cut timber perpetually or for a limited time."

Article 381, thus amended, now reads as follows:—

381. Rights of emphyteusis, of usufruct of immovable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes, and rights of action which tend to obtain possession of an immovable, are immovable by reason of the objects to which they are attached.

The fundamental law of the Province as formerly interpreted having been thus expressly amended, I respectfully submit that this new addition to the list of rights formerly held to be immoveable though less than the entire ownership thereof, and a new definition of what is to be comprehended within the term "immoveable" ought to be observed throughout by the Courts; and at all events in dealing with any subject matter falling within the term "immoveable" used in any legislative enactment passed by

the Quebec Legislature after said amendment, that word "immoveable" should be interpreted in light thereof and construed accordingly, unless there appear in such enactment a clear intention that another meaning is to be attributed to the word "immoveable."

The new Municipal Code was enacted some five years thereafter, 6 Geo. V. 1916 (Que.), ch. 4, and must, I submit, be read in light thereof.

Article 651 thereof reads as follows:—"All land or immoveable property situate in a local municipality, except that mentioned in article 693, is taxable property." Surely that is expressly within the definition of "immoveable" in the Civil Code as amended.

Article 693 contains a lot of exemptions of which this now in question is not one.

I am quite aware that much in the language of the new Municipal Code remained, as it was in that which it substituted, apparently capable of subserving either the purpose of art. 381 of the Civil Code, as it stood before the amendment, or as it stood when amended.

It is, however, in art. 651, just quoted, that the keynote of the whole is to be found so far as assessment or valuation roll is concerned, and I submit that said article dominates all else in that regard.

It is the amended article of the Code which must also always be applied to the later enactments and deeds or agreements. And if the *Laurentide* case, *supra*, or one like thereunto, should again hereafter arise, it is the amended article that should, so far as relevant, be applied.

We ought not to encourage the following of a metaphysical train of thought, born of other days, to defeat such a plain enactment, clearly intended to set aside for all purposes that which had resulted from the adoption by the Courts of that mode of reasoning.

The Legislature, moved evidently by a new mode of reasoning in relation to every-day affairs of the people concerned, had been led to determine that the antiquated mode, so far as the right to cut timber extended, should cease in regard to the meaning of the word "immoveable."

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The comprehensive conception and purpose of such an excellent fundamental law as the Civil Code should not be lightly set aside.

I think, therefore, the appeal fails.

There is another aspect presented by the hearing of this case.

There is, as I read the law, no title to land (in the sense in which these words are used in sec. 46 (b) of the Supreme Court Act defining our jurisdiction) involved herein upon which our jurisdiction can rest. At all events, if the right in question is a mere personal one, there can be no title to land in question, and hence we should dismiss the appeal for want of jurisdiction.

And if, by any process of reasoning, there can be found a title to land in question, then, and only then, we have jurisdiction and, by adopting that ruling, the appellants are assessable and properly placed on the valuation roll.

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

Duff, J.

DUFF, J.:—By art. 688 Mun. Code, municipal taxes imposed on land may be collected from the "occupant or other possessor of such land as well as the owner thereof or from any subsequent purchaser of such land." By sec. 16, sub-sec. 20, owner is defined as meaning "everyone having the ownership or usufruct of taxable property or possessing or occupying the same as owner or usufructuary, or occupying Crown lands under an occupation license, or a location ticket." Section 16 provides that the expression so defined shall have the "meaning, signification and application" so assigned to it "unless the context . . . declares or indicates the contrary." It is, in my judgment, not permissible to give to the word "owner" or "proprietor" in sec. 688 a more extended meaning than that derived from the above quoted definition. Nothing in the context or in the subject matter indicates an intention to employ the word in a mere comprehensive sense. These considerations in my opinion dispose of the appeal. Art. 381 C.C. as amended undoubtedly provides that the appellant's *droit de coupe de bois* is an immoveable but it does not follow that this right is a usufruct or that it is proprietorship within the meaning of these provisions of the Mun. Code. It is not sufficient, I think, to bring a possible subject of taxation within the sweep of these provisions to have a statutory enactment declaring that possible subject to be an immoveable.

ANGLIN, J.:—Since "the right to cut timber permanently or for a limited time" has been declared by art. 381 of the Civil Code, as amended by 2 Geo. V. 1912 (Que.), ch. 45, to be "immoveable by reason of the object to which it is attached," I should have been disposed to regard it as "immoveable property" within art. 651 of the Mun. Code, and as such "property taxable" in the name of the owner or holder of such right, were it not for the definition of "immoveable property" in para. 27 of art. 16 of the latter Code. That definition is as follows:

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> The words "land" or "immoveable property" mean all lands or parcels of land [*toute terre ou partie de terre*] in a municipality owned or occupied by one person, or by several persons jointly, and include the buildings and improvements thereon.

It is argued that this definition is merely indicative and not restrictive. But the introductory paragraph in art. 16, in my opinion, answers that contention. It reads as follows:—

> Article 16. The following expressions, terms and words, whenever they occur in this Code or in any municipal by-law or other municipal order, have the meaning, significance and application respectively assigned to them in this article unless the context of the provision declares or indicates the contrary.

The "application" of the term "immoveable property" is thereby confined to "all lands or parcels of land (*toute terre ou partie de terre*)." Now, standing timber is no doubt part of the land on which it stands. But the mere right to cut that timber is not. This distinction (I speak with the utmost respect) is, in my opinion, disregarded in the judgment of the majority of the Judges of the Court of Appeal (1919), 29 Que. K.B. 309. It seems to have been assumed, as put by Martin, J., at p. 317, that under the right to cut them "property in the trees is vested in the buyer before severance of the trees from the soil."

Ownership of the trees passes, in my opinion, only when they are cut and converted into moveables. The incorporeal right theretofore vested in the holder of this *droit de coupe* is not parcel (partie) of the land and therefore not "immoveable property" within the meaning of that term as used in art. 651 of the Mun. Code, although it undoubtedly is so for other purposes.

I would allow the appeal with costs here and in the Court of King's Bench and would restore the judgment of the trial Judge.

BRODEUR, J.:—This is an action brought by the appellants to have annulled entries on a valuation roll which described them as

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proprietors of the right to cut wood on certain lots of land. The lots in question have two valuations, one for the land, which is put in the name of the proprietor, the other for the right to cut wood, which is put in the name of the appellants.

The corporation defendant in its defence maintains the validity of its roll, and alleges that it has the power to tax the appellants for their rights to cut wood.

To avoid the costs of *enquête*, the parties have admitted that the plaintiffs are taxpayers in the municipality, that a valuation roll was made, and that the plaintiffs were entered thereon as proprietors of the right to cut wood. These admissions are followed by a demand for adjudication in the following terms:—"La seule question a decider est de savoir si un proprietaire d'un droit de coupe de bois pour trente ans de ce jour, peut être porté au rôle d'évaluation sans être propriétaire du fonds sur le terrain privé."

This question is evidently submitted according to the dispositions of art. 509 and following, of the Code of Civil Procedure.

The Superior Court replied to this question in the negative, and maintained the action of the appellants, but this judgment was reversed by the Court of Appeal, 29 Que. K.B. 309, which decided that the proprietor of a right to cut wood is the proprietor of an immoveable, and as such is subject to taxation by the municipal authorities, even when he is not the proprietor of the land.

We have then to examine if this judgment of the Court of Appeal is well founded.

The valuation rolls are made under art. 649 and following of the Mun. Code. They serve as a basis for the municipal taxes (art. 684). They must contain in distinct columns:

(Article 654) (2) The description and area of every immovable in the municipality and of every part of an immovable . . . (3) the real value of every taxable immovable or part of an immovable . . . (6) the name and surname of the owner of every immovable, or part of immovable if known.

In the present case the valuation roll of the respondent described certain lots of land as being the property of different persons, as far as the land is concerned, and the appellants were given as proprietors of the right to cut timber on these same lots. There is a separate valuation for the land and the right to cut timber.

When the taxes are levied the appellants will be called on to contribute for their rights to cut timber.

Did the corporation respondent have the right to inscribe the appellants on the valuation roll as proprietors of the right to cut timber?

If the appellants were proprietors of the standing timber itself, I would not hesitate to say yes. In other words, if we were in the presence of a right of superficies, the municipal councils would have the right to place on the valuation roll the proprietor of the land and the proprietor of the right of superficies; for then it would be a question of a lot of land possessed and occupied partly by the proprietor of the land and partly by the proprietor of the surface; and each of these proprietors could be taxed for the part which he occupies. (Art. 16, para. 27, Mun. Code.)

Planiol, vol. 1, 4th ed., 2572, says: "La superficie formant, comme le fonds luimeme, une propriete immobilière (Besancon, 12 déc. 1864; D.65-2-1, et la note) est par suite susceptible d'hypothèque."

Proudhon, Traité des droits d'usage et du droit de superficie, 2nd ed., p. 604, says:

> La superficie est un immeuble particulière qui, quoique reposant sur le sol d'autrui, a cependant son existence propre et independante de tout autre héritage . . . Et en cela il est d'une nature tout differente de celle du droit d'usage qui, comme servitude réelle, ne peut avoir une existence solitaire, même civile, séparée du fonds auquel elle est due.

Baudry-Lacantinerie, vol. 5, 2nd ed., No. 341, says: "Le superficiaire n'a pas un simple droit d'usufruit mais bien un droit de propriété."

Article 378 of the Civil Code tells us that trees are immoveable as long as they hold to the soil by their roots. Then we are taught by the following authors that if they belong to a different person from him who has the land they are susceptible of being charged with hypothecs, usufruct and servitude. Rolland de Villargues, vo. superficie. Aubry & Rau, vol. 2, p. 440. Demolombe, vol. 9, no. 483. Fuzier Herman, vo. superficie. Planiol, 2eme ed., vol. 1er., no. 1182.

The right of surface is not mentioned by name in the Civil Code, but it none the less exists, as has been decided in the case of *Cournoyer* v. *Cournoyer* (1911), 18 Rev. de Jur. 194, but we are not in the presence of a right of surface.

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In 1908 in a case of *Laurentide Paper Co.* v. *Baptist*, 41 Can. S.C.R. p. 105, this Court decided that the right to cut wood constituted only a moveable right on the wood when it is cut, and that registration of this right could not give to the proprietor of the right to cut a preference against the subsequent purchaser of the property on which this right to cut is to be exercised.

This judgment evidently incited the Legislature to make the amendment which we find in the statute of 1912, when art. 381 of the Civil Code was amended. Art. 381 reads as follows:— "Rights of emphyteusis, of usufruct of immoveable things, of use and habitation, servitudes, and rights or action which tend to obtain possession of an immoveable, are immoveable by reason of the objects to which they are attached," and in 1912 was added before the word "servitude" the following words: "the right to cut timber perpetually or for a limited time."

If we had to decide the present case by the dispositions of the Civil Code, I should have to say that the right to cut timber is an immoveable. Unfortunately for the respondent the definition of the word "immoveable" in the Civil Code has not been carried into the Mun. Code, and thus recourse must be had to the Mun. Code to decide the question which is submitted to us. The Mun. Code then in its definition of the word "immoveable," art. 16, para. 27, did not include the right to cut timber. Not all the immoveable rights of which the Civil Code speaks are susceptible of being taxed, but it is only properties or parts of properties which can be taxed.

There are many immoveables designated as such in the Civil Code which are not considered immoveables in the Mun. Code. Thus servitudes, rights concerning the possession of an immoveable, the capital of constituted rents, the moneys realised by the redemption of constituted rents belonging to minors, sums given by ascendants to their children in consideration of their marriage to be employed in the purchase of real estate, are immoveables according to the Civil Code (arts. 381 and 382), but no one would pretend that these immoveables could be placed on the valuation roll, and would be immoveables under the authority of the definition in art. 16, para. 27 of the Mun. Code.

It is possible that the Legislature intended in 1912 to make the right to cut timber susceptible to being taxed, but unfortunately

it did not say so. It is possible that the Breakeys may be proprietors of a surface right, and in consequence of a part of the immoveable. Then that should have been said, but the admission grants only that they are proprietors not of the timber itself, but of the right to cut.

Brodeur, J.

I would at first have been inclined to send the record back to the Superior Court for certain proof, to be made of the nature of their rights in the wood, but on reflection I have come to the conclusion that it would be better to dispose of the case just as the parties presented it before us with their admissions. Besides, if the plaintiffs are really proprietors of the trees and if in other words their right is a surface right, nothing prevents them from submitting this point to the Courts. I consider that *chose jugée* could not be invoked, for it is not what has been submitted to us by the present appeal.

I come then to the conclusion that we should reply in the negative to the question which has been put to us by the parties. The judgment *a quo* should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The appellants, who acquired extensive rights to cut lumber in the municipality of Metgermette North, complain that they have been entered on the valuation roll as subject to municipal taxation by reason of these rights, and the question between the parties, which will determine the outcome of the case, is whether the owner of a right to cut timber for 30 years can be entered on the valuation roll without being the owner of the lands. The Superior Court answered the question in the negative, but the Court of King's Bench (Carroll and Pelletier, JJ., dissenting), 29 Que. K.B. 309, reversed this judgment and decided that the right to cut timber is subject to the municipal taxes imposed on immoveable property under the Mun. Code.

There is no doubt that since the amendment to art. 381 Civil Code, the right to cut timber in perpetuity or for a limited period is included in the class of things which are immoveable by reason of the object to which they are attached. But these provisions of the Civil Code do not resolve the question which is submitted to us. The question on the contrary is whether this immoveable right is subject to the tax on immoveables under the operation of the Mun. Code.

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Article 651, first paragraph, of this Code provides: "All land or immoveable property situate in a local municipality except that mentioned in article 693, is taxable property."

But to determine the meaning of the words "land or immoveable property" under the Mun. Code and art. 651, it is necessary to refer to the definition of para. 27, art. 16, which provides:

"The words 'land' or 'immoveable' or 'immoveable property' mean all lands or parcels of land in a municipality owned and occupied by one person or by several persons jointly, and include the buildings and improvements thereon."

It follows from this that what the Mun. Code considers as "taxable property" are *things* and not *rights*. A right, in a sense, is an abstraction. It is the object of it which makes it moveable or immoveable. Prior to the amendment to art. 381 Civil Code the right to cut wood was considered a moveable right, as its object was the wood which the grantee has the right to cut and remove: *Laurentide Paper Co.* v. *Baptist*, 41 Can. S.C.R. 105.

The Civil Code now places it among the rights which are immoveable by reason of the object to which they are attached. But that does not involve the consequence that it is land or a parcel of land. It is simply a right, immoveable it is true, but a right which cannot be confused with land or parcel of land.

The counsel for the respondent in reply to a question which I put to him at the argument, said he understood by "*partie de terre*" a physical part of the land. The English text of para. 27, which speaks of "parcels of land," shews this to be the case. The words "partie de terre" may be applied among other cases, to that where a piece of land lies in two or more municipalities, and then each municipality will tax the part of the land within its limits. But it seems to me to be an abuse of language to say that a right to cut wood is a part of the land where the right is exercised. It is not sufficient that the right be immoveable, but it must be shewn that it is an immoveable in the sense which art. 16, para. 27 of the Mun. Code gives to the word.

If it were sufficient to cite art. 381 of the Civil Code to shew the respondent to be in the right, it would logically follow that a right of servitude is impossible, for it is also a right which is immoveable by reason of the object to which it is attached. Such a proposition cannot be seriously maintained.

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It is said that the grant of a right to cut timber on land diminishes the value of the land, that the owner of the land would be entitled to have the land valued without the wood on it, and that then the wood which forms part of the land would be exempt from taxes if the grantee of the right could not be reached.

This argument, which seems to be one for the Legislature, does not convince me. It would have as much force in the case of a lot burdened with a servitude, for the servitude diminishes more or less, according as it may be more or less onerous, the value of the land over which it is exercised. In the present case we are not concerned with a sale of wood upon land, nor with the sale of a right of superficies, but with the sale of a right to cut wood, and as we have a definition adopted by the Legislature, we must ask whether this definition includes the right to cut wood. My opinion is that it does not.

I think, therefore, that the question submitted by the parties must be answered in the negative. With all possible deference to the Judges of the Court of King's Bench who have expressed the contrary opinion, I consider that the appeal should be maintained with the costs of this Court and the Court of King's Bench and the judgment of the Superior Court restored.

Appeal allowed.

MARTIN v. FINLAYSON; FINLAYSON v. MARTIN.

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British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. February 7, 1921.

STAY OF PROCEEDINGS (§ I—14)—TWO ACTIONS COMMENCED—ONE ARISING OUT OF SUBSTANTIAL CLAIMS IN OTHER—STAY OF ONE PENDING DECISION IN OTHER.

Where two actions have been commenced by a mortgagee for foreclosure, and one by the mortgagor for fraud, and it is necessary that one of them be stayed pending the decision in the other, the claim of the mortgagor which arises out of the substantial claim of the mortgagee for foreclosure, will be stayed pending the mortgagee's action, particularly where the mortgagor's action can be advanced as a defence to the mortgagee's action by way of defence.

[*Thomson* v. *South Eastern R. Co.* (1882), 9 Q.B.D. 320; *Miller* v. *Confederation Life Ass'n* (1885), 11 P.R. (Ont.) 241, referred to.]

Statement.

THE judgment appealed from is as follows:—

Two applications have come on to be heard before me at the same time, to stay one or other of the above actions.

Mr. White, solicitor for the plaintiff in *Martin* v. *Finlayson*, before I have given my decision, has asked me for reasons for any judgment which I

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might hand down in contemplation of an appeal. I at first was disposed to refuse giving any such undertaking, as I could not recognise in the material before me any new point of practice nor any question requiring the reannunciation of any principle of law. However, under the particular circumstances of this case, I accede to his request.

These applications although made in cross actions savour in their nature of one for consolidation of the two suits. However that may be, it is necessary to be satisfied of the true character of the main substantial claim arising from the dealings between the parties. Nothing is clearer than what was brought about by the passing of the Judicature Act, 1873, namely, that the Courts are empowered fully to grant all such remedies as the parties to a suit may appear entitled to in respect of any legal or equitable claim to the end that all matters in controversy may be completely determined without dilatoriness and without undue expense and multiplicity of proceedings concerning any such matters avoided where there are cross actions as here. The Court therefore looks for a main cause of action or dispute; looks to see if the one arises incidentally out of the other or not. If so, then I would think that that one could be more conveniently and fairly disposed of along with the one in which the main dispute arises. In a foreclosure action the result of which may lead to alienation of property, the plaintiff must prove his case conclusively, and in so doing anything in the nature of a defence can be raised in answer. To ascertain whether that is the situation here a brief recitation of the alleged facts set out in the respective statements of claim is necessary.

The mortgagee, Miss Sarah Susette Finlayson, in her statement of claim, alleges that in 1899 Mr Justice Martin, one of the parties herein, mortgaged to Sarah Finlayson, A. W. Jones, R. D. Finlayson and herself jointly, certain properties in the city of Victoria, for $7,000, repayable in 1902. In 1907 there was an assignment of this mortgage to R. D. Finlayson by the surviving mortgagees, Sarah Finlayson having died in 1906. In 1916 R. D. Finlayson died, having by his last will devised this mortgage to his wife L. M. Finlayson, who remarried in 1919 a Mr. Brooks. In May, 1920, she in turn assigned it to Sarah Susette Finlayson aforesaid. In 1904 there was $3,000 paid by the mortgagor in reduction—since then there has been default in payments. In 1912 a further mortgage was given by the mortgagor herein to Sarah Susette Finlayson on the same property for $2,000 and there has been default in payment of principal and interest thereon. Again in 1913 the sum of $6,000 was borrowed from R. D. Finlayson on this same property to be repaid in 1916. This mortgage was also bequeathed by him to his wife L. M. Finlayson—she assigned it to the said Sarah Susette Finlayson. Default has also been made in the payments thereon. In March, 1914, the sum of $14,000 was borrowed from H. W. Jones on the security of other Victoria property. This sum was to be repaid in 1916. This mortgage was assigned May 27, 1920, to Sarah Susette Finlayson. There is default also in respect of this mortgage.

On March 25, 1914, a further sum of $5,000 was borrowed from Sarah Susette Finlayson on adjoining property, to be repaid in 1916. Default has occurred in payment of this one. Then the mortgagee in her action makes the usual formal claim for an accounting and judgment and also for consolidation of the above mortgages.

The mortgagor on the other hand in his action which was commenced on August 27, 1920 (the mortgagee's action having been commenced on the 30th of the same month), alleges that the said Sarah Susette Finlayson called in and demanded payment of the first mortgage on the property known as "The Homestead," and threatened to foreclose. Whereupon the mortgagor began negotiations with a view to pay off this particular mortgage, leaving the others as they were. It is also further alleged that the mortgagee refuses to allow him to redeem the said mortgage unless he redeems the other overdue ones. And then it is alleged that after the above demand was made, the said Sarah Susette Finlayson, *mala fide* and pursuant to a fraudulent scheme prevented the mortgagor from paying off this mortgage by means of the several assignments aforesaid from Mrs. Brooks and Mrs. Jones. It is also claimed that in consequence of this alleged wrongful refusal to allow redemption without also redeeming the other mortgages, it is impossible for the mortgagor to raise a further loan. He therefore claims to redeem the mortgage on his homestead freed from all the other mortgages aforesaid and to have the same reconveyed to him; that there is no right to consolidate and he seeks a declaration that the assignments are part of a fraudulent scheme and are null and void as against his equitable rights of redemption.

On this application the parties support their respective submissions by affidavits, Mr. Jackson, solicitor for Miss Finlayson, having been fully cross-examined on his.

On this material the substance of which I have set out above, the mortgagor claims his suit should be heard first and that the suit in which the mortgagee is pursuing her remedies under the various mortgages should be postponed pending the trial and determination of the allegation of fraud thus set up and of the question of the mortgagee's right to consolidate her mortgages. Against so doing there is a strong current of authority. In my opinion there can be no question that the claim put forward by the mortgagor arises out of the substantial claim of the mortgagee for foreclosure: and particularly where there are no perplexing differences as to parties or subject matter, it occurs to me that the question raised in the mortgagor's action can be advanced as a defence to the mortgagee's action when the time arises to file a defence, and thus all the matters in dispute between the parties herein will be disposed of effectively in the mortgagee's action. *Thomson* v. *South Eastern R. Co.* (1882), 9 Q.B.D. 320; *Miller* v. *Confederation Life Ass'n* (1885), 11 P.R. (Ont.), 241.

The action, *Martin* v. *Finlayson*, therefore, will be stayed pending the determination of the issues in the other action herein.

H. A. Maclean, K.C., and *C. G. White*, for appellant.

M. B. Jackson, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The first of the above actions was commenced some days earlier than the second, and upon application to Morrison, J., in each, he made an order staying the first and allowing the second to be proceeded with.

At the hearing of the appeals a question arose in respect of the inclusion in the appeal books of an affidavit and cross-examination thereon, of Mr. Jackson, which was disposed of by his disclaimer of any intention to refer to them in the course of his argument.

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Thomson v. *South Eastern R. Co.* (1882), 9 Q.B.D. 320, is relied upon by both sides. The case is useful to this extent that it sets at rest the notion that the first to commence action is as a matter of course entitled to proceed; nor is the first to threaten action, nor the one who has the most substantial claim against the other. Beyond this the case merely enunciates the well established doctrine of the Courts that each case must be decided on its own facts and that hard and fast rules ought not to be laid down when the decision must necessarily depend to a large extent on the discretion of the Judge who has to determine the question.

The test proposed by Mr. Dalton, then Master in Chambers, in *Miller* v. *Confederation Life Ass'n* (1885), 11 P.R. (Ont.), at p. 245, is, I think, a useful one to apply to the case at Bar:

> I think a good practical test in such circumstances, to discover who should be plaintiff where there are no cross demands but really only one subject of litigation, would be to ask whose object would be defeated supposing both actions to be stayed forever. The one who in that case would be defeated should be allowed to be plaintiff and the other might set up his case as a defence.

It is manifest that Miss Finlayson would be the only one to suffer if both actions were stayed forever. I am also of opinion that the burden of proof is in the true sense upon her. In this connection burden of proof does not mean the burden of proving a particular issue, but the onus which rests upon the party who must discharge it or fail to recover in the action. Miss Finlayson must in her action first prove the facts which entitle her to consolidate her several mortgages; if she shall fail in this the issue raised in the first action, viz., fraud, will become immaterial. If she shall prove facts which *primâ facie* are sufficient to entitle her to consolidation, then the issue of fraud is a material defence.

Taken as a whole, Miss Finlayson's case is (1) to have judgment for the debt, (2) to consolidate and foreclose her several mortgages. Consolidation is resisted. If the defence succeeds the defendant will get all the relief that he could obtain in his own action, *i.e.*, he will be allowed to redeem the mortgages separately and he need not even counterclaim for redemption since that is his right under a foreclosure decree.

I have examined *Rechnitzer* v. *Samuel* (1906), 95 L.T. 75, to which my attention has been drawn by my brother McPhillips, but am unable to derive assistance from it. A stay of an action

brought in the Chancery Division was refused in that case because a more complete remedy could be obtained under the machinery of that Court than in the Common Law Division.

But even if I were in doubt as to which action should have been stayed, I should not be justified on the facts before us in interfering with the discretion exercised by the Judge in the Court below. The practice is well established that the large measure of discretion vested in the Judge of first instance in matters of this character, is not, except for very cogent reasons, to be interfered with.

I would dismiss the appeals.

Macdonald, C.J.A.

GALLIHER, J.A., would dismiss the appeal.

Galliher, J.A.

MCPHILLIPS, J.A. (dissenting):—The appeals really involve the determination as to whether one action should be stayed pending the hearing of the other. The action of *Martin* v. *Finlayson* was first begun and a summons was taken out asking for an order that the proceedings in the action of *Finlayson* v. *Martin* should be stayed pending the decision in the action of *Martin* v. *Finlayson*. The subject matter of both actions is the same, that is, having relation to certain mortgage securities.

McPhillips, J.A.

In the action of *Martin* v. *Finlayson* the plaintiff Martin is claiming the right to redeem the mortgage on the homestead freed from all other mortgages and to have the same reconveyed to him, and a declaration that the defendant is not entitled to consolidate any of the mortgages, an account in respect of the mortgages and for a declaration that the three certain assignments of mortgages not given to the defendant by the plaintiff, but to others, have been obtained by the defendant Finlayson as part of a fraudulent scheme to prevent the redemption of the home of the plaintiff Martin. The action of the plaintiff Finlayson is to have an account taken of the same mortgages dealt with in the action of *Martin* v. *Finlayson*, and a consolidation thereof and that the redemption must be as to all of the mortgages—which would result in preventing redemption and destroying the plaintiff Martin's equitable rights in his homestead. This may be said to be shortly, perhaps, a statement of the issues that will necessarily require consideration and disposal at the trial and may be disposed of in the action of *Martin* v. *Finlayson*, the one first begun —and being determined obviate need of any further trial.

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Now, the question becomes one of what, under the circumstances should have been the proper and correct order in the Court below? The Judge in Chambers dismissed the application of the plaintiff Martin, which was one for a stay of proceedings of the action in *Finlayson* v. *Martin*, pending the trial of the action in *Martin* v. *Finlayson*, and in the action of *Martin* v. *Finlayson* made an order that that action be stayed until after the trial of the action in *Finlayson* v. *Martin*.

The practice in matters of this kind has received some considerable attention from time to time in the Courts in England and counsel for both parties in the appeals have referred to and relied upon *Thomson* v. *S. E. R. Co.* (1882), 9 Q.B.D. 320. That decision was considered by Buckley, J. (now Lord Wrenbury), in *Rechnitzer* v. *Samuel*, 95 L.T. 75, a case which may be said to be somewhat analogous to the case we have for consideration upon these appeals. The action was one brought upon a promissory note; the defence was that the transaction in respect of which the note was given was harsh and unconscionable and that the transaction ought to be reopened. Here it is contended in effect that there is harshness and unconscionableness in the attempt to consolidate the mortgages and prevent redemption of the homestead, and what the plaintiff Martin contends specifically is that he be allowed to redeem the mortgage upon the homestead freed from all the other mortgages and to have the same re-conveyed to him.

Now, when all is considered, some of the language of Buckley, J., would appear to me to be apt and very appropriate in the consideration of these appeals, and to my mind conclusive of the matter in favour of the appellant Martin—if the reasoning of Buckley, J., be agreed in, and I may say that I am in complete agreement with the reasoning of Buckley, J., and would apply it to the present appeals. At p. 77, Buckley, J., in the *Rechnitzer* case said:

> In the common law action there is nothing whatever for the plaintiff to do except to put in the promissory note to prove the defendant's signature if it were disputed (which it is not), and ask for judgment. That is the end of his case.

In regard to the present appeals all the mortgages are admitted so that the position is quite similar and the onus is upon the

plaintiff Martin in the action of *Martin* v. *Finlayson* to establish all that is contended for, that is, he (Martin), as Buckley, J., has said, "is the person upon whom the onus rests." Buckley, J., proceeds and says, in the action he had under consideration, at p. 77:

> It is for him to prove that his opponents are moneylenders within the Act of Parliament; that they have so dealt with him as that under the Act of Parliament he will be entitled to the special remedies which are allowed by the Act of Parliament, and so on. He is the person upon whom the onus entirely rests and if the two actions could be brought, as I could not bring them together, it seems to me the right order would be to consolidate the two, and make the borrower the plaintiff in the consolidated action.

Now, Buckley, J., had a difficulty that does not present itself to this Court and which was not present in the Court below that is, in England actions may be brought in either the Queen's Bench or Chancery Division, and as it happened one action was in the Queen's Bench and the other in the Chancery Division. The *ratio decidendi* of the decision of Buckley, J., clearly indicates that if the situation was as it is with us, the borrower's action would have been given priority and to apply that same conclusion to the present appeals, the mortgagor Martin would be allowed to proceed with his action and the *Finlayson* v. *Martin* action stayed with leave for the defendant Finlayson, if desired, to set up in the *Martin* v. *Finlayson* action by counterclaim all that is being sued for in the action of *Finlayson* v. *Martin*, that is, the principle is well settled that it is preferable to allow that action to go on in which the burden of proof rests upon the plaintiff and that would clearly appear to be upon the plaintiff in the action of *Martin* v. *Finlayson*.

Further, a consideration not to be lost sight of and one which is entitled to consideration is the fact that the action of *Martin* v. *Finlayson* was first begun, and upon all the facts and circumstances of this case it is a consideration which is entitled to very considerable weight in view of the fact that it is alleged, and not denied at this Bar, that the mortgagee refuses to accept redemption of the mortgage upon the homestead alone, but insists that the mortgages upon other lands than the homestead be redeemed. There is no suggestion that if the order of the Court be that the proceedings be stayed in the second action, namely, that of *Finlayson* v. *Martin*, and that the action first begun of *Martin* v.

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Finlayson should be proceeded with, that any loss or damage will in the interim ensue, in any case if the mortgagee counterclaims in the mortgagor's action, the whole matter in dispute may be determined in the one action.

Here we have the situation, that makes it clear to demonstration that the action of *Martin* v. *Finlayson* should be first proceeded with, and the action of *Finlayson* v. *Martin* stayed. The plaintiff Martin first sued and as we have seen the onus rests upon him, so that it is impossible upon the authorities to make any other order, *i.e.*, *Martin* v. *Finlayson* must first go on. It is only necessary to read the language of Brett, L.J., and Holker, L.J., in the *Thomson* case, 9 Q.B.D. 320, at 327, *per* Brett, L.J., to see the futility of contending otherwise: "If indeed there should be in any case nothing to guide the exercise of his discretion but the fact that one party was the first to issue the writ, then he would properly give that party the benefit and advantage of his diligence."

The situation here is, exactly, that the plaintiff Martin first sues—raising the whole question and with the onus upon him—the mortgages being admitted. Brett, L.J., at p. 327, proceeds: "If, for instance, the burden of proof was as much on one litigant as on the other litigant, then the party who first issued the writ would get the advantage and his action would be allowed to proceed."

It is here seen that if the plaintiff Martin had not even the impregnable position which he has—that of having the onus upon him, *i.e.*, if honours were even, which they clearly are not, he yet would be entitled to first proceed. And Holker, L.J., said, at p. 335: "It appears to me to be more reasonable to allow the party who has substantially everything to prove to begin; he has really to establish his case, and in the action which proceeds, it is just that he and not the other party should be the plaintiff. The appeal, therefore, must succeed."

(Also see *White* v. *Harrow* (1902), 50 W.R. 166.) Then we have a case in the Court of Appeal in England which is absolutely on all fours with this case—demonstrating that the appeals of the plaintiff Martin should be allowed and the action of *Martin* v. *Finlayson* do first proceed and the action of *Finlayson* v. *Martin* be stayed. The case is *Tumin* v. *Levi* (1911), 28 T.L.R. 125:—

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The defendant, who had a number of transactions with the plaintiff, a registered moneylender, offered the plaintiff just before the last sum he had borrowed had become due, the balance of the principal and a sum for interest which the moneylender declined. The borrower thereupon issued a writ in the Chancery Division claiming an account of all transactions between him and the moneylender, and a declaration that some of them were harsh and unconscionable, and for relief under the Moneylenders Act. The moneylender shortly thereafter issued a writ in the King's Bench Division for the full amount said to be owing by the borrower. The borrower thereupon took out a summons asking for a stay of the proceedings in the King's Bench Division on the ground that they were an abuse of the process of the Court in view of the proceedings pending in the Chancery Division.

Held (Kennedy, L.J., dissenting), that, in the circumstances of the case, the proceedings in the King's Bench Division should be stayed.

And we find Vaughan Williams, L.J., in this case, at p. 126, approving of the rule in the *Thomson* case, 9 Q.B.D. 320, and saying: "That being the rule and applying it, he thought he ought to stay the second action not simply because it was the second action, but because there was nothing in the onus of proof to make it just that the plaintiff in the Chancery action should have that action stayed and be left to be added only as defendant in the common law action."

And Buckley, L.J., at p. 127, said:

Primâ facie, therefore, it was oppressive to appeal to the King's Bench Division as well, and it was wrong when an action was pending to bring another action [and here it was wrong in the circumstances to bring the *Finlayson* v. *Martin* action]. The second ground rested on this, whether the borrower was first or not [and here the borrower, the mortgagor, Martin, was first]. It was on him that the burden of proof lay, and he had to satisfy the Court as to the facts. *Primâ facie* then it was right that the second action should be stayed and that the action go on in which the burden of proof was on the plaintiff.

In view of these decisions in the Court of Appeal in England—decisions binding upon this Court—in the absence of decisions to the contrary in the Supreme Court of Canada or the Privy Council (see *Trimble* v. *Hill* (1879), 5 App. Cas. 342), this Court, with all respect to contrary opinion, cannot do otherwise than follow the well defined rule and that palpably is, in the circumstances of the case, to stay the proceedings in the *Finlayson* v. *Martin* action.

I am therefore of the opinion that both of the appeals should be allowed and that it should have been determined in the Court below that the action of *Martin* v. *Finlayson* should be first proceeded with and that the action of *Finlayson* v. *Martin* be stayed

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pending the decision of the action in *Martin* v. *Finlayson*, with liberty to the mortgagee Finlayson to set up in the mortgagor's action, that is in *Martin* v. *Finlayson*, all that she is proceeding for in her action.

Eberts, J.A.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

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GOODFELLOW v. O'BRIEN.

New Brunswick Supreme Court, Hazen, C.J., White and Grimmer, JJ. February 18, 1921.

NEGLIGENCE (§ I D—72)—FISHING NETS ILLEGALLY IN RIVER—CLOSE SEASON—INJURY TO, THROUGH NEGLIGENCE OF TUG-BOAT OWNER—DAMAGES.

The fact that the plaintiff was illegally fishing during the close season does not prevent him from recovering damages for injuries done to his nets through the negligence and carelessness of the crew of a tug-boat engaged in towing a raft of logs, which blew against the nets causing the injury.

[*Snowball* v. *Donovan* (1895), 33 N.B.R. 182, followed.]

Statement.

APPEAL by defendant from a verdict entered for the plaintiff in the Northumberland County Court, before the Judge without a jury, in an action for damages for injury to his fishing nets. Affirmed.

R. R. Hanson, K.C., for defendant, supports appeal.

J. J. F. Winslow, *contra*.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—This is an appeal from the County Court of Northumberland. The action was brought to recover damages alleged to have been sustained by salmon nets of the plaintiff, through the negligence and carelessness of the crew of a tug-boat owned and operated by the defendant company and engaged in towing a raft of logs on the south-west branch of the Mirimichi River. The case was tried before the County Court Judge without a jury. The defendant company was found guilty of negligence, and a verdict was entered for the plaintiff for the sum of $50. The appeal is supported upon the following grounds: 1. The verdict is against the weight of evidence, and against evidence and against law. 2. There was no legal proof of negligence on the part of the defendant. 3. The plaintiff's nets being illegally placed, the Judge was in error in allowing the plaintiff damages.

The plaintiff was the owner of a set of salmon nets which were placed on the south side of the south-west branch of the

Mirimichi River, and was engaged in getting salmon during September, 1919, being in the close season. On September 30, the defendant company's tug was towing a raft of logs down the river. The nets were held and supported in place by pickets driven into the bed of the river, with which the raft came in contact, carrying some of them away along with a portion of the nets, thus giving rise to the claim for damages. By the Fishery Regulations of 1915 (Can.), p. cclxxxv, sec. 13, sub-sec. 7, it is provided: "No one shall fish for, catch or kill salmon with nets of any kind from the 16th day of August in each year to the last day of February following, both days inclusive," and sub-sec. 3 of the same section provides that: "No one shall fish for, catch or kill salmon with gill net, drift net, trap net or pound net except under license from the Minister of Naval Services."

The net injured was a pound net. It was claimed on the part of the plaintiff the net was placed and was being fished under the special authority of the Minister of Naval Service, and therefore the fishing was legal. The defendant company, on the other hand, urged and contended that the fishing was being done illegally, it being close season according to law, and no special authority legalising the same was produced. The only evidence in support of the plaintiff's claim was that in the year 1918 a permit, as provided by sec. 4, of 4-5 Geo. V. 1914 (Can.) lxxxvi, had been granted to him to take salmon out of season for hatchery purposes, and that in 1919 he had been told by the agent of the Minister of Naval Services to go ahead and put his nets in and fish. No written permission was given the plaintiff by the Minister of Naval Services to set nets or fish in the Mirimichi River or elsewhere in the year 1919, and the Court held under the evidence produced the nets were illegally placed at the time of the injury.

The question then arises whether under the circumstances the defendant company is liable for the damages which the plaintiff sustained from the injury done to his nets. I feel we are bound by the decision in *Snowball* v. *Donovan* (1895), 33 N.B.R. 182, which is substantially on all fours with this case, save that it perhaps may not be quite so strong. There Donovan had the license from the Minister of Marine and Fisheries to fish with 40 fathoms of salmon net from March 1 to August 15 in the year 1893, near his property on the north side of the north-west branch

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of the Mirimichi. Instead, however, of fishing with but 40 fathoms he used 80 fathoms of net which were run into and injured by a raft being driven down the river and owned by Snowball. Before striking the net the pilot of the raft, seeing there was danger of that happening, ran out a kedge anchor for the purpose of avoiding so doing. The rope attached to the anchor broke, with the result that the raft struck and injured the nets. A verdict was given for the plaintiff for $25 which the Judge of the County Court of Northumberland refused to disturb. There was evidence that the pilot of the raft when asked how the injury happened, said [at p. 184] his warp broke—"My warp was poor." There was plenty of room for the raft to run down the river without touching the nets, as the river at that point was one-quarter of a mile wide from the nets to the opposite shore. There was no unusual current or storm or other circumstances which rendered the navigation on that day more difficult than it ordinarily was. The warp used for swinging the raft when it became a necessary manoeuvre in order to avoid the collision, broke and proved insufficient for the very purpose for which it was principally intended, and no other cause was assigned for it other than its weakness and inefficiency. The Court held under these circumstances that there was evidence of negligence to support the verdict, and the appeal was dismissed.

In this case the plaintiff had no license to fish at all, while in the former the plaintiff was fishing with 80 fathoms of net when he only had a license to fish with 40, and the defendant was held liable for damages for the injury done, even though the plaintiff was fishing illegally. Here the plaintiff was fishing illegally, but it was clearly proved by a number of witnesses that the collision of the raft with the nets could have been avoided by throwing out the kedge anchor, when the force of the wind caused the raft to drift towards the nets.

The captain of the tug boat was aware that a very heavy wind was blowing under which circumstances it would be necessary for him to use much greater care than under ordinary conditions, if he would keep clear of the nets. He was supplied with a kedge anchor and a boat and men to handle them, and the anchor in fact had been used to help guide and navigate the raft coming down the river but some time before it came to the vicinity of

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the nets. The captain of the tug boat in his evidence stated he knew and could see the raft was going towards the nets, that he hauled off as far as he could, sounded for bottom and put his boat in as shallow water as was consistent with safety. Also that swinging the boat and raft off as he did would have a tendency in a certain way to carry the tail of the raft into the nets, and that he towed over as far as he could when he saw the raft was going into the nets. Another witness stated the raft was in good shape, but was coming down river anglewise; that the crew of the boat made no effort to put the anchor out, and the wind blew the raft against the nets; that he had worked on rafts and had not the slightest doubt, if the men on the boat had taken the kedge anchor and kedged the raft they would have prevented the accident, but that no anchor was put out, and the damage to the nets resulted, which could have been avoided if the necessary precaution had been taken. Another witness for the defence, who was one of the crew of the tug boat, said they were taking a chance and thought they could clear the nets. From this and other evidence I think there were circumstances from which the County Court Judge might very reasonably infer want of care on the part of the appellant's servants, and was therefore right in the conclusion he arrived at, and the verdict and judgment entered for the plaintiff should not be disturbed.

The appeal will be dismissed with costs.

Appeal dismissed.

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Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Chisholm, JJ. December 6, 1920.

DIVORCE AND SEPARATION (§ II—5)—EVIDENCE—CORROBORATION—RULE OF PRACTICE—NOT NECESSARY IN CERTAIN CASES.

The rules upon which the Court has usually acted in cases of divorce, of not granting a decree upon the uncorroborated testimony of the petitioner, is merely a general rule of practice, and not an inflexible rule of law.

[*Weinberg* v. *Weinberg* (1910), 27 T.L.R. 9; *Riches* v. *Riches* (1918), 35 T.L.R. 14, referred to.]

Statement.

APPEAL from the judgment of Ritchie, E.J., Judge Ordinary of the Court of Marriage and Divorce, refusing plaintiff's petition for divorce on the ground of absence of corroboration. Reversed.

W. J. O'Hearn, K.C., for appellant.

No one *contra*.

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Harris, C.J.

Harris, C.J.:—A petition for divorce alleging adultery and cruelty was presented in the Court for Divorce and Matrimonial Causes by a wife against a husband.

On the trial the wife gave evidence of facts of a disgusting character, the nature of which it is unnecessary to discuss, but which it is claimed produced nervous prostration, and greatly injured her health.

There was evidence from Dr. Johnstone to the effect that he had attended the wife and found her in an extremely nervous condition, and he said that her physical condition would be caused by the habitual performance of the acts testified to by the wife.

The husband did not appear in the case and was not present at the trial.

The trial Judge was of opinion that the evidence disclosed legal cruelty on the part of the husband but added, "as I understand the rule prevailing in the Divorce Court in England the Court will not act on the evidence of the petitioner without corroboration."

He thought the evidence of Dr. Johnstone was not corroboration and added "if I could find corroboration I would grant the divorce."

I understand from this that the Judge believed the evidence of the wife but felt himself obliged to decide against the divorce because he thought he could not act on the evidence of the petitioner without corroboration.

There is an appeal and the question is as to whether or not the law with regard to corroboration is as stated by the Judge.

In *Curtis* v. *Curtis* (1905), 21 T.L.R. 676 at 677, Bargrave Deane, J., stated the rule applicable to the case is as follows:

> As a general rule the Court would not act upon the uncorroborated evidence of a petitioner; but there was no rule which prohibited it from so acting if on consideration of the whole of the materials before it, the Court was satisfied that the story put forward was a true one.

In that case the only evidence in support of the petition was that of the petitioner which was contradicted by the respondent, but the Judge did not believe his evidence and he had admitted signing a written confession of his guilt of the charge of adultery which he said had been written under compulsion from his wife.

He had also admitted that he had been to a house of ill fame, but said he had gone there merely as an ex-police officer and journalist and not for purposes of immorality.

In *Weinberg* v. *Weinberg* (1910), 27 T.L.R. 9, the petitioner gave evidence that he had seen his wife living the life of a prostitute and she had admitted to him that she was doing so. There was no other evidence. Evans, Pres., said:

> That he believed the petitioner's story and cited the case of *Getty* v. *Getty*, [1907] P., in which it was laid down that although it is the general practice in matrimonial cases not to act and grant relief upon uncorroborated confessions of adultery, there is no absolute rule of practice and no rule of law precluding the Court from acting upon such uncorroborated evidence. The true test seemed to be whether the Court was satisfied from the surrounding circumstances in any particular and exceptional case that the confession was true. In this case, as he was satisfied of the truth of the petitioner's evidence, he would pronounce a decree *nisi*.

In *Riches* v. *Riches* (1918), 35 T.L.R. 141, there was no evidence but that of the petitioner who stated that he had found the co-respondent in bed with his wife. Coleridge, J., said:

> This case is very much on the line. I consider that the law as to corroboration in this Court is the same as in all Courts, including criminal Courts. I am in the position of a jury and I am entitled to act on the uncorroborated evidence of a witness in the absence of any statutory enactment that corroboration is essential. Here there is no substantial corroboration; but there are circumstances to aid my mind on the question whether I believe the petitioner's evidence uncorroborated. He gave a succinct account of finding the co-respondent in bed with the respondent. Then there was his evidence of his thrashing the co-respondent; and there was the calling in of the police to protect the co-respondent, which I believe to have taken place. There are no circumstances here which make me suspect the petitioner's evidence, and I am entitled to act upon it. I therefore grant the petitioner a decree *nisi* with costs.

In *Weinberg* v. *Weinberg*, 27 T.L.R. 9, and in *Riches* v. *Riches*, 35 T.L.R. 141, there was nothing but the petitioner's evidence to go upon. In the former, it is true, the petitioner said that the wife had admitted her guilt to him but whether or not she had made the confession depended absolutely on his uncorroborated evidence. So also in *Riches* v. *Riches*, evidence of the husband having thrashed the co-respondent was that of the husband only, and even if there had been (which there was not) evidence of someone else as to the thrashing, the fact that he had thrashed the co-respondent might have been for some other offence or supposed offence. So also the calling in of the police was perfectly equivocal

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and in any event it apparently depended entirely upon the unsupported evidence of the husband.

In *Robbins* v. *Robbins* (1868), 100 Mass. 150, Gray, J., speaking for the full Court, said, at p. 151:

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> The report of the justice before whom the hearing was had reserves for the consideration of the full Court nothing but the question of law involved. The only matter for our decision therefore is, whether the evidence reported in law warrants the finding; and we have do doubt that it does. The rule upon which the Judges have usually acted in these cases, of not granting a divorce upon the uncorroborated testimony of the libellant, is merely a general rule of practice, and not an inflexible rule of law. When other evidence can be had it is not ordinarily safe or fit to rely upon the testimony of the party only. But sometimes no other evidence exists, or can be obtained. The parties are made competent witnesses by statute, and there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established.

This language applies with peculiar force in the present case. The secret vice practised in the dead of night is something as to which no other evidence than that of the wife can be obtained.

The whole question, in my opinion, is for the trial Judge. If taking the evidence of the doctor and the fact that the husband has not appeared, and all the other facts and circumstances into consideration the trial Judge believed the evidence of the wife he had the right to act on that opinion.

I think the decree should be set aside and the case should go back to the trial Judge to be disposed of accordingly.

Russell, J.

RUSSELL, J.:—In the case of *Evans* v. *Evans* (1844), 1 Rob. Eccl. 165, 163 E.R. 1000, the sources of the law administered in divorce cases by the English Courts are referred to and Sir Herbert Jenner Hust says that neither by the civil nor by the canon law (the principles of which are one and the same) is the evidence of one witness standing entirely alone sufficient. The Judge proceeds to point out how greatly the principles applied in the ecclesiastical Courts, as to proof, differ from those of the common law.

The case of *Evans* v. *Evans* occurred in 1844 and the principles on which it was decided continued to dominate the subject of proof in these Courts until a quite recent period. But it becomes manifest, on perusal of the cases referred to in the opinion of Harris, C.J., that in England these Courts are now inclined to depart from the rigid and somewhat arbitrary requirements of their earlier procedure, or that of their predecessors, and the principle

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now prevailing is that expressed in the decision of Gray, J., of the Supreme Court of Massachusetts. The rule requiring corroboration is now, I think, to be properly regarded as "merely a general rule of practice and not an inflexible rule of law." *Per* Gray, J., in *Robbins* v. *Robbins*, 100 Mass. 150. This utterance was an anticipation rather than an application of the present English rule. It dates back to 1868 at which date the rule as to the necessity for corroboration still continued to be strictly enforced by the Courts and expounded in the text books.

In a case such as the present it would be cruelly unreasonable to require corroboration as a pre-requisite to the granting of relief because the nature of the case is such that the existence of corroborative evidence must necessarily be a pure accident and one which in the great majority of cases would be extremely unlikely to occur.

As I understand the decision of the Judge of the Court for Divorce and Matrimonial Causes, the divorce applied for would have been granted but for the want of corroboration and I assume that the Judge would welcome a direction that there should be a decree for a divorce, which as I read sec. 10 of the present act, R.S.N.S. 1884, 5th series, appx. A. p. 12, this Court is competent to give.

Longley, J.

LONGLEY, J., concurred with Harris, C.J.

Chisholm, J.

CHISHOLM, J.:—I concur in the opinion of Harris, C.J., and that of Russell, J. The Courts have been slow to grant a decree upon the uncorroborated evidence of a petitioner; but there is no rule of law to prevent a decree being made upon such evidence. In the case of *F.* v. *D.* (1865), 4 Sw. & Tr. 86, a decree was granted and the Judge Ordinary observed at p. 93:

> No one can help feeling that the single oath of the party interested, fortified by nothing stronger than the silence of the party charged, is treacherous ground for a judicial decision; but no one can deny that, if this lady's story is true, her condition is one of grievous hardship. And to call for corroboration, where all corroboration is, from the nature of the subject, impossible, would be harder still.

The petitioner's costs of the appeal should follow the costs below.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland and Masten, JJ., and Ferguson, J.A. December 20, 1920.

INDICTMENT, INFORMATION AND COMPLAINT (§ II G—60)—ADMINISTERING POISON WITH INTENT TO ENDANGER LIFE—CONVICTION OF ADMINISTERING WITH INTENT TO INJURE, AGGRIEVE OR ANNOY—AMENDMENT OF INDICTMENT.

An act of one person which is intended to endanger the life of another person includes an act to injure, aggrieve, or annoy such other person, and by sec. 951 of the Criminal Code, an accused if not proved guilty of the offence charged, of causing to be taken . . . a certain poison . . . with intent to endanger the life of another may, without any amendment of the original indictment, be convicted of the offence of administering poison with the intent to injure, aggrieve or annoy, and as the grand jury assented to the indictment for the major offence, they must be held to have approved of an indictment for the minor offence.

Statement.

CASE stated by Lennox, J., on a conviction for an offence under sec. 278 of the Criminal Code, as follows:—

"At the sittings of the assizes holden at Kitchener in and for the County of Waterloo, on the 20th and 21st days of September, A.D. 1920, an indictment was found by the grand jury against Leo Voll, charging 'that at the village of St. Agathe, in the county of Waterloo, on the 2nd day of March, 1920, Leo Voll unlawfully did cause to be taken by Antoinette Ball certain poison, to wit, a mixture of whisky and carbolic acid, with intent thereby to endanger the life of the said Antionette Ball.' At the conclusion of the case for the Crown, I was of opinion that there was not evidence to support the charge covered by the indictment, but that there was evidence proper to be laid before the jury in support of an offence properly charged under section 278 of the Criminal Code, R.S.C. 1906, ch. 146.

"I accordingly amended the indictment so as to read: 'The jurors of our Lord the King present that at the village of St. Agathe, in the county of Waterloo, on the 2nd day of March, 1920, Leo Voll unlawfully did cause to be administered to or taken by Antoinette Ball certain poison, to wit, a mixture of whisky and carbolic acid, with intent thereby to injure, aggrieve, or annoy the said Antoinette Ball;' and, there being, in my opinion, evidence to go to the jury under the indictment as amended, and counsel for the accused declaring that he would not call witnesses, and after granting his motion for a stated case, I allowed the trial to proceed and took the verdict of the jury upon the offence charged in the amended indictment. The jury found the accused

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guilty, with a recommendation to mercy, upon the ground of previous good character.

"I therefore state and sign the following case or question for the opinion and decision of the Appellate Division of the Supreme Court of Ontario, namely:—

"Was I right, and particularly had I the power to amend the indictment as I did amend it, and thereupon allow the trial to proceed?

"And, at the request of counsel for the accused, I make all exhibits, documents, and papers put in, and the evidence taken at the trial, part of the stated case."

The sections of the Criminal Code specially applicable to the questions arising are the following:—

277. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully administers to, or causes to be administered to or taken by any other person, any poison or other noxious or destructive thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm.

278. Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully administers to, or causes to be administered to or taken by, any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person.

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

R. T. Harding, for defendant.

Edward Bayly, K.C., for the Attorney-General.

MULOCK, C.J.Ex.:—The prisoner was being tried on the following indictment:— Mulock, C.J.Ex.

"That at the village of St. Agathe, in the county of Waterloo, on the 2nd day of March, 1920, Leo Voll unlawfully did cause to be taken by Antoinette Ball certain poison, to wit, a mixture of whisky and carbolic acid, with intent thereby to endanger the life of the said Antoinette Ball."

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At the conclusion of the case for the Crown the learned trial Judge expressed the opinion that there was not evidence to support the charge covered by the indictment, but that there was evidence proper to be laid before the jury in support of a charge of an offence properly chargeable under sec. 278 of the Criminal Code, and accordingly amended the indictment so as to read as follows:—

"The jurors of our Lord the King present that at the village of St. Agathe, in the county of Waterloo, on the 2nd day of March, 1920, Leo Voll unlawfully did cause to be administered to or taken by Antoinette Ball certain poison, to wit a mixture of whisky and carbolic acid, with intent thereby to injure, aggrieve, or annoy the said Antoinette Ball."

This amendment reduced the charge contained in the indictment, of administering poison with intent to endanger the life of Antoinette Ball, to one of administering poison with intent to injure, aggrieve, or annoy Antoinette Ball.

In my opinion, an act of one person which is intended to endanger the life of another person includes an act to injure, aggrieve, or annoy such other person; and, therefore, by sec. 951 of the Code, the accused, if not proved guilty of the offence charged in the unamended indictment in question, might, without any amendment, have been convicted of the offence of administering poison with the intent to injure, aggrieve, or annoy.

As the grand jury assented to the indictment for the major offence, they must be held to have approved of an indictment for the minor offence.

For these reasons, I am of opinion that the answer of the Court should be that the learned trial Judge had power so to amend the indictment, and acted rightly in so amending it, and in allowing the trial to proceed.

Sutherland, J.

SUTHERLAND, J., and FERGUSON, J.A., agreed with MULOCK, C.J.EX.

Riddell, J.

RIDDELL, J. (dissenting):—Counsel for the Crown at the trial seemed to think that he had laid and the grand jury had found a bill under sec. 277 of the Criminal Code. It is quite clear that the indictment cannot come under sec. 277. The elements of an offence under that section are: (1) administration, etc., of a poison, etc., to another; (2) unlawfulness of the administration; and (3) effect in

endangering life, etc.—the intent is immaterial except as an element in the unlawfulness; and intent is not enough, there must be effect in fact. For example, had DeQuincey, in his errant years, been given a teaspoonful of laudanum by one who intended to endanger his life, his long course of opium-eating would have made the drug quite innocuous, and he would have relished it more than so much honey. No offence such as is covered by sec. 277 would have been committed, whatever other offence might be alleged. Or suppose one wished to endanger the life of his neighbour, and administered to him 5 or 6 grains of arsenic—the proposed victim, however, was like the arsenic-eater of Quebec spoken of in Witthaus and Becker's Medical Jurisprudence, vol. 4, p. 516, and not only was not injured but actually enjoyed it—there would be no offence under sec. 277.

It is plain that if the Crown counsel intended his bill to be laid under sec. 277, he has wholly failed to carry out his intention.

The next question is, Does the original indictment allege any offence known to the law? And, first, does it come under sec. 278?

Section 852 provides that a count shall be sufficient if it contains in substance a statement that the accused has committed some indictable offence therein specified; and it cannot be objected to if it contains any words sufficient to give the accused notice of the offence with which he is charged. Is an intent to endanger the life of any person an intent to injure, aggrieve, or annoy him? If so, then this is a good indictment under sec. 278.

There may be confusion of thought unless we attend carefully to the terminology employed.

The "intent" referred to in sec. 278 does not refer to the intent to do an act—it has no immediate reference to the quality of the act—it refers to the intended consequence of the act, the injuring, the aggrieving, the annoying of the victim. If an intention to endanger the life of a person necessarily connoted an intention to injure, to aggrieve, or to annoy him, the indictment would be good under sec. 278. But such is not at all the case, in my view. Leaving aside the more or less remote illustrations mentioned in the argument, suppose a lady, wanting to better her complexion, goes to a "beauty specialist," who has long been familiar with the marvellous effects on the skin of the arsenic eaten by the Styrians—the specialist knows that the administra-

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tion of arsenic will necessarily endanger the life of her patient, but will not necessarily actually do her harm. There is no intent to injure, aggrieve, or annoy, but quite the reverse—the intent is to benefit, satisfy, and please.

The effect might be to injure, aggrieve, or annoy, but the intent has no necessary connection with the effect: *Ex parte Mercer* (1886), 17 Q.B.D. 290—"that it is a necessary inference that a man intends the natural and necessary result of his acts" is described by Lord Esher, M.R., at p. 298, as a "monstrous proposition," and no one now questions the justice of his opinion.

In an offence under sec. 278 there is an element other than those necessarily involved in the alleged offence stated in the original indictment. One method of testing the effect of the original indictment is to inquire whether an acquittal upon it would enable the accused to plead *autrefois acquit* to an indictment under sec. 278.

The earlier rule in *favorem vitæ aut libertatis*, elaborated in the sanguinary times of the common law, has been much relaxed, and the present rule is well established that acquittal "is a bar to a subsequent indictment for any offence of which the accused could have been lawfully convicted on the first indictment:" Russell on Crimes and Misdemeanours, 7th (1st Canadian) ed., pp. 1984, 1985.

As the trial Judge holds that there was no evidence to support the indictment as framed, we must assume that (without amendment) he would have directed an acquittal. If the accused were afterwards indicted under sec. 278, and pleaded *autrefois acquit*, the answer of the Crown would be obvious.

In the case of *Regina* v. *Morris* (1867), L.R. 1 C.C.R. 90, the plea of *autrefois convict* was in question, but the same principles apply to both *autrefois* pleas: Russell, *op. cit.*, p. 1982. It was pointed out that such a plea is not effective if in the offence subsequently charged there is a new fact not necessarily included in the former. As is said by Byles, J., at p. 95: "The cause for the present indictment comprehended more than the cause in the former summons before the magistrates, for it comprehends the death of the party assaulted." Accordingly a conviction for an assault was held to be no bar to an indictment for manslaughter, where the death resulted from the assault. So in *Regina* v. *Friel*

(1891), 17 Cox C.C. 325, the prisoner had been summarily convicted of an assault upon one Carr, who subsequently died of injuries resulting from the assault. A plea of *autrefois convict* was disallowed. "It is a charge based on new facts; and the circumstance that some of those facts have been made the basis of a former charge of a different class is immaterial . . . That death is a new fact . . . ." *per* Williams, J., at p. 327.

In *Reg.* v. *Connell* (1853), 6 Cox C.C. 178, an acquittal upon a charge of murder by administering poison was held not to be a bar to a prosecution for administering poison with intent to murder —and to the same effect is *Regina* v. *Salvi* (1857), 46 Cent. Crim. Ct. Sess. Pap., p. 884, referred to in Russell, p. 1982 (note (*p*)), and in *Regina* v. *Morris*, L.R. 1 C.C.R. 90. As pointed out in the latter case by Kelly, C.B., it was held in the *Salvi* case by Pollock, C.B., that murder might be committed without any intent to kill, as, if the accused had intended to maim and caused death and it could be made out that he did not mean to kill, yet if he did the act with the purpose of effecting his limited purpose, and death were caused thereby, he was guilty of murder. Accordingly, as intent to murder was not a necessary ingredient in murder, an acquittal on a charge of murder was not a bar to a charge of intent to commit murder by the same means—the intent being a "new fact."

The same considerations apply to the question whether a conviction could be had, on the original indictment, of the offence charged in the amended indictment, under the provisions of sec. 951. That section extends the common law doctrine, and provides that, if the commission of the offence charged in the count includes the commission of any other offence, the accused may be convicted of that other offence. Applying these words to the present case, if the intent to endanger life were a case especially provided for, and the intent to endanger life included intent to injure, aggrieve, or annoy, the section could be appealed to, The index rightly reads "offence charged, part only proved." The test always applied is, Is the so-called part or less offence a necessary ingredient of that charged? see *Rex* v. *Muma* (1910), 22 O.L.R. 225, 17 Can. Crim. Cas. 285. In *Regina* v. *Lamoureux* (1900), 4 Can. Crim. Cas. 101, the question whether on an indictment for housebreaking a conviction could be had for removing

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stolen goods was resolved in the negative, for the latter offence "contains essential elements or ingredients which do not form a part of the offence of theft" (p. 104). So here the intent to injure, etc., contains elements which do not form part of the intent to endanger life. See the discussion in Russell, *op. cit.*, pp. 1962 *sqq*. I do not think, therefore, that sec. 951 helps.

If I am right so far, it follows that the amendment is not a matter of form, and therefore the learned trial Judge should not have amended the indictment. The proper course was to direct a bill properly drawn to be laid before the grand jury. The grand jury never passed upon the "intent to injure, aggrieve, or annoy Antoinette Ball," and their consent was only "that the Court shall amend matter of form, altering no matter of substance without your privity and consent, in this bill which you have found." *Cf.* Russell, p. 1971.

It is not enough that the facts made to appear at the trial clearly establish guilt on the part of the accused; such cases as *Rex* v. *Nerlich* (1915), 25 D.L.R. 138, 24 Can. Cr. Cas. 256, 34 O.L.R. 298, shew how careful this Court is to see that all legal protection is extended to an accused, however wrongly, even criminally, he may have acted. "In imputing or charging a crime, the language of the indictment should be clear and unmistakable:" *per* Maclaren, J.A., 25 D.L.R. at p. 143; Meredith, C.J.O., and Garrow, J.A., concurring.

We are of course not called upon to express an opinion whether any criminal offence at all was described in the original indictment. I am discussing the case reserved on the hypothesis that the indictment was good; if it was bad, the effect would be the same.

I am of opinion that the answer of the Court should be in the negative, but under the facts I think we should exercise the powers expressly given us by sec. 1018 (*e*) and order that the accused be indicted for the offence of which he has been found guilty.

It should not be too much to expect that counsel paid by the Crown to draw bills of indictment should draw them according to the plain words of the Code, and not according to some notion of their own. The administration of the criminal law is no place for experiments; and such cases as the present, involving a wholly unnecessary waste of time and public money, should never occur, being avoidable by ordinary care and attention to plain law.

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REX v. VOLL.

Masten, J.

MASTEN, J.:—In this case I have considered with care the very interesting judgment prepared by my brother Riddell, and with much of what he states I am in full accord.

But I am of the opinion that when an act is done with intent thereby to endanger the life of another, such an act necessarily includes an intent to injure that other, for surely to subject another to peril of death beyond the ordinary risks to which all are liable is to diminish the chances of life which such person enjoys. How such a diminution of the ordinary chances of life can be anything but an injury, I am unable to comprehend.

The term "injure," as used in sec. 278 of the Criminal Code, appearing as it does in collocation with the terms "aggrieve" and "annoy," does not mean mere physical injury, but has a much broader signifiance.

For these reasons, I think the indictment presented by the grand jury covered in substance the indictment as amended; that a conviction under the original indictment, in the words of the amended indictment, would have been valid under sec. 951; and that the amendment made by the trial Judge was a matter of form, and not of substance.

I therefore agree with the judgment proposed by my Lord the Chief Justice. *Conviction affirmed.*

PANTON v. SPENCER.

Saskatchewan King's Bench, McKay, J. February 14, 1921.

SASK.

K. B.

TAXES (§ VI—220)—INCOME—FAILURE TO MAKE RETURN—INCOME WAR TAX ACT, SEC. 8—JURISDICTION OF POLICE MAGISTRATE TO MAKE CONVICTION.

A police magistrate has jurisdiction to try and convict a person for failure to make a return of income, under sec. 8 of the Income War Tax Act, 7-8 Geo. V. 1917 (Can.), ch. 28, notwithstanding sec. 18 of the Act.

[See Annotation, Duties Imposed by Dominion Income Tax, 57 D.L.R. 4.]

Statement.

APPEAL by way of stated case from an order of a Police Magistrate, dismissing an information against the respondent for failure to make a return of his income for the year 1917 required to be given pursuant to sec. 8 of the Income War Tax Act, 7-8 Geo. V. 1917 (Can.), ch. 28, and amendments.

Alexander Ross, K.C., for appellant.

P. H. Gordon, for respondent.

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PANTON v. SPENCER.

McKay, J.

McKAY, J.:—The information charged that the said respondent J. H. Spencer on November 15, 1920, at North Battleford, Saskatchewan, did fail to make a return of his income for the year 1917 required of him to be given pursuant to sec. 8 of the Income War Tax Act, 7-8 Geo. V. 1917 (Can.), ch. 28, and amendments.

The question submitted is: "1. Whether I have jurisdiction as a Police Magistrate and Justice of the Peace to try and convict the said J. H. Spencer in the charge notwithstanding section 18 of the Income War Tax Act 1917."

The information is laid for an alleged breach of sec. 8 of the Income War Tax Act, 1917, as amended. The only sections of the said Act dealing with the question of jurisdiction are sections 9, 18 and 21.

Section 9 as amended reads as follows:—

9. (1) For every default in complying with the provisions of the next preceding section, the taxpayer and also the person or persons required to make a return shall each be liable on summary conviction to a penalty of one hundred dollars for each day during which the default continues.

(2) Any person making a false statement in any return or in any information required by the Minister, shall be liable on summary conviction to a penalty not exceeding ten thousand dollars or to six months' imprisonment.

The above section does not expressly say what Court is to make the "summary conviction," but considering this expression in connection with sec. 28, of the Interpretation Act, R.S.C. 1906, ch. 1, and secs. 705 and 706 of the Criminal Code, R.S.C. 1906, ch. 146, I come to the conclusion that it must be a Justice of the Peace under Part XV. of the Crim. Code who is to make the summary conviction, if the evidence warrants such conviction.

Section 28 of ch. 1, R.S.C. 1906, in so far as it is material to this case reads as follows:—

28. Every Act shall be read and construed as if any offence for which the offender may be, (a) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence; and (b) punishable on summary conviction, were described or referred to as an offence; and all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.

The default for which a person is liable on summary conviction under said sec. 9 is an offence or breach of sec. 8 of the Income War Tax Act (1917), although not described as an offence, and by virtue of the above in part quoted sec. 28, as it is punishable

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on summary conviction, the provisions of the Crim. Code relating to offences, namely Part XV., applies to it.

Having come to the conclusion that the words "summary conviction" in said sec. 9 mean, summary conviction by a Justice of the Peace under Part XV. of the Crim. Code, I do not think the subsequent general secs. 18 and 21 take away the jurisdiction already conferred on the Justices of the Peace by said sec. 9.

Maxwell on Statutes, 3rd ed., p. 232, says:—

Where a general intention is expressed, and also particular intention which is incompatible with the general one the particular intention is considered an exception to the general one. Even when the latter; or latter part of the enactment is in the negative, it is sometimes reconcilable with the earlier one by so treating it. If, for instance, an Act in one section authorised a corporation to sell a particular piece of land, and in another prohibited it to sell "any land," the first section would be treated not as repealed by the sweeping terms of the other, but as an exception to it.

My answer then to the question submitted is, "Yes," "You have jurisdiction as a Police Magistrate and Justice of the Peace to try and convict the said Spencer on the charge laid notwithstanding sec. 18 of the Income War Tax Act, 1917."

As there is no evidence before me as to what witnesses appeared before the Justice of the Peace and I am not in a position to fix the costs, I will remit the matter to the Justice of the Peace who heard the case to be dealt with by him.

The respondent will pay appellant's costs of this appeal.

Judgment accordingly.

BOILEAU v. BOURNIVAL.

QUE.

C. R.

Quebec Court of Review, Archibald, Acting C.J., Demers and Lorimier, JJ. June 12, 1920.

SALE (§ II A—26)—OF MILL—EXPRESS WARRANTY AS TO CAPACITY—NOT AS WARRANTY—SETTING ASIDE.

An express warranty that a mill can grind from 12 to 20 minots per hour is sufficient ground on which to set the sale of the mill aside, if in fact it can only grind from 3 to 4 minots an hour.

Statement.

APPEAL by defendant from a judgment of the Superior Court (Quebec), in an action to set aside the sale of a mill as not complying with the express warranty as to capacity under which it was sold. Affirmed.

The plaintiff states that on July 22 last he bought a mill (moulange) from the defendant, with a warranty that it could grind from 12 to 20 minots of wheat per hour, at the price of $1000,

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payable $500 in 30 days and the balance by two notes of $250 each at 3 and 6 months, with interest at 7%; that he has paid the sum of $500 and given the said notes; that, after several attempts, it has been ascertained that the mill does not comply with the warranty and can grind at the best only 3 or 4 minots an hour; that he has offered to return the said mill to the defendant and has requested him to return the sum of $175 as also the said notes, or to pay him the amount and he asks for the cancellation of the sale and the return of the amount paid and the notes.

The defendant denies the special warranty set up, and alleges that the mill was improperly installed and that the action is too late.

The Superior Court maintained the action for the following reasons:—

Considering that the plaintiff has proved that the sale was made with the special warranty which he alleges, and particularly that the said mill could grind from 12 to 20 minots an hour, excepting some dimunitions more or less considerable, resulting from some defects of the grain, but of which no proof was given relative to the said mill in this case; that the plaintiff has likewise established that the mill in question cannot give this return, but that it can only grind about 3 to 4 minots per hour; that the plaintiff has likewise proved that on September 23 last, he paid the sum of $500 to the defendant and gave him two notes of $250 each, as agreed upon; that under the circumstances, that the defendant is entitled to ask for the cancellation of the said sale and the return of the said notes as well as of the sum of $150, which he appears to have paid over and above the price of the said machine, dismisses the said defence, maintains the plaintiff's action, cancels and annuls the said sale in so far as it relates to the said mill, orders the defendant to take it back and to pay and reimburse the plaintiff the sum of $150, and to return to the plaintiff the two notes above mentioned within the usual time, and, on default of returning the said notes within the said time, orders him to pay the amounts following, namely, the said sum of $500, with interest at 7% from September 23 last and interest on $150, from the issue of the writ, December 13, 1918, and costs.

Cousineau and *Lacasse*, for plaintiff.

Dorais and *Dorais*, for defendant.

Archibald, A.C.J.

ARCHIBALD, Acting C.J.:—In looking over the record, and particularly the correspondence of the defendant with the plaintiff, one cannot help admiring the vigour with which the defendant pressed upon the plaintiff the sale of the machinery in question. Nor does one find in that correspondence much reference to buckwheat and Indian corn.

In a letter of defendant to plaintiff of July 16, 1918, we find the expression (translated):

We have sold a great quantity of these machines last year distributed all over the Province, which have given great results. This year the demand for these mills is very considerable. It will be very prudent and important for you to make up your mind promptly if you wish to receive your machine in time for the grinding. You will see by the circular that we sent you with our catalogue that the scarcity of wheat flour will make them more and more valuable upon the market, and it will be necessary that there shall be mills installed in almost all the parishes. This will create a great demand for these mills. It will be in your interest to place your order immediately in order to assure yourself a machine for the coming season.

Then, in another letter, on the following day, long arguments, are gone into as to the value of these machines, and the profits that can be made out of them. The defendant in that letter on the second page uses the following language:—

Supposing that you would choose a mill which could grind 100 minots of wheat per day, and that you took every 8th minot for yourself, you would be found at the end of a day with a salary which might reach $50 a day.

And then he proceeds: "The Government is anxious to stimulate the culture of wheat by every possible means."

And he mentions the fact that he encloses a copy of the catalogue. And on the third page, he says:—

If we resume the advantages of the offer to you of the installation of one of our mills, they will be as follows: superiority and efficiency of the mill; assured clientele, extraordinary profits, complete 85 per cent; purchased at a price excessively low and upon easy terms.

Then he refers to their catalogue and sends plaintiff a number of questions to answer. Now the catalogue is a catalogue of the "Royale," which shews the mill which plaintiff bought. On the 11th page of that catalogue, under the heading "Moulins à farine de Royale," on the first column are found the sizes of the mills. The largest size is 30 pouces. The next column shews the weight of the machine, and the next column the horse power required to operate it, and the next column the dimensions of the pulley. The next column the speed of the revolutions. And under the heading "Capacity per hour," in the same line, is found 12 to 20 minots.

It is quite true that in a note at the foot of the same page the following is stated:—

There are certain grains such as wheat among others and also oats to which these capacities cannot be applied other than with a diminution more or less considerable according as the grains were in proper condition as to maturity at the time of being harvested and of their proper preservation.

All the correspondence of the defendant was manifestly intended to produce in the mind of the plaintiff the impression that

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he could make large wages by the purchase of one of these machines by grinding wheat as well as other grains for his neighbours.

The proof established that for the short time the machine was tried on two occasions it did not produce more than 3 or 4 bushels of wheat per hour, although the motor power was sufficient, and although the machine attained the number of revolutions required by the circular of the defendant.

As I have said there is a remark made with regard to wheat, which more or less limited the warranty. But certainly that could not honestly account for such a difference as that between 3 and 4, and 12 and 20 minots per hour. But the defendant says that all warranty was excluded in the contract itself. The following words are found in the contract (translated): "The warranty on the back of this order is granted to me for this machine, and no other is granted to me."

The warranty in question on the back of the order is as follows (translated): "We warrant the solidity and the good construction and the good operation of our machines."

A question would arise whether a machine which was represented by the defendant as being capable of grinding 12 to 20 bushels of grain per hour, could be considered to be working well when it only ground 3 or 4.

The defendant makes a point that the machine was constructed for grinding buckwheat and implies that it was not suitable for grinding wheat. If that is the case the letters of the defendant to the plaintiff might be characterised as fraudulent, because these letters clearly and over and over again point out the necessity for the plaintiff to buy a machine for the grinding of wheat.

I would be of opinion that, apart from the warranty, the judgment would be well founded in setting aside the contract in question as having been induced by false representations on the part of the defendant.

I am of opinion to confirm the judgment of the Court below.

Appeal dismissed.

HATFIELD & SCOTT, Ltd. v. CANADIAN PACIFIC R. Co.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, J.J. February 18, 1921.*

CARRIERS (§ III C—392)—OF GOODS—BILL OF LADING—TERMS AND CONDITIONS—CONSTRUCTION OF—INJURY TO GOODS IN WAREHOUSE—LIABILITY.

One of the conditions in a bill of lading provided that 'in the case of shipment from one point in Canada to another point in Canada or where goods are shipped under a joint tariff, the carrier issuing this bill of lading shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of the bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada or under such joint tariff or over whose line or lines such goods may pass in Canada, or under such joint tariff. The onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading."

The Court held that the intention of this condition was to fix the original carrier issuing the bill of lading with liability from which the ultimate carrier was not relieved by the bill of lading, not only during, but after, transit, and that the onus of proof was on the original carrier who was liable for damage caused by the connecting carrier failing to promptly notify the shipper of the arrival of the goods at their destination and of storing them in an improper and unsuitable warehouse whereby they became unfit for use and had to be destroyed.

MOTION by defendant to set aside verdict entered for plaintiff before Crocket, J., and a jury, or for a new trial. Statement.

F. R. Taylor, K.C., for defendant; *W. P. Jones*, K.C., *contra*.

HAZEN, C.J.:—This action was for the recovery of damages by the plaintiff in a loss of 5 carloads of potatoes shipped over the defendant's railway. It was tried before Crocket, J., and a jury. After certain questions had been answered argument was heard and a verdict entered for the plaintiff for $6,148.41, by direction of the trial Judge. Hazen, C.J.

The potatoes which were the subject of the suit were shipped from different stations on the defendant's line of railway in New Brunswick, between April 17 and 24, 1919, under order bills of lading of the form approved by the Board of Railway Commissioners for Canada, and under a joint tariff between the defendant and the New York Central Railway Co. They were consigned to the order of the plaintiff, and billed to the New York Barclay St. Docks, "Notify Sullivan, Young and Russland Inc., at New York." Sullivan, Young and Russland were notified on the day that each car arrived, but as they failed to take delivery the potatoes were unloaded in bags and kept on a pier of the N.Y.C.R. for a number of days, running from a week to three

*White, J., took no part in the judgment.

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weeks for the respective carloads, when the New York Central agent placed them in a commercial warehouse without notice to the plaintiffs of its intention to store them. On each bill of lading was written, "Perishable, rush with tracer."

There was evidence to shew that at the time they were stored in the warehouse the potatoes were in good condition, and no notice was sent to the agent at the shipping point or to anybody else until after the potatoes had been stored. There was evidence to shew that the warehouse in which they were stored was a dilapidated building with broken windows and generally out of repair. It was not a cold storage warehouse, and there was evidence to the effect that the potatoes were stored in such a way that there was no ventilation whatever, and that they were placed on a wet floor. They were kept in this warehouse for several weeks, and sprouted, and the warehouse company sold some of them in different lots to meet their storage charges and expenses, and destroyed the remainder, but the proceeds of the sale were not sufficient to cover the storage charges, and the 5 carloads of potatoes became a total loss to the plaintiff. After the contents of each of the cars had been stored the railway company in New York sent to the shipping agents at Hartland, New Brunswick, a form of notice upon which were the words, "This shipment is stored by consignee," also stating that it was refused or unclaimed freight, and after he received these notices the agent at Hartland called the plaintiff's office on the phone and notified them accordingly. Mr. Kyle, the plaintiff's representative, says that he got the impression from this conversation over the telephone that the goods had been stored by the consignee and that therefore the consignee had paid the drafts or else the railway was responsible for the goods. Upon inquiry, however, the plaintiff found that the drafts had not been paid, and on June 8, Kyle went to New York, found the potatoes practically worthless, and a storage bill for $1,100 against them. The questions left to the jury with their answers were as follows:

Q. 1. Did the agents of the railway at New York, upon or after the failure of Sullivan, Young and Russland to take delivery, exercise reasonable care and prudence in connection with the keeping and warehousing of the potatoes? A. No. Q. 2. If not in what respect were they negligent? A. In not notifying Hatfield & Scott before putting potatoes in warehouse. Q. 3. If you find that there was negligence on the part of the agents of the

railway at New York was the plaintiff company's loss caused by such negligence? A. Yes. Q. 4. At what amount do you assess the plaintiff's loss? A. $6,148.31. Q. 5. Is there a uniform and generally recognised usage at New York in connection with the shipment of perishable freight to that city, that the consignor is immediately notified of the failure of the consignee or his assigns to take delivery? A. Yes.

There seems to be some confusion with regard to the answer to Q. 2, and it is submitted by the appellant that the answer is against the weight of evidence as there was no obligation under the American practice or under our law to give notice to Hatfield & Scott before warehousing, and failure to give such notice cannot be negligence.

The Judge in his charge to the jury stated that they might find that failure to notify the plaintiff that Sullivan, Young and Russland had failed to take delivery constituted negligence, and also referred to the question of notice of intention before storing the potatoes, but withdrew this subsequently from the jury and told them to disregard what he had said in respect to it. In reference to this, in giving judgment he said:

Mr. Taylor contends with reference to these findings that the answer to Q. 2 must be taken to mean that the New York Central's negligence consisted of its failure to notify the plaintiff of its intention to store the potatoes in a commercial warehouse, and that all other grounds of negligence have been thus negatived. In the light of the fact that I told the jury that the plaintiff had put forward two principal grounds of negligence, viz., the failure of the railway to promptly notify the plaintiff of the non-acceptance of the goods by Sullivan, Young and Russland, and the storing of the goods in an unsuitable and improper warehouse, and had withdrawn the reference I made to the railway's failure to notify the plaintiffs of the intention to store the goods in a licensed warehouse for the reason that this was a question of law, I assumed when the jury returned their findings that the answer to Q. 2 referred to the failure to notify of the non-acceptance of the goods by Sullivan, Young and Russland, and was under that impression until Mr. Taylor made his argument upon the motion for the entry of the verdict which immediately after the return of the findings it was agreed should be heard at a subsequent date at Chambers. Although I am still inclined to think that this is what the jury had in their minds, it is evident that the language which the jury used is capable of the meaning which Mr. Taylor assigns to it, and I am not so sure that had the onus rested upon the plaintiff to prove that his loss was caused by the negligence of the New York Central Railway, the defendant would not have had good ground for resisting the entry of the verdict for the plaintiff upon so uncertain a finding as that referred to.

Crocket, J., however, rested his judgment on other grounds entirely, and held that as a matter of law and on the undisputed facts of the case the verdict should be entered for the plaintiff.

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The conditions of the bill of lading which have bearing upon the question in dispute it seems to me were Nos. 1, 2, 3, 4, and 6 which are as follows:—

Sec. 1. The carrier of any of the goods herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided.

Sec. 2. In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading, in addition to its other liability hereunder, shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of this bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada or under such joint tariff, or over whose line or lines such goods may pass in Canada or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading. The carrier issuing this bill of lading shall be entitled to recover from the other carrier on whose line or lines the loss, damage or injury to the said goods shall have been sustained the amount of such loss, damage or injury as it may be required to pay hereunder, as may be evidenced by any receipt, judgment or transcript thereof. Nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier.

Sec. 3. The carrier shall not be liable for loss, damage or delay to any of the goods herein described caused by the act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the goods, or the act or default of the shipper or owner; for differences in weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights when the elevators are not operated by the carrier, unless the weights are evidenced by Government certificate; the authority of law or by quarantine. For loss, damage or delay, except where cartage is to be performed by the carrier or its agents, caused by fire occurring after forty-eight hours (exclusive of legal holidays) or in the case of bonded goods seventy-two hours (exclusive of legal holidays) after written notice of the arrival of said goods at destination or at port of export (if intended for export and not covered by a through bill of lading) has been sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier (and the burden of proving freedom from such negligence shall be on the carrier) the carrier shall not be liable for loss, damage or delay occurring while the goods are stopped and held in transit upon the request of the party entitled to make such request. When in accordance with general custom, on account of the nature of the goods or at the request of the shipper, the goods are transported in open cars, the carrier (except in case of loss or damage by fire, in which case the liability shall be the same as though the goods had been carried in closed cars) shall be liable only for negligence and the burden of proving freedom from such negligence shall be on the carrier.

Sec. 4. (Part) The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under this bill of lading (including the freight and other charges, if paid, and the duty if paid or payable and not refunded), unless a

lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based, in any of which events such lower value shall be the amount to govern such computation, whether or not such loss or damage occurs from negligence.

Sec. 6. (Part) Goods not removed by the party entitled to receive them within forty-eight hours (exclusive of legal holidays) or in the case of bonded goods within seventy-two hours (exclusive of legal holidays) after written notice has been sent or given, may be kept in car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may at the option of the carrier (after written notice of the carrier's intention to do so, has been sent or given), be removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the risk of the owner and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges including a reasonable charge for storage.

Crocket, J., held, and I think correctly, that under these conditions the defendant agreed to carry the goods described therein to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination, and agreed with the plaintiff as distinctly set forth on the face of the bill of lading, as to each carrier of all or any of said goods over all or any portion of said route to destination, and as to each party at any time interested in all or any of said goods, that every service to be performed should be subject to all the conditions therein contained, including the conditions on the back thereof. One of the conditions on the back, No. 2, provides that in the case of shipment from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of the bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada or under such joint tariff or over whose line or lines such goods may pass in Canada, or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading.

I concur entirely in the opinion of the Judge that the intention and purpose of Condition 2 was to fix the defendant as the original carrier issuing the bill of lading in addition to his other liability thereunder, with liability for any loss or damage from which the other carrier (the New York Central R. Co.) was not by the

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terms of the bill of lading relieved, during the time the goods were in the possession and control of the other carrier, whether during or after transit, and that the onus of proving that such loss or damage was not so caused or did not so result was on the defendant as the original carrier issuing the bill of lading.

The Judge has very fully discussed the terms of the bill of lading, and the clauses which I have set out, and their application to the facts of the present case, and with the conclusions to which he has come I fully agree, and concur that the undisputed facts constitute under the terms of the bill of lading a good cause of action against the defendant, which could be defeated only by proof that the loss of the goods was not caused or did not result from the act or neglect of the railway itself. It is unnecessary, it seems to me, in view of the very thorough manner in which Crocket, J., has done so, and of my complete agreement with the conclusions at which he has arrived, to further discuss his reasons therefor, or the authorities upon which he relies. He has come to the conclusion upon the facts that the jury could not reasonably have found on the evidence that the loss of the goods was not caused by or did not result from the act of the New York Central R. Co. because they had not notified the plaintiff of the failure of Sullivan, Young & Russland to take delivery of the goods according to the uniform and generally recognised usage at New York in connection with a shipment of perishable freight to that city, and because after retaining them in their possession so many days after the expiration of the 48 hours free time without communicating with the plaintiff they placed them in a licensed warehouse without sending or giving any notice of intention to do so, which there was no justification for doing under the contract. The potatoes having subsequently become a total loss to the plaintiffs, he found they were entitled to damages on the basis of the value of the goods at the place and time of shipping, under Condition 4 of the bill of lading, including the freight and other charges paid and the duty if paid or payable and not refunded. The amount of damages awarded was admitted as the value. The Judge found that the defendants entirely failed to prove by a preponderance of evidence that the loss was not caused by the act, neglect or default of the New York Central R. Co., and did not satisfy the onus which was placed upon them, and to discharge

this onus it was not sufficient to shew that the same loss might have happened if the act of the New York Central in placing the goods in the warehouse without notice had not been done, but it was necessary to prove that it must inevitably have happened regardless of that railway's act or default, and there was no evidence upon which any such finding could reasonably have been made.

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I see no reason for disagreeing with the findings of fact or conclusions in law arrived at.

Hazen, C.J.

In my opinion the appeal should be dismissed with costs.

GRIMMER, J., concurs. *Appeal dismissed.*

Grimmer, J.

BONHAM v. BONHAM.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Hodgins, J.A., Riddell and Masten, JJ. December 20, 1920.

EVIDENCE (§ VI F—541)—ADMISSIBILITY—PROMISSORY NOTE—ORAL AGREEMENT BETWEEN MAKER AND PAYEE—UNCOMPLETED GIFT—CHANGE OF INTENTION—LIABILITY.

Two promissory notes were given by the defendant payable to his mother. After the mother's death her executor brought action to enforce payment of the notes. At the trial of the action the defendant sought to prove that the money for which the notes were given was a gift to him but admitted on cross-examination that it was a loan to him, and was to be repaid after his death if he died before his mother. The Court held, affirming the trial Judge, that evidence of the oral agreement was properly admitted at the trial, as shewing an intention on the part of the mother to make a gift to the son, but that it also established that the mother changed her mind before her death, and as the intention to give, although communicated to the son, did not continue until the death of the mother the son was liable for the amount due.

[*Strong* v. *Bird* (1874), L.R. 18 Eq. 315; *Re Goff* (1914), 111 L.T.R. 34; *Re Barnes* (1918), 42 O.L.R. 352, distinguished. See Annotations on Evidence, Oral Contracts, Effect of Admission in Pleading, 2 D.L.R 636; and Gift, Necessity for Delivery and Acceptance of Chattel, 1 D.L.R. 306.]

Statement.

Appeal by defendant from the judgment of Rose, J. (1920), 47 O.L.R. 535, in an action by an executor to recover the amount of certain promissory notes. Affirmed.

W. S. MacBrayne, for appellant.

H. Carpenter, for respondent.

The judgment of the Court was delivered by

Masten, J.

MASTEN, J.:—Appeal from the judgment of Rose, J., who tried the case without a jury.

The only argument advanced by Mr. MacBrayne was, that the evidence which was received subject to objection was admissible

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and shewed that the instruments in question, being two promissory notes, one for $800 and the other for $140, were not to become operative as notes unless the condition, namely, the death of the defendant in the lifetime of the testatrix, was fulfilled.

The notes in question were given for money advanced by the mother of the plaintiff and defendant to her son Lincoln, the defendant. The plaintiff is the executor of his mother.

I have perused the evidence in the light of the argument addressed to us by Mr. MacBrayne, and the conclusion at which I arrive coincides with that which was formed by the trial Judge, namely, that the bargain was not that the commencement of the obligation represented by the notes should be suspended, but rather that the notes imported a definite present obligation, which should be liable to be defeated if the event mentioned in the oral agreement happened. That finding of fact negatives the argument adduced on behalf of the appellant.

On the hearing of the appeal, another question has presented itself to me, namely, whether the circumstances here shewn brought the case within the principle established by *Strong* v. *Bird* (1874), L.R. 18 Eq. 315, and subsequently followed in the Courts of England in a number of cases which are to be found in Halsbury's Laws of England, vol. 14, p. 270; the principle being that where there is an uncompleted gift, and the donor appoints the debtor to be the executor of the will, the debt is extinguished in law, though in equity the executor is answerable for the amount of the debt as assets of the testator in favour of creditors and of all persons taking beneficially under the testator; and the further principle that the claim in equity may be rebutted by evidence of an intention on the part of the testator to forgive the debt, the same principle applying where the testator, during his lifetime, attempts to make a gift, which, being uncompleted, fails on technical considerations.

In the present case the trial Judge has found in favour of the defendant's account of what took place at the time when the money was advanced, namely, that the mother then said that she would not lend the money to him, but would give him the money provided he paid her interest on it as long as she lived, and has made the further finding that the notes were given to secure the payment of the interest, and to insure payment of the principal only in case

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the son predeceased the mother. On this issue it appears to me that the evidence which was admitted subject to objection was properly admissible, but it establishes that the intention to give did not continue throughout the lifetime of the testatrix—on the contrary, that she changed her mind and did away with the arrangement, as she was entitled to do. The essentials in such a case are: that the intention to give shall be plain and absolute—this has been found in the defendant's favour; that the intention to give must be communicated to the donee—that also was proved; but it must further be established that the intention to give continued until the death of the testatrix—and on this phase of the evidence the defendant fails.

I am therefore of opinion that the appeal should be dismissed with costs.

In addition to the case above mentioned, reference may be had to the case of *Re Goff* (1914), 111 L.T.R. 34, and to *Re Barnes* (1918), 42 O.L.R. 352. *Appeal dismissed.*

YEATES v. GILLEN.

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Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Chisholm, J. February 26, 1921.

LANDLORD AND TENANT (§ II E—37)—LEASE OF PREMISES—RESTRICTION ON OCCUPATION—SUBLEASE—CONSENT OF LANDLORD—VERBAL WAIVER OF RESTRICTION—RIGHT OF POSSESSION FOR BREACH OF CONDITION.

A verbal representation made by a landlord, that a forfeiture clause in a written lease of the premises will not be enforced, on which condition the lease is signed and the tenant moves into the premises, is a waiver of such clause, for breach of which the landlord cannot afterwards claim possession.

[*Yeomans* v. *Williams* (1865), L.R. 1 Eq. 184, followed.]

Statement.

APPEAL from the judgment of Wallace, Co. Ct. J., granting an order for a writ of possession in proceedings under the Overholding Tenants Act, R.S.N.S. 1900, ch. 174.

T. R. Robertson, K.C., for appellant; *D. V. White*, for respondent.

The judgment of the Court was delivered by

Chisholm, J.

CHISHOLM, J.:—This is an inquiry under the Overholding Tenants Act, R.S.N.S. 1900, ch. 174, to determine the respective claims of the parties in relation to the letting of a certain portion of the Commodore Apartments in the city of Halifax. The inquiry was first had before Wallace, Co. Ct. J., on January 20,

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1921, and after taking the evidence of witnesses and hearing counsel, Wallace, Co. Ct. J., decided in favour of the landlords, and directed a writ of possession to issue. The tenant, Miss Gillen, made application under sec. 6 of the Act and the matter came on for hearing before Harris, C.J., who referred it to the Court *in banco*.

By an indenture dated February 1, 1920, the landlords, through their agent, leased to Captain G. C. Milsom the basement on the first floor of the building known as the Commodore Apartments from February 1, 1920, to May 1, 1921, at a rental of $780 payable in monthly instalments of $65 each in advance. The lease contained a covenant, *inter alia*, that the premises should not be used to give instructions in music or singing.

In July, 1921, the lessee, Captain Milsom, desired to sublet the apartment, and in responce to an advertisement in the newspaper Miss Gillen called upon him and he brought her down to Minshull, the agent of the landlords. She told Minshull that she was a music teacher and intended to teach music in the flat. The evidence as to the conversation is as follows:—

G. C. Milsom: I went down and told Minshull that we had a tenant for the flat, and that she taught music. He said to bring her down. I told him she was a music teacher . . . I brought her down . . . In effect she said she was going to teach music in the flat. Mr. Minshull said if anybody complained to send them down to him, that he would fix it. After the conversation with him the lease was signed. I understood that he consented to her teaching music there . . . I understood she was to play as long as she did not play all day and all night.

A. H. Minshull testified: Captain Milsom was wanting to dispose of his lease and I asked him to find a tenant and he brought Miss Gillen down one day about the last of July. Miss Gillen informed me that she gave lessons in music. The impression that I got was that there were a few lessons in music and I said so far as I was personally concerned I had no objection, but if there were any objections by any of the tenants we would have to take notice of it. If I had expressly waived the clause I would have crossed it out. There were objections subsequently made by the other tenants and I ignored them for a time, hoping that things would die down . . . I can't remember the exact words of the conversation. The impression that I got was that I told her that she could carry on piano lessons, but if there were objections made by other tenants I would have to take notice or words something like that. I remember another interview when she and her sister came to see me. I can't remember what occurred at the second interview . . . I always had the impression that she was eking out a living by giving a few lessons.

Miss Gillen's evidence is as follows: Before I signed the document I asked Mr. Minshull if I would be allowed to teach piano playing. I told Mr.

Minshull that I was going to give piano lessons and he said that would be all right provided that I let up at a reasonable hour . . . He laughed at the idea of persons complaining. He said, if they bother you, come to me. I told him that I wanted a permanent place for the winter. I told him I made my living as a music teacher. After that I signed the original document. At the time I signed I was not aware that there was any clause prohibiting piano teaching. I moved my piano in and started teaching . . . I said I did not want to go in and be put out.

The Judge below has held that by reason of giving instruction in piano playing in the apartment, Miss Gillen committed a forfeiture, and he deals with the legal consequences of a forfeiture under the language of the particular lease. I do not understand that he rejects the evidence of Miss Gillen and Milsom respecting the conversations which led up to the completion of the assignment of the lease. It is clear beyond question that Miss Gillen informed Minshull that she intended to give music lessons. The latter speaks more of his impressions than of actual conversations, one of his impressions being that Miss Gillen (who assumed responsibility to pay in advance a monthly rental of sixty-five dollars) was eking out a living by giving a few lessons. It is hard to conceive how a music teacher could pay rent at the rate of $780 a year, and meet her other living expenses by giving a few music lessons. It was the natural thing for any person under the same circumstances to do as Miss Gillen says she did, namely, to ascertain in advance whether she was free to give her lessons and to secure assurance that she would not be disturbed in her possession of the premises for the currency of the written lease. I should find upon the evidence that Minshull agreed that Miss Gillen had permission to give piano lessons—up to a reasonable hour; and that by so agreeing he waived the forfeiture clause upon which the application to the Judge is founded. It was urged that the terms of the written lease could not be waived except in express terms and by another instrument executed by the parties. I think, however, the case of *Yeomans* v. *Williams* (1865), L.R. 1 Eq. 184, is authority supporting the oral waiver in the present case. The case decides that a voluntary declaration by a creditor that he intends to release his debtor from a debt, though not amounting to a release at law, may nevertheless be held in equity to be a representation which the creditor is bound to make good. The creditor in question was a mortgagee who represented to the mortgagor, his son-

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in-law, that he would not require payment of interest on the amount secured by the mortgage. The mortgage deed contained the usual covenants for the payment of the principal and interest. It was held to be a good discharge of payment of the interest.

Sir J. Romilly, M.R., said, at p. 186: "When one man induces another to enter upon a certain course of action upon the faith of certain representations held out to him, he shall be compelled to make such representations good."

Taking the view that the forfeiture clause as to teaching piano playing was waived and that there was no forfeiture, it becomes unnecessary to discuss the other points raised on the application. The order of Wallace, Co. Ct. J., and the writ of possession issued thereon will be set aside with costs both in this Court and before the Judge below.

Order and writ of possession set aside.

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CANADIAN GRAIN Co. v. MITTEN BROS.

Saskatchewan King's Bench, Taylor, J. January 18, 1921.

BROKERS (§ I—2)—STOCK BROKERS—SALE OF GRAIN—FUTURE DELIVERY—FAILURE TO DELIVER—PURCHASE BY BROKER TO COVER SHORTAGE—DAMAGES—LIABILITY OF SELLER.

Where there is at the time of entering into a contract with a broker for the sale of wheat for future delivery a *bonâ fide* intention to deliver the wheat at the time agreed upon the transaction is not illegal.

The seller must be deemed to have knowledge of the rules of the stock exchange governing the sale of such grain, and is liable in damages to his broker who has been compelled to buy other grain to cover the shortage caused by the seller's failure to deliver.

[*Maloof* v. *Bickell* (1919), 50 D.L.R. 590, 59 Can. S.C.R. 429, followed; *Smith Grain Co.* v. *Pound* (1917), 36 D.L.R. 615, 10 S.L.R. 368, distinguished.]

Statement.

ACTION to recover damages caused by defendant's failure to deliver certain wheat sold to the plaintiffs, which delivery was guaranteed by the plaintiffs and through which it was compelled to purchase other wheat under the rules of the Winnipeg Exchange, and for commission. Judgment for the plaintiff.

B. H. Squires, for plaintiffs; *Russell Hartney*, for defendants.

Taylor, J.

TAYLOR, J.:—The defendants Mitten Bros. are farmers residing in the Saskatoon district. The firm is composed of two brothers, William and Henry Mitten. They carry on business as implement agents, and also operate and live upon a large farm. In the summer of 1916 they had prospects of a good crop of wheat, and whilst

William Mitten was in Saskatoon he was advised by his brother, R. C. Mitten, who is not a member of the firm, that wheat was then selling at such a good price that it would be advisable to sell a portion of the crop, and accordingly William Mitten concluded that he had better make a sale of three carloads. He did not discuss the matter with his co-partner, but assuming authority he entered the office of the plaintiff company, told them what he wanted to do, and . . . asked them to sell 3,000 bushels of wheat for him. The plaintiff company then had a private telegraph wire between their office and that of their correspondents, the Norris Commission Co. Instructions were sent on this wire to the Norris Commission Co. to sell 3,000 bushels at the market price, and the advice was returned in a minute that 3,000 bushels had been sold at $1.23 for October delivery. A written contract was then drawn in the office of the plaintiff, purporting to evidence the agreement made between the plaintiff and the defendants, and the material paragraph is in these words:—

> The seller does hereby constitute and appoint the company and the company agrees to act, as the seller's agent to sell on the Winnipeg Grain Exchange and according to the rules and regulations thereof 3,000 bushels of wheat for delivery in the month of October and for the price of 1.23 cents per bushel . . .

The Norris Commission Co., on the same date, July 29, sent a letter confirming the sale to the plaintiff, and on the same date the plaintiff company mailed to the defendants a letter confirming the sale made on the defendants' behalf. The agreement of July 29 was signed by William Mitten only, and is under seal. He was given a copy of this. When he took it home he told his co-partner, Henry Mitten, and shewed him a copy of the contract. They had a few words over it. The co-partner objected to the transaction but made a statement to the effect that as William had signed the contract if the defendants had the wheat it would have to be shipped to the plaintiff company. A little later Henry Mitten was in Saskatoon and called at the office of the plaintiff company at its request. He was advised that they wanted his signature along with his brother, and he refused to sign. He was asked by the representative of the company if his brother William had authority to sign for the firm and he answered that they always backed one another up in anything they did; that he did not approve of this deal; but he did not, as I understand the evidence,

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say anything which would lead the plaintiff company to believe that he was repudiating the transaction and the signature of the agreement made on behalf of the firm and the firm's signature attached thereto. I think under the circumstances he must be held to have ratified it.

On October 20, 1916, the plaintiff, not having heard from the defendants, wrote asking for delivery. The defendants' crop had not turned out as expected, and they replied by letter of October 28, 1916 (this letter was signed by the defendant William Mitten), which would be received on October 30, advising that owing to crop failure the defendants would be unable to make delivery of the 3,000 bushels of grain. The plaintiff immediately purchased 3,000 bushels at $1.89¼. Its reason for so doing is that under the rules under which the grain is sold by it on the Winnipeg Exchange it is required to guarantee delivery and was responsible to the clearing house for any loss that might occur. The action is to recover from the defendants the damages thus sustained, $1,987.50, and an additional $7.50 for commission which it would have earned had the defendants carried out the contract.

Certain evidence taken on commission was put in, and it is contended that the effect of this evidence is to shew that there was no sale in fact made by the plaintiff of the grain in question to any person; that the plaintiff was appointed as agent to sell, and never having made a sale the defendants are not responsible to the plaintiff company for damages sustained by doing something which they were not authorised to do. It is not contended that the agreement between the plaintiff and the defendants was an illegal transaction, as was held by some members of the Court in *Beamish* v. *Richardson* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595, 23 Can. Cr. Cas. 394, but counsel admits that upon the facts there was a *bonâ fide* intention on the part of the defendants to deliver 3,000 bushels of grain in October at the agreed price of $1.23 per bushel. Delivery of course would be as the defendants would well understand to the plaintiff company.

This statement of fact, and the evidence adduced on the commission, would bring the case almost on all fours with *Smith Grain Co.* v. *Pound* (1917), 36 D.L.R. 615, 10 S.L.R. 368 (McKay, J.), and *Atlas Elevator Co.* v. *Averill*, a judgment of Brown, C.J.K.B., not reported, of February 19, 1920. On what appear to be similar

facts, Brown, C.J. K.B., and McKay, J., find that they cannot find anyone against whom the defendant or his brokers would have a right of action or an enforceable contract. The Chief Justice adds that in view of the decision in *Smith Grain Co.* v. *Pound*, 36 D.L.R. 615, 10 S.L.R. 368, to which I have referred, and *Canadian Grain Co.* v. *Nichol* (1920), 50 D.L.R. 431, 13 S.L.R. 30, he does not think he should be over industrious in finding grounds to distinguish the *Atlas Elevator Co.* v. *Averill* from *Beamish* v. *Richardson*, 16 D.L.R. 855, 49 Can. S.C.R. 595, 23 Can. Cr. Cas. 394.

In both *Atlas Elevator Co.* v. *Averill* and *Smith Grain Co.* v. *Pound, supra*, the decision is that the plaintiffs have no cause of action, and the actions were dismissed with costs. It is somewhat unfortunate for me that I cannot also follow the same course as that of the Chief Justice and leave it to an appellate Court to pass on the question of the liability. But I find that about the same time that the Chief Justice was considering *Atlas Elevator Co.* v. *Averill*, the Supreme Court of Canada in *Maloof* v. *Bickell & Co.* (1919), 50 D.L.R. 590, 59 Can. S.C.R. 429, had *Beamish* v. *Richardson*, and the effect of the same rules, regulations and customs of the Winnipeg Grain Exchange and the Winnipeg Clearing House Assn. again under consideration, and once the question of illegality is removed I am unable to distinguish the case of *Maloof* v. *Bickell & Co.* from the case under consideration. In that case the respondent company had on the appellant's instructions sold 50,000 bushels of May corn on the Chicago market. It was understood between the parties to be a margined transaction, and the appellant had $2,000 to his credit with the respondent company. When this was wiped out, under the rules of the market upon which they were operating, the appellant's sale was closed, and the action was brought by the appellant to recover this $2,000 and damages. The Appellate Division of the Supreme Court in Ontario had decided that the transactions between the parties were real purchases and sales under the authority of *Forget* v. *Ostigy*, [1895] A.C. 318, and similar cases. Duff, J., in 50 D.L.R., at 595, says:—

> The purchases authorised by the appellant's orders were to be purchases in the corn pit of the Chicago Board of Trade and in the usual course of business, that is to say, by agents in Chicago; with the consequence that in the absence of agreement to the contrary the agents would contract as prin-

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cipals and not as representatives; in other words, the purchases and sales would be purchases and sales enforceable only by the agent. (See *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802.)

There is this distinction between *Maloof* v. *Bickell & Co.*, 50 D.L.R. 590, 59 Can. S.C.R. 429, and *Smith Grain Co.* v. *Pound*, 36 D.L.R. 615, 10 S.L.R. 368, that in the former the customer well knew the customs of the Exchange with which he dealt and the rule as to margining the grain. In the latter the defendant was in the finding of the trial Judge ignorant of the rule, and that the effect of the transaction was that the customer had no one to look to to carry out the transaction other than the agent employed by him, and the decision was that a rule or rules bringing about such a result were unreasonable and not binding upon the defendant without notice.

I have before me nothing to shew upon what evidence McKay, J., drew that conclusion in *Smith Grain Co.* v. *Pound*. On the evidence in this case I am unable to draw a similar conclusion. The defendants admit that they have been running an implement business and farming in Saskatchewan for a number of years. It is common knowledge that the produce of this Province is shipped for use outside of the Province and mostly sold upon the Winnipeg market. There the representatives of the sellers and buyers meet in the Exchange. The enormity of the business transacted requires rules to be made to govern the actions of the members. It would seem to me impossible to create a state of affairs whereby the farmer in Saskatchewan having a certain quantity of grain to sell intimated to his agent here or in Winnipeg that he desired to sell, that another agent having a principal ready to buy intimates his willingness to buy, and that then a specific contract should be made whereby the farmer agreed to deliver to the purchaser the grain in question. In the first place, no vendor of grain would deal in that way. How would he know that the purchaser was solvent or likely to be able to accept delivery on the agreed date? It is necessary that a guarantee should be given some place, and it has been worked out by the agents accepting personal responsibility each to the other and to their customers, and intelligent farmers such as the Mitten Bros. appear to be, of long experience, must be taken to have a working knowledge of the way in which their grain from year to year is marketed and the price fixed.

Then in the actual transaction which took place in the plain-

tiff's office it is to be noted that the defendants did not ask, and apparently never expected to be advised as to who was the buyer, and the subsequent letter shews, and the conversation between the two partners shews that they understood that delivery was to be made to the plaintiff company. The inference I would draw from the evidence submitted to me would be that the defendants had a working knowledge of the customs of the Grain Exchange, and of the way in which grain would be marketed for future delivery, and that they knew that in making a sale it was made under rules whereby the agents look each to the other, saving the necessity of putting the vendor in direct privity with the buyer, and knew also that under the custom of the Exchange and its rules the plaintiff company would be accepting the responsibility of delivery and looking to the defendants for delivery.

Arriving at that conclusion this case falls rather under the decision of *Maloof* v. *Bickell & Co.*, 50 D.L.R. 590, 59 Can S.C.R. 429, than of *Smith Grain Co.* v. *Pound*, 36 D.L.R. 615, 10 S.L.R. 368. The other decision referred to by the Chief Justice, *Canadian Grain Co.* v. *Nichol*, 50 D.L.R. 431, 13 S.L.R. 30, has since been reversed in the Appeal Court on other grounds (1920), 53 D.L.R. 375. The Appeal Court held that a subsequent request to the agent made by the customer to advance for him the margins necessary to carry the grain and prevent the customer from being sold out distinguished the transaction from that in question in *Beamish* v. *Richardson*, and the plaintiffs were entitled to succeed on this subsequent agreement.

In the result I feel that had the Chief Justice before him the decision in *Maloof* v. *Bickell & Co.*, that he could not escape responsibility for expressing his own view by simply referring to and following the previous cases, and whilst the decision of the Chief Justice is later in date than the decision of the Supreme Court its report was apparently not before the Chief Justice, and I conclude, after reading the decision of the Supreme Court, were the facts as I have found them in this case before the Supreme Court of Canada their decision would on the *ratio decidendi* of *Maloof* v. *Bickell* be for the plaintiff, and under the circumstances I can see no useful purpose in discussing at any greater length the questions of law involved.

There will be judgment for the plaintiffs for $1,995 and costs.

Judgment accordingly.

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THE KING v. MAGEE.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. February 19, 1921.

INTOXICATING LIQUORS (§ III H—90)—NOVA SCOTIA TEMPERANCE ACT—DESTRUCTION OF LIQUOR—REASONABLE BELIEF OF INSPECTOR AS TO INTENTION TO SELL—SWORN INFORMATION—SUFFICIENCY OF—JURISDICTION OF MAGISTRATE.

Under the Nova Scotia Temperance Act, 8-9 Geo. V. 1918 (N.S.), ch. 8, sec. 59, in order to give the magistrate jurisdiction to order the destruction of liquor, the inspector making the seizure must give information under oath that at the time of seizure he reasonably believed that the liquor was intended for sale, and in the absence of such information the magistrate is without jurisdiction to order the destruction of the liquor. An information sworn some days after the seizure and setting out that he then "verily believes" the liquor was intended to be kept for sale is insufficient.

The Court may look at the evidence and decide if the inspector could have a reasonable belief under the circumstances of the case that the liquor was intended for sale.

[*The Queen* v. *Hughes* (1879), 4 Q.B.D. 614; *The King* v. *Clark* (1918), 34 Can. Cr. Cas. 130, 52 N.S.R. 406; *Hawes* v. *Hart* (1885), 18 N.S.R. 42; *The Queen* v. *Walsh* (1879), 29 N.S.R. 521, referred to; see also *The King* v. *Flavin* (1921), 56 D.L.R. 666.]

Statement. APPLICATION by *certiorari* to quash a conviction by a stipendiary magistrate whereby the defendant was convicted on the information of an inspector under Part I. of the Nova Scotia Temperance Act, 8-9 Geo. V. 1918 (N.S.), ch. 8, sec. 59, for keeping liquor for sale in said municipality in violation of the provisions of said Act. Conviction quashed.

T. R. Robertson, K.C., for defendant, in support of motion to quash.

No one *contra*.

Harris, J.C. HARRIS, C.J. (dissenting):—I regret that I am in the unfortunate position of being unable to agree with the majority of the Court in this case. The quashing of the conviction seems to me to involve two propositions which I am unable to accept.

First, I cannot agree that in every hearing under sec. 59, sub-sec. 6, of the Nova Scotia Temperance Act, 8-9 Geo. V. 1918 (N.S.), ch. 8, evidence must be produced to shew the state of mind of the inspector or officer at the time he made the seizure under sub-sec. 1, and

Second. Admitting that the information should have contained a statement that the inspector reasonably believed at the time he made the seizure that this liquor was to be sold or kept for sale, I cannot agree that this is not waived by the appearance of the owner and his entering upon the inquiry under sub-sec. 6 without objection of any kind.

In my opinion there was a waiver of any objection to the information by the appearance of the owner in person and by counsel and by entering upon the inquiry without any objection whatever to the proceedings.

I would dismiss the application.

RUSSELL, J., agrees with RITCHIE, E.J.

RITCHIE, E.J.:—In this case S. S. Strong, a stipendiary magistrate for the municipality of the county of Kings; made an order for the destruction of one gallon of rum, three bottles of brandy and nine bottles of whiskey, and the vessels containing the same. This liquor, as a matter of fact, was undoubtedly the property of Magee. The order has been removed into this Court by *certiorari* and a motion to quash is made.

The sections of the Nova Scotia Temperance Act which govern this case are as follows:—

59 (1). Where any inspector, constable or other peace officer finds liquor in transit or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place and reasonably believes that such liquor is to be sold or kept for sale in contravention of this Act, he may forthwith seize and remove the same.

By sub-sec. 3, where liquor has been seized under the section which I have quoted,

The person seizing the same shall give information under oath before a magistrate who shall thereupon issue his summons directed to the shipper, consignee or owner of the liquor if known, calling on him to appear at a time and place named in the summons and shew cause why such liquor shall not be destroyed.

Sub-sections 6 and 7 are as follows:—

6. At the time and place named in the summons any person who claims that the liquor is his property, and that the same is not intended to be sold or kept for sale in violation of the Act may appear and give evidence before the magistrate, and the magistrate shall receive such evidence and the evidence of the person who seized the liquor, and such other evidence as may be adduced, in the same manner as upon a complaint or information made under this Act.

7. If no person claims to be the owner of the liquor, or if the magistrate disallows such claim and finds that it was intended such liquor was to be sold or kept for sale in contravention of this Act, he may order that such liquor, and any vessels containing the same, shall be forfeited to His Majesty, and destroyed.

It should, I think, be borne in mind that the magistrate was not trying Magee for selling or keeping for sale; the inquiry was as to whether or not his property should be forfeited and destroyed under a statute.

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Ritchie, E.J.

The well known case of *The Queen* v. *Hughes* (1879), 4 Q.B.D. 614, establishes that when a person is before a Justice who has jurisdiction over the subject matter it is not essential to a valid trial that he should inquire how the defendant came before him, but he may proceed to try the case. This is because the information or warrant are merely means of bringing the accused before the Justice and have nothing to do with his jurisdiction to try the case. But *The Queen* v. *Hughes*, and the reasoning upon which it is based have no application to this case, because the statute under which the proceedings for forfeiture were had requires the reasonable belief of the officer and an information as a condition precedent to jurisdiction. The statute says "the person seizing the liquor shall give information under oath before the magistrate who shall thereupon issue his summons." There was an information but not an information setting forth the fact upon which the jurisdiction of the magistrate was wholly dependent, namely, that the inspector at the time of the seizure reasonably believed that the liquor was intended to be sold or kept for sale. The proceedings are statutory and the basis on which they rest is the reasonable belief of the inspector. It must exist, otherwise he cannot take the initial step of making the seizure; and it must be clearly made to appear to the Justice that it did exist because its existence is the fact upon which his jurisdiction depends. The information does not contain the jurisdictional fact, namely, the inspector's reasonable belief at the time of the seizure. It is sworn some days after the seizure and sets out that he then "verily believes" the liquor was intended to be kept for sale.

When the magistrate issued his summons he had no information as to the kind of belief which the statute requires and he was in my opinion without jurisdiction to issue the summons or otherwise proceed with the case. I do not know that it is at all necessary to rely on any question of strict construction, but this Court has held that this legislation must be strictly construed: see *The King* v. *Clark* (1918), 34 Can. Cr. Cas. 130, 52 N.S.R. 406.

There is another point which I think is fatal to the validity of the order in question and that is, had the inspector as a matter of fact the reasonable belief which the statute requires? This Court can look at the evidence and decide this question of fact because it is a question collateral to the merits and is the question

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upon which the jurisdiction of the magistrate depended. For this proposition authority will be found in two cases in this Court: *Hawes* v. *Hart* (1885), 18 N.S.R. 42; *The Queen* v. *Walsh* (1897), 29 N.S.R. 521. Whatever kind of belief the inspector had, I have no hesitation in reaching the conclusion of fact that his belief was not reasonable. He has never sworn that it was reasonable. All the facts and circumstances in evidence convince me that there was no reason for believing that the liquor was intended to be dealt with in violation of the Act. Magee is a farmer who has lived for 47 years at Port Williams. He has, like some other respectable people, had liquor in his house for the last 30 years for his own use. The quantity he was importing certainly is not large, particularly in view of the fact that the day was fast approaching when he could not lawfully import liquor. He has never been accused of selling liquor or any other infraction of the liquor laws. The importing of the liquor was perfectly legal and was done openly. I cannot discover any ground for reasonable suspicion. Magee was simply doing what very many highly respectable people all over Nova Scotia were doing, namely, laying in a stock against what they regarded as the evil day when it would become illegal to import.

In my opinion the order for the forfeiture and destruction of the liquor should be quashed as having been made without jurisdiction. No counsel appeared in support of the order; costs therefore cannot be given. I regret the inability to give costs because there is no justification for the decision which the stipendiary magistrate made on the facts; he not only made his order for destruction and forfeiture without any evidence, but he did so in the teeth of uncontradicted evidence and the inherent probabilities of the case.

Chisholm, J.

CHISHOLM, J., agreed with Mellish, J.

Mellish, J.

MELLISH, J.:—Section 59 (1) of the Nova Scotia Temperance Act, 8-9 Geo. V. 1918 (N.S.), ch. 8, provides that:—

> When any inspector, constable or peace officer, finds liquor, in transit or in course of delivery, upon the premises of a carrier, or at any wharf, warehouse or other place, and reasonably believes that such liquor is to be sold or kept for sale in contravention of this Act, he may forthwith seize and remove same.

Sub-section 3 further provides that when liquor has been so seized the person seizing the same

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shall give information under oath before a magistrate, who shall thereupon issue his summons, directed to the shipper, consignee, or owner of the liquor if known, calling upon him to appear at a time and place named in the summons, and shew cause why such liquor should not be destroyed or otherwise dealt with as provided by the Act.

Sub-section 6 provides that any person who claims to own the liquor and that the same was not intended to be sold or kept for sale may appear on the hearing and give evidence.

Sub-section 7 provides that in default of such claim, or if the claim is disallowed and the magistrate finds that the liquor was intended to be sold or kept for sale, he may order its forfeiture and destruction.

It will thus be seen that in case of default of appearance, which might well happen when the owner could not be found, the magistrate may order the forfeiture and destruction of liquor upon the mere information of the party seizing the same that he reasonably believes it was to be sold or kept for sale in contravention of the Act.

In the present case the inspector under the Act for the county of Kings seized certain liquor in course of transit at Port Williams Station, N.S., addressed to the defendant.

Whether he reasonably believed it was to be sold or kept for sale in violation of the Act nowhere appears. But he laid an information before the convicting magistrate stating that he verily believed the liquor was intended to be kept for sale. Upon this information the magistrate issued his summons and the defendant appeared and swore that the liquor was not intended to be kept for sale or sold in violation of the Act.

The inspector swore that when he seized it he "believed" it was intended to be kept for sale, but gave no evidence that it was in fact so intended. Nevertheless the magistrate ordered the destruction of the liquor. The conviction has been removed by an order for *certiorari* and comes before us on a motion to quash it.

In view of the reversal of the ordinary rules of law and procedure which we confess to have regarded with some pride, viz., that an accused person is not called upon to prove his innocence and that he cannot be convicted by opinion or hearsay evidence, in view, I say, of the reversal of these rules which is apparently contemplated by the Act, we must, I think, hold that no magistrate can put himself in a position to exercise such a revolutionary

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procedure without the strictest compliance with the provisions of the statute empowering him to do so. In my opinion the information herein was defective in not at least disclosing a reasonable belief of the inspector which would alone justify a seizure and that the summons therefore was unauthorised and the subsequent conviction void. No one appeared to support the conviction before us, which is not to be wondered at, because it is difficult to come to any other conclusion on the evidence than that an injustice has been done the defendant whether the magistrate had jurisdiction or not.

The question nevertheless was suggested whether the defendant having appeared, apparently without objection to the jurisdiction, the want of an information can be set up.

If the magistrate were acting in the exercise of his ordinary criminal jurisdiction this question would, I think, have to be answered in the negative. An information or summons is no doubt often unnecessary as where a person is charged with an offence when he is in the presence of a magistrate over which the magistrate has jurisdiction. But no magistrate has general jurisdiction to call upon people to prove their innocence or in default suffer the loss of their property. The exercise of such a power is not, I think, the function of a magistrate or a Justice of the Peace as such. The jurisdiction is, I think, wholly the creation of the statute, and involves something more than mere procedure in a matter where general jurisdiction must be conceded. There is a statutory prerequisite to the jurisdiction which cannot be conferred by implied consent or acquiescence, nor I think in any other way than that provided by the statute. *Farquharson* v. *Morgan*, [1894] 1 Q.B. 552, at pp. 556, 560; *Alderson* v. *Palliser*, [1901] 2 K.B. 833, at pp. 836, 838; *Hamp-Adams* v. *Hall* (1911), 2 K.B. 942. *Conviction quashed.*

REX v. McGONEGAL.

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Ontario Supreme Court, Middleton, J. December 24, 1920.

INTOXICATING LIQUORS (§ III A—55)—IN TRANSIT FROM ONE LEGAL PLACE TO ANOTHER—NECESSITY OF HAVING VESSEL SEALED—ONTARIO TEMPERANCE ACT, SEC. 43.

All that is required by sec. 43 of the Ontario Temperance Act, 6 Geo. V. 1916 (Ont.), ch. 50, is that during the time that liquor is being transferred from a place outside the Province to a place where it may lawfully be within the Province, the vessel or package containing the liquor shall not be opened nor shall the liquor be drunk or used. There is no provision requiring the vessel or package to be sealed.

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REX v. MC GONEGAL.

MOTION to quash a conviction of the defendant, by the Police Magistrate for the Town of North Bay, for having intoxicating liquor in his (the defendant's) possession in a public place, not sealed. The defendant was sentenced to pay a fine of $200, and in default of payment to be imprisoned for three months. Conviction quashed.

J. W. Curry, K.C., for defendant.

F. P. Brennan, for magistrate.

Middleton, J.

MIDDLETON, J.:—The evidence shews that the accused received liquor for the purpose of carrying the same from Hull, Quebec, where it had been given to him, to his home. The bottles were not sealed, but were not opened during the transit nor until after the accused reached his home. Before he reached his destination, he was accosted by a policeman, who, on searching his grip, found the bottles, and assumed that, because the bottles were not sealed, an offence against the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, had been committed. Upon the hearing, the magistrate took the view presented by the prosecution, and accordingly convicted.

It is admitted that under sec. 43 of the Act the accused had the right to carry the liquor in question from a place outside of Ontario to a place where the same might lawfully be within Ontario, his private residence; but it is contended that the concluding clause of this section requires the package to be sealed. I do not agree with this. The words in question are: "but no person during the time such liquor is being carried or conveyed as aforesaid shall open or break or allow to be open or broken any package or vessel containing the same, or drink or use or allow to be drunk or used any liquor therefrom."

All that this requires is that, during the transit, the vessel or package containing the liquor shall not be opened or broken nor shall the liquor be drunk or used. It is not required that the packages shall be sealed nor that they shall be the original and unopened bottles. In this case, there is no evidence whatever suggesting that the defendant's story should not be accredited in its entirety. The magistrate has in fact stated this, for the conviction is for having the liquor "not sealed."

The conviction, for these reasons, should be quashed. There will be no costs, and the usual order for protection will be made.

Conviction quashed.

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New Brunswick Supreme Court, White, Crocket and Grimmer, JJ.
February 18, 1921.

1. CONSTITUTIONAL LAW (§ II B—208)—PROVINCIAL RAILWAY—EXCLUSIVE POWER OF PROVINCIAL LEGISLATURE—TRANSFER TO DOMINION CONTROL—SEC. 92 (10c) B.N.A. ACT—EXPRESS DECLARATION—ADVANTAGE OF CANADA.

In order to bring a local railway, situate wholly within the Province, and in relation to which the Provincial Legislature possesses exclusive legislative power, within exception (c) of enumeration 10 of sec. 92 of the B.N.A. Act, and thereby to transfer to the Parliament of Canada the legislative jurisdiction in relation to it, there must be a declaration distinctly made in express words, by the Parliament of Canada, that the railway is for the general advantage of Canada, or for the advantage of two or more Provinces.

[*Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566, referred to.]

2. COMPANIES (§ VI C—330)—TERMINATION OF RAILWAY COMPANY—RECONSTITUTION—VALIDITY OF PROVINCIAL ENACTMENT.

A provincial enactment, the practical effect of which is to terminate a provincial railway company as it existed and was constituted at the time of the passage of the Act, and to place the reconstituted company under the direct and absolute control of the Lieutenant-Governor-in Council in accordance with the Act, does not in its terms purport to wind up the company on the ground of its insolvency, and so is not *ultra vires* as trenching upon the Federal field in relation to bankruptcy and insolvency.

[*Att'y-Gen'l of Ontario* v. *Att'y-Gen'l for Canada*, [1894] A.C. 189, referred to.]

3. COMPANIES (§ I E—193)—PROVINCIAL RAILWAY—SHARES OF CAPITAL STOCK—POWER OF PROVINCIAL LEGISLATURE TO LEGISLATE—SEC. 92 (13) B.N.A. ACT.

The shares of the capital stock of a provincial railway company must be considered as being situate within the Province, where and where only they can be liquidated and are property in the Province in relation to which the Provincial Legislature has power to legislate under sec. 92 (13) of the B.N.A. Act.

[Review of legislation and authorities. See Annotation, Franchises, Federal and Provincial Rights to Issue, 18 D.L.R. 364.]

Statement.

APPEAL by plaintiff from judgment of Hazen, C.J., to set aside or vary his order. Affirmed.

J.J.F. Winslow, supports appeal.

P.J. Hughes and W.P. Jones, K.C., *contra.*

The judgment of the Court was delivered by

Crocket, J.

CROCKET, J.:—The decision of this appeal turns entirely on the validity of the provincial legislation by virtue of which the respondents are acting as the board of directors of the appellant railway company by appointment of the Lieutenant-Governor-in-Council.

By sec. 4 of the Act respecting the St. John and Quebec R.W. Co., 5 Geo. V., 1915 (N.B.), ch. 9, the Legislature purported to

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authorise the Lieutenant-Governor-in-Council, in the event of the railway company failing to make satisfactory arrangements for the completion of the railway it had contracted to construct, by order published in the *Royal Gazette* to vest all the shares of the capital stock of the company issued prior to the date of the publication of the said order in His Majesty on behalf of the Province free from all liens, pledges, charges or other encumbrances except the lien in favor of the Prudential Trust Co., Ltd., as then existing, in respect to 19,749 shares with power to transfer them to such persons as might from time to time be designated by the Lieutenant-Governor-in-Council to be held by them in trust for the Province. It provided that upon the publication of such order in the *Royal Gazette* the directors and officers of the company should *ipso facto* be disseized of their respective offices and that the Lieutenant-Governor-in-Council should in such order appoint such directors and officers of the company as he might deem advisable and that the directors and officers so appointed should hold office until the general meeting of the shareholders to be called in the manner therein provided should have been duly held. It further provided that such directors and officers need not be shareholders and that upon the publication of such order they should forthwith be vested with all the powers conferred upon the directors and officers by the Act incorporating the company and by its by-laws and regulations. The Lieutenant-Governor-in-Council having by Order in Council of August 4, 1915, exercised the powers conferred or sought to be conferred by this section, and appointed 5 new directors in place of those, who were declared to be disseized of their offices, the Legislature by sec. 11 of the Act, 6 Geo. V., 1916 (N.B.), ch. 3, provided that 4 of the persons who had been appointed by that Order in Council and one other who had not been so appointed, should be the directors of the company and continue in office until they should be replaced in part or in whole by persons appointed by the Lieutenant-Governor-in-Council with power to transact all the business of the company and to do all the acts which might be done with the authority or by the direction of the shareholders, and that until the Lieutenant-Governor-in-Council should otherwise order it should not be necessary to hold any meeting of shareholders for any purpose whatever. The directors mentioned in this section having re-

signed, the respondents and two members of the Executive Council were appointed directors by the Lieutenant-Governor-in-Council by an Order in Council, dated May 9, 1917, and by a subsequent order of July 11 of the same year the two members of the Executive Council were retired and the three respondents declared to be the board of directors, the Legislature in the meantime, by sec. 6 of the Act, 8 Geo. V., 1918 (N.B.), ch. 9, having purported to grant the necessary authority in that behalf.

It is evident that the removal of the former directors and the appointment of others in their stead by the Lieutenant-Governor-in-Council was conditioned by sec. 4 of the Act 5 Geo. V., 1915 (N.B.), ch. 9, upon the vesting in His Majesty in behalf of the Province of all the shares of the capital stock of the company issued prior to the date of the publication of the Order in Council of August 4, 1915, and that sec. 11 of the Act, 6 Geo. V., 1916 (N.B.), ch. 3 and sec. 6 of the Act, 8 Geo. V., 1918, (N.B.), ch. 9, are founded on the status of the company as effected by that Order in Council. The practical effect of that Order in Council and the subsequent legislation and Orders in Council has been to merge the corporation in the Lieutenant-Governor-in-Council. If the legislation is valid the company has to-day no existence apart from the Lieutenant-Governor-in-Council, who is empowered to transfer all the shares of the capital stock, which were vested in His Majesty on the publication of the Order in Council of August 4, 1915, "to such persons as might from time to time be designated by the Lieutenant-Governor-in-Council, to be held by them in trust for the Province," and by whom its directors and officers may be appointed and replaced and without whose order there may be no meeting of the shareholders for any purpose whatever.

There can be no doubt that what was sought by the legislation and what has taken place thereunder was and has been the confiscation of the entire corporation with all its assets and franchises. It is not contended that this fact of itself makes the legislation invalid because in relation to all matters coming within the classes of subjects, upon which the B.N.A. Act has by sec. 92 empowered it to legislate the Provincial Legislature's jurisdiction is quite as plenary as the legislative power of the Imperial Parliament itself. It may confiscate if it sees fit to do so, but it must take care that such enactments are confined to matters falling within the purview

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of its legislative powers as enumerated in sec. 92 of the B.N.A. Act.

The decisive question on this appeal, therefore, is this: Is the impugned legislation confined to such matters, or does it go beyond them and trench upon any of the matters coming within the classes of subjects the exclusive legislative jurisdiction in relation to which is vested by sec. 91 of the B.N.A. Act in the Parliament of Canada?

The power of the Provincial Legislature to incorporate the company, as it did by 10 Edw. VII., 1910 (N.B.), ch. 52, is not questioned. The company, as incorporated by that Act, was clearly a company with provincial objects within enumeration 11 of sec. 92 of the B.N.A. Act, as interpretated by the Judicial Committee of the Privy Council in *Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, at p. 284, [1916] 1 A.C. 566, at 583, no powers or rights having been bestowed which were not exercisable within the Province. Neither can it be doubted that the railway which the company was empowered by its Act of incorporation to construct, operate, sell, lease, etc., as in the Act described, is a railway wholly situate within the Province and was a local work within enumeration 10, not falling within either exception (a) or exception (c) of that enumeration.

The appellant contends, however, that, though the company was competently incorporated by the Provincial Legislature and empowered to build, operate, sell, lease, etc., a provincial railway, the Province has been divested of legislative jurisdiction over it for the reason that the railway has in fact become a work for the general advantage of Canada and has been impliedly so declared by Parliament within the meaning of exception (c) of enumeration 10 above referred to.

The principal grounds relied upon in support of this contention are: that the company entered into a contract in December, 1911, with the Government of New Brunswick for the construction of the railway in the terms prescribed by the Act of Assembly, 10 Edw. VII., 1910 (N.B.), ch. 6, which required it to enter into an agreement with the Government of Canada and the Government of New Brunswick for the leasing of the line of railway to the Government of Canada for operation, equipment, upkeep and repair by the Government of Canada as part of the Government Railway System of Canada for a period of 99 years upon terms of

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the Government of Canada paying 40% of the gross earnings annually as rental to either the Provincial Government or to the company; that in March, 1912, in pursuance of that contract and the provisions of the Dominion statute, 1-2 Geo. V., 1911 (Can.), ch. 11, the Government of Canada entered into a contract with the Government of New Brunswick and the company to lease the railway for operation as part of the Government Railway System of Canada with the proviso that the railway should be built upon plans and specifications to be approved by the Governor-in-Council and up to the general standard of the National Transcontinental Railway in New Brunswick; that Parliament subsequently passed an Act, 2 Geo. V., 1912 (Can.), ch. 49, confirming the said contract and authorising His Majesty on behalf of the Dominion of Canada to aid in the construction of three bridges which it was proposed to construct as part of the said line of railway by guaranteeing the principal of the bonds of a bridge company, which the appellant company undertook to have chartered by either the Provincial Legislature or the Parliament of Canada, to an amount not exceeding $1,000,000; that the Government of Canada on or about January 1, 1915, leased a completed section of the railway from Fredericton to Centreville for operation, equipment, maintenance, upkeep and repair as part of the Government Railway System of Canada under the provisions of the said Dominion statute, 1-2 Geo. V., 1911, ch. 11; that Parliament by the Act, 6-7 Geo. V., 1916 (Can.), ch. 23, which repealed the Act, 2 Geo. V., 1912, ch. 49, and authorised the Governor-in-Council to enter into a new agreement with the company and the Government of New Brunswick by the terms of which the route of the railway was to be changed between Gagetown and St. John, and the line of railway as constructed by the changed route leased on completion by the Government of Canada for operation, equipment, maintenance, upkeep and repair for a period of 99 years on the same rental as provided by the former agreement, provided that the Government Railways Act should extend to any line or lines of railway leased or operated by the Government of Canada under the provisions of the said agreement; and that sec. 55 of the Government Railways Act, R.S.C. 1906, ch. 36, provides that all Government railways are and shall be public works of Canada.

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The Act, 6-7 Geo. V., 1916 (Can.), ch. 23, upon which the appellant strongly relies as having brought the railway within the exclusive legislative jurisdiction of the Parliament of Canada by making it subject to the Government Railways Act and under the terms of the Government Railways Act, a public work of Canada, was passed after the passage of the Act of Assembly, 5 Geo. V., 1915 (N.B.), ch. 9, in pursuance of the provisions of which the alleged *de jure* directors, who initiated the action out of which this appeal arose, were declared to be disseized of their offices and all the shares of the capital stock of the company theretofore issued vested in His Majesty. It cannot, therefore, enter into consideration of the question of the validity of that Act of Assembly.

The other facts relied upon afford no doubt strong evidence that the railway had in fact become a work for the general advantage of Canada and been so treated by the Government and Parliament of Canada, but this is not of itself enough to remove it from the legislative jurisdiction of the Province. In order to bring a local work wholly situate within the Province, in relation to which the Provincial Legislature possesses the exclusive legislative power, within exception (c) of enumeration 10 of sec. 92 of the B.N.A. Act, and thereby to transfer to the Parliament of Canada the legislative jurisdiction in relation to it, there must be a declaration by the Parliament of Canada that the work is for the general advantage of Canada or for the advantage of two or more of the Provinces. As to whether it must be an express enacting declaration or one which may be inferred from the terms of legislation passed by Parliament is a question upon which there has been a conflict of judicial dicta. The point, however, has never been considered, so far as I can discover, as essential to the decision of a case. Seeing that the declaration indicated by that exception to enumeration 10 is one which the Act manifestly requires as a condition precedent to the transference of exclusive legislative jurisdiction in relation to a local work or undertaking from the Legislature of the Province in which the work is wholly situated to the Parliament of Canada, I cannot think that anything short of a clear and express statutory declaration was intended or is sufficient for such a purpose. I agree therefore with the view of Hazen, C.J., that the declaration must be distinctly made in

express words and that, no such declaration having been made, the railway has not been brought within exception (c) of enumeration 10 of sec. 92.

There may be doubt as to whether, if such declaration has been made and the railway as a local work and undertaking had thereby been transferred to the legislative jurisdiction of the Dominion Parliament as a work declared to be for the general advantage of Canada, the Provincial Legislature would thereby have been divested of the right to further legislate in relation to the corporate existence and constitution of the company, but there can be no doubt that the facts relied upon by the appellant in connection with the contract with the Provincial and Dominion Governments and the leasing of the railway to the Dominion Government as part of the Government Railway System of Canada have neither altered the character of the railway as a local work in the sense of its being wholly situate within the Province nor the character of the company as a company "with provincial objects" in the sense in which the quoted words have been construed by the Judicial Committee of the Privy Council in *Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566. Although the construction of the railway under the terms and conditions of the contract with the Provincial and Dominion Governments necessitated the enactment of legislation by the Parliament of Canada for the purpose of authorising His Majesty in behalf of the Dominion of Canada to enter into such a contract and to lease the railway from the company, there has been nothing, so far as the company is concerned, which required the exercise upon its part of any powers or rights "in respect to objects outside the Province." Its objects remained precisely as before, within the Province, and were attainable by the exercise of its corporate powers and rights within the Province. I have therefore concluded that the Legislature was not divested of legislative jurisdiction in relation to the corporate existence or constitution of the company either by the railway having been declared a work for the general advantage of Canada within the meaning of exception (c) of enumeration 10 or by the company itself having ceased to be a company with provincial objects within the meaning of enumeration 11 of sec. 92 of the B.N.A. Act.

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Neither am I able to agree with the appellant's contention that the impugned legislation is *ultra vires* as trenching upon the Federal field in relation to bankruptcy and insolvency under enumeration 21 of sec. 91. The legislation is directed primarily to the organisation and constitution of the company and undoubtedly falls under enumeration 11 of sec. 92. While it may be said that its practical effect has been to terminate the company as it existed and was constituted at the time of the passage of the Act, 5 Geo. V., 1915 (N.B.), ch. 9, and to place the re-constituted company under the direct and absolute control of the Lieutenant-Governor-in-Council, and in that way and to that extent to confiscate the company and its assets, it does not in its terms purport to wind up the company upon the ground of its insolvency, nor indeed to wind it up at all. On the contrary, it purports to continue it, though under the direct control of the Lieutenant-Governor-in-Council, and to enable it, under that control, to carry on and complete its undertaking. Neither does it provide in any manner for a ratable distribution of the company's assets among its creditors in discharge of their debts, which distribution, as pointed out by the Privy Council in *Att'y-Gen'l of Ontario* v. *Att'y-Gen'l for Canada*, [1894] A.C. 189, is a feature common to all systems of bankruptcy and insolvency.

It is true that sec. 12 of the same Act, 5 Geo. V., 1915 (N.B.), ch. 9, provides for the retention by or deposit with the provincial secretary-treasurer from the moneys obtained from the sale of bonds authorised to be guaranteed under the Act, 4 Geo. V., 1914 (N.B.), ch. 10, and under the Act in question and out of the amounts which would otherwise be paid to the company an amount sufficient to cover or provide payment for all outstanding indebtedness of the company then due or to become due to contractors other than the Quebec and St. John Construction Co., a company incorporated by Dominion Letters Patent, and at that time in process of liquidation under the (Dominion) Winding-Up Act, R.S.C., 1906, ch. 144, and to all other creditors having claims in connection with the actual construction of the railway, and for the payment by the provincial secretary-treasurer of all such claims as should be filed with him and either agreed upon between the company and the claimant at an amount which the Lieutenant-Governor-in-Council should deem reasonable, or should have

been ascertained by the judgment of a Court of law, or fixed by the award of arbitrators as therein provided. The payment of such claims in such a way by the Provincial Government out of moneys obtained by the sale of bonds guaranteed by it with the object of helping the company out of the difficulties with which it was confronted by reason of its having been unable to issue and the Province unable to guarantee the additional bonds authorised by the Legislature by the Act, 4 Geo. V. 1914 (N.B.), ch. 10, "owing," as one of the preambles of the Act sets forth, "to the financial conditions which existed in the month of August, 1914," cannot, I think, be regarded in any view as a distribution of the company's assets on the footing of insolvency or bankruptcy. See the judgment of the Judicial Committee of the Privy Council in *L'Union St. Jacques de Montreal* v. *Bélisle* (1874), L.R. 6 P.C. 31, where it was said that the fact that the company there involved appeared upon the face of the Provincial Act to have been in a state of embarrassment and in such a financial position, that, unless relieved by legislation, it might have been likely to come to ruin, did not prove that it was in any legal sense within the category of insolvency,

Nor do I think that sec. 5 of the Act, 5 Geo. V., 1915 (N.B.), ch. 9, which cancels and annuls the company's construction contract with the Quebec and St. John Construction Co. Ltd., and provides that the default of that corporation to carry out its contract with the company for the construction of the railway should constitute a complete bar to all claims which the construction company, its representatives, liquidators or assigns, might have against the railway company, can be regarded as bankruptcy or insolvency legislation insofar as it purports to affect the railway company, whatever may be said of it as affecting the construction company, which, as I have already stated, was a Federal corporation then in process of being wound up under the (Dominion) Winding-Up Act, R.S.C. 1906, ch. 144, and was thereby debarred, if the enactment was valid, from the right to sue and recover anything from the railway company upon the ground of its own default. The section contemplates no distribution whatever of the assets of the railway company.

In any event, it is not sec. 5 or sec. 12 of the Act, 5 Geo. V., 1915 (N.B.), ch. 9, which is involved in this appeal, but sec. 4, in

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pursuance of which and in pursuance of which alone those who directed this action were ousted from their offices as directors of the company without reference to the provisions of secs. 5 or 12. The latter sections applied to the company as it existed and was constituted at that time and in no way affect the only question involved in this appeal, which is whether or not this action, in the name of the St. John and Quebec Railway Co., to restrain the respondents from acting as the board of directors of the company, was properly brought on the authority of the gentlemen who were the directors of the company at the time of the passage of that Act, and who were declared by the Order in Council of August 4, 1915, to be disseized of their offices in pursuance of the provisions of sec. 4. That section in no manner affects or purports to deal with the matter of bankruptcy or insolvency, but solely with the shares of the shareholders and the reorganisation and management of the company. For these reasons I am of opinion that the impugned legislation in no way trenches upon the exclusive legislative jurisdiction of the Parliament of Canada under enumeration 21 of sec. 92 of the B.N.A. Act.

It is also contended that the legislation is *ultra vires* on the ground that it sought to affect and to destroy civil rights, outside the Province. The judgment of the Judicial Committee of the Privy Council in the *Royal Bank of Canada* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, was mainly relied upon in support of this contention. That a Provincial Legislature cannot validly legislate in derogation of civil rights outside the Province, even though the civil rights sought to be affected have been created by or have arisen out of contracts authorised by a previous Act validly enacted by the same Legislature may, I think, be correctly said to be established by that judgment. The statute there in question was a statute of the Legislature of Alberta respecting the Alberta and Great Waterways Railway. It provided that the proceeds of a mortgage bond issue by the Alberta and Great Waterways R. Co., which had been guaranteed by the Province for the construction of a railway wholly within the Province, should form part of the general revenue of the Province. There was no doubt that it related to a local work and undertaking within the meaning of enumeration 10 of sec. 92 of the B.N.A. Act. Neither was there any doubt that the moneys which it sought to appropriate were

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the proceeds of the sale of a bond issue which was authorised by a previous statute of the same Legislature in relation to the same subject matter, viz., the construction of a provincial railway, or that the right of the bondholders to claim their money from the head office of the appellant bank in Montreal and the obligation of the bank to return their money to the bondholders arose out of contracts which were entered into in accordance with the provisions of the previous statute. Yet the Judicial Committee held that the right of the bondholders to claim from the bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist was a civil right outside the Province, in derogation of which the Legislature of the Province could not validly legislate and that the statute was beyond the powers of the Legislature because what was sought to be enacted was neither confined to property and civil rights within the Province nor directed solely to matters of merely local or private nature within it. I take it, therefore, that the *dictum* of Osler, J., in *Jones* v. *The Canada Central R.* (1881), 46 U.C.R. 250, relied upon by the respondents, that where debts and other obligations arise out of or are authorised to be contracted under a local Act which is passed in relation to a matter within the powers of the local Legislature, such debts and obligations may be dealt with or affected by subsequent Acts of the same Legislature in relation to the same matter without regard to whether such debts or obligations are domiciled within or without the Province, cannot now be supported, and that the effect of the decision in the Alberta case is that a Provincial Legislature cannot legislate validly in derogation of civil rights outside the Province, notwithstanding that such civil rights have been created by or have arisen out of legislation previously and validly enacted by such Legislature concerning a subject matter in relation to which sec. 92 of the B.N.A. Act has empowered it to legislate.

The essential question therefore arises as to whether sec. 4 of the Act of Assembly, 5 Geo. V., 1915, ch. 9, did or did not purport to derogate from civil rights outside the Province.

It is contended that it did for two reasons, as I understand the argument, first, that the Prudential Trust Co., Ltd., a Dominion corporation having its head office at Montreal in the Province of

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Quebec, as trustee under the trust mortgage by which the guaranteed bonds were secured, held a large amount of the money obtained from the sale of the bonds in its hands at Montreal, in respect to which money the shareholders, whose shares were sought to be appropriated, as well as the bondholders, possessed civil rights, and, *second*, that all the shareholders, whose shares were sought to be appropriated, were non-residents of and domiciled without the Province.

As to the bondholders I cannot see how the legislation, if otherwise valid, could in any manner alter or affect their rights with respect to the trust fund at Montreal. If it preserved the existence of the railway corporation, as it surely purported to do, though under different control, the bondholders' rights with respect to that fund would be no more affected than they would have been, had the original or then existing shareholders voluntarily transferred their shares and the control of the company to others. If the legislation had purported to dissolve the corporation it might then have well been claimed that such legislation would render abortive the scheme upon the faith of which the bondholders had advanced their money and that their rights as well as the obligations of the Prudential Trust Co. with respect to the fund at Montreal would thereby be affected. The legislation in question, however, did not purport to dissolve the company nor to affect in any manner the rights or obligations either of the Prudential Trust Co., or of the bondholders, and is not impugned by either the bondholders or the trust company.

It is otherwise with the shareholders. As regards them the legislation unquestionably sought to confiscate all their rights and would be valid only if and insofar as it was confined to property and civil rights within the Province.

As regards the shares which sec. 4 of the Act, 5 Geo. V., 1915 (N.B.), ch. 9, sought to vest in His Majesty in behalf of the Province the first question is the question of their locality, whether they were situate within or without the Province.

It is not disputed that all the holders of all the shares of the capital stock of the company issued prior to the publication of the Order in Council of August 4, 1915, were non-residents of and domiciled without the Province, or that the certificates representing these shares were held outside the Province. The head office

of the company was, as provided by its Act of incorporation, at St. John within the Province and there was no other office at which shares could be registered.

There is no question that the domicile of the company was in New Brunswick—whether within the Province at large as the Province in which it was incorporated, or at St. John as the place where its head office was situate, makes no difference for the purpose of this case. The point is as to the legal situs of the shares.

It is obvious from the facts just stated that unless either the domiciles of the registered shareholders under the rule *mobilia sequuntur personam* or the possession of the share certificates fixed the situs of the shares they must be considered as having been situate within the Province.

After as exhaustive an examination as I have been able to make of the English cases dealing with the question of the situs of intangible effects I have found no instance outside of succession and legacy duties cases where the rule referred to has been applied and the situs of a share in capital stock of a corporation or of any other intangible effect has been held to be determined by the domicile of the holder. For the purpose of succession and legacy duties it may be taken as settled that the domicile of the decedent is the governing factor. See *Smith* v. *Provincial Treasurer of Nova Scotia* (1919), 47 D.L.R. 108, 58 Can. S.C.R. 570, and the cases there cited.

Apart from succession duties cases the question of the locality of intangible assets has most frequently been treated in the English Courts in connection with their liability to probate and estate duties, where the liability depends upon the locality of the assets at the time of the testator's death, whether within or without the jurisdiction of the ordinary. The cases leave no doubt that for this purpose the rule referred to has no application. See *Att'y-Gen'l* v. *Higgins* (1857), 2 H. & N. 339, 157 E.R. 140; *Stern* v. *The Queen*, [1896] 1 Q.B. 211; *New York Breweries Co.* v. *Att'y-Gen'l*, [1899] A.C. 62, (all of which dealt with shares); also *Att'y-Gen'l* v. *Sudeley*, [1896] 1 Q.B. 354; and *Winans* v. *Att'y-Gen'l*, [1910] A.C. 27.

In the last named case foreign bonds and certificates, payable to bearer, passing by delivery and marketable on the London Stock Exchange and physically situate in England at the death of the owner in England, were held liable to estate duty under the

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English Finance Act, 57-58 Vict. 1894, ch. 30, sec. 1, notwithstanding the fact that the deceased owner was a foreigner domiciled abroad.

It will be observed that that judgment treated such assets as tangible effects, having an actual physical *situs* of their own and not as intangible choses in action, to which a *situs* must be imputed by the law, but it clearly shews that the doctrine of personal property following the person has no application to such securities.

In the *Sudeley* case, [1896] 1 Q.B. 354, where the asset involved was distinctly treated as a chose in action, it is clear from the judgments of Lopes and Kaye, L.JJ., as well as from the dissenting judgment of Esher, M.R., that all three Judges considered that the question of the *situs* of the asset was determinable according as it was enforceable and recoverable in England or in New Zealand. Lopes and Kaye, L.JJ., regarding the asset in the aspect of a mere right to have an English estate administered and to receive a share of the residue which included a share of a mortgage debt in New Zealand, held such right was recoverable only in England. Esher, M.R., considering that the real asset involved was the right to a share of the New Zealand mortgage debt, held that such right was enforceable and recoverable only in New Zealand, and that it was therefore a foreign asset situate in New Zealand.

Whether or not that be the true test of the locality for all purpose of all intangible assets in their character as choses in action it is clear that none of the cases above cited lend any support to the proposition that the domicile of the owner or holder in any manner fixes their legal *situs*.

There is another case, *In re Clark*; *McKechnie* v. *Clark*, [1904] 1 Ch. 294, which deals with the location of corporate shares. It was necessary to fix their *situs* in that case in order to determine whether they passed under a bequest of all the testator's "personal property in England" or under his bequest of all his "personal property in South Africa." The shares in question were shares in mining companies, which were incorporated in South Africa but which had duplicate head offices and share registry offices in South Africa and in London. The holder was domiciled in England and the shares were registered in the London office. Farwell, J., held they passed under the gift of the testator's personal estate in

England and not under the gift of his personal estate in South Africa on the ground that "the only conceivable distinction (he) could discover in point of locality (was) the possession of the certificate which for this purpose is essential to complete the title to the shares." He did not discuss the question as to whether the shareholder's rights to a share of the property of the company was enforceable or recoverable in England, but it may be that with the company having its head office and a share registry office in England as well as in South Africa, the shareholder's rights were enforceable and recoverable as well in one country as in the other. He does not appear, however, to have attached any importance to the fact that the company was incorporated in South Africa or carried on its operations there, and distinctly based his judgment on the ground stated in the above quoted passage. The case is an exceptional one and cannot be regarded as an authority for anything more than that in such special circumstances the possession of the share certificates may be the determining factor. It is true that the possession of the share certificate in England concurred with the domicile of the holder in England, but if that were the reason for the judgment I cannot think that that Judge would have expressed it as in the passage I have quoted.

Having regard to the English authorities and to the special reason, as explained by Lord Atkinson in *Winans* v. *The Att'y-Gen'l*, [1910] A.C. 27, above cited, for the application of the *mobilia sequuntur personam* maxim in succession and legacy duties cases, I have concluded that there is nothing to warrant its application in the present case.

I am likewise of opinion that the possession of the share certificates outside the Province in the circumstances as existing in this case can have no effect upon the question of the *situs* of the shares. It is true that *Stern* v. *The Queen*, [1896] 1 Q.B. 211, decided that share certificates representing shares in American railway companies, and held by English executors of a testator, domiciled in England, were liable to probate duty in England, but the judgment is distinctly founded on the ground that the share certificates in question were current marketable securities of value and transferable by delivery, and as such were themselves *bona notabilia* actually situate within the jurisdiction of the ordinary. That case dealt with the share certificates, as distinguished from

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the shares they represent, and for the reasons stated, and may be taken as an authority that share certificates may be of such a negotiable character that they may be regarded as tangible effects, having an actual, physical *situs* of their own, in the same way as the foreign bonds and certificates payable to bearer and passing by delivery with which the House of Lords dealt in *Winans* v. *Att'y-Gen'l*, [1910] A.C. 27, but not, I think, as an authority that either the domicile of the holder or the possession of the share certificates determines the legal *situs* of the shares themselves.

I have reached the conclusion that the shares of the capital stock of the St. John and Quebec R. Co., which the Order in Council of August 4, 1915, purported to vest in His Majesty in behalf of the Province, must be considered as having been situate within the Province, where and where only they could be liquidated, and were property in the Province in relation to which the Provincial Legislature had power to legislate under enumeration 13 of sec. 92 of the B.N.A. Act.

There may be rights, exercisable without the Province, in respect of property within the Province, as, for example, the rights of the shareholders, domiciled without the Province, to sell and assign without the Province their certificates of title to their respective shares of the capital stock of the company within the Province—rights which would incidentally and necessarily be affected by any legislation affecting the shares and which in the present case have been wholly destroyed if the legislation in question is *intra vires* of the Province. If such rights are to be regarded as civil rights falling within the general ground taken by the Judicial Committee of the Privy Council in the *Royal Bank* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, that the statute there in question was beyond the powers of the Alberta Legislature because what was sought to be enacted was neither confined to property and civil rights within the Province nor directed solely to matters of merely local or private nature within it there may be difficulty in supporting the New Brunswick enactment now in question. An examination of the judgment in the Alberta case, however, shews that the particular civil right with which the Judicial Committee was dealing was a right in respect of property which itself was outside the Province of Alberta, viz., that portion of the proceeds of the bond issue which was held by the Royal

Bank at its head office in Montreal in the Province of Quebec—the right of the bondholders to claim from the bank at its head office there the money which they had advanced solely for a purpose which had ceased to exist. It was a right which was not merely exercisable outside the legislating Province, but a right which was directly enforceable and recoverable only in the Province of Quebec. It was in no manner analogous to the mere right to sell without the Province a certificate of title to shares of capital stock situate within the Province, which is the only right exercisable by the shareholders without the Province that can be said to have been derogated from by the legislation now in question. I have concluded therefore that such a right as that last mentioned cannot properly be regarded as falling within the dictum of the Judicial Committee in the Alberta case that a legislative enactment purporting to affect property is beyond the powers of a Provincial Legislature if it is not confined to property and civil rights within the Province. Otherwise the jurisdiction of our Provincial Legislature to make laws in relation to property within the Province, to provincial companies, and to local works and undertakings would be dependent upon the will and pleasure of the owners, shareholders and those financially interested in such companies, property and undertakings. I can see no distinction in principle between the right of a non-resident shareholder in a provincial company to sell his title to shares of the capital stock of the corporation situate within the Province and the right of a non-resident land-owner to sell his title to land within the Province. The execution of the form of transfer endorsed on the share certificate and the execution of the deed of land are equally effective, so far as transferring the right of the transferor to the transferee is concerned, though neither is wholly operative to pass the title to the shares or to the land, the registration of the deed in the proper registry being quite as essential for this purpose as the registration of the transfer of the shares in the share registry of the corporation. It seems to me therefore that, if the legislation here in question was beyond the powers of the Provincial Legislature because it derogated from the rights of the non-resident shareholders to sell without the Province their titles to their respective shares within the Province, there would be an equally good reason for declaring that the Legislature cannot validly

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enact any legislation in relation to land within the Province which might derogate in the same way from the rights of non-resident land owners to sell without the Province their titles to their lands within the Province. I venture to think that no one would seriously contend that such a consideration would preclude the Legislature from passing an Act in relation to land situate within the Province. The right to sell and transfer one's title to a share of the capital stock of a provincial corporation, though exercisable without the Province in the sense above suggested, gives to the transferee, when exercised, a right which can only be perfected and enforced within the Province where the share is situate, and is not, in my opinion, any more than the share itself, a civil right without the Province, which the Provincial Legislature cannot validly touch or affect when legislating in reference to the constitution and organisation of the corporation.

As to the impugned legislation derogating from the civil rights of the shareholders in respect of the money on deposit with the Prudential Trust Co., the shareholders had no civil rights which they could enforce as individuals in any action against the trust company either within or without the Province. They had a right to their respective shares of the corporate property, but this right is a right, it seems to me, which they could enforce as individuals only by actions or proceedings taken against the company in the Courts of New Brunswick.

I think the appeal must be dismissed with costs to be paid by the appellant's solicitor.

Appeal dismissed.

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CHAMBERLAND v. CHASSEUR.

Quebec King's Bench, Lamothe, C.J., Carroll, Pelletier, Martin and Greenshields, JJ. June 29, 1920.

FIRES (§ I—1)—NEGLIGENCE—DAMAGE TO ADJOINING PREMISES—LIABILITY OF LANDOWNER.

A person who, being unable to cultivate all his land himself, gives to another the right to cultivate a portion of the land for such person's exclusive profit, does not thereby make such person either his agent or his servant, and is not liable to a third person for damages from fire caused by the negligence of such person.

Statement.

APPEAL by defendant from the judgment of the Superior Court (Quebec) in an action for damages on account of fire. Reversed.

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The action was to recover $2,071.55 for damages on account of a fire. The circumstances of the case are set out in the remarks which follow.

Gagnon and *Sasseville*, for appellant.

A. M. Tessier, K.C., for respondent.

LAMOTHE, C.J. (dissenting):—A fire kindled on land belonging to the defendant, appellant, at a prohibited time, without permission of the administrative authorities, spread to the neighbouring land and destroyed a house, a barn, etc., belonging to the plaintiff, respondent. Lamothe, C.J.

The latter claimed damages to the amount of $2,071.55; the Superior Court awarded him $1,350.

The fire was started by one Gagnon who worked upon land of the defendant Gagnon admits the fact.

No more is the destruction of the buildings of the plaintiff denied. The amount of the loss as estimated by the Judge is not excessive.

Is the defendant responsible for the act of Gagnon? The plaintiff claims that he is because Gagnon was the defendant's son-in-law and was his agent. The appellant claims on the contrary that he was not the employer of Gagnon and that the latter worked for himself.

This kind of cause depends upon the legal relations which existed at the time of the fire between Gagnon and his father-in-law.

The evidence of the plaintiff consisted in proving that the fire was illegally kindled at a prohibited time upon land belonging to the defendant; that this fire was the cause of the damage; and that it was started by a son-in-law and a son of the defendant working for the clearing and seeding of this land. Thereby the case of the plaintiff was established *a priori*.

But the defendant has alleged that he lent to his son-in-law the part of the lot where the fire started, that he had no interest in the work done and that Gagnon alone was responsible. The defendant was obliged to prove this.

There was nothing in writing. Proof of the loan for use of something having a value of more than $50 in a non-commercial

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matter cannot be proved by oral testimony. The defendant and the said Gagnon gave their evidence upon this point without any objection being made to it. It is said that without objection on the part of the plaintiff this oral testimony becomes legal. I do not admit this proposition in the circumstances of the case. When it is a case of proving an agreement entered into between the two parties in a cause, failure to object to the oral testimony may be fatal. But it is not so when the evidence relates to facts *inter alia acta*—to agreements to which one of the litigants has not been a party. But then apart from the question of disability of such evidence other principles of law enter into the matter. Verbal agreements between third persons, even private writings which state these agreements, have no effect against the parties in the cause—the verbal agreements *a fortiori*. Evidence of these agreements between third parties, or between one of the litigants and the third party, can be made by means of a writing *sous seing privé*, without the rights of the other litigant being affected. The latter has the right to say that this evidence has no effect as against him—that what it was intended to say should not be considered in the litigation. Failure to object to the evidence is not then fatal. But the proof remains insufficient in law. The loan for use alleged is not sufficiently proved so far as the plaintiff is concerned.

Has the defendant proved that there was between him and his son-in-law the special contract that the Code designates by the name of "loan for use" or "gratuitous loan" assuming this evidence to be regular? The evidence leaves no doubt upon this point. The defendant had a right of location upon the lot in question, a lot upon which some clearing had been commenced. This clearing was not complete. Some felling of trees had been done; there remained some wood to be gathered together and to burn. The defendant could not find men to do this work. He had an interest in seeing that this land should be made fit for culture by a proper clearing and by regular seeding. He said to his son-in-law, Gagnon, that he would give him a part of it if the latter would do the work and seed it for his own benefit. Gagnon had accepted.

Now the appellant not finding men had imagined that the work could be done by his son-in-law by giving him as wages all the

produce of the crop or he had lent this land to Gagnon out of pure goodwill. One of these things appears as probable as the other. There is a shadow of difference between the two alternatives—a shadow possible to exaggerate on one side or the other. I believe that the circumstances lead to the conclusion that Chamberland had in view his own interests as much as that of his son-in-law. His interest consisted in the completion of the clearing and in the improvement of the soil. The contract was not purely one of goodwill, and then it cannot be a gratuitous loan. For it is of the essence of this latter contract that it should be of pure goodwill. See art. 1876 C.N., the idea of which is expressed by the word *gratuitement* in art. 1763 of our Civil Code.

I consider that Chamberland had preserved the control over this part of the land and that he could have prevented Gagnon from starting the fire. The recommendations that he made to Gagnon so indicate.

Finally the fire was communicated to the land of the plaintiff by an inanimate thing belonging to the defendant.

My opinion would be to confirm the disposition of the case by the judgment.

PELLETIER, J.:—The sole question in the case is whether or not Gagnon, who started the fire, was the agent of the defendant and if, as a consequence, the latter is responsible from the fact that he did start the fire.

The verbal evidence on the record—evidence given without objection and to the legality of which the respondent does not object in his factum—shews in a certain manner that the defendant, not being able to work all his property, transferred the use of a part of it to Gagnon so that the latter could seed it for his own profit.

Proof of this is made by three witnesses and is not contradicted. The respondent claims, and the Judge of first instance has adopted this manner of looking at it, that all this proof was prepared and organised in order to cause the plaintiff to look to Gagnon, who was worth nothing instead of the defendant who is solvent. I have read the evidence twice and I do not see how the conclusion could be arrived at that the three witnesses in question perjured themselves.

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It is, moreover, proved without contradiction that the defendant had positively forbidden Gagnon to start the fire and that the latter had done it in spite of this prohibition.

I would reverse the judgment and dismiss the action.

The reason so plausible for which the Supreme Court, whose jurisprudence has since been followed, declared that if there was no objection to the evidence it would be considered legal is that the parties have the right to consider that there is acquiescence in this respect.

In effect, if I wish to offer any evidence, and my adversary does not object, then there is between the parties the equivalent of a contract as to it. If the other party wishes to object to the evidence it is necessary to do so in such a manner that the party who offers it can make or endeavour to make some other proof where that which he offers would be declared illegal. Here it appears to me evident that the counsel of the plaintiff, knowing that his client would probably himself admit the fact or in any case would give a commencement of proof in writing, decided that it was as well in the circumstances to allow the proof to be made as the defendant made it.

If we should declare this evidence illegal when the other party accepts it as legal would we not be taking the defendant by surprise? There is no question of public order, it is a question between the parties; if the parties have so agreed between themselves, which appears to me manifest, I do not see why we should intervene.

Our Court has for at least 5 years sanctioned at times the principle that even when the best proof has not been made, if this proof has been made without objection, it remains on the record as legal. It is thus, for example, that there has been declared legal proof of the civil status of a person, his marriage, his death, his birth, without the production of documents which would be the best proof. Here the existence of the bargain between the defendant and his son-in-law is, it seems to me, a fact like all the other facts in the case. The plaintiff does not contest the existence of this fact, he allows it even to be proved by witnesses, probably because he finds it incontestable, or yet again because his own client would admit it. Can we object for him who does not object for himself?

GREENSHIELDS, J.:—It seems to me that the question of the responsibility of the appellant for the act of Gagnon must be decided by the provisions of our Code, as found in art. 1054, C.C. (Que.): "He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control."

It has been repeatedly affirmed by our Courts and reaffirmed, that control is the test of responsibility.

The liability of the employers for acts of their employees is much more restrained than the liability of the principal for the act of his agent or *préposé*.

If the testimony of the appellant's witnesses can be relied upon, Chamberland, the appellant, was not the employer or master of Gagnon.

In like manner, if these witnesses can be believed, Gagnon was not under the control or under the orders or direction of the appellant.

The counsel for the respondent cites Beaudry-Lacantinerie, Des obligations, No. 2912. It is quoted at length, and I should accept it as a fair and accurate statement of our law; but I should not accept the statement of the counsel, that because the appellant said to Gagnon: "Do not make any fires upon the lot," that places Gagnon under the orders and control of the appellant, and therefore constitutes Gagnon the *préposé* of the appellant.

The trial Judge would seem to have been of opinion that the whole story told by the witnesses for the appellant was one fabricated for the sole purpose of shifting the responsibility from the shoulders of a solvent debtor to those of an insolvent.

I am irresistibly forced to the conclusion, after a careful consideration of the proof, that such an opinion is without support, and I should allow the appeal and dismiss the action, with costs in both Courts.

JUDGMENT:—Considering that the fire which caused the damage claimed is due to the act of a third party, namely, one Gagnon, who, although the son-in-law of the defendant appellant, was neither his servant nor his employee nor under his control; that the said Gagnon had obtained from the defendant appellant the right to cultivate for his exclusive profit a certain piece of land belonging to the said defendant, that this arrangement was

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proved by three witnesses and that no objection was made as to the admissibility of this oral testimony; that the fire started by Gagnon on the said piece of land was communicated to the land and buildings of the plaintiff respondent; that in the circumstances the defendant appellant is not responsible for the acts of the said Gagnon; that there is error in the judgment of the Court of first instance; the Court reverses the said judgment and proceeding to render that which the said Court of first instance should have rendered dismisses the action of the plaintiff respondent with costs as well in the Superior Court as in the Court of Appeal. *Appeal allowed.*

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ERNST BROS Co. v. CANADA PERMANENT MORTGAGE CORP.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland and Masten, JJ. December 20, 1920.

MORTGAGE (§ VI G—111)—ENFORCEMENT—MARSHALLING SECURITIES—SUBROGATION—NECESSARY PARTIES.

The Court cannot interfere with the choice of a mortgagee in proceeding on any part of the property subject to the mortgage, but if the mortgagee pay himself in whole or in part out of property which is the security of another creditor, this creditor is allowed to resort to the unsold property under the mortgage to the amount by which the mortgagee has benefited by the sale of the other property, or to the amount of the creditor's claim whichever is the less. This can only be done with the mortgagee before the Court and he is a necessary party to such proceedings.

[*Dolphin* v. *Aylward* (1870), L.R. 4 H.L. 486; *Ex parte Kendall* (1811), 17 Ves. 514, 34 E.R. 199; *Wallis* v. *Woodyear* (1855), 2 Jur. N.S. 179; *Fell* v. *Brown* (1787), 2 Bro. C.C. 276, 29 E.R. 151, referred to.]

Statement.

APPEAL by the defendant Jeremiah McAsey from the judgment of ORDE, J., (1920), 47 O.L.R. 362, in an action for a declaration that certain securities held by the defendants should be marshalled in favour of the plaintiffs. Affirmed.

H. H. Davis, for appellant.

H. J. Scott, K.C., for respondents.

Mulock, C.J.Ex.

MULOCK, C.J. Ex.:—This is an appeal from the judgment of Orde, J., declaring the plaintiff company entitled to have certain securities marshalled in their favour. The material facts may be summarised as follows:—

By mortgage dated the 23rd May, 1912, Frank McAsey, then owner of lot 13 in the 8th concession of the township of Glenelg, and the defendant Jeremiah McAsey, his brother, owner of lot 14 in the 9th concession of the said township, conveyed the said lots 13 and 14 to the defendant corporation as security for a loan of

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$1,200, $200 of which loan Jeremiah received, Frank receiving the balance. Both mortgagors covenanted to pay the mortgage. On the 22nd June, 1914, Frank McAsey, being indebted to the plaintiffs in the sum of $800, created a charge on the said lot 13 for securing payment thereof to the plaintiffs. The amount of such indebtedness was subsequently reduced to $487.20, and the charge on lot 13 continued in respect of that balance.

By indenture of bargain and sale, bearing date the 1st April, 1916, made between the said Frank McAsey, the grantor, and the said Jeremiah McAsey, the grantee, in consideration, as stated therein, of $1,500 paid by the grantee to the grantor, Frank McAsey purported to grant to Jeremiah McAsey in fee simple the said lot 13. This deed contained the statutory covenant by Frank McAsey that he had done no act to incumber the said lands. As a fact, there were then, as Jeremiah knew, two incumbrances upon lot 13, namely, the mortgage for $1,200 to the defendant corporation and the charge in favour of the plaintiffs. By indenture of mortgage, bearing date the 27th January, 1917, Jeremiah purported to convey lots 13 and 14 to the defendant corporation to secure payment of $1,500, but no money was advanced upon this mortgage. Jeremiah had negotiated with the plaintiffs for a reduction of their claim to $200; and, under the impression that they would accept that sum in full satisfaction of their claim, and thinking that the $1,500 would be sufficient wherewith to pay off the $200 to the plaintiffs and the amount owing to the defendant corporation on its mortgage, he executed the mortgage of $1,500 referred to. Later on, he learned that the plaintiffs would not accept $200 in full of the amount; and hence it happened that this mortgage transaction fell through.

On the 29th May, 1918, the defendant corporation, under a power of sale contained in its firstly mentioned mortgage, sold lot 13 for $1,150, leaving a balance still owing, in respect of which the corporation holds said lot 14 under its said mortgage.

The plaintiffs contend that, under the above mentioned circumstances, they were entitled, as against Jeremiah, to have had the defendant corporation's claim realised first out of lot 14, whereby lot 13 would have continued as security in respect of the plaintiffs' claim; but, lot 13 having been resorted to, that the plaintiffs are now entitled to resort to lot 14; and that is the question involved in this action.

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Before discussing the law, it is material to determine whether, by the deed of the 24th April, 1916, Jeremiah took lot 13 as beneficial owner or only as trustee for his brother Frank. The learned trial Judge has held that he took beneficially. The conveyance on its face declares no trust, but at one place in his examination Jeremiah, when being examined in regard to this deed, said: "My brother Frank was going overseas at that time, and he wanted to leave me that property so that I could sell it or rent it in some way for him, to do the best I could with it." He swore that in connection with the conveyance from Frank to him no money passed, and that he was not liable for anything to Frank. On being asked, "how it was intended that the Ernst Brothers' claim was going to be paid," he answered, "Out of the sale of lot 13."

"Q. That was the intention when the deed was given to you? A. Yes, if there was enough got to pay them.

"Q. How did you hope to be able to do that; did you contemplate lot 13 would sell for enough to pay the Canada Permanent and Ernst Brothers? A. No, my Lord, I did not expect it would; I thought it would sell for more than it did.

"Q. How did you propose to pay the difference? A. To pay Ernst Bros.?

"Q. Yes, was it to come out of your $200? A. Well, no, I don't think so, my Lord.

"Q. You did propose to pay $200; you intended to pay $200 to the Canada Permanent to clean up? A. Yes.

"Q. Where was that money to come from? A. I was to make that up myself."

Referring to the deed from Frank to Jeremiah, he was asked:—

"Q. Why was $1,500 put in as the purchase-price? A. The time I bought, you mean?

"Q. Yes; this is the deed from your brother to yourself, why was $1,500 put in as the purchase-price? A. Well, there was this mortgage to be paid up, the 1912 mortgage, and the balance was to pay Ernst Brothers this $200.

"Q. You figured it out in that way, that it would require about $1,500 to pay off the Canada Permanent mortgage and Ernst Brothers' claims? A. Yes."

Jeremiah was in possession of lot 13 when it was conveyed to him, and he so continued until it was sold; and, on being asked if

he expected to account to his brother, he said he did not—that the cost of operating the lot exceeded the revenue. It may be that Frank might have given valuable testimony on the point, but he was not called. He is not a party to this action, and the decision of this appeal as to whether Jeremiah became trustee of lot 13 for Frank or beneficial owner cannot bind Frank.

The learned trial Judge must have rejected any evidence as to Jeremiah's having taken as trustee; and, although there is much in Jeremiah's evidence in support of the view that he did not take beneficially, it is impossible to say that on the evidence the learned trial Judge erred in his finding that the transaction was an actual sale to Jeremiah free from any trust; and, after some hesitation, I have reached the conclusion that the fair inference is that the consideration of $1,500 mentioned in the deed represented the obligation of Jeremiah to pay the mortgage of the defendant corporation and the plaintiffs' claim.

It is a settled principle of law that where there are two funds to which, or to either of which, as he may elect, a creditor may resort, and there is another creditor who is entitled to resort to only one of such funds, the latter has the right to require the former creditor first to exhaust the fund on which the latter has no claim: *Dolphin* v. *Aylward* (1870), L.R. 4 H.L. 486. Here the defendant corporation had a lien on both lots, and the plaintiffs a lien on lot 14 only. Jeremiah was the owner of the equity of redemption in both lots, and, as between the common debtor, Frank, and himself, he was bound to pay both claims, and thus save Frank harmless.

Under these circumstances, the plaintiffs were entitled to have marshalled in their favour the securities of the defendant corporation—a right which cannot be defeated by the action of the defendant corporation in having first resorted to lot 13, on which the plaintiffs had no claim.

In view of these facts, the application of the principle of marshalling securities shifts to lot 14 the plaintiffs' right to resort thereto in respect of their claim; and I therefore think that the formal judgment entered rightly declared that the plaintiffs were entitled to a lien or charge on lot 14, and the only amendment to

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the formal judgment that I consider necessary is to add thereto the usual provisions for redemption and in default for sale.

The appeal should be dismissed with costs.

SUTHERLAND, J., agreed with MULOCK, C.J. Ex.

RIDDELL, J.:—Stripped of irrelevancies, the facts are very simple, but we are assured by counsel that there is no reported case on all fours.

Jeremiah McAsey owned lot No. 14; his brother Frank wished to buy lot No. 13, and Jeremiah was willing to help him. Accordingly the two brothers joined in a mortgage on lots 13 and 14 to the Canada Permanent Mortgage Corporation for $1,200—it being agreed between the brothers that $900 should go to pay for lot No. 13, Jeremiah should receive $200, the other $100 to go for expenses, etc. Frank, purchasing a machine from the plaintiffs, gave a lien on lot No. 13 for the purchase-money; he not paying, it was agreed that the plaintiffs should take the machine back and that the lien should hold for some $400.

Frank conveyed lot No. 13 to Jeremiah by a deed in ordinary form.

The mortgage being unpaid, the Canada Permanent Mortgage Corporation determined to sell one of the lots; it received notice of the plaintiffs' lien, and was asked by the plaintiffs to sell lot No. 14; Jeremiah asked the corporation to sell lot No. 13, and it sold lot No. 13, realising all the mortgage-debt except some $300 odd.

It is thoroughly established by our own decisions, such as *Beatty* v. *Fitzsimmons* (1893), 23 O.R. 245, that, as between the brothers, Jeremiah was to pay the incumbrances upon lot No. 13; consequently he was both in law (under his covenant) and in equity bound to pay the amount of the $1,200 mortgage to the Canada Permanent Mortgage Corporation. As between himself and Frank, he should also pay the amount of the plaintiffs' lien, and by proper proceedings this duty could be enforced by Frank—see, e.g., *Campbell* v. *Robinson* (1880), 27 Gr. 634; but there is no privity between the plaintiffs and Jeremiah, and they could not recover from him in law or in equity—see, e.g., *Clarkson* v. *Scott* (1878), 25 Gr. 373.

The result then is that the Canada Permanent Mortgage Corporation has a security covering two properties—that they were really two separate properties, and should be treated as such,

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is evidenced, among other things, by the fact that the mortgage corporation sold one separate from the other—the plaintiffs have a security covering only one—the defendant Jeremiah owes the debt to the mortgage corporation, but not that to the plaintiffs. He, however, should pay the latter debt.

The first question is: does the equitable principle of marshalling of securities apply?

It has often been said that this principle applies only where there is a common debtor—the language employed being that of Lord Chancellor Eldon in *ex parte Kendall* (1811), 17 Ves. 514, at p. 520, 34 E.R. 199: "It was never said that, if I have a demand against A. and B., a creditor of B. shall compel me to go against A."—these are the words quoted in text-books, e.g., Snell's Principles of Equity, 17th ed. (1915), p. 260. But the following words should also be quoted, for, as pointed out by my brother Orde, the passage reads: "It was never said that, if I have a demand against A. and B., a creditor of B. shall compel me to go against A.; without more; as, if B. himself could insist that A. ought to pay in the first instance; as in the ordinary case of drawer and acceptor, or principal and surety . . . if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity, giving B. the right for his own sake to compel me to seek payment from A."

The exception given by Lord Eldon covers the present case; and, in my opinion, the doctrine applies.

The next question is as to the form of action and judgment.

It is elementary, and it is admitted, that the Court cannot interfere with the choice of the mortgagee in proceeding on any part of the property subject to the mortgage—*Wallis* v. *Woodyear* (1855), 2 Jur. N.S. 179—but it is equally clear that, if the mortgagee pay himself in whole or in part out of the property which is the security for the other creditor, this creditor is allowed to resort to the unsold property under the mortgage, to the amount by which the mortgagee has benefited by the sale of the other property, or to the amount of the creditor's claim, whichever is the less: Snell on Equity, p. 259, and cases cited.

In the present case the amount by which the mortgage corporation benefited by the sale of lot No. 13 is in excess of the claim of the plaintiffs—accordingly the plaintiffs are entitled to resort to

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lot No. 14 for the amount of their claim. This is accomplished by subrogating them to the mortgage corporation on the mortgage—see Seton on Forms of Judgments and Orders, 7th ed., vol. 3, pp. 2016 *sqq.*—and can be done only with the mortgagees before the Court: *Fell* v. *Brown* (1787), 2 Bro. C.C. 276, 29 E.R. 151. The mortgage corporation then is a proper and a necessary party: being wholly within its rights, it must have its costs from some party.

While the judgment entered would probably secure the plaintiffs, it might lead to difficulty, and conceivably another action. The judgment should declare the plaintiffs entitled (to the amount of their claim) to the security of the mortgage, and direct a reference to determine: (1) the amount of the plaintiffs' claim, principal and interest; (2) the amount of the mortgage, principal, interest, and costs, including (unless sooner or otherwise paid) the costs of this action and reference—order that, on payment of the amount of the mortgage as so found with costs of assignment by the plaintiffs to the mortgage corporation, the corporation assign the mortgage to the plaintiffs—declaring the plaintiffs on such assignment to be entitled to hold and enforce the mortgage so assigned as security for the amount paid by them to the mortgage corporation, and the amount of their claim, with the costs of action, appeal, and reference.

The judgment is right in all essentials, and the defendant Jeremiah should pay the costs.

Masten, J.

MASTEN, J.:—The facts are clearly and accurately stated in the judgment appealed from, now reported in 47 O.L.R. 362, and need not be repeated. In my opinion, the appeal should be dismissed. I concur in the reasons of the trial Judge, but desire to add one or two observations.

I agree that the plaintiffs' right to have the securities marshalled depends exclusively upon the acquisition by Jeremiah from Frank of the equity of redemption in lot 13, and upon the terms on which he acquired it. If Jeremiah had never acquired lot 13, or if he had purchased the equity of redemption for value, and with no obligation to pay the incumbrances which affected it, the doctrine of marshalling could not, in my opinion, be invoked against him, because Jeremiah would then have occupied the position of an independent third party, who would be prejudiced by the appli-

cation of the doctrine of marshalling, and against whom the right of marshalling would therefore not be exercised: 1 White & Tudor's Leading Cases, 7th ed., p. 57; though, as between him and the plaintiffs, the Court might in that case have directed an apportionment of the first mortgage, as in *Adams* v. *Keers* (1919), 46 O.L.R. 113 and 523, 51 D.L.R. 514.

In the present case, however, Jeremiah is not only a mortgagor to the Canada Permanent Mortgage Corporation (though not a mortgagor of lot 13), but he has since accepted a conveyance of the equity in lot 13 without paying anything therefor, and with an obligation to Frank to assume the incumbrances thereon, including the plaintiffs' lien. If, under these circumstances, the Canada Permanent Mortgage Corporation had brought an action on its security for sale or foreclosure, the present plaintiffs would have been entitled to redeem the first mortgage, and receive an assignment of it to themselves or to a trustee for them, and Jeremiah would then have been entitled to redeem the plaintiffs only on satisfying the amount due to the plaintiffs on both their securities.

Instead of bringing an action on its mortgage, the Canada Permanent Mortgage Corporation has chosen to exercise its power of sale, and has sold lot 13 alone, as of course it had the right to do; but the substantial rights of the plaintiffs cannot, I think, be defeated by any such course of proceeding. While it is true that the plaintiffs have not redeemed the Canada Permanent Mortgage Corporation, and the two securities have not become actually consolidated in the hands of the plaintiffs, yet the circumstance that Jeremiah accepted the equity in lot 13 as a gift from Frank, with an obligation to assume the charges against it, is sufficient, in my opinion, to found an equity giving the plaintiffs the right, on their own behalf, as against Jeremiah, to have the securities marshalled and recover the amount of their claim out of lot 14, to the extent of the value of lot 13. In other words, as between the plaintiffs and the defendant Jeremiah the result must be as nearly as possible the same as though a mortgage action had been brought and the plaintiffs' right to consolidate had arisen. Having been deprived of their security on lot 13, the plaintiffs must, I think, be subrogated to the rights of the Canada Permanent Mortgage Corporation as against lot 14.

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On the question of costs I was at the hearing impressed with the view that the present issue lay exclusively between the plaintiffs and Jeremiah, and that the Canada Permanent Mortgage Corporation was neither a necessary nor a proper party. Further consideration has led me to the conclusion that it is proper and necessary that the rights of the parties should be completely administered in the present action, and for that purpose it is necessary that the Canada Permanent Mortgage Corporation should be a party defendant. I am, therefore, of the opinion that the judgment as it stands is right in that regard.

With respect to the form of the judgment, the precedents in Seton, 7th ed., vol. 3, p. 2016, shew that the judgment should be moulded in each case to meet the particular circumstances. I think that the form suggested by my brother Riddell is probably suitable and effective for the determination of the rights of the parties in the present case; but if, upon the settlement of the judgment, any difficulty appears, I think leave should be reserved to the parties to mention the matter to a Judge of this Division, so that the judgment may meet all requirements.

The appeal should be dismissed with costs.

Appeal dismissed.

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GOON KING et al. v. LAHEY.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. February 12, 1921.

APPEAL (§ VII I—360)—FINDINGS OF FACT BY TRIAL JUDGE—JUDGMENT BASED ON FINDINGS—DISCRETION.

Where the trial Judge has found that there has been a settlement between the parties for a certain sum, on the basis of the plaintiffs abandoning their lease and agreement for purchase, and such finding is based on the evidence of the plaintiffs' own solicitor, and his evidence is inconsistent with the claim of the plaintiffs that they are entitled to recover more, and the trial Judge has given judgment for the amount so agreed upon, the Appellate Court will not disturb his judgment.

Statement.

APPEAL from the judgment of Longley, J., in favour of plaintiffs in an action claiming damages for breach of an agreement for lease of a building and premises on Charlotte St., Sydney, for the period of three years. Also for breach of an agreement for the sale by defendant to plaintiffs of the stock in trade, fixtures and goodwill of the business of a restaurant carried on by defendant in the premises referred to.

C. J. Burchell, K.C., for appellant.

Finlay McDonald, K.C., for respondents.

HARRIS, C.J.:—The defendant leased to the plaintiffs the premises No. 208 Charlotte St., Sydney, for the period of 3 years from July 1, 1920, at a monthly rental of $150 payable in advance each month, and possession was to be given to plaintiffs on July 2.

At the time of the making of the lease, but by a separate agreement, the defendant agreed to sell the plaintiffs the stock in trade, fixtures and goodwill of the business which he had previously carried on in the same premises for the sum of $1,000 which was payable as to $500 on July 2, 1920, and the balance on August 1, 1920.

Both the lease and the agreement were dated June 18, 1920, and on that day plaintiffs paid the defendant the $500 called for by the agreement of sale.

No rent was ever paid under the lease nor did plaintiffs take possession of the shop or stock. Mr. McDonald had been acting for them and so the defendant went to see him about the matter a few days after July 2. The defendant says that Mr. McDonald told him the plaintiffs wanted to "back out" and that Mr. McDonald first proposed that the defendant should accept one month's rent and on his refusal to accept this Mr. McDonald proposed that defendant should repay $300. Mr. McDonald says the defendant agreed to do this and the matter was settled in that way. The defendant on cross-examination is thus reported: "Q. Did you promise to pay these plaintiffs $300? A. Well I wouldn't say I promised them. I kind of went away with a half promise till I seen Mr. Langille. I wouldn't just say I would."

I do not think that sort of denial ought to prevail against the positive evidence of Mr. McDonald, and the trial Judge, I think, rightly found "that the plaintiffs through their solicitor offered to take $300 and he promised to pay but on the advice of counsel he did not."

I understand that finding to mean that there was a settlement for $300 on the basis of the plaintiffs abandoning their lease and agreement for purchase. That finding is based on the evidence of Mr. McDonald, plaintiffs' own solicitor, and his evidence is inconsistent with the claim on the part of plaintiffs that they are entitled to recover more.

I think the appeal and cross-appeal should both be dismissed with costs, and there should be the usual set-off.

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RUSSELL, J.:—The plaintiffs in this case on June 18 took a lease for 3 years of the defendant's shop to begin from July 1, at a rental of $150 a month payable in advance, and on the same date they purchased his stock in trade and the goodwill of the business for $1,000 payable $500 on July 1 and the balance one month later. Before July 1, the plaintiffs, to borrow a phrase from the evidence, "took cold feet" and wished to get rid of the property and the obligation. Negotiations ensued with a view to a settlement, but before the negotiations were concluded the defendant, on July 24, relet the real estate to a Greek named Kosmetos and resold to Kosmetos for $1,100 the plaintiffs' stock in trade with the goodwill on which they had already paid $500. The case does not disclose the conditions on which defendant could re-enter. By the common law, before any entry could be made under proviso for re-entry on non-payment of the rent, the landlord was required to make a demand upon the premises of the precise rent due, at a convenient time before sunset. There is no evidence of any such demand. The law with respect to this subject has been modified in England by statute. If the common law continues in force here the re-entry was illegal, and our provincial Act, the Overholding Tenants' Act, R.S.N.S. 1900, ch. 174, sec. 3, seems to contemplate, apart altogether from any equitable doctrines regarding forfeiture, that a tenancy cannot be put an end to without something more than was done in the present case. The plaintiffs did not surrender their lease to the landlord. They were not bound to actually occupy the property. Defendant says that some time before July 2, one of the plaintiffs came to the place with a carpenter and started fixing it up. I do not think that the defendant under these circumstances, and while the negotiations were proceeding, had any right to re-let the place. His doing so was an actionable wrong for which the plaintiffs could claim damages.

But whatever question there may be as to the rights of the defendant to determine the lease in a summary way by re-letting the shop, it is perfectly clear that he could not re-sell the plaintiffs' personal property without their consent, and there is no evidence of any such consent. The defendant says he made a kind of a promise to pay $300 before he saw his lawyer, but the lawyer advised him not to pay it and he has persistently refused to pay it. The plaintiffs have sued for damages for breach of the agree-

ment. They would have been willing to settle the matter for $300, and the trial Judge has given judgment to the plaintiffs for that sum with costs, from which judgment both parties appeal. The plaintiffs through their counsel at the argument claimed damages for the loss of the trade profits they could have made had the agreement been carried out by both parties and the defendant appeals from the judgment for plaintiffs for the $300 assumed to have been promised.

The condition of things on July 24, when the defendant re-let and re-sold the property was that negotiations were still in progress. The defendant had in his hands $500 advanced on the stock in trade by the plaintiffs and he had or had the right to receive $1,100 from the Greek for the goodwill and the plaintiffs' personal property which he re-sold. Against this sum the defendant could if he had not himself broken the agreement claim $150 for a month's rent in advance.

I do not find any evidence of such a repudiation of their liability by the plaintiffs as would warrant the defendant in considering himself discharged on that ground, and if his re-letting of the property was a tortious act we may well assume that the damages would more than extinguish the claim for rent, if indeed the defendant could claim rent at all after summarily putting an end to the lease. We have a right to presume and I think we are bound to assume the possibility that if the negotiations for a mutually satisfactory settlement had failed the plaintiffs would have proceeded with the business under their agreement. As to the plaintiffs' personal property it seems very clear that the defendant had no legal right, while negotiations were pending, to re-sell it. This was a conversion for which plaintiffs would be entitled to claim damages. Assuming, however, their willingness to acquiesce in the re-sale and forego their right to damages, they should at least be entitled to recover their $500 payment as on a consideration that has failed.

I think, therefore, that the defendant's appeal should be dismissed with costs and that the judgment be varied by awarding $500 to the plaintiffs with their costs of appeal.

RITCHIE, E.J. and CHISHOLM, J., concurred with HARRIS, C.J.

Ritchie, E.J.
Chisholm, J.

MELLISH, J.:—If the trial Judge has found that the plaintiffs unconditionally repudiated their contracts in such a way as to

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permit defendant to treat them as abandoned I regret that I am unable to agree.

In my opinion the pleadings and evidence clearly shew that the plaintiffs were only willing to abandon the contracts on condition that they could make a satisfactory settlement with defendant, and I do not think Mr. Langille's testimony is inconsistent with that view. Paragraph 4 of the defence as well as the evidence of the defendant I think clearly shew the terms on which plaintiffs were willing to give up their contracts. Defendant's solicitor, however, prevented any such settlement being made, apparently relying on the plaintiffs' failure to pay the amount due under the leasing contract on July 2, viz., $150. The amount of $500 due on this date under the other contract had admittedly been paid before it was due, viz., on June 18, the date on which the contract was made.

In my opinion no amendment of the statement of claim is necessary and the plaintiffs are entitled to succeed and recover damages for breach of contract.

I think it impossible to say that the contracts were abandoned unconditionally by the plaintiffs and at the same time give them judgment for the amount of a compromise which as I interpret the evidence could only be made on the assumption that they were not unconditionally abandoned. The abandonment of the contracts by the plaintiffs was a term of the compromise, and Lahey says he made a "kind of a promise" to pay them $300 if they would call the contracts off. The plaintiffs were evidently trying to drive a bargain and I do not think it should be held that they threw away their only chance of doing so.

I therefore hesitate to conclude that the trial Judge has found that the contracts were unconditionally abandoned and as before stated I would consider such a finding unjustified by the evidence. If however he intended to give judgment in accordance with the statement of claim I disagree with his finding as to damages.

It is not and could not be contended that the mere failure to pay the $150 rental on July 2 would justify the defendant in repudiating the contracts as he did.

If a compromise was agreed on—and there is a great deal to support such a finding—it was clearly repudiated by the defendant. This, I think, left the plaintiffs free to consider it as never having been made.

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As to the question of damages, in view of the plaintiffs having agreed to settle at a loss their claim for damages must be considered in the light of that fact. But we must also consider that business prospects were such that defendant was able to make a more advantageous disposition of the properties. I think the plaintiffs should at least be allowed their out of pocket loss—$500.

In the result defendant's appeal should be dismissed with costs and the cross-appeal allowed, giving the plaintiffs judgment for $500 damages and the costs of the trial and cross-appeal to be taxed, and varying the judgment appealed from accordingly.

Appeal and cross-appeal dismissed.

THE KING v. VANBUSKIRK, POIRIER AND WILSON.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. February 18, 1921.*

THEFT (§ I—12)—OF AUTOMOBILE—INTENTION—QUESTION OF FACT—SUBMISSION TO JURY—MISDIRECTION BY TRIAL JUDGE—NO SUBSTANTIAL WRONG OR MISCARRIAGE OF JUSTICE.

A fraudulent taking of a motor car without colour of right with intent to deprive the owner thereof temporarily constitutes theft; the question of intention is a question of fact which should be submitted by the trial Judge to the jury, but where no substantial wrong or miscarriage of justice was occasioned by misdirection to the jury in this respect, the verdict will be sustained on appeal.

[*Cohen and Bateman* (1909), 2 Cr. App. 197; *Re James Morgan* (1911), 7 Cr. App. 63; *The King* v. *Lew* (1912), 1 D.L.R. 99, 19 Can. Cr. Cas. 281, 17 B.C.R. 77, referred to.]

Statement.

RESERVED case by the trial Judge on a conviction for the theft of an automobile. Conviction affirmed.

P. J. Hughes, supports appeal.

Hazen, C.J.

HAZEN, C.J.:—When leave was granted at a previous term of this Court to appeal in this matter under the provisions of sec. 1015 of the Criminal Code, R.S.C. 1906, ch. 146, I delivered the following oral judgment:—

This is a matter in which application was made for leave to appeal in a criminal case. It was made on behalf of one of the accused—Alonza Poirier—at the last term of the Court, under sec. 1015 of the Criminal Code. The defendants were indicted for stealing a motor car, at Sunny Brae, near Moncton, the car being the property of a man named Arseneau. The evidence shews that in the night-time they went to the place where this car was kept, exercising care so that no one should detect them or hear any noise when in the act of removing the car; that they removed it and drove it as far as Calais, in the State of Maine, when they left it and proceeded by other means—on foot and obtaining rides on railway trains—as far as Rochester, where they

*White, J., took no part in the judgment.

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obtained employment, and after being at Rochester a certain length of time, one of them, Vanbuskirk, wrote back to his brother and told him where the car was, that it had been left at a garage in Calais, and stated that he was at liberty to tell the owner of the car.

The defendants were indicted under the Criminal Code for theft, and the Code makes the fraudulent taking of any property with intent to deprive the owner of its possession, or to deprive the owner temporarily of its possession, theft. It is claimed by the counsel on behalf of Poirier, that there was no intention whatever to take the car either temporarily or permanently from the possession of the owner, and that the parties in taking the car were actuated by a consideration something like this: that previously one of them had imported some liquor and the parties owning the car got possession of the liquor and used it, and then laughed at the others, and that it was in retaliation really for this that the alleged joke was perpetrated. The prisoners went on the stand themselves, and I think their own evidence answered that contention, because it appears that their object in taking the car was to get to the United States.

It was contended that they should have been proceeded against under sec. 285B of the Criminal Code Amendments, 9-10 Edw.VII., 1910 (Can.), ch. 11, which provides: "Everyone who takes or causes to be taken from a garage, stable, stand or other building or place, any automobile or motor car with intent to operate or drive or use or cause or permit the same to be operated or driven or used without the consent of the owner shall be liable, on summary conviction, to a fine not exceeding fifty dollars and costs or to imprisonment for a term not exceeding thirty days."

The Court is not impressed with that contention. It believes that that section was put in the Act for the purpose of providing for cases where motor cars are taken not with any intention of taking them either permanently or temporarily, from the possession of the owners, but in a case such as this, for example: Mr. A., going to a theatre, leaves his car outside; B. comes along and takes the car and goes for a joy-ride, as it is called. It is to meet cases of that sort; or where a person takes a car anywhere along the street and goes for what is called a joy-ride. In any case, if what was done comes within the provisions of the section of the Code which defines theft, there is no reason why the party should not be prosecuted for theft, even if at the same time he might be prosecuted under sec. 285B, which was added to meet cases such as I have suggested.

There is only one ground which is stated in the application for appeal that impresses the Court as worthy of serious consideration, and that ground is error on the part of the Judge in directing the jury, that under the defendant's own evidence they were guilty of the crime with which they were charged. The statements made by the trial Judge, Crocket, J., referred to there, are the following: He says, after charging the jury with regard to what would constitute theft, and pointing out that at common law the deprivation of the thing from the owner temporarily was not sufficient to constitute theft, but that under the Criminal Code such temporary deprivation is sufficient to constitute theft, "It is sufficient if there be an intent to interfere with the dominion or right of property in the thing, of the owner, or an intent to deprive the owner temporarily of the thing. Now, it is in that view, in view of the fact that the facts are undisputed, that I have felt it my duty in this case to

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direct you that under the defendants' own evidence they are guilty of the crime with which they stand charged, the crime of stealing this automobile. They have admitted not only the facts that I have referred to, that they took the car from LeBlanc's garage on the night of November 1, in a clandestine way, taking precautions to roll it out and to have one of their number on guard to see that nobody would see them taking the car, but Vanbuskirk, who seems to have been the originator of the proposal to take this car to the United States, stated distinctly that he knew he had no right to take it, so that there is no question in this case of their taking it with any color of right," and so on. Further on he says: "I feel it, therefore, to be my duty to direct you that the defendants are guilty, upon their own testimony, of the offence with which they stand charged." Later on, he says: "I have felt that the interests of justice perhaps would be served by directing you in the first place that the defendants are guilty, upon their own evidence, and then asking you for your finding upon that special question." Further on in his charge he says, "So that I will direct you that the defendants are guilty of the offence charged, for the reasons that I have said, upon their own evidence; but I am going to ask you, notwithstanding that you are directed in that way that you must convict the defendants, to answer this question." The question which Crocket, J., left to the jury was as follows: "Did the defendants, when they took the car from LeBlanc's garage on the night of November 1, intend to make it their own, or did they intend to return it to the owner?"

This question was left in consequence of strenuous contention made by counsel for the prisoners that the question was one of intent, and that there was nothing to shew that they intended to deprive the owner either permanently or temporarily of the use and control of his car.

The jury, after finding the prisoners guilty, answered the question submitted to them by the trial Judge as follows: That they do not think they intended to return the car.

It was claimed on the argument that even if Crocket, J., was wrong in telling the jury that they must find the prisoners guilty, and that the prisoners were guilty according to their own admission, which, it was contended by counsel for the prisoners, was practically a taking of the case out of the hands of the jury, because they were directed by His Honour that they must find the prisoners guilty, and that therefore it was subversive of the principles of trial by jury, that any error in that respect had been cured by the answer which was found by the jury to the question which he submitted to them, in which they said, in effect, that their belief was that the prisoners did not intend to return the car.

There are verdicts of two sorts that are found in criminal cases: a general verdict, and a special verdict. I do not think, in my experience at the Bar, I have ever known of a special verdict being found in the Province of New Brunswick. A special verdict, as I understand it, is where there may be a question as to the legal effect of the facts, and the jury are asked to find facts from the evidence, and then, on the finding of those facts, the Judge decides whether the verdict shall be one of "guilty" or "not guilty," and directs a verdict entered accordingly. In order to constitute a special verdict there must be a finding, I believe, on all the facts in connection with the case; but in this case it would appear that there had been a verdict entered as a general verdict, a verdict of "guilty," which the trial Judge directed the jury to bring

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in, and in addition that they answered this question, and it is very doubtful if it is sufficient to constitute a special verdict or not. In addition to that, it is a question whether a Judge trying criminals is justified in leaving questions like that to the jury. It has never been the practice in this Province.

These questions are of such importance that the Court does not feel justified in pronouncing a final judgment in regard to them at the present time. In some cases—in fact, in most cases—granting leave to appeal is tantamount to granting the appeal itself. In this case the Court has decided it will grant the leave to appeal, but in doing so it wishes it to be distinctly understood that it does not regard the granting leave to appeal in this case as being tantamount to granting the appeal itself, and it will expect to hear further argument on the matter at the next term of the Court.

In compliance with that judgment, Crocket, J., stated a case which was as follows:—

The accused were tried at the Westmorland Circuit, on February 25 and 26, 1920, upon an indictment charging the theft of an automobile, the property of Albert Arseneau, from the garage of one Tim. LeBlanc, at Sunny Brae, in the County of Westmorland, on or about November 1, 1919.

At the close of the case for the prosecution the counsel for the defendants, Friel, K.C., moved for a direction for the acquittal of the accused Wilson and Poirier, upon the ground that there was no evidence against them. I refused this motion, and all three defendants afterwards went upon the stand in their own defence.

The accused, Vanbuskirk, on his direct examination, testified that he was in Sunny Brae on November 1; that he left there the Saturday after Hallowe'en about ten o'clock at night; that he took the car out of LeBlanc's garage to go to the States; that he did not tell LeBlanc or Arseneau or anybody that he was going to take the car; that he had no talk with either Arseneau or LeBlanc, and gave them no hint that he was going to take the car; that Poirier and Wilson went with him; that they were going to the States with him to work; that he told them they would go in the car, though he did not mention any particular car at the time; that they went to LeBlanc's garage and got the car and went; that they put the car in a garage in Calais, Maine: and in answer to the question, "What were you going to do with the car?" he replied that they were going to send it back by freight; that when they left with the car they expected to go with it to the border; that they left Sunny Brae on Saturday night, travelled all day Sunday, and stopped at or near St. Stephen in a barn on the side of the road all Sunday night; that after crossing the border into Calais they put the car in a garage owned by a Mr. Gregory, to put springs under the car; that Mr. Gregory told them he would have to send for the springs, and that it would take a week; that Vanbuskirk told Gregory he was in no hurry for the car, and went out and left the car there; that he, Poirier and Wilson, then went by rail to Rochester, New Hampshire, where Vanbuskirk had been working previously.

In cross-examination, Vanbuskirk testified that he took the car without permission; that he never suggested to the owner that he was going to take it; that he had no right to take it whatever, and that he knew that at the time; that his object in taking the car was to go to the States; that when they took the car from LeBlanc's garage he thought he and Poirier opened the door,

and that they didn't start the engine, but pushed the car out on the road about fifty feet. In answer to the question, "Why did you push the car out?", he said, "Because they would hear it if we started it."

The accused Wilson testified in his direct examination that he found out what car they were going in, about half-past nine; that the three of them planned together that they would get Arseneau's car, and that they went over and got it out of the garage about half-past nine or ten o'clock; that they pushed the car out of the garage, and that he watched to see that nobody came out of the door, and helped push it out of the yard. In answer to the question, "When you boys took the car out of the garage, where were you going with it?" he said, "To the States"; and that they travelled all night. To the question, "What were you going to do with the car?" Wilson said, "Send it back." That Vanbuskirk, after they had taken the car and while they were on the road, said that he was going to send it back by freight; that after the car was left in the garage at Calais, they went to Rochester, walking some of the way and stealing rides.

The accused Poirier, when asked on direct examination, how they came to take the car, said the three of them just went and took it; and in answer to the question, "Did you plan to go to the States?" said, "Well, they were going to go a ways, yes, and then go by rail afterwards, and ship the car back as soon as they got the money." He said that was said by the three of them before they left. He admitted that they had no permission to take the car.

When Mr. Friel rose to sum up to the jury I said that it seemed to me that the evidence which had been given by the three accused had reduced the case to a pure question of law; that the facts which the Crown sought to establish in proof of its case had been admitted by the accused; that was, the Crown sought to establish by inferential evidence that the car was taken out of LeBlanc's garage on the night of November 1 by the three accused, acting together, and that they took the car to Calais, in the State of Maine, and left it there; that those facts had been admitted by the defendants, and that it seemed to me that it was simply a question of law as to whether those facts established theft, and that it was a case in which there must be a direction to the jury.

After argument, in which the counsel for the defendants claimed that the admitted evidence did not shew a fraudulent taking or an intent on the part of the defendants to make the car their own, I intimated that I would have to direct the jury that the defendants were guilty, upon their own evidence, so far as the act of fraudulently taking the car with intent to deprive the owner temporarily of the property was concerned, but that I would leave a special question to the jury upon the question of the intent to make it their own or to return it. I therefore charged the jury that the Crown sought to establish its case by proving a series of facts and circumstances from which it was proposed to ask them to infer that the defendants were guilty of the crime with which they were charged; that the main facts which the Crown sought to establish, were, first, the fact that these three defendants, acting together, took the car from LeBlanc's garage and proceeded in it to the town of Calais, in the State of Maine, and there left it in the garage; that the defendants, all three of them, went upon the stand, and each admitted that they planned together to take the car from the garage, with the intent or the intention of proceeding with it to the United States; that they furthermore admitted

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that the car was rolled out of the garage and the engine was not used, in order that there might be no noise to attract the attention of the persons in LeBlanc's home; that one of the accused, Wilson, remained outside to watch that nobody came out of the house; that they admitted, not only that they took the car in that way, with the intention of taking it to the United States, but that they actually did take it there and left it in a garage for the purpose of repairs; that by reason of these admissions the case had assumed a somewhat unusual aspect for a criminal case, and that it was for that reason that I told the counsel for the defence that it seemed to me the case was reduced to a pure question of law, the responsibility for the decision of which rested upon me as the trial Judge; that it was my duty to direct them either one way or the other; that the admitted facts either constituted theft or they did not constitute theft; that under the Criminal Code the fraudulent taking of anything which was capable of being stolen, without colour of right, with intent to deprive the owner of it either absolutely or temporarily, constituted theft; that there were two essential ingredients in the offence: first, the fraudulent taking, without colour of right, and, secondly, the intent to deprive the owner, in the words of the definition temporarily or absolutely of the thing; that formerly at common law it was necessary to prove the intent to acquire the property themselves—to make it their own—but that it was not now necessary that there should be an intent upon the part of the persons taking a thing to make it their own, in order to constitute theft; that it was sufficient if there were an intent to interfere with the dominion or right of property in the thing, or an intent to deprive the owner temporarily of it; that it was in that view, and in view of the facts that the facts were undisputed, that I felt it my duty to direct them that under the defendants' own evidence they were guilty of the crime with which they stood charged—the crime of stealing the automobile. I then referred to the defendants' admissions respecting the clandestine way in which the car was taken, and their recognition that they had no right or colour of right to take it, and respecting their intent to take it to the United States, and stated to the jury that I had determined to direct them that those facts, admitted by the defendants, constituted in law a fraudulent taking, without colour of right, and that the intent to take the car to the United States constituted an intent to deprive the owner temporarily of the car, within the meaning of the statutory definition of theft, and the defendants were guilty upon their own testimony.

In answer to the special question the jury found that they did not think the accused intended to return the car.

Upon the counsel for the defendants moving for a reserved case, I said I would have had no hesitation at all in reserving a case upon the question of my direction to the jury with respect to the fraudulent taking, without colour of right, with intent to deprive the owner temporarily of the car, had it not been for the finding of the jury upon the special question, which seemed to me to conclude the matter against the defendants, and for that reason I refused to reserve a case, leaving the defendants to their right of appeal from my decision.

The Appeal Division, at its September sitting, having granted leave to appeal from my decision refusing a reserved case, I now submit this statement upon the point upon which I was asked to reserve a case, with the following question, for the opinion of the Appeal Division:—

Was I in error in directing the jury, as above stated, that a fraudulent taking of the car, without colour of right, with intent to deprive the owner temporarily thereof, constituted theft, and that the defendants were guilty, under their own testimony, of the crime of theft, as defined by the Criminal Code?

Having regard to the question reserved by the trial Judge I am of opinion in regard to the first portion of it that he was not in error in directing the jury that a fraudulent taking of the car without colour of right with intent to deprive the owner thereof temporarily, constituted theft. I think that this is unquestionably a correct statement of the law, and that no exception can be taken thereto. With regard to the second part, however, viz.: "And that the defendants were guilty under their own testimony of the crime of theft as defined by the Criminal Code," I am of opinion that the question of intention was one which was a question of fact that should have been submitted to the jury, and that the trial Judge was in error in stating to the jury that under the defendants' own evidence they were guilty of the crime with which they were charged, and in directing them that the defendants were guilty upon their own testimony and that they must convict the defendants. I am of opinion that the Judge should have informed the jury that it was for them to decide if the defendants intended to deprive the owner temporarily or absolutely of the car, and in doing so he might well have directed their attention to the evidence given by the defendants themselves, evidence which it seems to me was conclusive of their intention to deprive the owner of the car of its possession temporarily at least, for they admitted in evidence that they had taken it from the garage under circumstances which shewed that it had been taken fraudulently without colour of right, for the purpose of going to the State of Maine, and in view of those facts, which were clearly proved in evidence by their own admissions, I fail to see how any jury could for a moment conclude that there was not an intention to deprive the owner of its use temporarily at least, even though it had been their intention when they reached the State of Maine to send it back. The question being one upon which the jury had to find, I think, with all respect, that the Judge was in error in directing them as he did. He, however, left to the jury the question to which I have referred, viz.—did the defendants,

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when they took the car from LeBlanc's garage on the night of November 1, intend to make it their own, or did they intend to return it to the owner?—and the answer given by the jury was that they did not think they intended to return the car. If this answer is to be accepted and this Court is to be influenced thereby, it appears clear that the intention of the jury was to find the parties guilty, not only because they were directed by the Judge to do so, but because they believed from the evidence that they did not intend to return the car and that therefore they must have intended to deprive the owner of its use.

The Attorney-General, when the case was last argued, after the special case had been stated by Crocket, J., contended that even if the charge of Crocket, J., was in error and the answer made by the jury to the special question left to them was not to be regarded, that the appeal should not succeed because of the provision of sec. 1019 of the Criminal Code, R.S.C. 1906, ch. 146, which provides that no conviction shall be set aside nor any new trial directed although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial, and he contended very strongly that it was perfectly clear under the evidence in this case that the persons were guilty and that the jury would have so found even if they had not been directed as they were by the trial Judge. This question has arisen in a number of cases under the statute 7 Ed. VII. 1907 (Imp.), ch. 23, sec. 4, which confers special powers on English Courts of Criminal Appeal, and provides that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appeal, dismiss the appeal if they decide no substantial miscarriage of justice has been done. The language is not the same as in the section of our Code, but I think that the principles which must prevail in both cases are the same, and therefore the judgments of the Court of Criminal Appeal in Great Britain will be of assistance to us in arriving at a conclusion in the present case.

In the case of *Cohen* and *Bateman* (1909), 2 Cr. App. 197, Channell, J., said, at p. 207:—

This section (sec. 4 (1)) has been considered in almost all the cases which have come before this Court, but these precedents are of little use in subsequent cases because of the varying circumstances of each particular case. Although therefore, the principle is quite clear, we desire to express it again. Taking sec. 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction, the jury *must* have come to the same conclusion. A mistake of the Judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words "any other ground," so that the appeal should be allowed according as there is or is not a "miscarriage of justice." There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the Judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty.

Lord Alverstone, C.J., in the case of *James Morgan* (1911), 7 Cr. App. 63, is thus reported at p. 64:—

In this case, if we had any doubt as to what the jury would have done on a proper direction by the Recorder, we should have quashed the conviction, since this Court is not here to re-try cases improperly tried below. But if we are convinced that on a proper direction the jury must have come to the same conclusion as they did upon the direction actually given them, then there is no substantial miscarriage of justice, and it is our duty to affirm the conviction, even although the point raised in the ground of appeal is determined in favour of the prisoner. Even though we may consider that the Recorder gave a wholly wrong direction to the jury when he used the words

. . .

In the same volume at p. 119 is to be found the case of *Arthur William Monk*, decided in 1912, where Phillimore, J., quotes from the judgment of Channell, J., in *Cohen* and *Bateman* with approval as follows, at p. 124:—

If, however, the Court, in such a case, comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events, no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due, to some extent, to such an error of the Judge, not being a wrong decision of a point of law.

In the British Columbia case of *The King* v. *Lew* (1912), 1 D.L.R. 99, 19 Can. Cr. Cas. 281, 17 B.C.R. 77, it was held that upon an appeal in a criminal case the Court of Appeal should not grant a new trial merely because a portion of the Judge's charge was objectionable if of opinion that irrespective of the charge the jury could not have done otherwise than convict the accused,

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and consequently that the misdirection could not have occasioned any substantial wrong to the accused within the terms of the Criminal Code.

I have come to the conclusion from having heard the argument and carefully read the evidence and the Judge's charge, that on a right direction the jury must have come to the same conclusion that they did, viz., brought in a verdict of guilty against the defendants, and that the mistake on the part of the Judge cannot reasonably be considered as having brought about the verdict. In the language of Lord Alverstone, I am convinced that on a proper direction the jury must have come to the same conclusion as they did upon the direction actually given them, and that being the case, under the judgment in the *James Morgan* case, there is no substantial miscarriage of justice, and it is the duty of this Court to confirm the conviction, even though the point raised in the ground of appeal be determined in favour of the prisoners.

My conviction to the effect that the jury must have come to the same conclusion is strengthened by the answer which they gave to the question submitted to them by the trial Judge, and while it is not customary to submit such questions in criminal cases in this Province, and I do not think it can be regarded in the nature of a special verdict, yet I think that having found the prisoners guilty and having answered the question as they did, the conclusion that we must necessarily come to is that they found the prisoners guilty because *inter alia* they believed that they did not intend to return the car.

In my opinion the appeal must be dismissed.

Grimmer, J.

GRIMMER, J., concurs with Hazen, C.J.

Appeal dismissed.

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Quebec Court of King's Bench, Lamothe, C.J., Lavergne, Carroll, Pelletier and Martin, JJ. October 27, 1919.

ARBITRATION (§ II—12)—AWARD UNDER RAILWAY ACT, R.S.C. 1906, CH. 37 —FAILURE TO GIVE NOTICE—EFFECT—RULES GOVERNING AWARD— ART. 391 C.C.P.

Failure on the part of a notary to give notice of an award rendered under the provisions of the Railway Act of Canada (R.S.C. 1906, ch. 37), or to serve the award, until five days after the expiration of the delay fixed for making the award, does not render the award a nullity, the rules governing the arbitration being found in arts. 391 *et seq* of the Code of Civil Procedure and not by art. 1442.

Statement.

APPEAL from the Quebec Court of Review (1918), 42 D.L.R. 685, in an action to set aside an award on the ground that notice of the award had not been given by the notary within the proper delay. The judgment of the Superior Court was rendered by Fortin, J., on December 27, 1915. It was reversed by the Court of Review on June 5, 1918, 42 D.L.R. 685, 54 Que. S.C. 220. This latter judgment is now reversed and the disposition of the case by the Court of first instance is restored.

All the facts of the case as well as the pleadings are set out in the report of the judgment of the Court of Review and in the following notes.

Beaubien and *Lamarche*, for appellant.

St. Germaine, *Guérin* and *Raymond*, for respondent.

Lamothe, C.J.

LAMOTHE, C.J.:—Should an award rendered under the provisions of the Railway Act, R.S.C. 1906, ch. 37, be served on pain of nullity within the delay fixed for making said award? The nature of the present case calls for a solution of this question.

Attentive study leads me to believe that the Act says nothing about service of the award. It does not say a word about it. It speaks of notice to be given of the award. This notice, says the Act, should be given by the arbitrators. Should it be given on pain of nullity within the delay fixed for making the award? Upon this point again the Act is silent. This obligation to give the notice within the delay fixed for making the award must be drawn by inference and deduction. The section of the Act makes the delay for appealing to run from the date of this notice. But, it is said, this notice must be given by the arbitrators and it must be given before they are *functi officio*. As the arbitrators would become *functi officio* by the expiration of the delay for making

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the award it would result that notice of this award should be given before the expiration of this delay; it could not be given later or the award would become null. This reasoning is not convincing. The Act in saying that the arbitrators should give a notice of their award does not take away from the parties themselves the right to give such a notice. This right pertains to everyone who is interested in exercising it; one can only be deprived of it by a positive provision of the Act, a provision which does not exist.

Does the failure to give such notice involve the nullity of the award itself? The Act does not say so and in the case of nullities it is necessary that the Act should speak. A nullity cannot be created by inference nor by deduction. In the present case the notice which should be given of the award is directory. Failure to give it may stay the execution of the award and delay its effect; it cannot affect the existence itself of the award. The arbitrators have given their decision within the time fixed; they could wait until the last day, the last hour and even the last minute, and in the latter case could give the notice on the following day or later. To decide otherwise would be to create, by interpretation, a nullity of *non esse*. The interpreter of the law has no such power.

The notary Dumesnil did not serve the award; he did not give notice that the award had been made, or rather he gave this notice 5 days after the expiration of the delay fixed for making the award. The expropriating company attacked this award for this reason, and also for the reason that the amount awarded was excessive and not justified by the evidence. The Superior Court set aside the award on the sole ground that notice had not been given on or before April 10, the date fixed for making the award. The result of this judgment is that the respondent has lost the benefit of the increase of compensation to $5,534, and has been obliged to accept the amount offered by the expropriating company, to wit, $1,196.65, and has in addition paid costs to a considerable amount.

This judgment was carried to the Court of Review but the latter Court refused to consider it saying that it, was an appeal from an award and that the Superior Court had finally decided it. In that the Court of Review, perhaps, lost sight of the fact that the action brought by the company had a double character, that of an action to annul (which could be taken to Review), and that

of an appeal from an award (which could not be brought before said Court). I express no opinion upon this point.

The consequence of these two judgments is that the respondent has lost a sum of $4,337.36, the difference between the amount offered and the amount awarded by the arbitrators, to which it is necessary to add the interest and costs.

What is the real cause of this loss? Is it the omission of the notary? No, since the notice could have been given after April 10, as I said above, and since it was really given 5 days after that date. The real cause of this loss (*causa causans*) is found in the erroneous judgment of the Superior Court (Dunlop, J.), creating by interpretation a nullity which the law does not create. A notary cannot be responsible for the consequences of this judicial error.

We have been referred to art. 1442 C.C.P., as one which should be applied in the case where the Railway Act is silent. Article 1442 applies exclusively to compromises and voluntary arbitrations. The nullity that it provides for is especially intended for such cases and cannot be extended by analogy or interpretation. In the case of railways there is no compromise, there is no voluntary submission to arbitration. The expropriation is compulsory; the arbitration is equally so; it is the Court which appoints the third arbitrator; this arbitration is placed under the control of the Superior Court. The rules which govern these arbitrations are found in arts. 391 *et seq.* of the Code of Civil Procedure. No Rule is to be found there similar to that of art. 1442; no nullity is attached to the failure to serve the award or to give notice of it.

Being of this opinion I am relieved of the necessity to decide upon the admissibility of the evidence of the order given by the arbitrators to the notary and upon the necessity of a special notice prior to the action.

The judgment of the Superior Court should be restored as to its result and the action against the notary should be dismissed.

Carroll, J.

CARROLL, J.:—I will only discuss the essential question which decides all the litigation, namely, whether or not the failure to serve the award makes it null. Proceedings were under the Railway Act, R.S.C. 1906, ch. 37, and the question is raised under sec. 209 of this Act, which provides: "Whenever the award exceeds $600 any party to the arbitration may, within one month after receiving a written notice from any one of the arbitrators,

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or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a Superior Court."

As is apparent this article implies that notice is given before the aggrieved party can take an appeal.

A delay of a month is provided after the receipt of this notice for carrying the cause to appeal, but I do not see in any part of this section or in the other provisions of the Railway Act that this notice must be given at once as soon as the award is made. Therefore the notice given by the notary on April 16, would appear to have been given in time.

If the notice has not been given in time this omission does not involve the nullity of the award because nullities are of strict law and should be provided for by the Act. Counsel for the respondent on the hearing and in their factum say that the award is only legal from the day on which it is brought to the knowledge of the interested parties.

We have in the Code of Civil Procedure an article upon this matter, art. 1442, which says that

> The award is received in authentic form . . . and it should be given in presence of the parties or a copy of the award should be delivered or served within the delay fixed by the compromise.

But the parties did not proceed under the common law but under a special Act which does not require this formality. That is a regrettable omission in the Railway Act, but we cannot supply a condition which the Legislature has not thought it proper to impose.

Garsonnet de l'arbitrage, vol. 8, sec. 3070, notes 1, 2, and 3, tells us that a decision of the Civil Court of June 7, 1808, commits an error in declaring that the award is effective only from the day on which it was definitely drawn up and signed; the contrary is the case, he says, from all principles on the matter of the judgment. He says that the reading of the award has no solemnity, that no publicity is required nor the presence of all the arbitrators.

There is in France upon the matter contradictory opinions but according to the principles of our common law it is clear that an award should be communicated to the parties, and the sole reason for which, under the special Act, we do not declare it null, is that this condition of service is not required on pain of nullity.

This condition not being required the damages incurred are not the direct and immediate result of the appellant's action and the judgment against him should be reversed with costs.

PELLETIER, J.:—The appellant first raised before us the ground resulting from the fact that he is a notary and therefore a public officer, that the notice required by art. 88 C.C.P. was not given; that therefore on this head alone the action should be dismissed.

I am against the appellant on this point, for I believe that it is sufficiently admitted by the defence that this notice was sent. It is true that there was a general denial of the paragraph alleging the sending of this notice but later the detailed defence on the matter claimed that the notice sent was for an amount less than that for which the action was brought, and therefore it did not conform to the provisions of this art. 88. But the judgment rendered is for an amount less than that mentioned in the notice. The law does not require that this notice should be served in a special manner and it is sufficient if there is a letter signed either by the plaintiff or his attorney provided that the letter sets out the cause of the action and the other formalities mentioned in art. 88. I believe then that this first ground of appeal has no foundation.

The appellant has, in my opinion, a ground much more serious which he states as follows: I have not caused you to lose the amount in question from the fact that the award was not served, because the service of an award, under the Railway Act, R.S.C. 1906, ch. 37, is not necessary for its validity. Upon this point I believe the appellant is right.

The respondent herself admits in her factum that there is nothing in the Railway Act which demands service of the award as a condition of its validity. All the Railway Act says upon this head is that a notice will be given of the fact that the award has been rendered, but the Act requires that not to declare the award void if the notice is not given, but only to make a commencement of the delay of a month during which there can be an appeal from the award.

There were a number of unfortunate circumstances. In the first place, the appellant was charged if the verbal evidence on the subject is admitted with being obliged to serve the award before April 10, which according to the respondent was the last day for making and serving it.

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In view of this failure to serve the award the railway company brought an action in the Superior Court which was partly an appeal upon the merits of the award itself and partly an action for a declaration that the award was void and of no effect. Dunlop, J., before whom this case was tried, ignored all the grounds invoked which could be considered as relating to an appeal from the award and considered only the allegations which asked that the award should be declared null for want of service and he gave effect to this last ground of appeal. The respondent inscribed in review against this judgment and, another unfortunate matter, the Court of Review declared itself incompetent because it believed that it was only a case of an appeal from the award; consequently as between the railway company and the respondent the judgment of Dunlop, J., has become *chose jugée*.

The appellant was not a party in this case and therefore as there is no *chose jugée* as against him, he invokes anew the fact that it was not necessary to serve the award. It is answered that this attitude is unjust for the respondent; that the appellant could and should have taken proceedings as *tiers-opposant* to have the judgment rendered by Dunlop, J., set aside, and that by contenting himself with defending the present action he leaves the respondent without remedy. All this is in fact very regrettable, but we are obliged to take the litigation as it has been submitted to us; we cannot condemn the appellant to pay a considerable sum which he does not owe because he could have taken another procedure which after all he was not obliged to take.

I am of opinion that the award was validly made; moreover, it was signified on April 16, and I believe that this was not too late. The delays which would expire on April 10 were those for rendering the award. But the arbitrators would have till the last minute of the day of April 10 for doing this. That alone shews that the notice of the making of the award could have been given on the 11th, and if it could have been validly given on the 11th, it could be equally so on the 16th.

Therefore I conclude that the appellant is not responsible for the erroneous judgment of Dunlop, J., nor for the judgment not less erroneous of the Court of Review and that he has preserved the right to invoke the ground that he now pleads to the action brought against him. Moreover, it is upon the arbitrators that

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the Railway Act has imposed the duty of giving notice of the fact that the award has been rendered; that shews first that the making of the award is one thing and that the notice of it is another and very different thing and in the second place since it is upon the arbitrators that the law imposes this duty, they should give this notice themselves. We are told that they charged the appellant with this duty and that the latter accepted the mandate, but I believe that the arbitrators although they did not give any notice could not be proceeded against for damages. They exercised judicial functions, they acted for the best and acted in good faith, and that, in my opinion, protects them against an action for damages. But if the arbitrators themselves could not be proceeded against for damages by the respondent the notary who was only their agent could not be sued any more than they.

I do not think that there is any privity between the expropriation and the notary in a case such as that which occupies our attention.

Moreover, the award was rendered at the end of March and the delays for making it expired only on April 10; respondent knew, or should have known, that the award had been made and could have put the arbitrators *en demeure* to give the notice in question. Respondent had another right in case of refusal of the arbitrators to give the notice, she had 10 days before the award had to be signified; and since she was of the opinion that the award should be signified before April 10, she could have demanded a copy of the notarial instrument and had it signified by another notary.

Upon the whole and without considering, since it is not necessary, the legality of the verbal evidence on the subject of the mandate of signification that the arbitrators should have given to the appellant, I have arrived at the conclusion that the judgment at first instance was well founded, that that of the Court of Review should be reversed and the action dismissed with costs in all the Courts.

Martin, J.

MARTIN, J.:—My first impression at the argument of this case before us was that the judgment of the Court of Review was right in holding the appellant responsible and that the award was invalid for lack of signification upon the parties within the delay fixed by the arbitrators. Further and more mature consideration of the

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case leads me to the conclusion that my first impression was wrong and that the judgment of the Superior Court, which dismissed the action, is right.

I am not prepared to accept as correct all of the reasons of the judgment of the Superior Court. I think it is sufficiently established by legal evidence that the appellant who received the award was instructed to signify the same upon the parties, that he promised to do so, and was paid for doing so, but failed to do so within the time limit fixed by the arbitrators for making the award. The main question is whether or not a signification of the award upon the parties within the time limit fixed for making the same was necessary to its validity. The Superior Court held it was not by the following *considérant*:

> Considering that there is no provision of the Railway Act [R.S.C. (1906), ch. 37] under which the expropriation took place that requires the signification of such an award; that this Act is exceptional in its nature and should be strictly interpreted; that no nullity can result from the omission of a formality which it does not require; and that therefore it is not the failure to signify the said award which was the cause of the said damages.

The Court of Review held the contrary, following the judgment of Dunlop, J., in the proceedings taken by the railway company to annul the award.

If sec. 209, sub-sec. 4, of the Railway Act, R.S.C. 1906, ch. 37, could be said to apply to art. 1442 C.C.P., I would be of opinion that the award was invalid and that respondent had by the fault and negligence of appellant, lost the difference between the amount of the award and the amount offered by the railway company, but I do not think art. 1442 C.C.P. applies. It is an exceptional provision applying only to acts of submission made and entered into by the parties agreeing to leave the decision of the matter in dispute to a Judge of their own choice. The general law of arbitration, C.C.P. arts. 441 *et seq.* contains no provision similar to that contained in art. 1442, and I think the only effect of sec. 209, sub-sec. 4, of the Railway Act is that the right to appeal from an award given by the preceding paragraph of that section does not affect any existing provincial law or practice for setting aside awards, and that the right to a direct action still subsists, for instance, in cases like that of *Brunet* v. *St. Laurent & Adirondack Railway etc.* (1896), 6 Que. Q.B. 116.

In the case of *Brooke* v. *Mitchell* (1840), 6 M. & W. 473, 151

E.R. 498, it was ordered that the matters in difference in that case should be referred to two arbitrators who should make and publish their award in writing on or before a date fixed.

The arbitrators differed, and appointed an umpire, who, on July 11, 1839, made and executed his award, in the presence of and attested by two witnesses, to whom it was fully make known and declared at the time of its execution. On the afternoon of the 12th, the attorneys of both parties received a letter from the umpire, stating that he was about to declare his award, and desiring them to attend at his office at half-past five o'clock on that evening. They accordingly did so, when he read over to them and declared his award, and delivered it to the plaintiff's attorney. At ten o'clock a.m. on the same day the plaintiff died, and Baron Parke said:—

I am of opinion that this award was sufficiently published for the purpose of making it valid, in the lifetime of the plaintiff. For that purpose it is only necessary that the act should be complete, so far as the arbitrator is concerned; that he should have done some act whereby he becomes *functus officio*, and has declared his final mind. That is the rule to be collected from the cases of *Brown* v. *Vawser* (1804), 4 East 584, and *Henfree* v. *Bromley* (1805), 6 East 309; and that is the meaning of the term "publication." Here the instrument was complete as an award, and the umpire could make no alteration in it; he was then *functus officio*, having declared his final mind. As to the time of moving to set an award aside, it is quite reasonable that the party should have two terms from the time of notice.

Baron Alderson said:—

I apprehend that the meaning of publication, in the rule which regulates the time for an application to set aside an award, is not the publication of the award itself, but, by analogy to the statute, publication to the parties, *i.e.*, when they have notice of its contents, and are therefore in a situation to move to set it aside. But on the terms of this submission, the award is made and published, when the arbitrator, by some act, has expressed his final determination on the matters referred to him.

Baron Guerney says:—

After the execution of the award, and its having been read over to the witnesses, there was as complete a publication of it as could be; the umpire could not afterwards revoke or alter it; and it was then ready to be delivered.

I agree with the counsel for respondent, and as was held by the Court of Review, that under the provisions of the existing Railway Act notice to the party's arbitrator is not notice to the party. The provision to such effect contained in sec. 152 of the Railway Act of 1888, 51 Vict. (Can.), ch. 29, is not reproduced, but I am of the opinion that the award was made when it was executed by the

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arbitrators and that sec. 204 of the Railway Act only provides that the time be fixed for making the award and that the notice to the parties under sec. 209 might be given at any time thereafter and that the stipulation as to notice contained in this latter article is to fix a date from which the delay of one month to appeal will run, but that the giving of such notice to the parties within the time fixed for making the award is not a *peine de nullité*. I would reverse the judgment of the Court of Review for this reason and restore the judgment of the Superior Court, which dismissed the respondent's action, with all costs.

JUDGMENT:—Upon the merits of the appeal brought by the defendant appellant from the final judgment rendered by the Superior Court, sitting in Review at Montreal on June 5, 1918, [42 D.L.R. 685, 54 Que. S.C. 220], maintaining for a certain amount the action of the plaintiff and reversing the judgment of the Superior Court of the District of Montreal which dismissed the action;

Considering that there is error in the said judgment of the Superior Court sitting in Review at Montreal; that the said judgment of the Superior Court of December 27, 1915, is well founded in its disposal of the case except, however, certain *considérants* which should be struck out, namely, *considérants* 1, 2 and 5; reverses the judgment of the Court of Review, and proceeding to render that which should have been rendered, restores the *dispositif* of the judgment of the Superior Court of the District of Montreal, dated December 27, 1915, and striking out of the said judgment the 1st, 2nd and fifth *considérants*; maintains the appeal and dismisses the action of the plaintiff with costs of the three Courts. *Appeal allowed.*

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S. C.

REX v. HAYTON.

Ontario Supreme Court, Middleton, J. December 23, 1920.

1. INTOXICATING LIQUORS (§ III I—91)—TRIAL OF OFFENDERS UNDER ONTARIO TEMPERANCE ACT, SEC. 41—MAGISTRATE RECEIVING EX PARTE STATEMENTS FROM CROWN PROSECUTOR BEFORE DELIVERY OF JUDGMENT—PREJUDICE OF MAGISTRATE.

Communications on behalf of the Crown prosecutor to the magistrate after he has reserved his decision and before delivery of his judgment, at which neither the accused nor any one representing him is present, and their possible influence upon the mind of the magistrate are sufficient to quash a conviction under sec. 41 of the Ontario Temperance Act, 6 Geo. V., 1916, ch. 50.

2. EVIDENCE (§ II B—111)—ONTARIO TEMPERANCE ACT—LABEL ON BOTTLE AS EVIDENCE OF CONTENTS.

There is nothing in the Ontario Temperance Act which makes the label on a box or a bottle conclusive or even *primâ facie* evidence of its contents.

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MOTION to quash the conviction of the defendant, made by the Police Magistrate for the City of Peterborough, on November 19, 1920, for having intoxicating liquor in a place other than his private dwelling, contrary to the provisions of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50. Conviction quashed.

Statement.

G. N. Gordon, for defendant.

F. P. Brennan, for magistrate and prosecutor.

MIDDLETON, J.:—The proceedings before the magistrate are attacked as being unfair and contrary to natural justice, in that the magistrate acquired information from parties interested, behind the back of the accused.

Middleton, J.

To understand the full vice of what took place, it is necessary to understand the matter in issue. A box which, it is suggested, contained intoxicating liquor, was sent by express from Montreal, addressed to a man named Edwards in Peterborough. The box was delivered, and the express-charges were collected. Edwards said he did not order the liquor, and thereupon the accused, who was a driver in the service of the express company, called at Edwards's residence, repaid him the express-charges, and took away the box, removing it to his own house. Instead of the accused being prosecuted for stealing the box, he was prosecuted for having the liquor or supposed liquor at a place other than his private dwelling house—presumably upon the street.

No evidence whatever was given that the box contained liquor. It is said to have been branded "liquor;" but whether it was truly branded or not, no one knew. The accused relied at the hearing upon the failure to prove his guilt in this vital respect.

The magistrate reserved judgment. After the judgment was reserved, on two occasions the prosecutor and the express-agent discussed the matter with the magistrate, apparently endeavouring to persuade him that the label on the box and the entries in the express company's book amounted to proof of the contents of the box.

Counsel for the accused objected to this strenuously, and, as he swore in an affidavit filed, pointed out to the magistrate "that

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he should not take testimony not under oath in the absence of the accused and his counsel, and the said Police Magistrate stated that he desired to obtain all the facts from whatever source he could obtain them," and the counsel in his affidavit adds that, in his opinion, "by reason of the said Joseph Stewart and the said W. F. Skitch giving unsworn statements to the said Police Magistrate in this case, in my belief the Police Magistrate's mind was prejudiced, and the accused did not obtain a fair trial." Similar statements are made by counsel present at the trial.

Three affidavits are filed in answer. They are made by the inspector, Stewart, the express agent, Skitch, and by the counsel for the prosecution. These affidavits are singularly guarded: one conversation with the magistrate is admitted, the second is neither admitted nor denied. The exceedingly suggestive expression, "No new evidence was taken," is used, and then a statement is made in reference to the earlier and apparently the least objectionable interview, that "the magistrate chatted in a general way about the case." Counsel, apparently not knowing about either conversation, merely states that "no evidence to my knowledge was taken by the magistrate after the trial."

In the absence of any denial by the magistrate, the statements I have quoted must be taken to be admitted, and I think it is plain that the conviction cannot, under these circumstances, be permitted to stand.

It is most important that the administration of justice should not only be free from impropriety, but that it should be so conducted as to avoid all suspicion of impropriety. It is needless to review the numerous reported decisions which go to shew that a judicial officer ought not to receive communications from either party *ex parte*. Here, from the nature of the discussion, it is hard to avoid the impression that the magistrate was influenced by the opinions, views, and unsworn statements of those interested in the prosecution.

I should have been compelled to quash the conviction also upon the ground that there was no evidence to shew the contents of the box in question. Such evidence could have been given without great difficulty, but was not, and there is no provision in the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, making the label upon a box or a bottle conclusive or even *primâ facie*

evidence of its contents. In fact sec. 70 (9)* indicates that too often "things are not what they seem."

With some hesitation I have concluded not to award costs against the magistrate, and to make the usual order for protection, but I think that costs should be awarded against the informant, who actively took part in the matters complained of.

Conviction quashed.

*70.—(9) If it appears to the Justice that such liquor [that is, liquor found in transit or in course of delivery or at a railway station, express office, etc.] or any part thereof was consigned to some person in a fictitious name or was shipped as other goods, or was covered or concealed in such manner as would probably render discovery of the nature of the contents of the vessel, cask or package in which the same was contained more difficult, it shall be *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of this Act.

HALL v. ELECTRIC LIGHT COMMISSIONERS OF LAWRENCETOWN.

Nova Scotia Supreme Court, Harris, C.J., Russell, Chisholm and Mellish, JJ. February 2, 1921.

ARBITRATION (§ III—17)—ORDER OF COURT GRANTING REFERENCE—SUBMISSION OF PARTIES TO—AWARD—APPLICATION TO SET ASIDE ORDER—JURISDICTION.

If an order is made by consent of the solicitors on both sides for a reference before arbitrators, and three arbitrators are appointed in pursuance of the order who take evidence and file their award, counsel representating both parties appearing before them and taking part in the proceedings and examining and cross-examining witnesses, and no objection is made to the regularity of the proceedings, the parties cannot afterwards attack the award or the subsequent proceedings on the ground that the Court had not jurisdiction to grant the order made.

[See Annotation, Conclusiveness of Award, 39 D.L.R. 218.]

Statement.

APPEAL from the judgment or order of Ritchie, E.J., dismissing with costs plaintiff's application for an order striking out and setting aside an order of reference made by Drysdale, J., and all proceedings taken thereunder.

W. G. Parsons, K.C., and *O. S. Miller*, for appellant.

J. L. Ralston, K.C., and *H. C. Morse*, for respondents.

The judgment of the Court was delivered by

Harris, C.J.

HARRIS, C.J.:—In this action an order was made by Drysdale, J., on October 10, 1919, which reads as follows:—

It is ordered that all issues of fact arising on the pleadings herein be referred under secs. 16 and 17 of the Arbitration Act [R.S.N.S. (1900), ch. 176], to the report of three arbitrators, one to be appointed by each of the parties hereto within fifteen days from the date of this order, such appointment to be signified

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by filing a notice of the same in the office of the Prothonotary of the Supreme Court at Annapolis and the third arbitrator to be appointed by the two so first appointed and his appointment to be signified by a memorandum signed by said first arbitrators and filed in said Prothonotary's office within forty-five days from the date hereof provided that if either party fails to appoint an arbitrator within the time and in the manner specified or in case of any default or contingency contemplated by sec. 7 of the Arbitration Act provisions of said section shall apply.

It is further ordered that the report of any two of such arbitrators shall be deemed the report of the arbitrators and that in order to afford the arbitrators an opportunity to view the land under various conditions of season and weather they have until the date of the June, 1920, sittings of the Supreme Court at Annapolis in which to file their report.

It is further ordered that the costs of this application be costs in the cause.

This order was granted by consent of the solicitors on both sides and subsequently the three arbitrators were appointed and they took evidence and filed their award. Counsel representing both parties appeared before the arbitrators and took part in the proceedings examining and cross-examining witnesses and no objection was made to the regularity of the proceedings.

After they had made their award the plaintiff's solicitor moved Ritchie, E.J., to set aside the order of Drysdale, J., and all subsequent proceedings and the following were the grounds stated in the notice of motion:—

That the order for reference made herein is a statutable order made or purporting to be made under and by virtue of the authority of secs. 16 and 17 of the Arbitration Act and there is no authority in such sections to make the order, and it is made without jurisdiction and is abortive because:

(a) There is no authority in said secs. 16 and 17 of the Arbitration Act to submit this case to three arbitrators selected by the parties unless said arbitrators are officers of the Court and appointed by the Judge on account of their special fitness to try the action.

(b) Because this is an action *ex delicto* and the Court had no authority under this Act to take this case from the jury.

(c) Because the arbitrators so wrongfully appointed were not special referees or arbitrators and were not official referees or officers of the Court.

(d) Because the said order for reference directs that all issues of fact arising on the pleadings in this action be referred under secs. 16 and 17 of the Arbitration Act to the report of three arbitrators and neither sec. 16 nor 17 of said Act authorises such a proceeding or order.

Ritchie, E.J., dismissed the application and there is an appeal.

The Court did not consider it necessary to hear counsel for the respondent.

The sole question in the case is as to whether or not the order made by the Court with the consent of counsel on both sides and acted upon by both parties can now be set aside.

It is quite unnecessary to decide as to whether the order was one authorised by secs. 16 and 17 of the Arbitration Act or by O. 34 of the Rules of the Supreme Court because, assuming that it is not authorised by either, it is quite clear that, apart from the statute and the rules, "the Court has, and always has had power to direct a reference to arbitration in all cases where the parties desire that the cause or matter should be referred instead of being litigated in Court." 1 Hals., p. 482.

In *Alexandria Canal Co.* v. *Swann* (1847), 5 How. St. Tr. 83, at p. 89, Taney, C.J., of the Supreme Court of the United States, on a motion similar to this, said; "A trial by arbitrators, appointed by the Court with the consent of both parties, is one of the modes of prosecuting a suit to judgment as well established and as fully warranted by law as a trial by jury." And later, he says: "As the attorneys on the record must have united in the motion for the reference, it is very clear that the objection would have been untenable."

In 5 Corpus Juris, at p. 26, the law is thus stated: "Where a cause was depending in Court, the parties might, at common law, agree to an arbitration and obtain an order referring the cause to arbitrators, or referees designated either by themselves or by the Court."

See also *Re Denison* and *Foster* (1908), 18 O.L.R. 478, at p. 481 (Riddell, J.).

The plaintiff cannot after consenting to the order and acting on it and attending the arbitration, examining and cross-examining witnesses, move to set the order aside when he fears an adverse finding or decision on the part of the arbitrators. That would lead to intolerable injustice.

The appeal will be dismissed with costs.

Appeal dismissed.

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TOWNSHIP OF SHIPTON v. SMITH.

Quebec Court of King's Bench, Lamothe, C.J., Cross, Carroll, Pelletier and Martin, JJ. June 26, 1920.

HIGHWAYS (§ IV A—151)—ALONG PRECIPICE—DUTY OF MUNICIPALITY TO BUILD WALL—MOTOR CAR—INTOXICATED PERSON DRIVING—CAR GOING OVER CLIFF—LIABILITY OF MUNICIPALITY—NEGLIGENCE.

A municipal corporation is not compelled to border a road which runs along a precipice with a solid wall, solid enough to prevent an automobile from running over the cliff, and is not liable in damages if a car driven outside of the regular way by an intoxicated person falls over the embankment causing injury to passengers in the car.

[*Township of Shipton* v. *Smith* (1919), 25 Rev. de Jur. 194, reversed. See Annotation, Liability of Municipality for Defective Highways, 46 D.L.R. 133.]

Statement.

APPEAL from the judgment of the Court of Review (1919), 25 Rev. de Jur. 194, in an action for damages caused by an automobile breaking through a guard placed along a highway along a precipice. Reversed.

The facts of the case are as follows:—

On September 30, 1916, at 9.30 p.m., John Smith, the father of the minor children, represented by the respondent, as their tutor, was in an automobile, owned and driven by one Morrill. The machine fell down one of the banks, and both Smith and Morrill were killed. The tutor sues the municipality in damages for $16,000, holding the appellant responsible on account of the bad condition of the road.

The defendant-appellant denies all respondent's allegations and pleaded specially that both Smith and the driver Morrill were under the influence of liquor. The accident took place by the fault of both Smith, and Morrill who was not in a fit condition to drive his machine. More details may be found in the following notes of the Judges.

The Superior Court dismissed the action, but the Court of Review condemned the defendant-appellant to $6,000 of damages to plaintiff-respondent for the minor children.

E. Languedoc, K.C., for appellant.

O'Bready and *Panneton*, for respondent.

Lamothe, C.J.

LAMOTHE, C.J.:—I am of opinion that the judgment of the Superior Court should be restored and that of the majority of the Court of Review (1919), 25 Rev. de Jur. 194, should be reversed.

The judgment of the Court of Review is based upon contributory negligence for it admits that the driver of the automobile was in liquor. Contributory negligence of the corporation consisted in

the fact that the road is very narrow, that the fence was insufficient and that there was a dangerous hole. The road has been in existence for a long time. Its restricted width is legalised by art. 769 of the former Municipal Code.

Fences on roads are not made to resist the shock of automobiles going at great speed. A stone wall alone would have afforded sufficient resistance.

The hole was not the cause of the accident. The automobile would have fallen over the embankment even if this hole had not existed because the chauffeur had crossed the road from right to left in a nearly direct line.

The negligence charged against the corporation appellant did not, in my opinion, contribute to the accident. The true cause of the accident is found in the fact that the man who drove the automobile was intoxicated. He drove this vehicle in violation of the law. He is the sole culprit.

Cross, J.

CROSS, J.:—The Court of Review, 25 Rev. de Jur. 194, limiting itself closely to the question of the immediate accident, "la cause première," has held the appellant responsible on the ground that the fatality was caused by defect in the highway. One should guard against being misled by metaphysical subtlety into ignoring a reality and fastening upon something which has a mere appearance of reality.

If, for example, in a case of homicide by shooting we could reason that the fatality was caused, not by the aiming of the gun and the pulling of the trigger, but by the explosive effect of gunpowder and that the assassin is consequently not responsible, this judgment of the Court of Review would be well-founded, and the same might be said of the majority decision of this Court in *Theberge* v. *Corporation of St. Hubert*, Montreal *Gazette*, 1910, and *Corporation of Compton* v. *Veilleux* (1913), 22 Que. K.B. 537. Preferring to be guided by realities, I would set aside this review judgment and restore the first judgment. The fatality was caused by intoxication of those in the automobile, not mere short time tippling but an all day carouse.

Morrill, the farmer who was driving the car, lived near the locality of the accident. The place would be nearly as familiar to him as his own barnyard and he had passed it less than two hours before the occurrence of the fatality. Yet he ran his car off the

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travelled part of the road before he had got out of sight of his home, and the curving tracks of the wheels of his vehicle, at the place of the accident, complete unerringly the story of the mishap and disclose what nineteen of twenty sensible people would say was the real cause of it.

Counsel for the plaintiff strove industriously to shew that the roadside fence was old and weak, and did not prevent the car from running down the bank, but it is realised that the obstacle which a substantial roadside fence would enterprise [present?] to the motor car would be about equivalent to what a sheet of paste-board would offer against a horse-drawn vehicle. The futility of that effort became apparent.

Then, it is said that there was a hole in the travelled part of the road. There was in fact a sort of cone-shaped depression extending down the bank at the side of the road, brought about by the action of surface water. After the wheels of one side of the car had ploughed through this depression, it was possible to set a stick of wood in the upper edge of it inside of the fence, that is on the side where the travelled track of the road was, as is shewn by one of the photographs. That, however, does not prove the plaintiff's contention that there was a hole in the travelled part of the road before the accident.

Then, there are cited in the recitals of the review judgment arts. 768, 771 and 778 of the Mun. Code (now arts. 468, 470 and 478), which indicate that the roads should have a width of 36 feet; that they should have a ditch on each side and be free from ruts, holes, etc., with hand-rails at dangerous places, in such manner as to permit of the free passage of vehicles of every description by day and night. It is said: "The road should have had at least 26 feet in width, French measure, between the fences on each side if it was a *route*, and 36 feet if it was a front road." And further on there is the recital, "If the road had been wider, if it had been provided with proper and sufficient guard rails it is to be presumed that the accident for which the defendant is sued would not have happened."

While these findings lose their importance if the intoxication was the real cause of the fatality, it may be well to point out that the specification of the width of roads means the width of right of way and not of the travelled track as it is to be inferred from the

review judgment. The road is to be 36 feet wide, so that, for example, in a case where it is carried at an elevation across a valley there will remain above the slope of the sides a flat travelled track "in such manner as to permit of the free passage of vehicles."

It is common knowledge that, by an outlay of between 8 and 10 million dollars, the Government of the Province, in giving effect to its good roads law "has managed to macadamize a relative small proportion of the public road for a width of 16 feet."

Ten million dollars would be a mere drop in the bucket of the cost of carrying out the ideas developed in the review judgment.

For conclusion, on the subject of the cause of the fatality, I adhere to what I said in *Theberge* v. *Corporation of St. Hubert* and in *Canadian Pacific R. Co.* v. *Frechette*, 22 D.L.R. 356, 18 Can. Ry. Cas. 251, [1915] A.C. 871, 24 Que. K.B. 459, in the latter of which cases it was held by the Judicial Committee, at pp. 361-362 (22 D.L.R.), "that term [contributory negligence] can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributory to it. If the negligence of either parties falls short of this, it is an irrelevant matter."

If a workman in the way of losing his life, by falling from the roof of a six-story building, it is irrelevant and nothing to the purpose to prove that some of his bones were broken by striking against a pole negligently left projecting from the building half way down to the ground, or to prove that he fell into a hole in the ground negligently left there by the defendant. In such a case contemporary negligence is not contributory negligence.

It is better to be guided by common sense than risk being misled by casuistry. It often happens, particularly in insurance cases, that the cause latest in operation is not the real cause.

Here the real cause was intoxication of both occupants of the motor car. Sooner or later and even in the best-paved city street their wild driving would have brought them up against some obstacle. Roads are for the "free passage of vehicle and pedestrian," are not sporting spaces for the tortuous evolution of intoxicated joy-riders, and the exhilarated passenger cannot safely say: "Let her go, if anything happens we'll sue the municipality."

As respects the duty of a municipal corporation in the matter of the requirement of guard-rails and of the width of roads, I

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adhere to what I said in *Corporation of Compton* v. *Veilleux* (1913), 22 Que. K.B. 537.

I would set aside the review judgment and restore the first judgment.

CARROLL, J.:—The allegations in the action may be summed up as follows: The road at this place was too narrow not having the width required by law. The guard-rails and the fence were decayed. At the south of the road and at the foot of the mound there was a deep hole where wheels had passed over it. The plaintiff says that the cause of the accident was the bad state of this road. The defendant corporation pleads that the chauffeur, Morrill, was in a state of intoxication, incapable of driving his machine and that this was the cause of the accident. The corporation denies all the allegations as to the bad state of the road. The accident happened on September 30, 1916, at 9.35 in the evening of a foggy and rainy night. The automobile, so far as can be judged from the evidence of Fowler, was going at a speed of 25 miles an hour. In place of following the route traced to the right upon the mound, 11 feet wide, it deviated to the left to the south of the mound and passed below it; the automobile was overturned and the two men were crushed under it. It is proved that the hole was not found in the level part where vehicles habitually passed but part of it is found outside of the fence and the other part within it.

The evidence is contradictory as to the condition of the fence itself. Mignault, engineer, says that it was decayed. A certain number of witnesses declare that the posts were good. One of the witnesses (Fowler) declares that the fence was sufficient to resist a horse in an ordinary collision, but it could *not* stand under the weight of an automobile. The Court of Review declared that the fence was defective and that this hole was the cause of the accident. One charge is that the road was too narrow which is based upon the statute, 36 Geo. III., 1796 (S.L.C.), ch. 9, sec. 2, which provides that all royal roads should be 30 feet wide between the two ditches, and art. 768 of the former Municipal Code providing that front roads should have a width of 36 feet.

It has been forgotten, however, that art. 769 of the former Code provides that municipal roads existing when the Code came into force (1871) could remain as to the width in their actual

condition and that the municipal corporation would not be obliged to enlarge them. All the same these old roads should be kept in good condition without ruts, holes, rocks, impediments or other nuisances, with guard-rails at the narrow places, so as to render the traffic by vehicles of all kinds easy by day and night. Arts. 771 and 778 Mun. Code.

It should be noted that this was legislation passed in 1871 and automobiles were then unknown, so that the Legislature had only in view at this time the means of locomotion then in use. Let us add that it is impossible to guarantee absolutely security from a dangerous machine like an automobile; it would be necessary if the contentions sometimes made were sustained upon at least half the roads in the Province to build walls to avoid accidents and yet these walls would often offer more danger by their presence than by their absence. If an automobile proceeding at a speed of 25 miles an hour struck a wall there would be no security for the passengers.

In this case we have no witness of the accident and the question submitted to us is, what is the cause of the accident? We can only proceed upon presumption. It is first necessary to eliminate as a determinate cause of the accident the absence of the fence and the presence of the hole; the automobile fell below the mound without these two elements of negligence contributing to it. Moreover, can we say that these faults aggravated the accident which brought about the death of the two unfortunate persons? Again can it be affirmed with certainty that this hole aggravated the accident and that the automobile would not have upset in falling without it? Nothing proves it.

On the other hand, we have positive evidence that Morrill was incapable of driving his automobile. That is what the proof shews and that is what the Court of first instance decided.

The two victims had travelled to Danville on September 30; that was the day of the exhibition; it is proved that Morrill and Smith had drunk liquor enough to intoxicate them. It is moreover established that without any excuse Morrill struck another vehicle in the course of the journey. On the evening in question Morrill was half drunk. The irresistible conclusion is that his state of intoxication was the sole cause of the accident. The principles upon the matter are well known. I admit, however,

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that their application has become more difficult since the judgment of the Privy Council in the case of the *C.P.R. Co.* v. *Frechette*, 22 D.L.R. 356, 18 Can. Ry. Cas. 251, [1915] A.C. 871, 24 Que. K.B. 459. That was the case of an employee of the company who, to aid in the loading of wagons with goods, went between two loaded wagons and was killed; the jury found that the victim was imprudent but that the C.P.R. Co. should have placed lights at the place where the men were working and that the absence of light was negligence. The Courts of this Province gave effect to the verdict of the jury but the Privy Council reversed the judgment, although the highest Court had made the distinction between our law which recognises liability in a case of contributory negligence and the English law which does not recognise it. The verdict was set aside.

I observe by the *considerant* of the judgment in this case that certain Judges incline to the ancient theory of the determinate cause of the accident probably influenced by this decision of the Privy Council. It is necessary to reaffirm the principles of our law. It was not a case of condemning one party only when his act has been the determinate cause of the accident, but he is liable when he has contributed to it or aggravated the accident.

It should be said also, because the case is cited in the factum of the appellant, that the principles laid down in the case of *Montreal Tramways Co.* v. *McAllister*, (1917) 34 D.L.R. 565, 26 Que. K.B. 174*, do not contain the opinion of this Court but that of one Judge only.

In view of the facts in this case I am of opinion that the judgment of the Court of Review should be reversed and that of the Superior Court restored.

Martin, J.

MARTIN, J.:—It is necessary to consider the following questions:—First. Was the road too narrow?

Demers, J., in review cites 36 Geo. III., 1796 (S.L.C.), ch. 9, sec. 2, to the effect that all roads should be 30 feet in width between ditches, and Tellier, J., cited art. 768 of the old Mun. Code, that front roads should have a width of 36 feet and by-roads of 26 feet between fences. Neither of the Judges hold that the width of the road was the cause of the accident, though they do say:—

*Affirmed by Privy Council, 51 D.L.R. 429.

"If the road had been larger, if it had been fit for traffic in all its width, and especially if it had been provided with proper and sufficient guard-rails, it is to be presumed that the accident for which the defendant is sued would not have happened."

Tellier, J., says:—

"The road was not fit for traffic in every place between the two fences."

While it is true that the land comprised within the fences may be said to belong to the municipal corporation, I fancy it would surprise most rural municipalities to be told that the whole width between the fences should be kept and maintained in a state and condition proper for travel. Such degree of perfection in the upkeep of municipal roads is unattainable, and it is manifest that it would be impracticable, if not impossible.

The road is admittedly a very old one and the evidence establishes that its width has been the same for over 50 years, and art. 769 of the old Mun. Code provides that municipal roads existing at the time of the coming into force of the Code, November 2, 1871, may retain the breadth which they have at such time, although such breadth be less than that required by the law under which such roads were established.

It may, moreover, be observed that at the place where the accident occurred a culvert is built to allow a brook to flow under the road. The travelled portion of this road is established and admitted to be 11 feet in width.

Second. The presence of the hole on the south side of the road.

It is stated in the respondent's factum that "a large hole existed on the south side on this part of 10½ feet in width of the roadway," though in the same factum it is stated in two places that the hole came within one foot and seven inches of the travelled roadway. This is in accordance with the evidence. The distance from the roadway to the fence would appear to be about 4 feet. The width of the hole in the direction of the brook is about 6 feet 6 inches. It would, therefore, appear that 2 feet 3 inches of this width of hole was inside the fence and 4 feet 3 inches outside the fence, though Mignault's plan shews a little more than two-thirds of the hole outside the fence.

It is manifest that the presence of this hole beginning 1 foot 7 inches from the south side of the road, could not have contributed

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to the accident if the driver of the car had remained within the space of the travelled roadway.

The wheel marks of the auto marked on the small plan shew that while Morrill was proceeding properly along the right hand side of the road, at a given point he turned across the road at an angle of nearly 45°, and the left hand wheel of the auto after it had left the roadway went into this hole, the auto continued down the bank and through the fence and turned over in the field beyond.

The proximate and determining cause of the accident was not the presence of this hole beginning 1 foot and 7 inches outside the travelled roadway, but rather the negligence of the driver of the car in getting off the travelled roadway, due no doubt to the fact he was not in possession of his full mental faculties.

Third. That the fences or guard-rails were insufficient.

Tellier, J., in review, says:—

"The guard-rail first should have been placed to prevent falling over the incline, and should have been solid enough to resist oblique pressure from any kind of vehicle."

I cannot accept this as a correct enunciation of the obligation of the municipality in such circumstances. I think the correct rule was laid down by this Court in the case of *Fafard* v. *The City of Quebec* (1917), 35 D.L.R. 661, 26 Que. K.B. 139, where it was held:—

"1. Municipal corporations are not responsible for inherent natural hazards resulting from the fact that their streets run along precipices or abut upon them.

"2. They are not obliged to border these streets with walls, solid and capable of resisting the shock of an automobile driven outside of the regular way."

This judgment was confirmed by the Supreme Court (1917), 39 D.L.R. 717, 55 Can. S.C.R. 615.

It is manifest that municipal corporations are not bound to construct a fence of sufficient strength and solidity to stop a runaway automobile going down an incline.

Fourth. What was the sole effective cause of the accident?

It is manifest from an examination of the evidence that the accident was due entirely to the negligence of the driver of the car. It is not necessary to review at length the evidence of what Morrill did during the day. That he had been drinking with companions

cannot be denied. The evidence of Manus Andrews is to the effect that they had had at least half a dozen drinks of whiskey blanc together. He ran his car a little reckless and when witness got out of it, he was glad. Morrill was pretty full.

"Was he under the influence of liquor at four o'clock?

"He certainly was. He had a bottle with him and one in the car and he was treating his friends as he met them and having a good time."

Another witness, Edwin T. Yale, had several drinks of whiskey blanc with him, and is asked:—

"Was he competent to drive a car?" to which he replied: "I do not think he was as far as I could judge."

Between 7 and 8 o'clock in the evening, Smith and Morrill in the latter's car went to Morrill's house near Nicolet Falls. The evidence of John Hannan, Morrill's farmer, and his wife is conclusive and convincing as to Morrill's condition and lack of sobriety at the time he started from his house on the fatal drive on the night of September 30, 1916.

By the provisions of art. 1427 R.S.Q., [1909] "no intoxicated person shall drive a motor vehicle."

Whiskey and gasoline don't mix.

Morrill by reason of his condition was the author of the fatal mishap and his faulty operation of the car caused the death of Smith and himself. If the automobile had been properly driven along the travelled roadway, no accident would have happened. The faulty steering of the car by a man who was not in fit condition to drive a car was the *causa causans* of the accident. Morrill's act made the accident inevitable.

Baudry-Lacantinerie et Barde, Obligations, No. 2881, says:—

"It is evident that the person from whom an indemnity is claimed cannot incur any condemnation if it is proved that the damage was exclusively caused by the negligence of the plaintiff."

In the case of *Canadian Pacific Railway Company* v. *Frechette*, 22 D.L.R. 356, 18 Can. Ry. Cas. 251, [1915] A.C. 871, 24 Que. K.B. 159, their Lordships in the Privy Council laid down this rule, 22 D.L.R., pp. 361-362:—

"2. That term [of 'contributory negligence'] can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the

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injury as to be a cause materially contributing to it. If the negligence of either party falls short of this, it is an irrelevant matter." And after pointing out that the law of Quebec differs from the law of England, on the question of contributory negligence so-called, they said, 22 D.L.R. 361-362:—

"But though this difference between the laws of the two countries on this subject does exist, it is equally certain that in Quebec, as in England, a plaintiff suing for damages in respect of an injury sustained by him cannot recover if his own negligence be the sole effective cause of that injury. . . .

That term can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this, it is an irrelevant matter, an *incuria*, no doubt, but to use Lord Cairns' words, not an *incuria dans locum injuriæ*."

In the present case, I am clearly of opinion that Morrill's own negligence was the sole effective cause of the fatal accident and that he and Smith were the unfortunate victims of their own rashness and recklessness and that consequently respondent has no legal claim against the appellant corporation.

I would maintain the present appeal, reverse the judgment of the Court of Review, and dismiss the respondent's action with all costs.

JUDGMENT: Considering that there is error in the judgment rendered in this cause on February 27, 1919, by the Superior Court sitting in review in and for the district of Montreal; that the judgment rendered in this case *en première instance*, on November 6, 1917, by the Superior Court sitting in and for the district of St. Francis, is well founded for the reasons mentioned in the said judgment; this Court doth maintain the present appeal, doth reverse and set aside the said judgment appealed from, to wit, the judgment pronounced by the said Superior Court sitting in review in and for the district of Montreal on February 27, 1919, and now giving the judgment which the said Court of Review ought to have rendered, doth confirm the judgment of the Superior Court rendered *en première instance* and doth dismiss the respondent's action with costs against the respondent in the three Courts. *Appeal allowed.*

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S. C.

Ontario Supreme Court, Orde, J. December 24, 1920.

INTOXICATING LIQUORS (§ III A—55)—ONTARIO TEMPERANCE ACT—CONVICTION FOR OFFENCE UNDER SEC. 41—PROOF OF DELIVERY OF LIQUOR AT PRIVATE RESIDENCE—ONUS—INFERENCE—SEC. 88 OF ACT.

A man cannot be convicted under the Ontario Temperance Act of having intoxicating liquor in a place other than the private dwelling house in which he resides on the sole evidence that he has had liquor delivered to the private dwelling house in which he resides.

MOTION to quash the conviction of the defendant by the Police Magistrate for the Town of Cobourg, for having intoxicating liquor in a place other than the private dwelling house in which he, the defendant, resided. Conviction quashed. Statement.

Keith Lennox, for defendant; *F. P. Brennan*, for magistrate.

ORDE, J.:—Can a man be convicted under the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, of the offence of having liquor in a place other than the private dwelling house in which he resides, upon the mere proof of the fact that he has liquor in the private dwelling house in which he resides? Startling as the suggestion may appear, that is precisely what has happened in the present case, and counsel on behalf of the magistrate argues that such a conviction is possible under the Act. Orde, J.

An information was laid against the accused charging that at some time between certain dates he did have or keep liquor in a place other than in the private dwelling house in which he resided. The sole evidence against the accused was that on the 29th September, 1920, there had been a delivery of five cases of Scotch whisky, consisting of 120 Imperial pints, to his dwelling house, and that on the following 11th October, when the inspector searched the house, there were only 24 pints left. There was no evidence of any sale by the accused, and there was some evidence of entertainment of the accused's friends, and also that he consumed a great deal of liquor himself. When delivering judgment, the Police Magistrate for the Town of Cobourg said to the accused: "The Crown has also proved that on the 11th day of October you had but one case, or about 24 Imperial pints, in your possession. It is for you to prove (sec. 88 of the Ontario Temperance Act) that you did not commit the offence for which you are charged, or to explain to the satisfaction of the Court what you have done

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with the 96 Imperial pints between the date you received them and the date of the inspector's search on the 11th October, 1920." The magistrate then points out that the accused has not done so, and that there is no evidence to shew that he and his guests could have consumed 96 pints in 12 days, and says: "The conclusion of the Court is that you have disposed of the liquor in some other way in violation of the Ontario Temperance Act;" and he then convicts the accused for that he "did have liquor in a place other than the private dwelling in which he then resided," etc.; and imposes a fine of $500 or in default thereof three months' imprisonment.

Had the charge been that of selling or keeping for sale under sec. 40, the possession of the liquor would have been sufficient *primâ facie* evidence of guilt, under sec. 88, to warrant the magistrate, if he saw fit, in convicting under sec. 40; and, under the authority of *Rex* v. *LeClair* (1917), 39 O.L.R. 436, 28 Can. Cr. Cas. 216, the conviction could not be reversed. But the charge was definitely laid under sec. 41, and is so treated by the magistrate in his judgment, and the conviction is for an offence under that section. Section 88 is as follows:—

"If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor, *primâ facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, then unless such person prove that he did not commit the offence with which he is so charged he may be convicted accordingly."

The effect of this section is very sweeping. Mere "possession or charge or control" of "any liquor in respect of, or concerning which, he is being prosecuted," throws upon the accused the burden of proving "that he did not commit the offence with which he is so charged." And the offences to which this section applies are those "against any of the provisions of this Act in the selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor."

Now there is no difficulty in applying this section to such cases as the following: any sort of possession, either in a private dwelling or elsewhere, of liquor, upon a charge of selling or keeping

for sale under sec. 40; or possession in the street or in a shop or in a building which is not a private dwelling upon a charge under sec. 41; or perhaps the possession of liquor by a mere visitor in a private dwelling house upon a charge under sec. 41. It is possible to suggest many cases where sec. 88 may be applied so as to shift the burden of proof. But in the present case the proof that the place where the accused had the liquor was his private dwelling house was clear and is so found by the magistrate. How can such possession be *primâ facie* proof of the offence of having liquor in a place other than his private dwelling house? The section calls upon the accused, upon proof of possession, to prove that he did not commit the offence with which he is charged, namely, that of having liquor in a place other than his private dwelling house. How is he to prove it? The very evidence which it is contended shifts the onus to the accused furnishes the proof in answer. He can do no more by any evidence he may offer. If this is to constitute evidence of guilt, it can only do so either by construing sec. 88, 6 Geo. V. 1916 (Ont.), ch. 50, as enabling the magistrate to convict for *any* offence upon proof of *any* kind of possession, regardless of the result, however absurd it may be, or by considering that the possession of which evidence is given is in some way a "possession" at large, dissociated from the place where the liquor is possessed, and so justifying a conviction for any offence. But this is not the way to construe a statute. Section 88 is wide enough to leave ample scope for its operation, without so construing it as to lead to a result so extraordinary as that in the present case. In my judgment, sec. 88 cannot, in the very nature of the circumstances, be deemed to apply to the present case.

Counsel for the accused cites *Rex* v. *Moore* (1917), 41 O.L.R. 372, 30 Can. Cr. Cas. 206, a case not unlike this one, as binding upon me. The same point as that involved here was raised there, but my brother Middleton does not deal with the point at all. His decision is based upon the fact that there was evidence to shew that the defendant had received the liquor from the express company, and there was consequently "possession or control or charge" of it outside the dwelling house, and the burden was cast upon the defendant to prove what had become of it. I do not regard that case as a decision upon the point here. In the present case it is true the liquor came by express,

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but it was consigned to the brother-in-law of the accused, and there was no evidence that the accused had "possession or control or charge" of it before it reached his house; nor any evidence that any of the liquor had left the house. It might have been a simple matter for the prosecution to have furnished some such evidence, but I do not see why any further presumptions should be raised against the accused. The only evidence adduced by the prosecution to support the charge laid against the accused was itself a complete answer to that charge. To hold that sec. 88 can be invoked to support a conviction in such a case as this would reduce the orderly administration of justice to a farce.

For these reasons, I am of opinion that the conviction cannot stand. It was open to the magistrate, under sec. 78, to amend the information, and, having due regard to the protection of the accused under the concluding provisions of that section, to have convicted for an offence under sec. 40. But he has not done so, and no suggestion as to any amendment under sec. 102 has been made to me. Had such a suggestion been made, I do not well see how I could have complied without remitting the case to the magistrate. The power to amend under sec. 102 is given only in cases where it appears that the merits have been tried. To amend by convicting for an offence under sec. 40, without giving the accused an opportunity of meeting that charge, would not be proper.

The conviction will, therefore, be quashed, with the usual order for the magistrate's protection.

Since writing the foregoing judgment, my attention has been drawn to the recent judgment of Masten, J., in *Rex* v. *Newton* (1920), 48 O.L.R. 403, in which he suggests the difficulty of applying the statutory presumption arising from possession in a dwelling house to a charge of having liquor in a place other than a private dwelling house. *Conviction quashed.*

THE ATT'Y-GEN'L OF CANADA v. BAILE AND CITY OF MONTREAL.*

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K. B.

Quebec Court of King's Bench, Lamothe, C.J., Cross, Carroll, Pelletier and Martin, JJ. June 26, 1919.

TAXES (§ I F—90)—CROWN LANDS—EXEMPT FROM TAXES UNDER THE B.N.A. ACT—RIGHT OF MUNICIPAL CORPORATION TO TAX LESSEE.

The City of Montreal cannot, by virtue of sec. 362a of its charter, tax land owned by the Crown and which is exempt from taxes under sec. 125 of the British North America Act, against the lessee of such land as if he were owner.

Statement.

APPEAL by defendant from the judgment of the Recorder's Court at Montreal in an action by the City of Montreal to recover certain school taxes. Reversed.

The facts of the case are as follows:

Andrew Baile was, as lessee, in possession of land belonging to the Crown. He was sued by the City of Montreal in the Recorder's Court for $850.61, for school taxes.

The City of Montreal based its right to receive this sum on art. 362a of its charter, which will be found cited below.

The Attorney-General of Canada intervened and attacked this article of the charter of the City of Montreal, alleging that it was unconstitutional and *ultra vires*. The Recorder's Court dismissed the intervention and gave judgment against the defendant.

The Court of King's Bench has reversed this judgment.

Goldstein, Beullac, etc., for appellant.

Laurendeau, Archambault, etc., for respondent.

Lamothe, C.J.

LAMOTHE, C.J.:—The B.N.A. Act exempts from all taxation property belonging to the Crown. Section 125 of this Act reads as follows: "No lands or property belonging to Canada or any Province shall be liable to taxation."

The City of Montreal applied for and obtained from the Legislature of Quebec an amendment to its charter, reading as follows (362a, as added by 7 Edw. VII. 1907 (Que.), ch. 63, art. 19):—

The exemptions enacted by art. 362 shall not apply either to persons occupying for commercial or industrial purposes, buildings or lands belonging to His Majesty, to the Federal and Provincial Government or to the Board of Harbour Commissioners, who shall be taxed as if they were the actual owners of such immoveables, and shall be held to pay the annual and special assessments, the taxes and other municipal dues.

*An appeal to the Supreme Court of Canada was quashed for want of jurisdiction.

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Lamothe, C.J.

It happens from time to time that the Crown for the purpose of procuring revenues for public purposes leases properties of which it has no present need. These are the lessees who, apparently, the City of Montreal would wish to tax. Can it legally do so under clause 362a of its charter?

Municipal corporations, I have no doubt, can tax what belongs to lessees occupying exempted lands. Thus if the lessee has erected a building upon such land, this building would belong to him exclusively; it is immovable by its nature; it is the object of a right of property different from that of the Crown. This building can be taxed as any other immovable property. The municipalities can, moreover, without doubt, impose on the lessees in such case the ordinary business tax, the water tax and other duties of the kind.

But can they tax the land itself belonging to the Crown as if it belonged to the lessees? The answer to this question should be in the negative for it would really be the land which would be taxed and not the rights of the lessee in this land. This would be to evade the provisions of sec. 125 of the B.N.A. Act.

In my opinion, clause 362a of the charter as it now stands is unconstitutional in the part which declares that the lessee shall be taxed as if he were owner of the land. That would be doing indirectly what the Act forbids being done directly.

That it would be the land that would be taxed in the present circumstances is evident. This tax is placed on the roll of taxes on land; the action in this case designates this tax as a land tax and it is so in reality.

The judgment of the Recorder's Court against the appellant should be reversed and the action should be dismissed.

The present case is distinguished from a former case decided by the Court of Appeal in which the constitutionality of art. 362a of the charter was not brought in question. The law of Quebec was not then attacked; it was applied. In the present case the procedure is different; art. 362a is attacked as it should be and the question is placed directly before us.

We should give effect to sec. 125 of the constitution which expresses all the federal or provincial law upon this subject.

To sum up: No property of the Crown can be taxed, even if temporarily placed in the hands of a subject; but what belongs

to the lessees (buildings, improvements and that kind of thing) can be taxed as the property of any other citizen.

CROSS, J.:—One would say that these are clearly taxes on land. Counsel for the city says that they are not taxes on the land, but are taxes on the occupant of land.

Article 362 of the city charter declares and enumerates descriptively what are the immovable properties which are "exempt from the ordinary and annual assessment." It makes no mention of Government lands, and that is appropriate, because it is not in virtue of provincial legislation that Dominion lands are exempt or rather not subject to taxation. It is followed by art. 362a introduced by 7 Edw. VII., 1907 (Que.), ch. 63, art. 19, which is worded as follows:

> The exemptions enacted by art. 362 shall not apply, either to persons occupying for commercial or industrial purposes, buildings or lands belonging to His Majesty or to the Federal or Provincial Government or to the Board of Harbour Commissioners, who shall be taxed as if they were the actual owners of such immoveables and shall be held to pay the annual and special assessment, the taxes and other municipal dues.

Reasoning from the literal wording of this enactment, counsel for the city says that the city had the right to make the above entries in its rolls of taxes on lands, because the occupants are to "be taxed as if they were the actual owners of such immovables," but that the tax, nevertheless, is not a tax on the land, but a personal charge upon Baile.

They rely upon the decisions in *The Calgary & Edmonton Land Co.* v. *The Att'y-Gen'l of Alberta* (1911), 45 Can. S.C.R. 170; *Smith* v. *Rur. Mun. of Vermilion Hills*, 30 D.L.R. 83, [1916] 2 A.C. 569, 32 T.L.R. 684; *Fraser* v. *City of Montreal* (1914), 23 Que. K.B. 242.

It is to be observed that in none of these three cases was the real issue joined between the municipal corporation and the Government of Canada, though it is true that in *Smith's* case the Attorney-General for Canada appeared before the Judicial Committee. He was left to bear his own costs in view of the conclusion there arrived at. It is also to be observed that, in both of the two first mentioned cases, what was decided was that the "beneficial interest" of the lessee or occupant could be taxed in virtue of enactments emanating from the provincial authority, though it is true that in *Smith's* case in the Supreme Court of

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Canada (1914), 20 D.L.R. 114, 49 Can. S.C.R. 563, it purports to have been held that:

> For the purposes of the collection of taxes so levied, the Provincial Legislature may authorise their recovery by personal action, as for debt, against persons so occupying such land, in the civil Courts of the Province, notwithstanding that the residences of such persons may be outside the limits of the Province.

In the report of the decision of the Judicial Committee in the same case as given in *The Times*, there appears the qualification (at p. 684), "provided that the operation of the statute imposing the tax is limited to the tenant's own interest and does not extend to the land itself as owned by the Crown."

In the matter before us, it is the Crown in right of the Dominion which complains that, whatever may be the form of words made use of, the effect is to tax its land, and it cannot be doubted that the land is worth $405 per year less to the Crown, if anybody whom it chooses to put upon the land is subjected, because of his occupancy, to that charge. It is not Baile's interest, but the Crown's interest, which has been taxed. I consider that the King can say to the city: "You admit that you cannot tax my land, yet that is what you are in effect doing when you put it into a tax-roll in the name of other persons whom you are taxing as if they were the actual owners."

The Crown is, consequently, sought to be made to suffer in the enjoyment of its lands and is entitled to relief.

What relief, if any, can be granted on the record now before us? The Attorney-General has come in and asked that an action against the Government's lessee be dismissed and has asked that the provincial enactment, art. 362a, be declared *ultra vires*.

The difficulty in the case is as to what order should be made. That difficulty did not arise in the Alberta case above referred to, because there the beneficial interest of the occupants could appropriately be treated as being the entire taxable value of the lands, and in *Smith's* case it was found that the Attorney-General for Canada was without substantial concern in the matter, whereas here, Baile's interest is that of a lessee for 5 years with an expectation of renewal dependent upon the grace of the Crown, and it arises because it may be said that in law, as pointed out in the case first above cited. *The Calgary and Edmonton Land Co.* v. *Att'y-Gen'l of Alberta*, 45 Can. S.C.R. 170 at pp. 184-185, "When

a statute does not expressly or within the purview of the statute apply to the Crown or its lands, it is to be taken as inoperative in relation to either," and, as was said in *Smith's* case, 30 D.L.R. at p. 86, "the taxing statute of Saskatchewan must be read, in accordance with a well-known principle, as not applying to the Crown or its lands."

It is said, here, for the city, that neither the Crown nor its lands are affected; but is that really so? No doubt the Government might stand by and let the land be judicially sold for taxes with all the solemnity of regular legal procedure and could, nevertheless, thereafter take the ground that its rights have not been affected and turn out the purchaser. I consider, however, that the Government need not wait in that way and that it has an interest to have the action against Baile dismissed so that its right to enjoy its land be not interfered with. It is, in my opinion, not a proper representation of the fact to say that this is not a tax on the land in question. Land, as an inanimate thing, cannot feel a tax burden. It is in the last resort, the owner who is burdened. Here the Sovereign's land is practically not exempt from taxation, if any occupant who enters upon it can be made to pay a tax as if he were owner. There is a violation of a property right. As was said in the House of Lords in *Rodriguez* v. *Speyer Bros.*, [1919] A.C. 59 at p. 125, "A man validly contracts as he will, because he is a free man; he validly disposes of his property as he will, because it is his own."

I consider that the proper adjudication to make is to declare that art. 362a is without effect to tax the property of His Majesty in the land in question and to dismiss the action. We need not go the length of saying that anything is *ultra vires*. The city may quite validly hereafter impose a tax upon the "beneficial interest" of Baile or another occupant.

Speaking in this particular for myself only, I would say that the conclusion here arrived at is in accord with the rule that the Sovereign is not to be impleaded or called in question in his own Courts. That is because of the dignity of his person as the head of a sovereign state and to his office. It is on the same consideration that Courts hold that the person and property of the sovereigns and ambassadors of other sovereign states are not to be subjected to process of our Courts.

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That was pointed out in the case of the *Parlement Belge* (1880), 5 P.D. 197 at p. 217, when it had been attempted to justify the right to seize a vessel belonging to the King of the Belgians by the argument that the process was not directed against the King, but merely against a vessel engaged in carrying mails. That contention was not sustained, and in giving judgment it was said: "But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded;" (and at p. 220): "If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner."

In the present case the insertion of the Crown land in the tax roll is, for the above reasons, illegal and ineffective.

It should be added that in *Fraser* v. *Cité de Montréal* (1914), 23 Que. K.B. 242, the Dominion Government was not a party and did not complain that any of its rights were encroached upon by attempt at abortive taxation, and that the general proposition laid down there should be read as made within the limits of what was necessary for the decision of that case.

It should also be added that failure to contest the entries in the tax-roll within the statutory delay does not take away the right of a land-owner to plead that his land is not taxable.

I would allow the appeal and make an order as above indicated.

Pelletier, J.

PELLETIER, J.:—The Recorder's Court condemned Andrew Baile to pay a sum of $850, claimed for municipal taxes, at suit of the City of Montreal. This judgment has been brought before us on appeal.

It is admitted that Baile is the lessee of property belonging to the Government of Canada. This immovable then was exempt from taxes under sec. 125 of the B.N.A. Act. The tax claimed from Baile is not a business tax, nor a personal tax, but a tax on land—the action and the judgment make that apparent—and therefore it is found to be a tax on an immovable exempt from taxation.

The City of Montreal claims the right to do this under a provincial statute; it claims that it is not the owner who is taxed

but the occupant or lessee and that the provincial statute permits that to be done; it is clear that a provincial statute cannot amend the B.N.A. Act; the Legislature has no right to confer on the City of Montreal the power to levy the tax in question; if the statute invoked was valid it would permit the taxation indirectly of property exempt from taxation, and that cannot be done indirectly which is forbidden to be done directly.

Pelletier, J.

The judgment of the Recorder's Court is then affected with an absolute nullity and, in my opinion, the present appeal should be maintained.

Martin, J.

MARTIN, J.:—The sole question to be determined on this appeal is whether the Act, 7 Edw. VII. 1907 (Que.), ch. 63, sec. 19, art. 362a of the city charter, is constitutional or not.

It was submitted by the counsel for respondent that the constitutionality of somewhat analogous enactments of other Provinces was upheld by the Supreme Court of Canada and by the Privy Council respectively, in the following cases: *Alberta* case—*The Calgary & Edmonton Land Co.* v. *Att'y-Gen'l of Alberta* (1911), 45 Can. S.C.R. 170; *Saskatchewan* case—*Smith* v. *Rur. Mun. of Vermilion Hills*, 30 D.L.R. 83, [1916] 2 A.C. 569.

In the Alberta case, the question in issue was whether the lands assessed, which were free grants from the Crown, but patents therefore not yet issued, were subject to taxation under the Local Improvement Act of Alberta, 7 Edw. VII. 1907 (Alta.), ch. 11, in respect of the beneficial interest of the owner to whom the title had not passed, and it was held in effect, that as the equitable title had become vested in the appellant, though the bare legal estate remained in the Crown, the land could no longer be said to be land belonging to Canada within the meaning of sec. 125 of the B.N.A. Act, and consequently was liable to the taxation in question.

In the Saskatchewan case, the appellant was assessed under Saskatchewan statutes in respect of Dominion land of which he held grazing cattle leases from the Crown. Land is defined for the purpose of those statutes, as including any estate or interest therein. The holding was to the effect that the restriction in sec. 125 of the B.N.A. Act does not invalidate a tax imposed on the interest of a tenant in Crown land leased to him by the Dominion

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Government, provided that the operation of the statute imposing the tax is limited to the tenant's own interest, and does not extend to the land itself as owned by the Crown.

The above two decisions are based upon the special wording of the statutes of the respective Provinces of Alberta and Saskatchewan.

Of course, under the lease here, the defendant has no legal interest in the land itself.

A judgment of this Court in the case of *Fraser* v. *City of Montreal* (1914), 23 Que. K.B. 242, was much relied on by counsel for the respondent, but in that case the constitutionality of article 362a of the city charter was not discussed or passed upon, as no notice had been given to the Attorneys-General of either the Dominion or the Province, as appears from the remarks of Lavergne, J., giving judgment in that case, at p. 244:

"The constitutionality of art. 362a cannot be considered without notice to the Attorney-General. This not having been given we cannot deal with this question and it is necessary to apply the law as the case is presented."

In the present case the constitutionality of the Act is squarely raised. In fact it is the principal issue. It is sought by the Act in question to make the defendant, as occupant of Government property, liable to property tax (*cotisations foncieres*) as if he were the actual owner of such immovables and the action against him is to recover such property tax on the ground that under the statute he is to be treated as owner.

It appears to me clear that the City of Montreal is attempting to do indirectly what it cannot do directly. The tax in question is based upon the assessed value of the land, the property of the Crown, not upon the interest therein of the defendant as lessee. It is not a business tax or a water tax based upon rental value and payable by the lessee. It is a straight property tax based upon the assessed value of the land and the City of Montreal has no right to tax land belonging to the Dominion of Canada and the Province of Quebec is not vested with any power and authority to delegate such right to the city.

I will maintain the appeal and declare unconstitutional the Act under which the city seeks to enforce payment of this tax.

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JUDGMENT:—Seeing that, by its action in the Recorder's Court, the respondent (plaintiff) prays for judgment against the defendant Andrew Baile for $850.61 for municipal taxes in respect of certain lands, alleging that the said Andrew Baile, being occupant for purpose of trade, of the said lands, is to be taxed as if he were the true owner thereof by virtue of art. 362a of the city charter, 7 Edw. VII. 1907 (Que.), ch. 63, sec. 19, the lands in question being lands of His Majesty in right of the Dominion of Canada; Seeing that the appellant, by intervention in the said action, sets forth that the said taxes are in effect a tax against lands of the Crown and an indirect tax the imposition of which is not within the power of the Legislature of Quebec to impose: B.N.A. Act, 1867, sec. 125; and prays that the said Act of the said Legislature in so far as it applies to occupants of lands of the Dominion of Canada, be declared *ultra vires* the said Legislature, and that the said action against the said Andrew Baile, lessee of the said lands under leases from His Majesty, be dismissed; that the said lands occupied by the defendant have been entered in the plaintiff's (respondent's) assessment rolls of taxes upon immovables for taxation at the value thereof and as being occupied by the defendant, but that it is admitted that the same are lands belonging to His Majesty in right of the Dominion of Canada; Considering that if the said taxes were exigible, the same would in effect be taxes upon the lands of His Majesty and would have to be borne and paid ultimately by him, and that there is therefore error in the judgment appealed from whereby the said intervention was dismissed;

Doth maintain the appeal, doth reverse and set aside the said judgment appealed from, to wit, the judgment pronounced by the said Recorder's Court at Montreal, on December 11, 1917, and, now giving the judgment which the said Recorder's Court should have given, doth declare the said art. 362a without effect to empower the respondent (the City of Montreal) to impose or charge the said taxes upon the said lands or upon any person as if he were owner thereof, and doth maintain the said intervention and dismiss the said action with costs in the Recorder's Court and of the appeal in this Court. *Appeal allowed.*

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PETRIE MFG. Co. v. WRIGHT.

Ontario Supreme Court, Orde, J. December 21, 1920.

COURTS (§ II A—151)—COUNTY—JURISDICTION—ACTION COMMENCED IN ONE COUNTY—TRIAL IN ANOTHER—COUNTY COURTS ACT, SEC. 25—RULES 245 (A), 767, 768—PROHIBITION ORDER.

In Ontario, the County Court of one county, or a Judge thereof, has no jurisdiction to try within that county an action brought in the County Court of another county, in the absence of any order transferring the action under sec. 25 of the County Courts Act, R.S.O. 1914, ch. 59, or of any order changing the venue under Rule 767.

Statement. MOTION by the defendant for an order prohibiting the Judges of the County Court of the County of Wentworth from proceeding with the trial of this action in that Court, on the ground that that Court and the Judges thereof have no jurisdiction to try the action.

E. B. Titus, for defendant; *G. R. Munnoch*, for plaintiffs.

Orde, J. ORDE, J.:—The action was commenced by writ of summons specially endorsed with a claim for the price of goods sold and delivered, issued out of the District Court of the District of Sudbury. The writ purported to lay the venue at Hamilton. The defendant delivered a statement of defence and counterclaim, to which the plaintiffs delivered a reply and a defence to the counterclaim, and the pleadings were in due course closed.

The next step which, in my judgment, the plaintiffs ought to have taken, if they desired a trial at Hamilton rather than at Sudbury, was to apply to the District Court Judge at Sudbury or to the Master in Chambers, under Rule 767*, for an order changing the place of trial to Hamilton. The plaintiffs, however, without making any such application, served notice of trial for Hamilton, in the county of Wentworth, for the 7th December, 1920, and the

*767. In all actions brought in a County Court the Judge of the County Court where the proceedings were commenced or the Master in Chambers (subject to appeal in either case as if the case were in the Supreme Court) may change the place of trial, and in the event of an order being obtained for that purpose, the Clerk of the County Court in which the action was commenced shall forthwith transmit all papers in the action to the Clerk of the County Court to which the place of trial is changed, and all subsequent proceedings shall be entitled in such last mentioned Court, and carried on in such last mentioned county as if the proceedings had originally been commenced in such last mentioned Court.

†245.—(1) Subject to any special statutory provisions the place of trial of an action shall be regulated as follows:—

(*a*) The plaintiff shall, in his statement of claim, or, where the writ is specially endorsed, in the endorsement, name the county town at which he proposes that the action shall be tried;

(*b*) Where the cause of action arose and the parties reside in the same county the place to be named shall be the county town of that county;

(*c*) Save in mortgage actions, where possession of land is claimed, the place to be named shall be the county town of the county in which the land is situate;

(*d*) The action shall be tried at the place so named, unless otherwise ordered upon the application of either party.

action was set down for trial there. The notice of trial and the præcipe for the entry of the action for trial at Hamilton are both entitled "In the District Court of the District of Sudbury."

The defendant then moved before the District Court Judge at Sudbury to set aside the notice of trial, but this motion was dismissed. I have not been furnished with a copy of the learned District Court Judge's reasons, if any, for such dismissal, nor with a copy of his order. I assume that his order does nothing more than dismiss the motion, and does not purport to be an order made under Rule 767.

The argument before me was directed almost wholly to questions as to the territorial jurisdiction of the County Courts and of the Judges thereof, as to the powers of the Supreme Court to prohibit a County Court Judge at all, in view of the provisions of sec. 26 of the County Courts Act, R.S.O. 1914, ch. 59, and as to the application of Rule 245†, regarding the laying of the venue, to County Court actions; and no mention whatever of Rule 767 was made to me.

I think it may be taken for granted that the County Court of one county, or a Judge thereof, has no jurisdiction to try within that county an action brought in the County Court of another county, except as such power is conferred by some statute or by the Rules. There is no analogy or parallel between such a case and that of a Judge of one County Court going into another county to try a case within that county. In that case, the outside Judge comes into the county to sit for the time being as a Judge of the County Court of that county, to try actions within the jurisdiction of that Court. He is in reality an *ad hoc* Judge sitting in a Court having jurisdiction over actions brought in that Court.

In the present case, the question is as to the power of the County Court of one county, or of a Judge thereof, to try, *within that county*, an action brought in another county, in the absence of any order transferring the action under sec. 25* of the County Courts Act, or of any order changing the venue under Rule 767.

Counsel for the plaintiffs contended that a plaintiff may issue a writ in a County Court action, and, by virtue of Rule 245 (*a*),

*25. Where it appears in an action brought in a County or District Court that such Court has not cognizance thereof, but that the Court of some other county or district has jurisdiction to try the same, the Judge before whom the action is pending may, at any time before or during the trial thereof, order the action to be transferred to such other County or District Court upon such terms as to costs and otherwise as he may deem just.

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may lay the venue at some place other than the county town of the county in which the action is brought; and, this being so, he may set the action down for trial in exactly the same way as is done in an action in the Supreme Court.

But Rule 768*, which make the Rules and the practice and procedure in Supreme Court actions applicable to County Court actions, is qualified by the words "so far as the same can be applied." In my judgment, in view of the special provisions of sec. 25 of the County Courts Act, and of Rule 767, the provisions of Rule 245 (*a*) cannot be applied to County Court actions so as to give the plaintiff the right to commence an action in one County Court and lay the venue in another county. There is no hardship in this, because, subject to the provisions of sec. 30 of the County Courts Act and of Rule 245 (*b*) and (*c*)—see *Leach* v. *Bruce* (1904), 9 O.L.R. 380—the plaintiff may commence his action in the county in which he wishes to have it tried. When a plaintiff issues a writ in a County Court he impliedly lays the venue at the county town of that county. Any express laying of the venue there is a mere formality. All the provisions of the County Courts Act and of Rule 767 are based upon the assumption that the jurisdiction of the County Court of each county and of the Judges thereof (except when sitting as *ad hoc* Judges in some other county) is limited to cases either properly brought in, or transferred to, the Court of that county, either under sec. 25 of the Act or under Rule 767. I am not overlooking the fact that sec. 25 confers upon a Judge of the County Court which has no jurisdiction over an action which has been improperly commenced in that Court, power to transfer it to another county, but that power is exercisable by virtue of that section, and not otherwise. I do not think that the County Courts Act or the Consolidated Rules ever contemplated such a thing as the commencement of an action in one County Court and its trial (while still pending in the Court from which the writ was issued) by any other County Court, or by the Judge of any other County Court, sitting outside the limits of the county in which the action was brought. But, in order to save expense and delay in a case where an action had been commenced, either by inadvertence or otherwise, in a County Court

*768.—(1) These Rules and the practice and procedure in actions in the Supreme Court shall, so far as the same can be applied, apply and extend to actions in the County Court.

having no jurisdiction, sec. 25 of the County Courts Act was passed in 1904 (4 Edw. VII. (Ont.) ch. 10, sec. 11) to provide for its transfer to its proper county; and in a case where the County Court in which the action was commenced had jurisdiction, but it was more convenient, upon the same grounds as would be applicable to Supreme Court actions, to change the place of trial, Rule 767 gives the necessary power to make the change. But it is significant that in either case, whether an action is transferred to the County Court which has jurisdiction, under sec. 25, or the place of trial is changed, under Rule 767, the action thereafter becomes an action within the jurisdiction and cognizance of the County Court to which it is removed. The provision in Rule 767 that "all subsequent proceedings shall be entitled in such last mentioned Court, and carried on in such last mentioned county, as if the proceedings had been originally commenced in such last mentioned Court," in effect transfers the action to the County Court of the county to whose county town the venue has been changed.

Section 25 and Rule 767 really provide, by somewhat the same procedure and with the same result, for the transfer of the action, sec. 25 being applicable where the County Court in which the action was commenced has no jurisdiction, and Rule 767 where, although the Court has jurisdiction, the place of trial ought to be changed. It is true that in *Corneil* v. *Irwin* (1903), 2 O.W.R. 466, and *Leach* v. *Bruce*, 9 O.L.R. 380, the Master in Chambers made orders under Rule 767 changing the venue where apparently the Court had no jurisdiction, but it is to be doubted whether those orders were properly made, having in view the opinion of Osler, J.A., in *Howard* v. *Herrington* (1893), 20 A.R. (Ont.) 175, at p. 179. But whether the Master in Chambers was right or wrong is immaterial, because there was in each of those cases an order changing the venue, which, in the result, by virtue of the Rule, transferred the action to the other county. I am clearly of the opinion that, without an order under Rule 767, the plaintiffs in the present action cannot give notice of trial and set the action down for Hamilton, nor has the Judge of the County Court of Wentworth any jurisdiction to entertain the action.

That being the case, is prohibition the proper remedy of the defendant? Counsel for the plaintiffs argued that sec. 26 of the

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County Courts Act has taken away the power to prohibit in every case. That section was first enacted in 1910, by 10 Edw. VII. (Ont.) ch. 30, which consolidated the County Courts Act. Prior to the enactment of that section (or, perhaps it would be more accurate to say, prior to 1904, when, by 4 Edw. VII. ch. 10, sec. 11, what is now sec. 25 was introduced, giving power to transfer an action from the Court without jurisdiction to its proper county), prohibition would lie to prevent a County Court from entertaining an action which was beyond its jurisdiction. Section 26 is as follows:—

"Prohibition shall not lie in respect of an action or counterclaim which may be transferred under the provisions of this Act to the Supreme Court, or from one County or District Court into another County or District Court."

The section is limited to cases in which the action or counterclaim is transferable under the provisions of the County Courts Act, that is, to cases which are transferable by reason of some lack of jurisdiction in the County Court in which the action is commenced. It has no application, so far as I can see, to cases coming properly under Rule 767. Here the plaintiffs propose to proceed to trial before the County Court of the County of Wentworth, a Court which, as I have held, has not at present any jurisdiction whatever over the action. The District Court Judge at Sudbury has refused to set aside the notice of trial for Hamilton. From his order there is probably no appeal, by virtue of sub-sec. 2 of sec. 40 of the County Courts Act. *Bank of Toronto* v. *Pickering* (1919), 46 O.L.R. 289, which deals with the right of appeal from an order made under Rule 767, would have no application to the District Court Judge's order in this case.

It may be argued that the attempt on the part of the plaintiff to go down to trial at Hamilton is mere *brutum fulmen*, and may be ignored by the defendant, but the defendant can hardly be expected to take that risk. Under these circumstances, prohibition seems the only appropriate remedy for the defendant, and would seem to be still applicable to a case like this. The case of *Oliver* v. *Frankford Canning Co.* (1920), 47 O.L.R. 43, upon which Mr. Munnoch relied, has no bearing upon the present case.

An order will, therefore, go prohibiting the Judges of the County Court of the County of Wentworth from proceeding with or entertaining the trial of this action, until such time as an order,

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if any, is made under Rule 767 changing the place of trial to Hamilton. The plaintiffs should pay the defendant his costs of this motion forthwith.

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Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Chisholm, J. January 11, 1921.

CONTRACTS (§ IV C—345)—FOR CONSTRUCTION OF BUILDING—DEPARTURE FROM TERMS OF CONTRACT—RIGHT TO RECOVER FOR SERVICES.

A builder supplying work and labour for the erection or repair of a building under a lump sum contract, but who has departed from the terms of the contract, is entitled to recover for his services unless the work done has been of no benefit to the owner, is entirely different from the work he contracted to do or he has abandoned the work and left it unfinished.

[*Dakin* v. *Lee*, [1916] 1 K.B. 566, followed; *Smith* v. *Schon* (1919), 46 D.L.R. 233, 53 N.S.R. 143, referred to. See Annotation, Builder's Contract, Failure to Complete Work, 1 D.L.R. 9.]

Statement.

APPEAL from the judgment of Wallace, Co.Ct.J., in favour of plaintiffs in an action to recover a balance alleged to be due under a building contract.

T. W. Murphy, K.C., for appellants.

A. Whitman, K.C., for respondents.

The judgment of the Court was delivered by

Chisholm, J.

CHISHOLM, J.:—The plaintiffs have brought this action to recover the sum of $2,350.75 alleged to be due from the defendants in connection with a contract for the erection of a house and shop at 411 Agricola St., in the city of Halifax. The price agreed upon between the parties was $4,800; and the plaintiffs claim a balance due of said price amounting to $1,850 and also a sum of $500.75 for extra work not included in the lump price, in all $2,350.75.

The proceedings were begun under the Mechanics Lien Act, 5 Geo. V. 1915, (N.S.) ch. 2.

The defence pleaded by the defendant Abrams is that the contract has not been completed in that: 1. The foundation is not completed according to the terms of the contract. 2. The plumbing is not completed according to the terms of the contract; and 3. The windows have not been put in and glazed according to the terms of the contract.

As to the extras this defendant claims that they were never ordered. He then counterclaims for damages done to his stock-

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in-trade in consequence of the negligent manner in which the building was constructed; and also for the conversion of certain boards and a door.

The defendant Cox simply pleads that there is nothing due to the plaintiffs.

The defendant Abrams furnished particulars of his defence as follows:—

1. There are holes in the foundation of the house and shop mentioned in the defence, and the said foundation has not been finished off in a workmanlike manner.

2. The plumbing in the said house and shop is not completed in the following particulars: The main water supply pipe is not of sufficient depth and leaks. Two toilets defective. One bath to be installed. Range boiler improperly put up and not properly connected with plumbing. Sewer pipe in basement not in proper position. Plumbing has not been examined and passed by city inspector.

3. The windows and glazing in said house and shop are not completed in the following particulars: Windows in shop front at sides of door not proper size and glazed with sheet glass instead of plate glass; other windows in shop front improperly glazed and defective sashes; sashes throughout are defective and improperly put in.

The action was tried before Wallace, Co.Ct.J., in the County Court, who found that the defects complained of were not of such a character and extent as to preclude the plaintiff from the recovery of the contract price, less certain deductions which he made. The deductions which were made are as follows:—To remedy: hole in foundation $20, chimney $20, defects in bathroom $15, defects in window sashes $25; to support boiler $10; in all $90.

He gave defendant $50 damages on the counterclaim and disallowed $90 of the amount claimed by plaintiffs for extras.

Judgment was accordingly ordered for $2,120.75, made up as follows:—Contract price $1,850.00; less deductions ($90.00) and damages on counterclaim ($50.00) $140.00—$1,710.00. Amount of extras ($500.75) less disallowed ($90.00) $410.75—$2,120.75.

The defendants have appealed from this decision so far as it adjudges any sum to be due to the plaintiffs, and the plaintiffs have given notice of cross-appeal so far as the deductions for defects, the disallowances of certain items of extras and the amount awarded on the counterclaim are concerned.

The main contention of the defendants on this appeal is that the work was for a lump sum and was never completed according to the terms of the contract, and that therefore the plaintiffs

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cannot recover. The law with respect to contracts, where the builder supplies work and labour for the erection of a house for a lump sum, but has departed from the terms of the contract may be taken as accurately stated by Sankey, J., in *Dakin* v. *Lee*, [1916] 1 K.B. 566, at 574. He says:—

> Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work he has contracted to do; or (3) he has abandoned the work and left it unfinished.

It cannot be seriously contended that the work that plaintiffs performed has been of no benefit to the defendants, nor that the work performed has been entirely different from what the plaintiffs contracted to do. Subject to some defects which had to be remedied, the work was substantially performed as the trial Judge has found. Nor again was the work abandoned and left unfinished. There was much contradictory evidence given on the trial and the case is, I think, one of the class in which a Court of Appeal should accept the findings of the Judge below. See the cases referred to in *Smith* v. *Schon* (1919), 46 D.L.R. 233, at 241, 53 N.S.R. 143, at 168.

Wallace, Co.Ct.J., has made deductions for defects in the performance of the contract; he has disallowed some of the items claimed as extras, and has assessed the damages on the counterclaim, and I cannot say that I find error in any of his findings. The plaintiffs' cross-appeal should therefore fail and I think the defendants' appeal should be dismissed with costs.

Appeal and cross-appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A., and Lennox, J. December 24, 1920.

MURDER (§ I—1)—PROVOCATION REQUIRED TO REDUCE TO MANSLAUGHTER.

The provocation required to reduce murder to manslaughter rests upon something said or done directly to the accused or in his presence, or something enacted before him in relation to some one else, from which he drew a conclusion which caused sudden passion and loss of self-control. Evidence of what had occurred prior to his entry upon the scene and of which he knew nothing at the time of committing the deed is inadmissible.

2. NEW TRIAL (§ III C—23)—GROUND FOR—CRIMINAL LAW—INFLAMMATORY ADDRESS TO JURY BY COUNSEL FOR CROWN.

There is no authority for an appellate Court granting a new trial in a criminal case because of an inflammatory address to the jury by the counsel for the Crown, although ill-advised and such as should not have been made.

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Case stated by ORDE, J., before whom the prisoner was tried and convicted of the murder of George Elliott, the trial having taken place at Sault Ste. Marie, on the 5th, 6th, and 7th days of October, 1920.

The following is a statement of the facts taken from the judgment of Meredith, C.J.O.

The questions submitted are the following:—

"1. Was I wrong in refusing to admit the evidence of Pearl Mouers and of Margaret York of any statements made to them by George Elliott and not communicated by them to the accused prior to the firing of the fatal shot?

"2. Was I wrong in not withdrawing from the jury the evidence relating to the milk-pail seen by James Elliott and Fred. Mastin?

"3. Was I wrong in my comment to the jury upon the weight to be attached to the evidence of Pearl Mouers and of Margaret York?

"4. Was I wrong when charging the jury upon the law regarding the right of the accused to use force in defence of a person who was under his protection, in stating to them that as a matter of law, under the circumstances as stated in my charge, there was no justification for the act of violence which the accused used in defence of Maggie York?

"5. Was I wrong, in that portion of my charge which is quoted above, in telling the jury that it was just as reprehensible an act to allow a guilty person to escape if they were convinced that he was guilty as it was to convict an innocent man if they thought he was innocent?

"6. Did I fail, in my charge, to instruct the jury sufficiently that they were the sole judges of the facts, and that they were at liberty to disregard any comment upon the facts made by me?

"7. Did I fail to instruct the jury properly that murder might be reduced to manslaughter if the homicide were committed in the heat of passion caused by sudden provocation?

"8. Was the accused prejudiced on his trial by the remarks made by the counsel for the Crown in his closing address to the jury: (a) as to the accused travelling up and down the country with Maggie York alone; (b) that the accused was a bandit?"

In the reserved case these questions are preceded by the following statement of facts:—

"The accused, William Dougle Mouers, was tried before me with a jury at the assizes held at the city of Sault Ste. Marie in and for the District of Algoma on the 5th, 6th, and 7th days of October, A.D. 1920, on an indictment whereby the said William Dougle Mouers was charged with the murder of one George Elliott on or about the 13th day of September, A.D. 1920, and at the said trial the said William Dougle Mouers was found guilty of murder, and was by me sentenced to be hanged on the 5th day of January, A.D. 1921.

"On the evening of the 13th September, 1920, the accused was in the house of his brother-in-law, John Peters, in the township of Korah, and about three miles from Sault Ste. Marie, along with the father and mother of the accused, and with his sister, Pearl Mouers, a girl of 16 years of age and one Margaret York, a girl of 14 years of age, who was a connection by marriage of the accused. They had arrived from the District of Parry Sound two or three days previously, intending to proceed up the Algoma Central Railway to camp and hunt. The accused had with him a short Winchester repeating rifle, a Smith and Wesson .44 calibre revolver, and two automatic .32 calibre pistols.

"George Elliott was one of several brothers who were farmers and who also carried on the business of making bricks. Their dwelling houses were all situated in the vicinity of the large barnyard in which the events took place. Peters was an employee of the Elliott brothers, and the house which he and his wife (a sister of the accused) occupied was upon the outskirts of the barnyard.

"Shortly before 8 o'clock in the evening of the 13th September, 1920, Pearl Mouers and Margaret York dressed themselves in men's or boys' clothing (which they had procured that day for the intended hunting and camping trip), consisting of khaki breeches, leather shoepacks, khaki shirts, sweaters, and caps, with their hair tucked in beneath their caps, and went outside and into the Elliotts' barnyard.

"About the same time George Elliott, who was unaware, so far as any evidence shewed, of the presence in the locality of the visitors to Peters's house, was proceeding from the house of his brother James Elliott, where he had gone to wash his hands after doing some repairs to his motor car in the garage, to a large

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barn for the purpose of milking the cows. His brother, Frank Elliott, had already gone to the barn for the same purpose.

"Shortly after the two girls had left the Peters house, the accused, as well as the others, were aroused by cries from Pearl Mouers calling to the accused, and to the effect that a man had got Margaret York. The accused ran from the house, and up the road towards the barn, firing shots from one of the automatic pistols as he ran. At or near one of the barn-doors, and in the light of an electric lamp, he met or saw George Elliott; and, to the accompaniment of certain words, the accused then and there shot George Elliott, the bullet entering the left side just over the tenth rib in line with the nipple, penetrating the tenth rib, passing downwards and backwards and to the right, penetrating the large bowel and lodging in the back. From the effects of the bullet-wound George Elliott died in the hospital at Sault Ste. Marie about 5 or 6 hours later.

"The evidence of Pearl Mouers and of Margaret York was to the effect that, while they were on the roadway some distance from the barn, George Elliott had come upon them, and had caught hold of Margaret York and had dragged or pulled her towards the barn, and that in consequence of this Pearl Mouers had run back along the road towards Peters's house calling to the accused to come, and that a man had got Maggie and was taking her to the barn.

"During the course of the examination of Pearl Mouers and the accused, counsel for the accused sought to give evidence of what the deceased George Elliott had said to the two girls when he met them upon the road. Counsel for the accused disclaimed any intention of trying to prove that anything which had been said by Elliott had been communicated to the accused prior to the firing of the fatal shot. I refused to allow any evidence of what Elliott said to the girls to be given, upon the ground that, unless communicated to the accused prior to the firing of the fatal shot, it could not have affected the state of the accused's mind towards Elliott, and was not relevant to the issue.

"In addition to the evidence of Frank Elliott that he had preceded his brother George to the barn for the purpose of milking one of George Elliott's cows, there was the evidence of Marjorie Elliott (wife of James Elliott) that George Elliott left her kitchen-

door to go to the barn to milk, and of Stanley Elliott, her son, that George Elliott had a milk-pail. There was also the evidence of James Elliott and of one Fred. Mastin that a milk-pail was seen that night after the shooting at a point about 40 or 50 feet distant from the barn. There was no direct evidence to establish that this was the pail which George Elliott had taken with him on his way to the barn. The sole importance of this evidence rested in the fact that, if it was George Elliott's pail, it might be inferred that it was at the spot where the pail was seen by James Elliott and Fred. Mastin; that George Elliott had put it down when he met and accosted the two girls; and, therefore, tended to contradict the evidence of the girls to the effect that the place where Elliott met them was at a greater distance from the barn. Counsel for the accused contended that the evidence in connection with the milk-pail should have been withdrawn from the jury.

"The defence of the accused, as developed by his counsel in his address to the jury, was based upon two grounds, namely: first, that the accused had fired the fatal shot in defending the honour of Margaret York, and to prevent an assault upon one who was under his protection, and that the homicide was therefore justified and the accused not guilty; and, second, in the alternative, that the accused had fired the fatal shot in the heat of passion caused by sudden provocation, and that the homicide was thereby reduced to manslaughter.

"In my charge to the jury, when commenting upon the evidence of Pearl Mouers and Margaret York, I pointed out that, in trying to weigh the value of the statements which the two girls had made, the jury must take into consideration the relationship of the girls to the accused, and that the accused was on trial for his life, and that they must weigh the evidence with these facts in their minds.

"During the course of my charge to the jury, when dealing with the defence that the homicide was justifiable as the result of the use of force in defence of Margaret York (as distinct from the defence that the offence might be reduced to manslaughter), I dealt with the law upon the subject; and, after telling the jury that it would be for them to say whether or not the circumstances were such as to justify what took place, I told the jury that, as a matter of law, if the circumstances were such as the accused and

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Maggie York said they were, that George Elliott was holding Maggie York by the wrist, and she was dragging away from him, and that the accused then fired, that was no justification for the act of violence which the accused used for the defence of Maggie York.

"Towards the close of my charge to the jury, while instructing them generally as to their duties, I used the following words:—

" 'Now, gentlemen, you have a very serious and responsible duty to perform. With you rests the fate of this man. With you rests the question, so far as you are concerned, whether or not he shall live or die, but with you also rests, as those who assist in the maintenance of law and order, the security of the lives of your fellow-citizens and your own, and it is just as reprehensible an act to allow a guilty person to escape, if you are convinced that he is guilty, as it is to convict an innocent man if you think he is innocent. If you come to the conclusion that this man is guilty of either murder or manslaughter and do not find him guilty of either one of these crimes, and thereby allow him to go, you are in a sense approving of what he did and thereby rendering the lives of yourselves and wives and children and fellow-citizens to some extent unsafe, not because of this man, but because of the general effect which that has upon the respect for law and order and the administration of justice in this country. You are here as part of the machinery of the administration of justice in this country, and it is just as much your duty to come to a right verdict upon all the facts, whether the man is guilty or innocent, and, if guilty, it is your duty to find him guilty, and if innocent to find him not guilty.'

"During the course of his closing address to the jury, counsel for the Crown, when commenting upon the defence that the accused had fired in defence of the honour of Maggie York, referred to the accused having 'travelled up and down the country with her alone;' and also, when commenting upon the conduct of the accused, referred to the accused as a 'bandit.' "

The evidence taken at the trial, including the exhibits, together with the addresses of counsel for the Crown and for the accused respectively and the charge of the learned Judge, are also made part of the case.

T. P. Galt, K.C., and *E. V. McMillan*, for the prisoner.

Edward Bayly, K.C., for the Crown.

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MEREDITH, C.J.O.:—We came to the conclusion upon the argument that all of the questions, except No. 1 and No. 8, should be answered in the negative; and, indeed, some of them were not argued by counsel for the prisoner, and some were but faintly pressed.

I have come to the conclusion that the first question also should be answered in the negative.

I am not prepared to say that, if the prisoner, who testified on his own behalf, had sworn that when he fired the fatal shot he believed that the man whom he shot was endeavouring to drag the girl into the barn for the purpose of committing a criminal assault upon her, the evidence would not have been admissible as tending to shew that his belief was a reasonable one. Nowhere in his testimony did the prisoner say or suggest that he acted under such a belief; and, therefore, in my view, the evidence which was rejected was irrelevant and inadmissible. The state of mind of the prisoner when he fired the fatal shot was an important circumstance to be considered in determining whether the homicide was murder or manslaughter; and, if the circumstances which were present to his mind were such as reasonably to lead him, and they did lead him, to the conclusion that a criminal assault was about to be committed on the girl, it may be that he would have been justified in using such force as was reasonably necessary to prevent the crime from being committed, although in fact no crime was being attempted to be committed by the deceased.

If the testimony of the prisoner is accepted, he was under no such apprehension as I have suggested, and did not himself believe that in order to protect the girl from being outraged it was necessary for him to shoot her supposed aggressor; for his account of the firing of the fatal shot was that it was fired into the air to frighten, and without any intention of its hitting, the deceased.

If, as is probable on the facts, the deceased took hold of the girl, who was dressed in boy's clothes and presented all the appearance of a boy, practically as a lark in order to see whether she was boy or girl, and the prisoner shot him because he thought that that was what was being done, his crime would clearly have been murder. I can find nothing in the prisoner's testimony which is inconsistent with that having been what he thought.

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I know of no authority for stating the 8th question as a question of law, nor of any authority for the Court granting a new trial because of an inflammatory address to the jury by counsel for the Crown. The Criminal Code, R.S.C. 1906, ch. 146, gives no such authority. Verdicts of juries have been set aside in civil cases on that ground, but the powers of the Court to grant a new trial in such cases are much wider than it possesses in criminal cases.

The only jurisdiction to direct a new trial is conferred by sec. 1021 of the Criminal Code, and is limited to directing a new trial "on the ground that the verdict was against the weight of evidence," and as incidental to the hearing of an appeal on a reserved case, as provided by sec. 1018.

The remarks of counsel which are complained of were ill-advised and ought not to have been made, but were not of such a character as would warrant the granting of a new trial in a civil action.

Maclaren, J.A.

MACLAREN, J.A.:—I, with some hesitation, agree with my Lord the Chief Justice.

Magee, J.A.

MAGEE, J.A. (dissenting):—My Lord the Chief Justice has fully set forth the case stated and questions submitted for the opinion of the Court, and I agree with his conclusions except upon the first question, the exclusion of evidence as to what was said to Margaret York and Pearl Mouers by the deceased George Elliott when seizing hold of the former and pulling her towards the barn. With much hesitation, I venture to submit that the jury were entitled to have before them such material facts as would enable them to put themselves in the position of the actors in the occurrence of the fatal evening. I agree that in so far as the question of justification of the homicide, or the other question of reducing its culpability from murder to manslaughter, is concerned, the chief issue is the state of mind of the accused. But that state of mind is to be arrived at by consideration of all the circumstances to be learned from the testimony of the witnesses. Suddenly alarmed as he and the others of the family in the house were by the cries of his sister that a man had got hold of her companion, and rushing as he did to the rescue or assistance of the young girl, his relative, the jury were entitled to consider the situation with which he was confronted or rather which would present itself to him. The outcry, agitation, and apparent ill-treatment or

peril of the girl, if existing, were material facts. I say apparent ill-treatment or peril—and I mean apparent to the accused. Excepting what he could see or hear or might infer, nothing could be said to be apparent. But it might well be that to his mind the nature of the cries of the two girls and their state of agitation were such as to make it apparent that they or one of them was in great danger. The jury were entitled to know how great was the fear and agitation of the girls, for two reasons: first, to enable them to judge of the effect they would have upon the prisoner; and, second, to enable the jurors themselves to know really what weight to attach to the girls' own evidence. If they had no cause for fear, the jurors might well belittle their conduct and evidence, and come to the conclusion that they had not thought of serious danger, and therefore that their conduct could not have been such as to create serious resentment or fear on their behalf in the prisoner's mind. On the other hand, if the conduct or the language of the deceased was really such as to create a sense of peril in the mind of the girl, that would react upon her and increase the outward indications in her cries, features, and actions, and it was from these and what he saw and inferred that the prisoner would have to draw his instant conclusions, if conclusions they may be called when sudden passion is aroused. If a man attacking a girl in the dusk has a knife in his hand apparently ready for use, surely that, if admitted to be proved, would help the jury to understand whether she was in great or deadly fear, and whether her cries were those of one in danger. Whereas, if a benevolent-looking man, with a kindly, jocular remark, laid his hand upon her arm, though she might be startled and make some outcry, the jury might well conclude it was not such as indicated great fear. I can well understand a prosecuting counsel in such a case cross-examining her and asking: "Now, did you really call out? You did not call very loud, did you? Why did you? What reason had you? Do you wish the jury to believe that you really cried out as if you were frightened when you had no cause to be? Did not you know the man well, although the prisoner did not? Did he not speak kindly to you?" I confess I cannot imagine that such questions would be disallowed. If then it would be open to the prosecution to shew or to urge the unreality to herself of her danger in order to shew the nature of

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her action and the value of her evidence, it should equally be open to the defence to impress and shew its reality. For the purpose of shewing its reality, what her assailant said is just as much a fact as would be his holding a knife, and I hardly think the knife would be excluded from any jury merely because its holder had his back to the prisoner.

In truth, I am unable to distinguish the admissibility of George Elliott's language to the girls from the admissibility of the fact that a milk-pail was found near by, which this Court now declares to have been properly submitted to the jury, though not known to the prisoner. What was its materiality except to minimise the distance the girl had been pulled or dragged and shew that George Elliott was about his peaceful occupation when he met the girls and could not have had evil intentions? It may, no doubt, be said that the girls were permitted to state how frightened they were, but it seems to me that the jury were entitled to know what weight to attach to their statement; and the defence were entitled to have the jury in a position properly to judge of it. It may be that if the question had been allowed the witness might have told of something unimportant being said—but that we unfortunately are not in a position to know.

The case is so important that I have felt impelled to present my view, though with much hesitancy, upon this first question, which I would answer in the affirmative.

I should add that the prisoner has to a certain extent cut away his ground by denying that he fired at the deceased, from which the jury might infer that he did not consider it necessary or called for, but the jury might well take that—as evidently they did—as the effort of a man on trial for his life to get out of danger by what seemed to him the easiest story.

Hodgins, J.A.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice as to all the questions submitted in the reserved case, but desire to add the following to what he has said upon question 1.

As to it, the only light thrown upon the matter in the evidence is the statement of the prisoner's counsel at the trial, p. 129 of the notes of evidence, that the questions he proposed to ask might have some bearing upon the conduct of the deceased, if he (the deceased) knew and was told as a matter of fact that they

were girls and was told their names. The witness Pearl Mouers had already been asked, "What did he say, if anything?" and her answer was, "He told us to go to the barn." Objection was then taken, and the learned trial Judge asked the question of the prisoner's counsel: "It is of significance to you in trying to impress the jury with something said by Elliott before Mouers left the house. Let us assume for the sake of argument that you had proved up to the hilt that he had made some improper proposals to these girls, how can that affect Mouers' attitude, unless it was in some way communicated to him?" And his ruling was: "I think the inferences must be limited to what he (the prisoner) himself heard, and I take the responsibility of ruling that these girls cannot give any evidence in connection with what Elliott said to them." It is reasonably clear that what was sought to be introduced was Elliott's knowledge of the true sex of the girls, from what they told him, and that the assumption made by the trial Judge carried the proposed evidence to the utmost limit that counsel for the defence could have desired.

In the Criminal Code, R.S.C. 1906, ch. 146, sec. 261 is as follows:—

"Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

"2. Any wrongful act *or insult*, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

"3. Whether or not any particular wrongful act *or insult* amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person."

I am myself unable to see anything in the evidence amounting to provocation, as understood in the cases: *Reg.* v. *Welsh* (1869), 11 Cox C.C. 336, where it is laid down that there must exist such an amount of provocation as would be excited in the mind of a

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reasonable man and so as to lead the jury to ascribe the act to the influence of that passion. The provocation must be serious, and such as might induce a reasonable man, in the anger of the moment, to commit the act.

In *Rex* v. *Lesbini*, [1914] 3 K.B. 1116, the Court of Criminal Appeal laid it down that the test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter, is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder of his self-control.

Archbold's Criminal Law, 24th ed., p. 885, contains this passage:—

"If it—i.e., the killing upon provocation—were effected with a deadly weapon, the provocation must have been great indeed to extenuate the offence to manslaughter."

In *Regina* v. *Rothwell* (1871), 12 Cox C.C. 145, Blackburn, J., says (p. 147):—

"As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such provocation of words as will have that effect."

And he instances a husband suddenly hearing from his wife that she had committed adultery.

This exception was concurred in in the case of *Rex* v. *Palmer*, [1913] 2 K.B. 29, on the ground that a sudden confession is treated as equivalent to a discovery of the act itself, but was not extended to cover the case of a man and a woman to whom he was engaged. And in *Rex* v. *Birchall* (1913), 9 Crim. App. 91, the Court deprecated any extension of this exception.

Park, J., with the concurrence of Parke, B., and Recorder Law, in *Regina* v. *Fisher* (1837), 8 C. & P. 182, at 185, 186, says:—

"There must be an instant provocation to justify a verdict of manslaughter . . . In this case the father only heard of what had been done from others."

Here what was sought to be proved in aid of the provocation was what passed, in words, between the deceased and the girls by way of information so as to found on it an inference of improper

proposals. This is far removed from insulting words spoken to the prisoner, and the reluctance of the Courts to give to words the same consequences as are attributed to overt acts, is some indication of the caution to be observed in admitting a narrative of previous events ostensibly as a key to what the prisoner himself saw and heard. But the nature and effect of the provocation is a matter for the jury; and, as it could not be withdrawn from them, it is proper to consider the question on the assumption that what occurred might prove provocation, and to deal with the evidence sought to be introduced upon that basis.

From the expressions in the cases already quoted, which are reflected in the language of the Criminal Code, it would appear that the provocation must be a sudden provocation to the prisoner himself, that he must act upon it on the sudden, and that whether what was done amounted to provocation and whether the prisoner was deprived of his control thereby, must be decided by the jury.

The only ground mentioned by the defendant's counsel at the trial upon which the proposed or assumed evidence would be admissible was that it was part of the *res gestæ*, as part of a continued series of events. Other reasons which have been suggested are: first, that what was said might shew that the provocation to the prisoner might be compounded of what was apparent to him at the time, and, as well, of what had previously occurred or was related thereto, as affording evidence bearing upon the reality of the scene enacted before the prisoner's eyes, and thereby shewing that he had some justification for drawing the inference he did; and, secondly, it is urged that it would enable the jury better to estimate the value of the testimony of the girls and help them to decide whether a needless outcry was being made or whether real apprehension justified their alarm.

The two grounds which I have outlined seem to be answered by a consideration of the language of the Code, which makes a very definite limitation upon what is provocation, and consequently upon what can be made available to prove it.

The provocation required to reduce murder to manslaughter must surely rest upon something said or done directly to the prisoner, or in his presence, or something enacted before him in

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relation to some one else, from which he drew a conclusion which caused sudden passion and loss of self-control.

To admit the evidence of what had occurred prior to his entry upon the scene would, to my mind, lay too heavy a burden upon the prisoner in the matter of proving provocation. I think he is entitled to the full benefit of what he heard, or what he saw going on, even if he misunderstood it. He is entitled to rely upon those facts and circumstances which would appear to an ordinary person to warrant the inference he drew; but if, in addition to that, the reality or unreality of what he saw is to form part of the evidence, it must be admissible on his behalf only to shew that that inference was in fact a proper inference, having regard to all the facts of the case.

On the other hand, assuming for the moment that what occurred between the deceased and these girls was nothing more than a frolic, and that nothing had been said or done, before the prisoner came up, that changed the situation, yet it might have appeared to him in such a way as to lead him as an ordinary person to conclude that it was a serious affair in which he was justified in interfering, and so was provoked into what he did. Is that position to be swept away by evidence that nothing serious had been intended? Has the Crown the right to prove, by evidence dealing with the situation before the prisoner appeared, that there was no justification in fact for the inference that he drew? I cannot think so, the more so because if the Crown were entitled to give that evidence, I can see no logical reason why the prisoner should not also be entitled to prove that facts which he did not know and were not apparent to him at the moment did actually exist and afforded ground for sudden passion, had he known them.

Bray, J., in *Rex* v. *Birchall*, 9 Crim. App. 91, during the argument, speaking of the suspicion of adultery held by the prisoner, said at p. 92: "There was no justification for the appellant killing his brother even if what he believed had been true."

That the supposed assailant of the girl might have had a knife in his hand, unseen by the prisoner, does not carry the matter any further in my mind. If the prisoner did not know of it, and it formed no element affecting his mental process, it does not appear to be a relevant fact in deciding, as the jury have to do, whether the wrongful act or insult which he did see or hear, and

which provoked him, constituted provocation. It might decidedly strengthen or weaken the reasonableness of his conclusion leading to his sudden outburst, but how a matter which forms no element in the provocation itself reaching the prisoner's mind, can be said to be part of the provocation he received, I am unable to see.

In Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 692, it is stated that "the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed."

The proposition, reduced to its simplest terms, must be that reasonableness of the outburst or loss of self-control must in some way be judged partly by the facts which occurred before the actual provocation took shape, and not wholly by its effect on the prisoner, testing that effect by the standard of what would be expected of an ordinary person under the circumstances. This is dangerously near the position that provocation can only be considered as established if it is justified by the facts as they really exist, and not if it merely appears to be so justified. If it is the prisoner's right or duty to prove the reality which lay behind the appearance, it must be open to the Crown to prove its unreality in order to decry his defence.

The case of *Regina* v. *Tooley* (1709), 2 Ld. Raym. 1296, 92 E.R. 349, has a bearing upon this point. There a constable without authority arrested a woman as a disorderly person and conveyed her to the round-house in Covent Garden. He was set upon by three bystanders, who endeavoured to rescue her, but, upon his explaining that he was on the Queen's business and displaying his staff, they desisted. After the woman was in the round-house the same three men again assailed the constable and killed his assistant. The constable was shewn to have no authority, but the prisoners had no knowledge of that fact. On the question whether this was murder or manslaughter, the Court, composed of all the Judges of England, divided in opinion, seven being for manslaughter and five for murder. Holt, C.J., in giving judgment (p. 1301), said that the majority of the Judges thought that the prisoners had sufficient provocation, "for if one be imprisoned upon an unlawful authority, it is sufficient provocation to all people out of compassion; much more where it is done under a colour

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of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England;" adding (pp. 1301, 1302): "Sure a man ought to be concerned for Magna Charta and the laws; and if any one against the law imprisons a man, he is an offender against Magna Charta. We seven hold this to be a sufficient provocation." But he prefaced the judgment in the case by the statement (p. 1300) that those Judges who were for manslaughter founded their opinions upon certain reasons, the first of which was "that it was a sudden action without any precedent malice, or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her." In dealing with the argument that the antecedent imprisonment could not be a provocation to the prisoners, because they knew not that the woman was illegally arrested, he says (p. 1302): "But surely *ignorantia facti* will excuse but never condemn a man. Indeed he acts at his peril in such a case, but he must not lose his life for his ignorance, when he happens to be in the right."

The fact that a street rowdy could escape punishment for the killing of a police officer, through his attachment to the principles of Magna Charta, roused, not the amusement, but the indignation, of Sir Michael Foster, J., a "great master of the Crown law" (as he is designated by the authors of Russell on Crimes and Misdemeanours, 6th ed., vol. 3, p. 116). I reproduce that part of his remarks from his work, "Crown Law," 3rd ed., pp. 311 to 316, which bear on the subject under discussion:—

"The indulgence shewn to the first transport of passion in these cases is plainly a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasteth, rendereth the man deaf to the voice of reason. The provocation therefore which extenuateth in the case of homicide must be something which the man is conscious of, which he feeleth and resenteth at *the instant the fact which he would extenuate is committed:* not what time or accident may afterwards bring to light. Now what was the cause of Tooley and his accomplices, stript of a pomp of words and the colourings of artificial reasoning? They saw a woman, for aught appears, a perfect stranger to them, led to the round-house under a charge of a criminal nature. This upon evidence at the *Old Bailey, a month or two afterwards,* cometh out to be an illegal arrest and imprisonment, a violation of *Magna Charta;*

and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for *Magna Charta* and the laws, and in this frenzy to have drawn upon the constable and stabbed his assistant.

"It is extremely difficult to conceive, that the violation of *Magna Charta*, a fact *of which they were totally ignorant at that time*, could be the provocation that led them into this outrage"

The importance of *Tooley's* case lies chiefly in that criticism, and led to its being overruled on that point: see *Warner's Case* (1833), 1 Moody's Crown Cases 380; *Regina* v. *Davis* (1861), Leigh & Cave 64; Stephen's History of the Criminal Law, vol. 3, p. 71; Russell on Crimes and Misdemeanours, 7th ed., p. 754; Roscoe's Crim. Evidence, 13th ed., p. 639.

The case of *Regina* v. *Allen* (1867), 17 L.T. N.S. 222, reviews all the cases relating to the killing of officers of the law, of which *Tooley's* case is an example, and emphasis is placed upon the statement of Holt, C.J., that the affray was sudden and not premeditated.

In *Regina* v. *Weston* (1879), 14 Cox C.C. 346, evidence was given of antecedent threats of violence by the deceased against the prisoner, coupled with words and circumstances on the occasions in question likely to provoke similar threats. These were received as evidence of danger to life or reasonable apprehension of it, on the occasion, such as might excuse or justify recourse to a loaded firearm in self-defence.

The reasoning of the Court of Criminal Appeal in England in the case of *Rex* v. *Thomson*, [1912] 3 K.B. 19, a prosecution for using an instrument upon a woman in order to procure miscarriage, appears to be somewhat apposite on this point. Lord Alverstone, C.J., in delivering judgment, says (pp. 21 and 22):—

"Counsel for the appellant was not allowed in cross-examination to put questions to a witness for the prosecution as to what the deceased woman had told her some time before the miscarriage as to her intentions and also a few days before her death as to what she had done. If put in a popular way, the argument for the appellant, that what the woman had said she had done to herself ought to be admissible evidence for the defence, might be attractive; but upon consideration it is seen to be a dangerous argument, and, in the opinion of the Court, the rejection of

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evidence of that kind is much more in favour of the accused than of the prosecution. If such evidence is admissible for one side it must also be admissible for the other.

"In our opinion there is no principle upon which this evidence is admissible any more than any other hearsay evidence. If it were admissible, then all those decisions in which it was considered whether statements were admissible in evidence as dying declarations, or as part of the *res gestæ*, or as admissions against pecuniary or proprietary interest, would have been unnecessary. The only ground upon which it has been suggested in argument that such evidence ought to be admitted is that since the Criminal Evidence Act, 61-62 Vict. 1898 (Imp.), ch. 36, and the Criminal Appeal Act, 7 Ed. VII. 1907 (Imp.) ch. 23, a new rule of evidence has been introduced under which anything must be admitted in evidence which will help the accused to prove his defence. There is a decision of a great authority, Charles, J., against that contention. In *Regina* v. *Gloster* (1888), 16 Cox C.C. 471, the prisoner was charged with having caused the death of a woman by an illegal operation, and it was sought to give in evidence statements made by the woman a few days after the operation as to who had caused the injuries from which she died. Charles, J., refused to admit the evidence and said: 'Mr. Poland proposes to ask the witness what the deceased said to her as to her bodily condition and what had been done to her. My judgment is this: that the statements must be confined to contemporaneous symptoms and nothing in the nature of a narrative is admissible as to who caused them or how they were caused.' In this case it cannot be argued that the statements were admissible as part of the *res gestæ*; the statements sought to be proved were not made at the time when anything was being done to the woman."

As to the other ground, that of enabling the jury to estimate at its true value the evidence of the girls, here again I am not persuaded that the argument is sound. These girls were Crown witnesses, but naturally strongly in sympathy with the prisoner. It was his counsel that sought to bring out the antecedent conversation. It cannot be contended that, apart from the question of relevancy, counsel for the prisoner can put questions to friendly witnesses for the purpose of establishing the credit to be given to

their testimony. He might seek to discredit them, but not to introduce matter for the purpose of enhancing the value of the evidence which his cross-examination had elicited. The fact that evidence directed solely to credibility—and that is the real meaning on this ground—cannot be contradicted and must be accepted by counsel eliciting it, seems in itself to indicate the fallacy which I think attaches to this ground. In *Rex* v. *Cargill*, [1913] 2 K.B. 271, the Court of Criminal Appeal rejected the argument that evidence going solely to credit, in order that the jury might know to what extent they might rely upon the general character of the testimony of the witness, can be contradicted.

The contention of counsel for the accused at the trial is the only one which would seem to place this evidence in its proper relation to the issues being tried. But I do not see that the term *res gestæ*, whose extent and meaning must depend upon the circumstances of each case, can be stretched to include what is not an element of instant provocation nor an incentive to sudden passion caused thereby. The reason is that it was not part of the provocation to the prisoner nor known to him when he lost self-control.

I do not think that the fact that the prisoner himself gave evidence tending to shew that he fired his pistol in the air and did not attempt to shoot the deceased—in other words, that it was an accident—makes any difference upon the admissibility or inadmissibility of the evidence in question. The jury were, I think, entitled to view his evidence as an attempt to exonerate himself, and were bound to deal with the other theory raised by his counsel as part of his defence, namely, that, even if he shot at the deceased, he did so under such provocation as would justify him in so doing: and that the crime therefore was not murder, but manslaughter, *Rex* v. *Hopper*, [1915] 2 K.B. 431.

LENNOX, J., agreed with MEREDITH, C.J.O. LENNOX, J.

Conviction affirmed.

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MARTIN v. RALPH.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. February 2, 1921.

NEGLIGENCE (§ II C—95)—COLLISION—ONE AUTOMOBILE TRYING TO PASS ANOTHER—LACK OF SUFFICIENT ROOM—LIABILITY—ABSENCE OF NUMBER PLATE AS GROUND FOR REFUSING DAMAGES.

An automobile driver who insists in passing another car on the highway must see that he has room to do so, and in the absence of clear evidence of negligence on the part of the other driver is liable for a collision with the other car while trying to pass. The absence of a number plate on the car which he is trying to pass is not a ground for refusing damages for the injury.

[*Godfrey* v. *Cooper* (1920), 51 D.L.R. 455, 46 O.L.R. 565, approved and followed. See also Annotation, Automobiles and Motor Vehicles, 39 D.L.R. 4.]

Statement.

APPEAL by defendant from the trial judgment in an action claiming damages for injuries caused to plaintiff by the negligent and unlawful act of defendant in driving his motor car at an unreasonable and reckless rate of speed on the public highway as the result of which it collided with and overturned a car in which plaintiff was riding as a passenger. Affirmed.

W. A. Kenry, K.C., for appellant.

D. D. McKenzie, K.C., for respondent.

The judgment of the Court was delivered by

Harris, C.J.

HARRIS, C.J.:—An action was brought by the plaintiff against the defendant to recover damages for injuries received in a collision between two automobiles. The plaintiff was invited by a friend, one Andrew Jardine, to take a ride in his automobile, and while so riding Jardine's car and one owned and driven by the defendant came into collision and the plaintiff was thrown out and injured. The case was tried by Longley, J., who found that the collision was due to the negligence of the defendant.

There is an appeal and it is contended that the findings of Longley, J., ought to be reversed as being against the evidence. The evidence discloses that both cars were proceeding in the same direction and the defendant was passed by Jardine just as the two cars began the ascent of a hill. When they reached the top of the hill the defendant in turn tried to pass the Jardine car and in doing so the two cars came into collision.

The road was said to be 14 or 15 ft. wide at this point and on one side there was a precipice and on the other a ditch two feet deep, and a short distance ahead a culvert crossed the road. The plan or sketch of the road put in on the trial was not produced

before the Court on the appeal but from one's knowledge of the usual conditions existing in the country and from the evidence it is, I have no doubt, the correct inference that the road gradually narrowed as it approached the culvert. There is the usual dispute as to speed of the cars and as to other matters, but one can easily fill in the details. There was probably a determination on the part of the defendant to regain the position he had lost when Jardine passed him on the hill—a speeding up to achieve this—nervousness perhaps on the part of both drivers caused by the proximity of the ditch on the one side and the precipice on the other, and a consequent tendency to draw a little nearer to the centre of the road and a little further from the danger—and the narrowing up of the road as it approached the culvert which made it necessary to get nearer the centre. Given these conditions and bearing in mind the width of the two cars, one is not surprised at the collision.

The driver who insists on passing another must see that he has room and in the absence of clear evidence of negligence on the part of the other driver I would be inclined to the view that the defendant ought to be held to blame. In any event, the best that can be said for the defendant is that the evidence is conflicting and Longley, J., who saw the witnesses, has believed one set as against the other, and no good reason has been given for thinking that he reached the wrong conclusion.

There was another ground urged by Mr. Henry, K.C., for the defendant. It was said that Jardine's car did not display on the back thereof a number plate as required by sec. 12 of the Motor Vehicle Act, 8-9 Geo. V. 1918, (N.S.), ch. 12.

The argument was that the car was therefore unlawfully upon the highway and first it was said that the owner could not recover damages if his car was injured by negligence of another person lawfully on the highway and then it was argued that the plaintiff was identified with and stood in the same position as did Jardine, the owner of the car. Both propositions are in my opinion unsound.

The only authorities cited to us on the first contention were cases where cars being operated unlawfully were injured by reason of defects in the highway and the municipality was held not liable.

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An examination of these cases shews that the decisions go upon the ground that the municipality was not liable because it owed no duty to keep its road in repair except to persons lawfully using the road. That principle has no application here.

The Motor Vehicle Act imposes a pecuniary penalty on Jardine for operating his car without complying with the Act but the statute does not give the Court power to add to that the loss or destruction of his car by the wrongful act of a third person against whom he has committed no offence. The negligence of the defendant is in no way excused by the failure of Jardine to comply with the law regarding number plates; the want of these number plates did not contribute to the accident in the slightest degree; the accident happened not because Jardine's car was on the highway without the number plates, but because it was on the highway at all, and as has been said, "It is impossible to perceive how a wrongdoer in one thing can protect himself against redress because his injury fell upon one who was a wrongdoer in another."

Bigelow on Torts, p. 182, says: "Wrongful acts or omissions cannot be set off against each other so as to make the one an excuse for the other unless they stand respectively in the situation of true causes to the damage."

The whole matter is fully discussed in a recent case in Ontario, *Godfrey* v. *Cooper* (1920), 51 D.L.R. 455, 46 O.L.R. 565, and I agree fully with and adopt the reasoning of Riddell, J., and of Middleton, J., in that case.

It is only necessary to add that even if Jardine was precluded from recovery, it would not solve the defendant's difficulty. The House of Lords in the *Bernina* case (1888), 13 App. Cas. 1, effectually disposed of *Thorogood* v. *Bryan* (1849), 8 C.B. 115, 137 E.R. 452, and the doctrine of identification of a passenger with the negligence of the driver in such a case.

The appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell and Masten, JJ., and Ferguson, J.A. December 20, 1920.

1. COSTS (§ I—2d)—SCALE OF TAXATION—ACTION BROUGHT IN COUNTY COURT—COUNTERCLAIM WITHIN JURISDICTION OF DIVISION COURT—DISMISSAL OF BOTH CLAIM AND COUNTERCLAIM—COSTS OF COUNTERCLAIM.

Where a defendant succeeds in his counterclaim he should have his costs on the scale of the Court in which the action is brought even though his recovery is within the jurisdiction of an inferior Court.

[*Foster* v. *Viegel* (1889), 13 P.R. (Ont.), 133, applied and followed.]

2. COURTS (§ II A—150)—DIVISION—JURISDICTION.

When the pleadings make it fairly clear that the title to land is in question the Division Court has no jurisdiction.

Statement.

APPEAL by the defendant from the order of a District Court Judge in Chambers, dismissing the defendant's appeal from the taxation by the District Court Clerk of the plaintiff's costs.

The action was brought in the District Court; the defendant delivered a statement of defence and counterclaim. By the judgment of the County Court, both action and counterclaim were dismissed with costs. On taxing the costs of the counterclaim, the Clerk allowed full costs on the scale applicable to County and District Courts to the plaintiff, who was the sole defendant by counterclaim. The defendant (plaintiff by counterclaim) appealed to the District Court Judge, on the ground that these costs should be on the Division Court scale; but the Judge affirmed the ruling of the Clerk; and this appeal was then brought.

J. M. Ferguson, for appellant.

J. M. Bullen, for respondent.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—This action was brought in the District Court of the District of Temiskaming; a defence was put in and a counterclaim was also set up. Both claim and counterclaim were dismissed with costs. On taxing costs of the counterclaim, the taxing officer allowed full costs on the District or County Court scale to the defendant by counterclaim—the plaintiff by counterclaim appealed to the District Court Judge, who affirmed the ruling, and the plaintiff by counterclaim now appeals.

There are two grounds for the appeal: (1) that the scale of costs should be as though the counterclaim were a separate action brought in a Division Court; (2) that the costs taxable on the counterclaim should not be the full costs but only the amount by which the costs are increased by the counterclaim.

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Mr. Bullen raised a preliminary objection that the Court had no jurisdiction to hear the appeal: the argument proceeded subject to this objection.

(1) For the first contention, were the counterclaim within the jurisdiction of a Division Court, much support could be found in *Amon* v. *Bobbett* (1889), 22 Q.B.D. 543, where it was held that the claim and counterclaim are for the purposes of taxation to be considered separate actions; but our Court of Appeal, about the same time, held in *Foster* v. *Viegel* (1889), 13 P.R. (Ont.) 133, that where a defendant succeeds in his counterclaim he should (in the absence of a special order) have his costs on the scale of the Court in which the action is brought, even though his recovery be within the jurisdiction of an inferior Court. The defendant is not obliged to set up a counterclaim at all, he is not forced into the higher Court to assert his claim, and it is for his own purposes that he does so. I think it would be unjust that a defendant should be allowed to set up such a counterclaim, with the result that if he won he would have costs on the higher scale, but if he lost he would have to pay on the lower scale only.

Moreover, the pleadings make it fairly clear that the title to land was in question, which would oust the jurisdiction of a Division Court.

I am of opinion that the ruling on this point was right.

(2) Mr. Bullen frankly admitted that the second contention was well-founded: the authorities are clear that, where claim and counterclaim are both dismissed with costs, the costs payable in respect of the counterclaim are only the amount by which the costs have been increased by the counterclaim: *Saner* v. *Bilton* (1879), 11 Ch. D. 416; *Mason* v. *Brentini* (1880), 15 Ch. D. 287; *Atlas Metal Co.* v. *Miller*, [1898] 2 Q.B. 500; *James* v. *Jackson*, [1910] 2 Ch. 92, and other cases; White Stringer and King, Annual Practice (1921), p. 322 (notes); Chitty, Yearly Practice (1920), p. 308; Holmested's Judicature Act, 4th ed., p. 262.

If, therefore, we have jurisdiction to entertain the appeal, it should succeed on this point: if not, the District Court has the same right to make mistakes as we have.

The question of jurisdiction depends upon the County Courts Act, R.S.O. 1914, ch. 59: that Act by sec. 40 (1) gives an appeal to a Divisional Court in County Court cases:—

"(*a*) Every decision of a Judge under any of the powers conferred upon him by any Rules of Court or by any statute, unless provision is therein made to the contrary;

"(*b*) Every decision or order made by a Judge in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees;

"(*c*) Every decision or order in any cause or matter disposing of any right or claim; and from

"(*d*) Any decision or order of a Judge, whether pronounced or made at the trial, or on appeal from taxation or otherwise, which has the effect of depriving the plaintiff of County Court Costs on the ground that his action is of the proper competence of the Division Court, or of entitling him to County Court Costs on the ground that the action is not of the proper competence of the Division Court.

"(2) This section shall not apply to an order or decision which is not final in its nature, but is merely interlocutory or where jurisdiction is given to the Judge as *persona designata*."

Did para. (*a*) stand alone, or even did it stand with para. (*c*) and no other, it might well be that it would give the right to appeal in respect of the quantum of costs. But para. (*d*) must also be considered. *Gibson* v. *Hawes* (1911), 24 O.L.R. 543, shews that para. (*a*) is controlled in its universality by the other paragraphs—and, while that decision is not binding upon us, I think that it is sound and should be followed. In *Weaver* v. *Sawyer* (1889), 16 A.R. (Ont.) 422, much the same point came up, and it was held that the general right of appeal was limited by a special provision, and that the special provision was to govern. Paragraph (*d*) gives a right to appeal in questions of costs, but that right is limited to the case of an "appeal from taxation or otherwise, which has the effect of depriving the plaintiff of County Court costs," etc.—not the present case.

I am of opinion that the generality of paras. (*a*) and (*c*) is restricted by the provisions of para. (*d*); and that the appeal cannot be entertained.

The appeal should, therefore, be dismissed. As to costs, the appellant fails, and I can see no good reason for depriving the respondent of costs. *Appeal dismissed.*

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ALLEN v. WAMBOLT.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Chisholm, J. December 18, 1920.

EJECTMENT (§ III—30)—DEED FROM SHERIFF PURSUANT TO JUDGMENT—APPLICATION FOR WRIT OF POSSESSION—CLAIM TO TITLE OTHERWISE THAN THROUGH JUDGMENT DEBTOR—JURISDICTION OF JUDGE ON SUMMARY APPLICATION.

A Judge has no jurisdiction on summary application in Chambers to issue a writ of possession under secs. 17, 18 and 19 of the Sale of Land under Execution Act, R.S.N.S., 1900, ch. 170, where the title of the parties sought to be ejected is not derived from the judgment debtor, or where there is a *bonâ fide* question of title not so derived.

Statement. APPEAL by defendants from the judgment of Longley, J., given on the hearing of an application by plaintiff and judgment creditor for an order for possession of certain land at Indian Harbour in the county of Halifax. Reversed.

The grounds of appeal are fully stated in the judgment of the Court as delivered by Ritchie, E.J.

J. J. Power, K.C., and *James Terrell*, K.C., for appellants.

Ingram Oakes, for respondent.

The judgment of the Court was delivered by

Ritchie, E.J. RITCHIE, E.J.:—On May 19, 1885, the plaintiff recovered judgment in this action against the above named defendants. From time to time this judgment has been kept in force and is therefore not affected by the lapse of time. The right, title and interest of the defendants in three lots of land was sold under execution issued on the judgment and bid in by the plaintiff who obtained a deed from the sheriff pursuant to the statute in that behalf. Application was made to my brother Longley at Chambers for a writ of possession. This procedure was taken under the R.S.N.S. 1900, ch. 170 [Sale of Land under Execution.] Sections 17, 18 and 19 are the relevant sections. They are as follows:—

17. Any person who has obtained from the sheriff a deed of land sold under execution, may apply to a Judge of the Court out of which the execution issued for a summons calling upon the judgment debtor, and upon every person in possession of such land, or any portion thereof, deriving title by, through, or under the judgment debtor, subsequently to the registry of the judgment, to shew cause why a writ of possession should not issue to put the purchaser in possession.

18 (1). The summons shall be served on the judgment debtor, and on any such person in possession.

. . . . .

19. Upon the return of the summons the Judge may receive evidence either *viva voce* or by affidavit, and if he is of opinion that the purchaser is entitled to the possession of the land, as against the persons named in the

summons, and that such persons are withholding the possession of the land, he shall make an order directing a writ of possession to issue out of such Court, and may in such order direct that such writ shall be issued only after a certain number of days, to be fixed by him.

When the summons came on to be heard objection was made that title could not be tried in this summary way at Chambers. It is quite clear that this summary method of procedure could only be invoked against the judgment debtors and persons in possession deriving title through or under them subsequently to the registry of the judgment. As to this there is no room for doubt or question: the words of the statute are clear and explicit: "Upon the return of the summons the Judge may receive evidence either *viva voce* or by affidavit." He elected to receive evidence *viva voce*. The point made by Mr. Power, K.C., for Charles H. Wambolt and by Mr. Terrell, K.C., for Rose and Arthur Wambolt, persons sought to be ejected by the writ of possession, is that their clients have title not derived from the judgment debtors, or at all events that there is a *bonâ fide* question of title not so derived. Mr. Power's client claims under a paper title and Mr. Terrell's clients claim a possessory title. Having reached the conclusion that the rights of these parties cannot be disposed of in this summary method it would be improper for me to express any opinion as to the validity of their respective titles. The question as to their title can only properly be decided in an action of ejectment and I must leave the question entirely open.

It is, however, clear that they have good colour of title not derived from the judgment debtors. When this appeared I think with respect the Judge should have refused the order for possession. In order to succeed as against Charles H. Wambolt it was necessary among other things for Mr. Oakes for the plaintiff to contend that a deed should be set aside as fraudulent under the Statute of Elizabeth. The deed in question did not come from the judgment debtors. To try out under a Chamber summons whether a deed is void under the Statute of Elizabeth is new practice to me and I venture to think that there is no such practice and that it should not in my opinion be established by a decision of this Court.

Mr. Terrell, K.C., for his clients took the position that they had been in possession of one of the lots for 18 years quite irrespective of the judgment debtors and that to eject them the plaintiff must shew title in the ordinary way, namely, in an action of ejectment. This point, in my opinion, is well taken.

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It is, of course, very desirable that the Court should if possible now dispose of the matters in dispute, namely, decide as to the title to the lands and thus prevent further litigation, and it is a matter of regret that I cannot now decide as to the title and so avoid further litigation; but to do so would be (in the light of the facts), to disregard the statute. It goes without saying that this I cannot do. Before a Judge can adopt this summary procedure and turn parties out of possession of land he must see that the case is within the terms of sec. 17 which I have quoted, because unless this is so he is without jurisdiction to make the order for the writ of possession. At common law if a man is wrongfully in possession of lands the only way to get him out is by an action of ejectment. The sole purpose of this summary procedure is to get the judgment debtor or persons deriving title from him out of possession after a sale of lands under execution, and it is not the policy or intention of the statute to turn out people in this summary way who have a *bonâ fide* claim to an independent title, whether that title turns out to be good or bad. The words of the statute, as well as its clear policy, object and intention, are against any such construction.

The appeal, in my opinion, should be allowed with costs of the appeal and at Chambers. *Appeal allowed.*

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BERLINER GRAMOPHONE Co. Ltd. v. PHINNEY and Co. Ltd.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley, Chisholm and Mellish, JJ. February 12, 1921.

CONTRACTS (§ V C—407)—TO SUPPLY GOODS TO DEALER—DEALER PROHIBITED FROM BUYING OTHER MAKE—FAILURE TO SUPPLY GOODS—IMPLIED CONDITION—REPUDIATION—INJUNCTION.

If in a contract for the sale and purchase of goods between a manufacturer and a dealer, there is a condition which prohibits the dealer from purchasing any other make of goods during the continuance of the contract, there is an implied condition that the manufacturer will supply the dealer promptly when requested with sufficient goods to supply his trade and failure to do so justifies the dealer in treating the contract as repudiated.

[*Fletcher* v. *Montgomery* (1863), 33 Beav. 22, 55 E.R. 274; *Courage & Co.* v. *Carpenter* (1909), 79 L.J. (Ch.) 184; *Telegraph, etc.* v. *McLean* (1873), L.R. 8 Ch. 658; *Mersey Steel, etc., Co.* v. *Naylor* (1884), 9 App. Cas. 434, followed; *Freeth* v. *Burr* (1874), L.R. 9 C.P. 213, distinguished.]

Statement.

APPEAL from the judgment of Ritchie, E.J., granting an injunction to restrain the defendant company from dealing in certain goods other than those of the plaintiff in alleged violation

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of an agreement in writing entered into between plaintiff and defendant.

J. McG. Stewart, for appellant; *S. Jenks*, K.C., for respondent.

HARRIS, C.J.:—The defendants carry on business in Halifax, N.S., as dealers in musical instruments, music, etc., and plaintiffs' general sales manager states that defendants are one of the largest dealers in Eastern Canada, and they have a number of branches in different parts of the Province, and sell yearly about 1,000 gramophones and talking machines. The plaintiffs carry on business in Montreal and sell Victor Talking Machines, Berliner Gramophones, records, horns and accessories.

On March 4, 1918, a contract for 5 years was entered into between the parties by which the defendants agreed among other things as follows:

In consideration of the right to purchase Victor Talking Machines, Berliner Gramophones, parts thereof, records, sound boxes and miscellaneous supplies from the Berliner Gramophone Co., Ltd., or their authorised distributors at the regular dealers' discount provided in the foregoing agreement for the purpose of vending in the Dominion of Canada only. We hereby accept all the terms and conditions provided in the foregoing and covenant and agree to faithfully perform all of said conditions and terms, to carry in stock a representative line and purchase during the year a sufficient amount of Berliner and Victor goods to warrant the continuance of the dealers' discount and to observe the said list prices, discounts and terms as well as other prices and terms that may be established from time to time by the Berliner Gramophone Co., Ltd., upon such patterns, sizes or styles of their wares as may be introduced or marketed by them, and to conform to and adhere strictly to and be governed by the same; the right of the Berliner Gramophone Co., Ltd., at any and all times to establish or change such new prices on all goods manufactured or sold by them in the hands of dealers or distributors, as well as on those hereafter to be manufactured or sold by it being hereby admitted.

We also consent and agree that any breach or breaches of the foregoing conditions shall constitute an infringement or infringements of the patents owned by the Berliner Gramophone Co., Ltd., and herein above referred to.

It is distinctly understood that this agreement grants no exclusive agency or territory to the undersigned, and that violation of any of the conditions or terms mentioned in the foregoing clauses will justify the Berliner Gramophone Co., Ltd., among other things to at once cut off the supply of goods and place the undersigned upon the suspended list.

In consideration of the dealer whose name is signed to the attached contract ordering its products to the value of $1,000 at cost prices, to be forwarded in one shipment, the Berliner Gramophone Co., Ltd., agrees to allow as a special discount the special class "A" prices as established by that company from time to time, and which special class "A" prices as at present are listed below, but are subject to change at any time without notice.

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In addition the dealer agrees at all times to carry in stock a representative line and purchase during each year a sufficient quantity of Berliner Co.'s merchandise to warrant the continuance of the special discount, and the Berliner Gramophone Co., Ltd., shall be the sole judge as to whether or not these conditions are complied with.

The dealer further agrees to handle exclusively as far as concerns disc talking machines and disc records the products of the Berliner Gramophone Co., Ltd., for a period of 5 years from the date of this contract.

If at any time during the continuance of this contract the dealer violates any of its terms, either by handling disc talking machines or disc records not marketed by the Berliner Gramophone Co., Ltd., or otherwise, unless with the written permission of that company, evidenced by the signature of one of its officers the dealer shall at once become liable for and shall pay to the said company the difference between said class "A" prices of all goods purchased by the dealer during the term of this contract and the class "D" prices of the said company for similar goods in force at the time or times of such purchase or purchases.

The defendants gave the plaintiffs notice on February 21, 1919, terminating the contract, alleging as a ground therefor the fact that plaintiffs had failed to fill their orders and keep them supplied with machines for sale.

The plaintiffs thereupon commenced an action for damages for breach of contract and claiming an injunction to restrain defendants from handling until March 3, 1923, disc talking machines or disc records other than the products of the plaintiffs.

On the trial the plaintiffs abandoned their claim for damages and asked only for an injunction, which the trial Judge granted, and there is an appeal.

It was admitted by plaintiffs' counsel on the argument that while the contract does not expressly require plaintiffs to furnish machines to the defendants, yet it is an implied term of the contract that plaintiffs should keep the defendants supplied for their trade.

That such a term is implied is, I think, clear on the authorities: *Fletcher* v. *Montgomery* (1863), 33 Beav. 22, 55 E.R. 274; *Courage & Co.* v. *Carpenter* (1909), 79 L.J. (Ch.) 184; *Telegraph Despatch and Intelligence Co.* v. *McLean* (1873), L.R. 8 Ch. 658.

Considering the magnitude of the defendants' business and the fact that by the contract they were prevented from selling any other disc talking machines and disc records than those purchased from plaintiffs, the failure to supply defendants promptly with goods went to the very root and foundation of the contract and justified the refusal of the defendants to be bound. If the defendants' sole business had been that of selling these talking machines

and records they would, I suppose, have been obliged to close their business because plaintiffs could not supply the goods and defendants were prohibited by the contract from dealing in other machines and records.

It does not appear just what portion of their total business was the selling of talking machines and records but it apparently was a very important part of the total, and according to the evidence of Phinney, at the end of the year 1918 they had only a few machines on hand—"no stock at all from a business standpoint;" in other words, this large part of their business was practically at a standstill.

Lord Blackburn, in *Mersey Steel* and *Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434 at pp. 443-444, says:

> The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, it is so laid down in the notes to *Pordage* v. *Cole*, 1 Wm. Saund. 548, (ed. 1871) [see 85 E.R. 449], if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say: "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct."

That principle, I think, applies here and the case at Bar is by reason of the special terms of the contract to which I have referred clearly distinguishable from *Freeth* v. *Burr* (1874), L.R. 9 C.P. 213, referred to in the decision of the trial Judge.

In 25 Hals., in note (M), p. 220, the rule is thus stated: "A failure to perform a vital part of the contract necessarily amounts to an implied repudiation."

I think it was a vital part of this contract that the plaintiffs should fill the defendants' orders so as to enable them to carry on their business without interruption. They could not carry on business without a stock of machines and the plaintiffs had bound them down by the contract so that they could not purchase elsewhere and under the circumstances disclosed by the evidence the defendants were, I think, justified in repudiating the contract and refusing to be further bound by its terms.

Plaintiffs' counsel argued that he was entitled to succeed on the facts and that the agreement contemplated there would be delay in shipping machines and that the evidence shewed no sufficient ground for repudiation. A careful perusal of the evidence shews that there was great delay in making shipments.

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Phinney's evidence as to his interview with plaintiffs' traveller (Clarke), in October (the usual time for taking orders for Christmas stock), is as follows:

Mr. Clarke was there the latter part of October, the usual time he would be there to get the Christmas order under ordinary circumstances. I asked him what the chances were for stock for Christmas. His answer to me was, practically nothing. I think he mentioned styles 4 and 6 might be available. They are small models of the Victor which are used largely by us for summer trade, camps and things of that sort.

And then a new traveller takes Clarke's place and calls on defendants in November and again in December. Phinney testifies as to these two interviews with him:

Q. What occurred between you and Hodgkins? In relation to your business with the company? A. The matter of stock came up again; I asked fo information and received the same reply as from Clarke, nothing available; he also was there in connection with record orders. Q. What if anything did he say as to the reason they were unable to supply these machines? A. Didn't have them. Q. Why? A. Could not get them from their people in the States. Q. What assurance did he give you? A. He told me practically the same as Clarke that at the New Year goods would probably be available; in fact he gave me the impression they would be. I cannot say exactly what he said, but I gathered that from the conversation. Q. When did you next see Hodgkins? A. I remember he was here on December 6th; there is a letter —some correspondence on the files in reference to that; he was here some little time but I cannot say how long; I judge ten days or longer. Q. Take up the matter of the company supplying goods to you with him? A. Yes, practically the same conversation as before; it was getting into Christmas trade and we were getting pretty wrathy; machines were getting low in styles and it is a difficult thing to go to a new company and ask them for instruments for Christmas trade and I wanted to know if there was some way possible we could get some machines to help out styles that were likely to run short. Q. You were unable to get any from him? Other than 4's and 6's? A. Yes.

And Clarke returns and visits defendants in February, 1919, and defendants are told that it would probably be four, five or six months before they could hope for anything. This is Phinney's evidence as to the February interview with Clarke:

Q. In November and December when these conversations took place? A. We had a fairly good stock; speaking of numbers I don't know the respective styles; but early in December the styles were beginning to run short; we might have a number of 4's and 6's but there would be special styles; no 8's at all; 9 short; 10 short and we had a few 11's; and short on 14 and 16; I could not say the exact numbers. Q. You were short of all styles except 4's and 6's. A. We had a fairly good quantity at first December; our December trade would not run into that style at all. Q. Remember Clarke returning again in February? A. Yes, he was here on the 14th; I remember that; I remember he was here a few days, because his wife was with him and they were staying at Birchdale and afterwards moved to a hotel in town, and a few days

elapsed at that time. Our policy in our business is to run special sales along the first of the year, and in running these special sales we must have stock, because we sell a big quantity of instruments, and following the sales there is also a demand because of the extra advertising creating that demand; and we were getting our advertising ready for the sale and I was very anxious for stock and I had to have it; there was no alternative. I got after Mr. Clarke very hard at that time; I don't know if Mr. Clarke told me, or who I got the information from, but in some way, the Berliner people in Montreal had a certain amount of goods, and I asked Mr. Clarke if this was so, for their own stores in Montreal. He told me they had a little stuff coming through but nothing they could give any dealer. I said what are the prospects for machines in future, we have been assured for the first of the year. He said it would probably be 4, 5 or 6 months before we could hope for anything. Q. Had your concern been able to get Victrolas at the time you speak of, in November, December and February, were you prepared to purchase? A. Yes. Q. Would they be substantial purchases? A. Yes. Q. How many do you think you would probably have sold? A. I could only make an estimate; the order would run from $25,000 to $40,000 at that time. Q. How much was the original order when you entered into the contract? A. I think it was around $60,000. Q. About 140 instruments? A. I forget about that. Q. I understand the reason you did not order on any of these occasions was because Clarke or Hodgkins said it was useless to order? A. It was no use to order, we could not get the stuff; that is the only reason we did not order.

None of the evidence I have quoted is contradicted. The defendants say Christmas was their best season and they could get no new stock except of sizes not suitable for that trade. Then they wanted to put on a special sale in February, 1919, and could get only a small portion of the number of machines ordered and very little satisfaction as to when the balance would be available. The fact that they did not repudiate the contract earlier was no doubt because of the hopes held out in plaintiffs' letters that the goods would be forthcoming shortly. Counsel contended that the whole matter must be judged by what took place in February, 1919; and the argument was that the question as to whether defendants were justified in repudiating must depend upon the last orders given and not filled and it was said that these orders were for immediate shipment, which could not be demanded under the contract. It is, I think, clear, that the whole conduct of the plaintiffs must be looked at, and not merely their reply to the last order. That order was only for a few instruments equivalent to the average sales of one week. Defendants had the right to judge of what was likely to be the future conduct of the plaintiffs in the light of their past dealings, and they had done nothing to estop themselves from setting up the delays of the past. It is

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often "the last straw" which causes trouble. I think, considering the nature of the contract, that the conclusion is inevitable that the defendants were justified in repudiating.

I would allow the appeal and dismiss the action with costs.

RUSSELL, J.:—The so-called contract in this case seems to me to be a mere license to sell such and so many of the plaintiffs' gramophones, discs, etc., as the plaintiff company will supply under a number of stringent regulations and prohibitions. There is no obligation that I can find on the part of the plaintiff company to supply any defined quantity of goods or to accede to any orders for goods to be given from time to time by the defendants. Even if such were the nature of the agreement it would, I think, amount only to an outstanding offer to be converted into a contract each time an order was given for the supply of the goods so ordered. That seems to me to be Mr. Leake's view of such a transaction. But here there is not even such an undertaking on the part of the plaintiff company. There is, I think, such a want of mutuality as would, before the Judicature Act, have prevented an equity Court from exercising its jurisdiction.

I have very great doubt whether an equity Court could restrain the defendant even if the condition of mutuality were present in the agreement. The more recent cases on this point, tending to overrule the leading case of *Lumley* v. *Wagner* (1852), 1 DeG. M. & G. 604, 42 E.R. 687, seem to shew that if the Court cannot conveniently decree specific performance or would not for some good reason decree specific performance, it will not by the round-about process of injunction restrain the defendant and thus induce him to perform his part of the agreement. I greatly doubt whether a decree for specific performance would have been made in this case even if plaintiff company had bound itself to supply goods ordered from time to time. In the present case that question does not arise and it may be argued that the issue of the injunction would result in the complete performance of the contract between the parties on both sides. Perhaps it would, but if so, that is because the plaintiff did not contract for anything, which brings us back to the objection of want of mutuality.

There is a further question whether a restraining order will be granted in a case where there is no express negative stipulation but only a negative stipulation implied from the terms of the

affirmative provision of the agreement. Here, it may be said the defendants have not agreed that they will not handle the defined classes of goods of any other company than the plaintiffs. They have only agreed that they will handle exclusively the plaintiffs' goods of the classes defined. This distinction is so artificial and absurd that it shocks the normal intellect, but it has nevertheless been made the ground of the decision in some of the cases on the subject.

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On the whole I cannot think that the issue of the injunction in this case is either just or convenient. In the words of Romer, J., in *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671, at p. 674, "In my opinion such a stipulation," as that imposed upon the defendant, "is unreasonable and ought not to be enforced by the Court."

The appeal should, I think, be allowed and the plaintiff's claim for injunction dismissed.

LONGLEY, CHISHOLM and MELLISH, JJ., concur with Harris, C.J.

Longley, J.
Chisholm, J.
Mellish, J.

Appeal allowed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur and Mignault, JJ. February 1, 1921.

ARCHITECTS (§ I—5)—PRIVILEGE FOR DRAWING PLANS AND SUPERINTENDING CONSTRUCTION OF BUILDING—ABANDONMENT OF CONSTRUCTION—DISMISSAL OF ARCHITECT—SALE OF PROPERTY—REGISTRATION OF PRIVILEGE—LOSS OF RIGHT.

The 30 days' delay granted by art. 2013b of the Quebec Civil Code for the registration of an architect's privilege applies only to a case in which the work has been completed. If the building operations are not completed but abandoned before completion there is no delay fixed for registration of the privilege, and if the owner makes a sale of the property to a third party who registers his deed of sale before the architect registers his privilege, the architect's claim cannot be asserted against the property.

[Review of legislation. *Cook* v. *Archibald* (1919), 57 D.L.R. 256, 29 Que. K.B. 364, affirmed.]

APPEAL by plaintiff from the judgment of the Quebec Court of King's Bench, appeal side (1919), 57 D.L.R. 256, 29 Que. K.B. 364, reversing the judgment of the Superior Court and holding that the plaintiff's privilege for drawing plans and superintending the construction of a building could not be asserted as against a purchaser. Affirmed.

Aimé Geoffrion, K.C., and *L. P. Crepeau*, K.C., for appellant.

J. W. Cook, K.C., and *F. J. Laverty*, K.C., for respondent.

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DAVIES, C.J.:—I am to dismiss this appeal with costs and concur in the reasons for judgment stated by Mignault, J.

IDINGTON, J.:—I think this appeal should be dismissed with costs.

DUFF, J.:—I concur in dismissing this appeal for the reasons given by Brodeur, J.

MIGNAULT, J.:—This is an action by the appellant to have it declared that he has, as architect, a privilege for $7,851 affecting subdivision 7 of lot No. 1339 and lot No. 1340 of St. Antoine Ward in the city of Montreal belonging to the respondent.

One James H. Maher had purchased these lots from the respondent in October, 1912, for $110,000 of which $20,000 was paid in cash and the balance $90,000, was secured in the respondent's favour by a vendor's privilege and was payable by instalments. Immediately after the purchase, Maher instructed the appellant's firm, Saxe and Archibald, in whose rights the appellant now is, to prepare plans and specifications for a ten-story building on this property. Tenders were then called for and that one of Deakin for $192,500 was accepted by Maher and a contract made between him and Deakin for the construction of the building, stipulating that it should be completed in September, 1913. The work was commenced and continued until May, 1913, when Maher became financially embarrassed and the work was stopped. On July 31, 1913, a contract was made between Deakin and Maher, which had been drafted by the appellant, whereby it was agreed that the building operations would be postponed until March 1, 1914; that the value of the building as it stood was $33,550 on which $25,000 had been paid, leaving a balance of $8,550; that there was a balance of $9,135 due the contractor for which Maher gave his note; that the contractor would proceed with the work on March 1, 1914, on receiving 20 days' previous notice, provided he was guaranteed that the necessary financial arrangements to complete the work had been made; and that should the construction not be proceeded with by March 1, 1914, the contractor would then be entitled to claim the balance due him to date.

No notice to continue the work on March 1, 1914, was given by Maher to Deakin, nor were the necessary financial arrangements made. No work was done save what was necessary to protect the part already built, which was nothing more than the foundations and reached the level of the sidewalk.

On September 1, 1916, Maher, being unable to pay the respondent the balance due on the purchase price of the property, reconveyed it to the latter, represented by his brother, J. W. Cook, K.C. in consideration of the balance he owed him, $90,000 for which the respondent gave him a discharge. This deed of sale was registered on September 2, 1916.

On September 14, 1916, the appellant addressed a notice to the Registrar of Montreal West and to Maher, stating that he claimed $7,851, and demanding that his claim be registered against the property. This notice was registered on December 16, 1916. On March 31, 1917, the appellant also addressed a notice to the Registrar as well as to Maher and the respondent, claiming $7,851 for his services as architect "in the construction of a building now being erected on said lots" and required that it be registered against this property. This notice was registered on April 13, 1917.

It may be observed that although the appellant stated that the building was then being erected, the work had been stopped since May, 1913, except what was done for the protection of the work from the weather, and the idea of any further construction had evidently been abandoned. It should be added that in November, 1916, the respondent leased the property to one Chadborn, who erected a garage on it some time between December, 1916, and May 1917.

The Superior Court dismissed the respondent's plea and gave judgment for the appellant on two grounds: 1. That the ratification by the respondent of the acceptance of Maher's reconveyance by Mr. J. W. Cook was insufficient; 2. That the appellant's privilege had been registered in due time.

The Court of King's Bench reversed this judgment (1919), 57 D.L.R. 256, 29 Que. K.B. 364, rejecting, and I think rightly, the first and somewhat technical ground, to which I will not further refer, the more so as it was not urged before this Court, and as to the registration of the appellant's privilege, holding as follows, in the formal judgment, (translated): "Seeing that on March 1, 1914, Maher had not been able, by reason of his financial difficulties to continue the work which from that time was considered as ended; that Archibald, the architect, could not register his architect's lien, neither on December 16, 1916, nor in April, 1917, more than 30 days after the work was considered to be at an end."

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In effect, and indeed in terms, this decision is that the appellant could not register his privilege more than 30 days *après que les travaux étaient censés terminés* (after the work was considered to be at an end).

With respect, I am of opinion that no such term as 30 days after the work is deemed to have terminated or to have ceased is to be found in this frequently amended and somewhat unskilfully drafted legislation. The case of work abandoned before completion is clearly *a casus omissus* in these articles, as is likewise the case of an architect or contractor dismissed during the course of the building operations.

It appears unnecessary to go into the history of this legislation, for we are only concerned with its proper construction as it existed at the time the appellant's services were rendered. Articles 2013 C.C. (Que.) (first para.), 2013a, 2013b, and the first para. of art. 2103, were then as follows:—

2013. The laborer, workman, architect, builder and supplier of materials, have a right of preference over the vendor and the other creditors, on the immoveable but only upon the additional value given to the immoveable by the work done.

2013a. For the purposes of the privilege, the laborer, workman, architect and builder rank as follows: 1. The laborer; 2. The workman; 3. The architect; 4. The builder; 5. The supplier of materials.

2013b. The right of preference or privilege upon the immoveable exists, as follows: Without registration of the claim, in favour of the debt due the laborer, workman and the builder, during the whole time they are occupied at the work or while such work lasts, as the case may be; and, with registration, provided it be registered within the thirty days following the date upon which the building has become ready for the purpose for which it is intended. But such right of preference or privilege shall exist only for one year from the date of the registration, unless a suit be taken in the interval, or unless a longer delay for payment has been stipulated in the contract.

2103. I. The privilege of the persons mentioned in article 2013 dates, in the cases mentioned in the first clause of article 2013b, only from the registration within the proper delay, at the registry office of the division in which is situated the immoveable affected by the inscription of a notice or memorial drawn up according to form A, with a deposition of the creditor, sworn to before a justice of the peace or a commissioner of the Superior Court, setting forth the nature and the amount of the claim and describing the immoveable so affected.

The Judges of the Court of King's Bench appear to have considered that through some inadvertence the first clause of the first paragraph of art. 2013b omitted any mention of the architect, and that during the continuance of the work superintended by him

the architect could claim a privilege without registration. I have been unable to so construe these articles, nor do I think that it is competent for the Court to supply an omission which appears to have been intentional. It was no doubt considered that inasmuch as the laborer, the workman and, to some extent, the builder have claims which become payable at fixed times as the work progresses, it would, especially in the case of the two first, be inconvenient to require them to register a series of claims payable day by day or week by week for varying amounts. In the case of the architect there is no exemption from registration during the progress of the work and there is no provision allowing him to assert a privilege, while the work progresses unless his claim has been registered.

A careful reading of art. 2013b shews that this difference was clearly intentional. "The right of preference or privilege upon the immoveable" which "exists" is obviously the "right of preference" mentioned by art. 2013, and is that in favour of the laborer, workman, architect, builder, and supplier of materials. Therefore the right of preference referred to in the first sentence of art. 2013b is the right of the five classes enumerated in art. 2013 and also in art. 2013a. Then art. 2013b states how this right "exists," and it exists:—

(a) Without registration of the claim, in favour of the debt due the laborer, workman and the builder, during the whole time they are occupied at the work or while such work lasts: and (b) with registration, provided "it," that is to say the right mentioned in the first sentence of art. 2013b, registered within the 30 days, etc.

If it had been intended that the words "in favour of the debt due the laborer, workman and the builder" should apply to and govern the two clauses above indicated as (a) and (b) respectively, they would have been placed in the introductory clause immediately after the verb "exists." Placed as they are, their restrictive effect is confined to the phrase "without registration, etc.", leaving the phrase "and with registration, etc.", unrestricted and applicable to the entire subject of the verb "exists," thus embracing in clause (b) the architect and the supplier of materials as well as the other three classes. No valid reason has been advanced for rejecting this plain grammatical construction. There is no accidental omission to supply. The architect is deliberately left out of the first clause and equally deliberately included in the second. The architect's right of preference or privilege "exists," "dates," or

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"takes effect" only from the date of registration, in view both of art. 2013b and of art. 2103, and also by virtue of the general rules applicable to the registration of real rights (arts. 2082, 2083), unless it be expressly exempt from registration (arts. 2013b and 2084), which it clearly is not.

It is true that art. 2013b grants a delay of 30 days for the registration of the architect's privilege, but this is in case the work has been completed, for the starting point of this delay is the date when the building has become ready for the purpose for which it is intended. If the building operations are not completed, but, as in this case, abandoned in course of prosecution, there is no delay for registration, for there is no date fixed by law from which this delay could be computed. It follows that, in such a case, although the architect must register his claim, he is granted no delay for registration and his right of priority as to other registered claims can only count from the date of the registration of his own claim (art. 2083).

I may now cite art. 2013f for it leads to the consideration of the legal principle upon which the dismissal of the appellant's action could in my opinion be supported.

> 2013f. The sale to a third party by the proprietor of the immoveable or his agents, or the payment of the whole or a portion of the contract price, cannot in any way affect the claims of persons who have a privilege under art. 2013, and who have complied with the requirements of articles 2013a, 2013b, 2013c and 2013.

It follows that the sale of the immovable to a third party will be conclusive against the architect if the latter has not complied with the requirements of the articles here mentioned, and therefore, in a case like this where the work has been stopped and abandoned and the building has never become ready for the purpose for which it is intended, if the property be sold to a third party who registers his deed of sale before the architect registers his privilege, the architect's claim cannot be asserted against the immovable.

Here when the appellant registered his claim the respondent was the registered owner of the property and in my opinion was then too late for the appellant to register his claim against the property. I may add that there is no suggestion of bad faith on the respondent's part, and the appellant must stand or fall on his strict compliance with the provisions I have cited.

It is unnecessary to express any opinion upon the question whether the appellant could have effectively registered his claim either on December 16, 1916, or on April 13, 1917, had Maher remained the owner of the property

I make no reference to the amendments made to this legislation by the statute 7 Geo. V. (Que.), ch. 52, because it came into force only in Dec. 22, 1916, at which date the respondent was the registered owner of the property, and any work done by the appellant had been finished long before its enactment.

For these reasons I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—The question before us in this case is whether an architect can claim his privilege under arts. 1695 and 2009 of the Civil Code against a third party purchasing the property and registering his title prior to the registration of the privilege.

The question is complicated by the fact that the construction for which the architect had prepared plans was discontinued by the former owner for lack of funds, and the building was not finished when the purchaser took possession.

The Superior Court held that the architect ranked ahead of the third party in possession. In appeal this judgment was reversed on the ground that the privilege had not been registered in time, that is to say, within the 30 days next following the end of the work, (57 D.L.R. 256, 29 Que. K.B. 364).

The workman's privilege has had an unfortunate history in the legislation of the last 30 years, particularly since what is customarily referred to as the Auge law, 57 Vict., 1894 (Que.), ch. 46. This law affected the conditions under which the privilege could be exercised rather than the existence of the privilege itself.

The architect's privilege has come down to us from a very old law. It is based on the equitable principle that those who give their time, work, care or material to make a thing, or repair or preserve it have a privilege for the additional value created by their labour. Domat, vol. 3, 1822 ed., p. 448. Pothier, 1844 ed., vol. 17, Des criees, No. 129.

In our Code, the codifiers have dealt with this privilege in art. 1695 under the title of Lease and Hire, in arts. 2009 and 2013 under the title of Privileges and Hypothecs, and in 2103 under the title of Registration. (DeLorimier, Bibliotheque du Code Civil, vol. 17, pp. 384 and 404; vol. 18, pp. 235-236.)

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With the exception of art. 1695, all these articles have been amended by the Auge law and subsequent legislation, that is to say, by the following statutes: 57 Viet., 1894 (Que.), ch. 46; 59 Viet., 1895 (Que.), ch. 42; 4 Edw. VII., 1904 (Que.), ch. 43; 7 Geo. V., 1916 (Que.), ch. 52.

Under the old French law the privilege existed without registration, and the law was the same in Lower Canada until 1841. In that year the special council promulgated an order dealing with registration, providing that architects, builders, and other workmen employed in the construction of a building must register their privilege by preparing a statement of the condition of the premises before the work was begun and after it was completed. This last provision of the law was incorporated in art. 2013 of the Civil Code (DeLorimier, vol. 17, p. 404). This law, however, provided so complicated and expensive a procedure that only the contractor and the architect could take advantage of its provisions. It gave but small comfort to the poor workman and the day-laborer, whose wages were at that time very low, and who could not afford the luxury of hiring a lawyer to petition the Courts and have experts appointed to visit the premises. The Auge law, so styled from the name of its author, was passed in 1894 (57 Viet. (Que.), ch. 46) to assist the workman. It provided that the laborer, the workman, the supplier of materials, and the builder were not obliged to furnish an expert's report, and that their privilege was effective without registration while the work went on, but subject to registration within the 30 days following the completion of the building or the end of the work.

The architect was not mentioned in this nomenclature. Arts. 2009, 2013 and 2103 of the Civil Code (Que.), which specifically referred to him, were repealed and replaced by other articles which did not mention his name. Other arts. 2013a, 2013b, 2013c, 2013d, and 2013e, indicated the procedure to be followed to assure the existence of the privilege, and to determine its rank and the rights of the owner receiving notice of the privilege. On the other hand, art. 1695 was left untouched, reading as follows:—

> Architects, builders, and other workmen have a privilege upon the buildings or other works constructed by them, for the payment of their work and materials, subject to the rules contained in the title of *Privileges and Hypothecs*, and the title of *Registration of Real Rights*.

It is possible that the Auge law did not have the effect of destroying the architect's privilege, for the general language of some of the articles in the titles *Of Privileges* and *Of Registration* might have been construed as permitting the registration of the privilege so explicitly provided by art. 1695. But the Legislature evidently thought that some uncertainty might be created and accordingly, in 1895, repealed the whole of the law of 1894, and replaced it by a new law, in which the architect this time appeared in arts. 2009, 2013, 2013a, 2013c, and 2103.

The supplier of materials, who in 1894 had been expressly included with the laborer, the workman, and the builder, in arts. 2009, 2013, 2013a, 2013b, 2013c, 2013d, and 2103, disappeared from these articles. In six new articles, 2013(g) to 2013(l), the legislator indicated the procedure to be followed in order to have "a hypothecary privilege which shall rank after the hypothecs previously registered and the privileges created by this Act." (Art. 2013(l)).

Under the law of 1895, the architect beyond all doubt resumed his privileged rank. On the other hand, the supplier of materials, who was privileged before the Civil Code, as Domat says (loc. cit., p. 448), was subjected to a special law combining the nature of a garnishment with that of a privilege and a hypothec. Later, in 1904 (4 Edw. VII., ch. 43), the privilege of the supplier of materials was restored among those of arts. 2013 and 2013a of the Civil Code as amended in 1895, but it was not specified in art. 2009 which enumerates the privileged claims upon immovables.

I must draw attention to the wording of art. 2013a which, as amended in 1904, now reads as follows:—

"For the purposes of the privilege, the laborer, workman, architect and builder rank as follows: the laborer, the workman, the architect, the builder, the supplier of materials."

It is surprising that it was not thought necessary to make mention of the supplier of materials in the first part of the article, in the same manner as the others. There are very evident oversights that shew us that all this legislation was very hastily drafted, As it is doubtful and ambiguous we must therefore ascertain the intention of the legislator (art. 12 C.C. (Que.)).

Bearing the above remarks in mind, I note that art. 2009, as it stands in the Auge law of 1894, in enumerating the privileged

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claims upon immovables, places in para. 7 "the claim of the laborer, the workman, the supplier of materials and the builder," subject to the provisions of art. 2013. Article 2013 as it read at that time provided that this privileged claim should be exercised on the plus-value, and in art. 2013b, the four privileged claims were again enumerated, and it was provided that the privilege should exist without registration while the work was going on and with registration after it was completed.

The law of 1895 replaced the supplier of materials in art. 2009 by the architect. The same change was made in arts. 2013 and 2013a, but in art. 2013b no mention was made of the architect, but only of the labourer, the workman, and the builder. Not a word was said about the architect. Was this an oversight, as the Chief Justice of the Court of Appeal says? This is possible, for just as those of the builder, the services of the architect acquire a greater value from day to day as the building proceeds. His claim grows with the work, and I can see good reason for not obliging him to register his claim in the course of the work.

The Order in Council fixing architect's fees was produced in the record. It shews that the architect's fees are liable to increase as the work progresses. It is therefore very possible that the omission of the architect among the persons mentioned in art. 2013b as entitled to rank by privilege without registration, is a legislative oversight.

But the Court of Appeal, in a case of *Carrière* v. *Sigouin* (1908), 18 Que. K.B. 176, seems to have disposed of this argument. The question discussed in that case was: did the privilege of the supplier of materials exist in the absence of the notice required by art. 2013g?

Demers, J., in the course of his analysis of the then current legislation, referred as follows to art. 2013b:—

> Article 2013b was not amended by the statute 4 Edw. VII. ch. 43. The law of 1895 did not include the supplier of materials in the enumeration of art. 2013b. Article 2103 cannot therefore be applied to the supplier of materials, as he is not mentioned in art. 2013b.

This opinion of Demers, J., is very explicit. He holds that art. 2013b does not apply to the supplier of materials because it does not mention him. The same would then hold true of the architect, as he is not mentioned either in art. 2013b. This case of *Carrière* v. *Sigouin*, 18 Que. K.B. 176, should not be quoted as an authority in support of the holding of the Court of Appeal in the

present case, that the architect must register in the 30 days following the completion of the work.

I share the opinion of Demers, J., that the fact that the legislator has not mentioned the architect in art. 2013b shews that this article cannot be invoked either on behalf of the architect or against him.

When the legislator wished to deal with the architect, in 1895, he mentioned him by name, and particularly in arts. 2009, 2013, 2013a and 2013c. As far as I am concerned, this last article makes it quite clear that there was no oversight in the draft of art. 2013b.

I have therefore come to the conclusion that the plaintiff cannot succeed in his demand, for the following reasons:

Article 1695 of the Civil Code subjects the architect's privilege to the provisions contained in the title *Of Privileges* and *Hypothecs* and in the title *Of the Registration of Real Rights*. The provisions of arts. 2013, 2013b and 2103 of the Civil Code, as they stood in 1916 when Cook acquired the immovable as a third party in possession thereof, are not very clear and are open to controversy, as I have just said. On the other hand, arts. 2082, 2083 and 2084 of the Code dispose of the rights of the parties in this case.

First, art. 2082 tells us that registration gives effect to real rights and establishes their order of priority according to the provisions contained in the title *Of Registration*.

Article 2084 states which real rights are exempt from the formality of registration. It includes particularly the privileges mentioned in paras. 1, 4, 5, 6, and 9 of art. 2009. Applying the rule *inclusio unius fit exclusio alterius*, it therefore follows that the architect's privilege, mentioned in para. 7 of art. 2009, must be registered. Turning now to art. 2083, we find that real rights subject to be registered take effect from the moment of their registration against creditors whose rights have been registered subsequently.

In the present case, the appellant registered his privilege after the registration by Cook of his deed of acquisition. Plaintiff's registration is therefore too late and cannot give him a privilege opposable to Cook.

Without adopting the considerants of the Court of Appeal, I would for the above reasons, confirm the judgment, with costs.

Appeal dismissed.

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REX v. SCHEER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 5, 1921.

EVIDENCE (§ XII L—990)—CRIMINAL LAW—HAVING STOLEN GOODS IN POSSESSION—NECESSITY OF IDENTIFYING GOODS IN COURT AS PART OF THOSE STOLEN—REASONABLE INFERENCES.

A conviction on a charge of having or of having had in his possession certain articles knowing them to have been stolen, will be quashed where there is no evidence from which it can be reasonably inferred that the goods in accused's possession were part of those stolen. It is essential to a conviction that the goods in Court be identified as part of those which have been stolen.

Statement. APPEAL by the accused from the refusal of Mr. Saunders, Police Magistrate of Calgary, to reserve a case under sec. 1014 of the Criminal Code, R.S.C., 1906, ch. 146, for the opinion of this Court. The accused was convicted on a charge of unlawfully receiving and retaining in his possession certain goods, knowing them to have been stolen. Reversed.

T. H. Randall and *J. C. Hendry*, for appellant.

J. Short, K.C., for respondent.

The judgment of the Court was delivered by

Stuart, J. STUART, J.:—There were a number of questions asked to be reserved, but they all in substance refer to the alleged absence of evidence upon which the magistrate could reasonably infer guilt.

It appears that a company called General Supplies Ltd. had a warehouse in the west end of Calgary wherein they had stored, along with other goods, some auto trucks and automobiles. In the latter part of December, 1919, and beginning of January, 1920, the company had discovered that two separate thefts had taken place from this warehouse, the first of 17 tires, tubes and rims, the latter of 8 tires, tubes and rims. About 8 or 10 days after the thefts 8 rims were discovered under the ice in the Bow River, but nothing further was discovered until towards the end of October, 1920. One Jackson, connected with a company called Hyman and Co., attempted to exchange two certain tires with tubes and rims with a man connected with the Ford automobile branch in Calgary in connection with some deal or other. This man, before accepting them, wanted to see if he could sell them. They were Goodyear tires in which General Supplies Ltd. dealt. So he took them to the office of this company, and they were there claimed by that company as their own and as being part of the property previously stolen. The matter was reported to the police,

and one of the officers began tracing the history of the two tires. He found that Jackson had got them from one Smith early in October, 1920. He found Smith, who was a manager of the Calgary Abattoir, and learned that he had, some time in January, got 4 tires and tubes from one Winter and had paid $195 for them. Winter, a driver for the Calgary Abattoir, said that in February he had taken 4 tires, 4 tubes and 2 rims from the accused in payment for a debt. The accused was then interviewed by the officer, and he said that he had bought the articles from one Dave Richards. After an abortive attempt to locate Richards the officer arrested the accused.

At the trial, one Smallpiece, the manager of General Supplies Ltd., was the first witness. He said that he identified the 4 tires and tubes and the 2 rims, which were produced as exhibits, as being the property of his company and related the circumstance of the two thefts in December and January. As to identification of the property he gave the following evidence:—

We were taking our inventory at the end of December as well and found some 17 tires, tubes and rims had been taken. We locked the place up and visited it again on the morning of the second of January and we found some 8 more tires had been taken, tubes and rims.

Q. Do you know if these are some that were taken? A. Yes, there is one of our rims. And the other one too and the tires.

And on cross-examination he said:—

Q. Your only means of identifying these tires are the fact that they are of the same name and size? A. No, I am absolutely convinced for this reason because all of that equipment was found together. My first view of the stuff was two of the tires accompanied by the rims which is absolutely conclusive evidence that it is our material. There is nobody stocking the Firestone type of rim. Q. Your reason for identifying the tires are that they were found along with the rims? A. Yes. Q. And that is your only reason? A. Two of the numbers have been obliterated and two are there but we do not keep the numbers.

* * * *

Q. And your only means of identifying the rims (is) to the best of your knowledge there are no other dealers in the city that deal in this particular type of rims? A. Yes, accompanied with the fact that those rims were found with the tires; they came from the same party. Q. Did you find them together—somebody told you? A. No, they were brought to us from the same party. Q. I mean these rims might have been stolen apart from the tires. A. No, I cannot conceive of that.

Next, Winter was called. He said that in the fall of 1919, about a year before the trial, which was in November, the accused had borrowed $300 from him and had given him a mortgage on a

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McLaughlin car as security, that before he was paid, the car was sold and he had "got after" Scheer for the money, that Scheer offered $75 cash and said he would let him have some tires for the balance, and that he took the tires over. Then he was asked:—

Q. Are these the tires that you got? A. I think they are. Q. Would you look at them. Have you examined them at all to see if they were the same tires? A. No, I never saw them after I had them. Q. When did they leave your possession? A. In February. Q. What did you get in settlement of your claim for $275? A. $75 and these tires and $225 for these tires. Q. How many tires did you get? A. Four. Q. How many rims did you get? A. Two. Q. Tubes? A. Four. Q. And at least they are similar to those? A. Yes. Q. You think those are the same ones? A. Yes.

He said also that he had no further dealings with Scheer, that he neither asked nor was told where the tires came from, and that one could hardly notice if they had been used. Upon cross-examination he said it was in January some time that he got the tires from Scheer. He had also stated that before taking the tires from Scheer he had ascertained if he could find a buyer, as the tires were no good to him, and that he had found Smith would buy. He said that Scheer had brought them down and put them in his back yard. He was also asked:—

Q. You were going to look at these tires before you would accept them for $225? A. No, he told me they were new ones and it was no use me looking at them. I don't know anything about tires.

Winter also stated that he had sold the tires to Smith for $195. Again he was asked:—

Q. Are you quite certain these are the four tires that Scheer turned over to you? A. Yes, I think so. Q. How do you mean? A. They look like the same. Q. You have no recollection of the number? A. No, and I don't know if they had any numbers. Q. Do you remember the size of them? A. Yes, 35 x 35 (whatever that may mean). Q. Do you remember are these precisely the rims that Scheer handed over to you? A. *I suppose they are.* I never looked at them very much, I think they are.

It will be observed that Winter nowhere swears that he sold two rims to Smith.

Then Smith was called. He stated that in January, Winter, who was his employee, came and asked of him to buy four 35 x 35 tires, that that was the size they were using for their truck, that he had told Winter four was too many, that Winter had said that he was taking them on a debt, and that they took these four tires at $195. His evidence then proceeded thus:—

Q. And that included the rims? A. No, the rims we have are of course already on the truck. The tubes were included. First of all the deal was for the covers and then we bought the tubes in at the price. Q. Did you get the

rims? A. No. Q. How much did you pay? A. $130-¾ (an inexplicable answer). Q. How much did you agree to pay him on the whole thing? A. $195. Q. How did you dispose of the tires? A. We used two. Q. Are those the tires you got (evidently referring to the exhibits)? A. I can't tell you that because all Goodyear tires 35 x 35 we use those on the truck. Q. Just tell how you disposed of the tires? A. We used two and two were kept in the basement up to three or four weeks ago and Mr. Jackson, of Hyman and Co., was running the same kind of truck as we were and I thought our tires would depreciate, and I asked him if he would buy them and he agreed to buy them and they were delivered to him. Q. What did you deliver to him? A. The two complete tires and no rims. Q. What about the tubes? A. Tubes and tires. Q. And you delivered those two to him? A. Yes. Q. Did you ever deliver the other two? A. No, they were on our truck.

Then Jackson was called and gave the following evidence:—

Q. Just tell what you know of these tires? A. I understood they are a pair of tires I bought from the last witness; to keep them in pretty fair shape I took them home and put them in my cellar; a week ago I was figuring on changing my old Ford car. Q. What did you get from Mr. Smith? A. As near as I can remember we got two tires, two tubes and two rims. Q. Are these the rims? A. I can't say anything about that. I did not even look at them when I got them. Q. Are they similar? A. I think, but I don't know whether the tires are pairs or not or whether the rims were pairs or not. Q. But you did get rims from him? A. Yes.

Then he went on to tell of his attempt to exchange his old Ford car with the Ford people and to turn in the two new tires as well and of the attempt of the Ford man to sell them to "the Goodyear people" (whether this meant General Supplies Ltd. or not is not clear), of their claim that they had been stolen, and of the seizure of the tires by the police.

Then the policeman Cheyne was called and related his tracing of the tires. He said that he took the two used tires from Smith's truck and the two new tires and tubes and the two rims from Jackson. He told also of his interview with the accused when the latter stated that he had purchased "the tires" from Dave Richards, a man with a Chalmers car who, so accused said, was a whiskey runner across the border, who had stayed in the King George Hotel and had been in the auto business at Nanton; witness said that he had done his best to trace that man, had looked up the records of the hotels and could not find such a man. On cross-examination Cheyne said that he had found that one D. B. Richards and wife had been registered at the King George Hotel at the latter end of December and beginning of January "from some place in the country, Delia or somewhere."

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The accused testified on his own behalf. He said that there was a man called Richards who had been coming into Calgary at each week end for two or three months in an automobile and each time had a dealer's license plate on his car, that he came in each time with a different car, that at the particular time he understood he was staying at the King George Hotel, and he had a Chalmers car but with an ordinary license plate on and that he had met him in the King George pool room. He said that he thought he had been in town about two weeks that time, that the witness was sitting in his own office and Richards had come in and asked him if he knew any boys who used 35 x 35 tires, saying that he had gone out of business; he said that he understood he was the manager or foreman of some auto business in the south, perhaps Nanton. He said that he told Richards that that was the size he used on his McLaughlin, that he was not carrying any spares, just then, and could very handily use two, that Richards said he had four and did not want to sell them separately, that he (witness) asked the price and in a day or so told Richards that he would take them and that he had taken them and put two on his car and had taken the other two and put them in a shed at the back of his place under lock and key. He spoke of having purchased a car from Richards and of trying to dispose of his McLaughlin and of taking the two tires off again and replacing his old tires on it so as to get a better result in price. As to these dealings his evidence seems a little confused but at any rate he said that he went to Winter, who lived next door to him, and was driving a truck and made the deal which Winter related. He said that the two tires which he put on his car for a time looked as if they had gone about 500 miles and that he had put them on his own rims on the McLaughlin car. On cross-examination he said that he had paid Richards $225 for the tires. He explained that he had referred to Richards as a bootlegger because he had seen him go up to a certain bootlegger and ask him where he could get some whiskey. He was uncertain about there being two rims but thought that there were. He also said that he could not mention any one else in Calgary who was acquainted with Richards and that Richards had given him a bill of sale of the tires which he had lost, for he had looked for it "high and low" and could not find it.

Smallpiece being recalled stated that the 4 tires and 2 rims would be worth about $355.

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Throughout the reported evidence the tires are referred to as being of the size 35 x 35. This seems surely to be a mistake for 35 x 5.

Counsel who appeared for the accused had been called into the case hurriedly. He made his chief argument upon the ground that the explanation of the accused should have been accepted. But the foregoing examination of the evidence shews that there is a more serious ground for attacking the verdict.

The accused was charged with having or having had in his possession certain articles knowing them to have been stolen. On this charge the first thing essential is to prove that the articles in Court had been in fact stolen. This means that it was first essential to identify the articles in Court, in respect to which the charge was laid, as being part of those which had been stolen from the warehouse of General Supplies Ltd. Now Smallpiece quite evidently, as will be seen from what he said, made no attempt whatever to identify the two rims in Court as being 2 out of the 25 that had been stolen from his company. He simply said at first: "Yes there is one of our rims." This might by itself perhaps be enough. But on cross-examination it was clearly put to him thus:—

Q. And your only means of identifying the rims (is) to the best of your knowledge there are no other dealers in the city that deal in this particular type of rims? A. Yes, accompanied with the fact that those rims were found with the tires, they came from the same party.

This shews that all he meant by his first answer was that the rims in Court were of the type that his company and his company only dealt in. The evident alternative hypothesis that the two rims in Court may have been two that his company had sold to someone in the regular course of business does not seem to have been negatived at all or even thought of by Court, counsel or witness. And admittedly Smallpiece did not think of attempting to identify the tires in Court as being part of those stolen except by reason of their being along with the rims.

But there is a further difficulty about the rims. Winter and accused both agree that on the deal between them two rims passed, but Winter, as will be seen from the evidence quoted, did not pretend to identify either the tires or rims in Court as the ones he got from accused. He said they were similar and that he *thought* they were the same ones and again that he *supposed* they were.

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Then next comes a very serious gap. Winter does not state that he sold 2 rims to Smith. He makes no reference to rims in his account of that sale. And Smith twice states specifically that he got no rims at all from Winter. He also states specifically that he sold no rims to Jackson. Then Jackson says he got 2 rims from Smith.

Now where did all this leave the prosecution in its obligation to prove that the 4 tires and 2 rims which were in Court were among those stolen from the company and to trace them all back to the accused's possession? It may be that Winter was not asked specifically if he had sold rims to Smith and merely overlooked mentioning the fact. But clearly the matter cannot be got past Smith. He swore he got no rims from Winter and sold none to Jackson. The Court might take Jackson's statement where he conflicts with Smith but there is no contradiction of Smith at the other end by Winter. The trail disappears.

I take the liberty of observing that there is nothing about which there is so much danger of slips in evidence as about identification of persons and chattels. And particularly is this so where chattels are said, as here, to have passed through a number of hands.

For these reasons my opinion is that there was no evidence adduced from which it could be reasonably inferred that the 4 tires and tubes and 2 rims which were in the accused's possession in January were among those which had been stolen from the company's warehouse.

On this ground I would allow the appeal and order the conviction quashed. It is therefore unnecessary to deal with the other question of the explanation of the accused.

Appeal allowed.

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THE KING v. LEONARD.

Saskatchewan King's Bench, Brown, C.J.K.B. March 5, 1921.

CONFLICT OF LAWS (§ I E—118)—CRIMINAL LAW—PROVINCIAL ACT—NON-CULPABLE HOMICIDE—PUNISHMENT—CONFLICT WITH CRIMINAL CODE SEC. 252—VALIDITY—ULTRA VIRES.

Section 38 of ch. 30 of the Saskatchewan Game Act (Sask. stats., 1916), which makes homicide which is not culpable an offence punishable by fine and imprisonment is *ultra vires* as being in direct conflict with the Dominion Act (sec. 252, Crim. Code), which enacts that it is to be regarded simply as an accident.

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ACTION for a writ of prohibition to prevent a magistrate from proceeding further with a hearing under sec. 38 of ch. 30 of the Saskatchewan Game Act. Prohibition granted.

H. E. Sampson, K.C., for plaintiff.

J. F. Frame, K.C., for defendant.

BROWN, C.J.K.B.:—The defendant was charged before Police Magistrate Murray, at the city of Prince Albert, as follows:—

That he, the said James P. Leonard, on the 12th day of December, 1920, at Meath Park district in the Province of Saskatchewan, whilst hunting or apparently hunting game, did kill John Kutsak by accident, contrary to section 38, chapter 30, of the Statutes of Saskatchewan, 1916, and all amendments thereto.

Section 38 of ch. 30 of the Statutes of Saskatchewan, 1916, which is the Game Act, is as follows:—

Every person who, while hunting or apparently hunting any game, shoots at or wounds any other person whether by accident, mistake or otherwise, under circumstances which would not constitute a crime under the provisions of *The Criminal Code of Canada*, shall be guilty of an offence and liable to a fine of not less than $500.00 nor more than $1,000.00; and in default of payment to imprisonment for a term of not more than six months. Any license which may be held by such person under this Act, shall be revoked and cancelled, and no further license shall for a period of ten years after such conviction be issued to him.

Objection was taken before the magistrate by counsel for the defendant that the section in question was *ultra vires* the Legislature. The magistrate overruled the objection; and this is an action for writ of prohibition to prevent the magistrate proceeding further with the hearing.

It is objected by counsel for the plaintiff that under the circumstances prohibition does not lie, that the proper remedy is by writ of *certiorari* or stated case. This contention cannot be upheld. If the legislation is *ultra vires* the magistrate is without jurisdiction: he has given himself jurisdiction by an erroneous conclusion on a point of law. In such case prohibition lies. In *Poulin* v. *Corpn. of Quebec* (1884), 9 Can. S.C.R., at pp. 191-192, Ritchie, C.J., says—

I cannot see how it can be said that prohibition will not lie without first determining whether the Act is *ultra vires* or not, for if the Act is *ultra vires*, then I can see no reason why prohibition would not be a proper remedy, because there could then be no pretence that the Recorder's Court could have jurisdiction over an offence alleged to be created by a statute which had no legal existence.

See also 10 Hals., p. 144; 32 Cyc. p. 606.

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On the question of *ultra vires*: the field of criminal law has been reserved to the Dominion by sub-sec. 27 of sec. 91 of the B.N.A. Act, 1867. The offence charged is that of homicide, and the legislation in question covers the offence as charged. The object of the legislation is undoubtedly the protection of human life and limb. I assume there is special danger to human life in the use of fire-arms when hunting game, and hence such a provision in the Game Act. In its essence, however, the legislation has nothing to do with regulating the shooting of game, but is essentially for the protection of human life and limb, although levelled at persons hunting game. That field, however, is covered by the Dominion in its enactment of the criminal law. By sec. 252 of the Criminal Code, R.S.C., 1906, ch. 146, homicide is either "culpable" or "non-culpable." Culpable homicide is murder or manslaughter, and it is expressly enacted that homicide which is not culpable is not an offence. In the face of this legislation the Province has, by the section in question, enacted that homicide which is not culpable is an offence involving fine and imprisonment. In other words, whereas the Dominion has stated that when a person lawfully using fire-arms without any intention of bodily harm and using proper precautions to prevent danger, happens to kill another person, it shall be regarded simply as an accident, a misadventure, and not an offence, the Province says it is an offence and the offender is liable to fine and imprisonment. In so legislating, both the Dominion and the Province have in view the protection of human life. There is here a complete conflict in the legislation; and as the Dominion legislation must prevail, the provincial legislation must in my opinion be held to be *ultra vires*.

It is also, I think, a matter of comment that the section in question is so worded that the magistrate could only decide on his jurisdiction in a particular case after hearing all the evidence offered. The cases to which I would refer having a bearing on the matter in question are: *Att'y-Gen'l for Ontario* v. *Hamilton Street R. Co.* [1903], A.C. 524; *Rex* v. *Lee* (1911), 23 O.L.R. 490; *Russell* v. *The Queen* (1882), 7 App. Cas. 829

In the result an order will go for the issue of the writ, and with costs against Cornell.

Judgment accordingly.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur, and Mignault, JJ. June 21, 1920.

SEDUCTION (§ II—7)—CRIMINAL LIABILITY—PROMISE OF MARRIAGE—PREVIOUS SEDUCTION BY SAME PARTY—REHABILITATION AS PERSON OF "CHASTE CHARACTER"—FINDINGS OF JURY—CRIM. CODE SEC. 212.

There is no statutory limit of time which must elapse in order that a woman seduced under promise of marriage may rehabilitate herself as a person of "chaste character" within the meaning of sec. 212 of the Criminal Code and if the facts and circumstances justify a jury in coming to the conclusion that she is a person of "previously chaste character" at the time of a second seduction an appellant Court will not disturb their finding.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1920), 33 Can. Cr. Cas. 387, 15 Alta. L.R. 313, dismissing, on equal division of the Court, the appeal by the appellant from the refusal of Simmons, J., at the trial with a jury, to reserve a case for the opinion of the Appellate Division.

W. F. O'Connor, K.C., for appellant; *W. L. Scott*, for respondent.

Davies, C.J.

DAVIES, C.J.:—This was an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta which, on an equal division of opinion, refused to quash a conviction against the appellant prisoner under sec. 212 of the Criminal Code, R.S.C. 1906, ch. 146, for having, under promise of marriage, seduced and had illicit connection on or about March 27, 1919, with one Mary Kovack, an unmarried female under the age of 21 years.

Two questions only were raised and argued at Bar: one, whether the evidence of Mary Kovack, the female in question, was corroborated or not; and the other, whether she was at the time of the alleged offence of previously chaste character.

After hearing Mr. O'Connor, counsel for the appellant, on the question of corroboration, we were unanimously of the opinion that there was sufficient evidence of corroboration, and Mr. Scott was not called on to reply on that point.

The second question raised a much more delicate and difficult point: Was the jury justified in not finding the complainant Mary Kovack, at the time of the illicit connection of March 27, between her and the prisoner, a girl of previously unchaste character?

The material facts necessary to reach a conclusion on that point are fully set out in the Judge's reasons given in the Appellate Division (1920), 33 Can. Cr. Cas. 387, 15 Alta. L.R. 313. The

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parties were, at the time of the commission of the offence on March 27, and for some length of time before that, engaged to be married to each other. They were both of them foreigners whose parents had emigrated to Canada. At a date about the latter end of December previously or the beginning of January, and at a time when the marriage engagement existed, there had been on one occasion illicit connection between the prisoner and Mary Kovack, but at the time this prosecution commenced, more than twelve months having elapsed, that offence was barred by the statutory limitation of time.

The prosecution, therefore, was necessarily confined to the second offence of March 27, 1919, a date when the engagement for marriage still continued, and the question immediately arose whether on the admission by the complainant of the first offence having taken place in the latter end of December or the beginning of January previously she could be found by the jury to have been of "previously chaste character" on March 27, when the second offence was committed.

Some evidence was given in prisoner's behalf by some young men to the effect that the girl complainant was not chaste, but the jury disbelieved that evidence, and the sole question, therefore, remains whether the single lapse of virtue by her with the prisoner on or about the last of December when the parties were under a mutual promise of marriage prevented the jury finding her to be of "chaste character" when the offence of March 27 was committed.

I am not able to accept the argument that such a single fall from grace of a woman, engaged to a man to whose solicitations she yields, either because of a weaker will than his or that combined with affection and a hope of their prospective marriage under his promise, necessarily stamps that woman as one of an unchaste character for all future time. That surely cannot be so. There must come a time when repentance and pureness of living can rehabilitate her as a chaste character within the meaning of the statute.

Whether or not the facts and surrounding circumstances justify such a conclusion can only be determined by a jury.

In this case, the jury had the advantage of seeing the complainant in the witness box and hearing from her all the material facts necessary to enable them to reach a conclusion as to her

family relationship, nationality, occupation, conditions and habits of life, marriage engagement with the promise and other material facts, and to determine from her manner, demeanour and evidence when examined and cross-examined, whether she should be believed in whole or in part.

The prisoner acting upon his rights remained mute.

The result was that they found her not to be of an unchaste character when the offence of March 27 was committed, and, unless I am compelled to find that one previous fall from virtue with the same man to whom on both occasions she was engaged to be married prohibits a jury from finding the same woman afterwards to be of a chaste character within the meaning of the Code, then I must accept the jury's finding. There is no arbitrary lapse of time which I can suggest as necessary before a jury can so find. It must be a case for determination on the facts and circumstances of each case. But assuming the jury to have been properly charged and directed upon the question, I think it would require a very extreme case to justify a Court of Appeal in setting aside their finding.

In substance, then I conclude that if under such circumstances as we have in this case before us, a woman falls to the solicitations of a man to whom she is engaged to be married, she does not, from that single fact, necessarily become such an unchaste character within the meaning of those words in the section of the Code before us as prevents a jury finding her, 3 months afterwards, not to be unchaste in character. It must be in the very nature of things a fact for the jury, under all the proved facts and being properly directed, to find.

There is no statutory limit of time which must elapse in order that she may rehabilitate herself. There is no arbitrary time which the Court may set up which must so elapse. I cannot set up my judgment, not having seen or heard the witnesses but simply from reading the record, against the findings under proper direction of the jury who did see and hear them.

I would, therefore, dismiss the appeal.

IDINGTON, J.:—The questions raised by the dissenting judgment so far as relevant to the requirement by the statute of corroboration "in some material particular" were practically disposed of on the argument.

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For my part I am of the opinion that in such a case the previous relations of the parties concerned may well form the subject of inquiry and evidence adduced on such a basis become of the most cogent character for the purposes of corroboration.

When that is applied herein there seems to be no reason for doubting the evidence of the girl.

But its very application and the mode of thought by which it becomes effective, tend to raise much doubt and difficulty in regard to the other question of the girl having at the time in question been of previously "chaste character."

The dissenting opinion of Stuart, J., 33 Can. Cr. Cas., at p. 389, 15 Alta. L.R., at p. 315, with which Ives, J., concurred, is the basis of any jurisdiction we may have to hear this appeal, and on this latter ground I have some difficulty in finding a clear and decided dissent.

The burden of his argument deals with the question of want of corroboration and all incidental thereto. He holds the evidence of what took place in December was inadmissible when presented, as it was, by the Crown.

The burden of proof relative to the want of previous chastity by the complainant is expressly cast, by sec. 210 of the Code, upon the accused.

If it was, however, admitted in evidence, then I think he had a right to rely upon it, for what it was worth, as fully as if adduced specifically on his own behalf.

Yet Stuart, J., contents himself with relying upon the non-admissibility of it relative to the question of corroboration.

The question of her previous chastity is presented by objections Nos. 3 and 4 of appellant's counsel at the trial, as follows:—

> 3. His Lordship should have withdrawn the case from the jury on the ground that there was evidence of previous unchastity. 4. Assuming in the complainant's favour all the facts that the jury could upon evidence reasonably find in her favour, that is, assuming that the accused in undertaking the burden of proving the unchastity which section 210 casts upon him proved against the complainant the least that the jury could upon the evidence reasonably find against her, were those facts such as to constitute the complainant a girl of previously unchaste character?

Stuart, J., in his final disposition of this part of the appeal disposes of it as follows, 33 Can. Cr. Cas., at p. 394, 15 Alta. L.R., at p. 321:—

As to question 3, my view is that, under the existing authorities and precedents especially in the American States whence the law has come, the case should have been withdrawn from the jury and I would answer it in the affirmative. But in view of my much firmer opinion on questions 2 and 5, I do not think it necessary to discuss the matter more fully. This also makes an answer to question 4 unnecessary.

Idington, J.

These points though submitted as separate really in substance deal with one and the same issue in law. The Judge appears to answer one hesitatingly and declines to answer the other.

Is that such a dissent as to entitle us to speak? I have grave doubts as to its being so. We should have a clear and explicit dissent to rest our jurisdiction upon.

The majority of the Court think it is, and answer accordingly.

As I understand the proposed answer it is to be that the question was one for the jury.

And, as the trial Judge left it to the jury in a way that cannot be complained of, unless that he should have withdrawn the case from the jury entirely, and the majority of this Court hold he could not do so, I may say that I much doubt if that is a satisfactory view of the law applicable to the very peculiar facts in question herein.

Many decisions have been given that tend to uphold such a ruling, but I doubt if any of them have gone quite so far as to justify the so holding in this peculiar case.

I do not hold any such decided opinion as to warrant my dissent.

I see no good purpose to be served by enlarging upon the matter.

Indeed, to meet the possibility of such a case as of this class again arising, enabling the offender to set up his own wrong as a means of defence, I submit the law might well be so amended as to prevent the possibility of such a curious means of defence.

Duff, J.

DUFF, J., (dissenting):—This appeal should, in my opinion, be allowed on the short ground that evidence of previous conduct could only be admissible as tending to shew a reciprocal state of feeling between the two persons concerned making it not only probable that the prisoner would desire to have intercourse with the prosecutrix but a disposition on her part also to yield to him. It could not be admitted for the purpose of shewing merely that the accused was a person who was likely to try to commit the offence with which he was charged; and it could only be admitted

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as evidence of a reciprocal guilty inclination existing at the time the offence was alleged to have been committed. The result must be either that the prosecution alleging the woman was chaste on the occasion of the occurrence out of which the complaint arises could not be allowed to say that the evidence was admissible or that the evidence having been admitted upon assumptions inconsistent with "chastity" on any reasonable interpretation of the words used in the statute, a verdict against the accused involving a finding of chastity could not legally be based upon such evidence. To hold otherwise would be playing fast and loose with justice.

Anglin, J.

ANGLIN, J.:—It was intimated on the argument that the Court was of opinion that there was sufficient corroboration of the complainant's story to satisfy the statute (sec. 1002 of the Criminal Code). *The King* v. *Shellaker*, [1914] 1 K.B. 414, is direct authority for the admissibility of some of this corroborative testimony and *The King* v. *Ball*, [1911] A.C. 47, indicates its value and effect.

On the other question I am of opinion that from the facts deposed to by the complainant—that she had received many visits from the appellant and that they had spent many hours together between Christmas, 1916, and March 27, 1917, when the act of illicit connection on which the present case rests occurred, and that there had been no illicit intercourse between them in that interval—if believed by them, the jury might not unreasonably draw the inference that the complainant, although seduced by the appellant under promise of marriage about Christmas, 1916, had so far recovered herself on March 27, 1917, as to have become at that time once more a woman "of previously chaste character" within the meaning of sec. 212 of the Criminal Code. If, as is practically conceded, that section does not require that the woman should be *virgo intacta*—if, as I think, the doctrine of rehabilitation is admissible under it, I am unable to accede to the contention that the trial Judge should, or could properly, have withdrawn this case from the jury. It was for them to determine what credit should be given to the complainant's evidence, and what inference should be drawn as to the chastity of her character—for that was the issue—on March 27, 3 months after the one previous act of unchastity which she admitted.

I would dismiss the appeal.

BRODEUR, J. (dissenting):—There was a question raised in this appeal as to whether the evidence of the complainant had been corroborated. It is not necessary on a charge of criminal seduction under promise of marriage that the corroboration should be as to every fact, it is sufficient if it confirms the belief that the prosecutrix is speaking the truth. Section 1002, Criminal Code; *The King* v. *Daun* (1906), 11 Can. Cr. Cas. 244, 12 O.L.R. 227.

There are facts disclosed by other witnesses than the complainant which shew conclusively that there was criminal intercourse between the complainant and the accused and that this intercourse took place at the time the promise of marriage was made. I have no doubt that there was sufficient corroboration.

But the main question is whether the complainant was of "previously chaste character," as required by sec. 212 of the Criminal Code.

The girl was seduced for the first time, according to her own story, by the appellant on Christmas Day, 1918. But she failed to lay any charge for this offence during the year which followed its commission and there was limitation of time for commencing a prosecution on this offence of Christmas, 1918 (sec. 1140, sub-sec. C-V). Then she made a charge against the appellant that she was seduced a second time by him in March, 1919. During her evidence at the trial she had to admit that she had surrendered her chastity 3 months before March, 1919.

Her own statement and admission as to having lost her chastity a few months before the relations of March, 1919, made it imperative on the trial Judge to withdraw the case from the jury, because one of the essential ingredients of the crime which is charged did not exist, according to the statement of the complainant herself. She was no more a chaste woman in March, 1919. Of course, the burden of proof of previous unchastity was upon the accused (Crim. Code, sec. 210); but the evidence of the girl herself rendered it unnecessary for the accused to bring any witnesses to prove her unchastity.

It is contended, however, that a woman who has been guilty of unchaste conduct may subsequently become chaste in legal contemplation and be seduced a second time. But no evidence

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was brought to shew that this girl regained her chastity in the few months which elapsed between December, 1918, and March, 1919. The jury could not, with the evidence they had before them, declare that this girl was, in March, 1919, of a "previously chaste character." Their verdict should be set aside and the prisoner should have been acquitted.

The appeal should be allowed with costs.

Mignault, J.

MIGNAULT, J.:—The only question on which this Court found it advisable to hear counsel for the respondent was whether there was evidence on which the jury could find that the complainant, notwithstanding the fact of her seduction by the appellant under promise of marriage about the beginning of January, 1919, was an unmarried female "of previously chaste character" when she was seduced by the appellant on March 27 of the same year. The evidence was that although the complainant met the appellant very frequently from January to March 27, she did not, after the first seduction, have any illicit connection with him until the latter date. From this evidence the jury could infer that, notwithstanding her fall in January, she had rehabilitated herself and was on March 27 an unmarried female "of previously chaste character." It is not for us to say that we would have so considered her, but the question is whether the previous seduction of the complainant precluded the jury on the evidence from finding that she had rehabilitated herself, or, in the words of the statute, that she was then an "unmarried female of previously chaste character under twenty-one years of age."

This was eminently a fact for the jury's determination, and I cannot say that there was no evidence to go to the jury on which they could find this fact.

The appeal should be dismissed with costs.

Appeal dismissed.

REX v. LEMAIRE.

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Ontario Supreme Court, Meredith, C.J.C.P. December 21, 1920.

1. JUSTICE OF THE PEACE (§ IV—22)—CONVICTION BY—ONTARIO TEMPERANCE ACT—ERRONEOUS VIEW OF LAW—QUASHING.
Where a magistrate in making a conviction under the Ontario Temperance Act has given his reasons for convicting and it appears from them that the conviction was based upon an erroneous view of the law, it cannot stand.

2. INTOXICATING LIQUORS (§ III I—91)—TRIAL OF OFFENDERS—LICENSE BOARD NOT GRANTING LICENSES FOR EXPORTERS—CONVICTION BASED ON LICENSE NOT BEING OBTAINED—EVIDENCE—LIABILITY.
Sections 40 and 46 of the Ontario Temperance Act having been held in the case of *Graham & Strang* v. *Dominion Express Co.* (1920), 55 D.L.R. 39, to be *ultra vires* and having been treated as such by the Board of License Commissioners who have since the decision ceased to inspect and grant licenses and permissions under their provisions to any one carrying on extra-provincial trade only, a conviction under these sections cannot stand where it is shewn that for that reason only the defendant's employees are without a license or permit.
[*Rex* v. *Le Clair* (1917), 39 O.L.R. 436, 28 Can. Cr. Cas. 216; *Rex* v. *Anderson* (1914), 16 D.L.R. 203, 22 Can. Cr. Cas. 455, referred to; sec. 88 of Ontario Temperance Act explained.]

Statement.

MOTION for an order quashing the conviction of the defendant, by the Police Magistrate for the City of Ottawa, for unlawfully keeping intoxicating liquor for sale without a license.

James Haverson, K.C., for the applicant.

Edward Bayly, K.C., for the magistrate.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The only ground upon which the conviction in question was supported in argument was: that, under sec. 88 of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, the applicant was *primâ facie* liable to conviction; and that in such a case a conviction can never be quashed on the ground that there is not evidence to support it; the case of *Rex* v. *Le Clair* (1917), 28 Can. Cr. Cas. 216, 39 O.L.R. 436, being relied upon as an authority fully supporting that ground.

But that is not the only question involved: the magistrate has given his reasons for convicting; and if from them it appears that the conviction was based upon an erroneous view of the law it cannot stand.

In them he shews that the conviction was not based upon sec. 88 of the Act; but was based upon the fact that the applicant's employers, who were carrying on the business in question, had no license or permission from the Board of License Commissioners; and also on his opinion that the building in which the business was carried on could not be considered a warehouse because not suitable for that purpose.

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It is plain, therefore, that the conviction was based entirely on secs. 40* and 46† of the Act; sections which, until the decision of the case of *Graham & Strang* v. *Dominion Express Co.* (1920), 48 O.L.R. 83, 55 D.L.R. 39, were treated as lawfully applicable to extra-provincial, as well as to inter-provincial, sales of liquor: and, accordingly, persons carrying on business in extra-provincial trade only, such as the business in question is, were required by the Board to comply with the provisions of these two sections, a license or "permit" being given after inspection of the "warehouse," and finding that it complied with the requirements of sec. 46.

But ever since the decision of that case the Board has apparently treated these two sections of the Act as *ultra vires* of the Provincial Legislature, and has ceased to inspect and grant licenses or permissions under their provisions to any one carrying on extra-provincial trade only; and, for that reason only, the applicant's employers are without a license or "permit," and have not had their building inspected: and indeed it seems plain, from the evidence for the prosecution in this case, that the Board did not authorise it and is standing aloof from it: but that is, of course, a matter of no material consequence.

The decision upon which the Board acted quite justified the course said to have been taken by it, indeed made it necessary: the effect of that decision being that: either sec. 139‡ of the Act takes extra-provincial trading out of secs. 40 and 46, or else those sections are *ultra vires*, as to such trading.

*40. No person shall . . . expose or keep for sale or . . . sell . . . to any other person any liquor without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license and as prescribed by this Act.

†46.—(1) Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse, provided such liquor warehouse and the business carried on therein complies with the requirements in sub-section 2 hereof mentioned, or from selling from such liquor warehouse to persons in other Provinces or in foreign countries.

(2) The liquor warehouse in this section mentioned shall be suitable for the said business and shall be subject to the approval of the Board . . .

‡139. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Ontario, except under license or as otherwise specially provided by this Act, and to restrict the consumption of liquor within the limits of the Province of Ontario, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Ontario and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly.

The conviction based upon them, therefore, cannot stand: whether or not it would if the Board were mistaken as to the law and refused to license only under such mistake.

And I may add that the magistrate's statement that the building in which it was intended to carry on business could not be considered a warehouse is quite unsupported by the evidence: it had been a warehouse for a brewing company, and was being adapted to the requirements of the new business, and there is really nothing to shew that it would not, when finished, be quite suitable for the purpose.

So, too, upon the ground that Mr. Bayly chose to support the conviction, it should, in my opinion, fall, if the other point were not fatal to it.

Mr. Haverson's bugbear, sec. 88*, is really not as formidable, objectionable, and vicious as he seems to imagine, though it goes a long way contrary to that which is the rule in trials generally and which generally must always be the rule. But it does not make all the innocent guilty. It must be given a reasonable meaning, the meaning that when any one charged with an offence against the provisions of the Act is proved to be or to have been in possession, charge, or control of liquor under such circumstances as would make him guilty of the offence charged, then, if it is not shewn to be a lawful possession, charge, or control, he *may* be convicted. Mere possession, charge, or control does not make an accused person even *primâ facie* guilty of all the crimes of the Ontario Temperance Act calendar. If any one is charged with selling liquor which it is proved he once had, but which now some one else has, he may, not must, be convicted if he fails to shew, as he should be able easily to do if innocent, that the change of possession was lawful, whilst if charged with unlawfully having liquor, and the prosecution prove only that the possession was had in the dwelling house in which the accused resides, the prosecution must fail; whilst, if it is in a place where it may not lawfully be had, the onus, apart from the section, should be on the accused to exculpate himself. And, when a case is made against an accused

*88. If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor, *primâ facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, then unless such person prove that he did not commit the offence with which he is so charged he may be convicted accordingly.

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person under sec. 88, its weight must, of course, depend upon its circumstances.

The onus being upon an accused person, no matter what the nature of the crime, is not an uncommon thing: it is, upon a question of insanity: the Criminal Code, sec. 19; see *Rex* v. *Anderson* (1914), 16 D.L.R. 203, 22 Can. Crim. Cas. 455; and is on all pleas by way of confession and avoidance; nor is it an uncommon thing in such cases for the trial Judge to direct an acquittal because upon the case for the prosecution, or upon the defence as well, reasonable men could not find otherwise.

But that is digressing from Mr. Bayly's contention that once a case is brought within sec. 88 the magistrate's finding is conclusive upon such an application as this.

It must be remembered that in such an application as this the Supreme Court of this Province is exercising its supervising powers over an inferior court, over inferior judicial officers frequently without legal training, but having their natural local prejudices and predilections and widely differing one from another in their views; and that under the Act very extraordinary powers of confiscation of property and of fine and imprisonment are conferred upon them without any right of appeal; and so there is especial reason for watchful and careful exercise of such supervising duties and powers.

And all this seems to me to have been present to the mind of the Legislature in framing and passing the enactment; for, instead of prohibiting *certiorari*, as is sometimes done, the Legislature by the 102nd section provides only that a conviction shall not be quashed when "there is evidence to support" it, the intention no doubt being that the ordinary rule should prevail as to quashing convictions, which, like verdicts, should be set aside when there is no reasonable evidence to support them, when reasonable men could not find as has been found in the conviction or verdict complained of.

The fact that the onus may have been upon one side or the other cannot make any difference, if, upon the whole evidence, reasonable men could not have come to the conclusion to which the magistrate has given effect.

I cannot think that the learned Judge who decided the case of *Rex* v. *LeClair*, 28 Can. Cr. Cas. 216, 39 O.L.R. 436, really meant to express a contrary view, much less to decide that in no

case coming under sec. 88 could a conviction be quashed for want of "evidence to support" it. All that that case seems to me to have really decided was: that, in view of the circumstantial evidence set out at the conclusion of the judgment, the magistrate could not be found fault with, in *certiorari* proceedings, for refusing to give effect to the unsupported testimony of the accused that he was not guilty.

And, it may be added, if Mr. Bayly's contention be right, every police magistrate has, and any two justices of the peace have, greater powers than the Provincial Legislatures—have powers equal to those of Parliament; by the simple process of such prosecutions and convictions as this he or they can crush any extra-provincial trader and so all extra-provincial trade: charges such as this and convictions, from which, by reason of sec. 88, there can be no relief, no matter how clearly it may be proved that the liquor in possession of the accused is for extra-provincial trade only, would put an end to any business, however extensive—a state of affairs which, if it really existed, would afford some reason for Mr. Haverson's fulminations against the iniquity of sec. 88.

But, if I am wrong and Mr. Bayly is right as to the meaning of the learned Judge, and if that meaning were not—as I think it would be—unnecessary for the determination of that case, and if Mr. Bayly is right in his contention that a decision under the Ontario Temperance Act comes within the provision of sec. 32 of the Judicature Act, I should refer this case to a Divisional Court.

There was no evidence in this case upon which reasonable men could find that the applicant or his employers were engaged or intended to engage in any but extra-provincial trade, or that they were in any but lawful possession of liquor. The magistrate has not found otherwise, and no one could so find: the charge of keeping for sale in Ontario, if that is what the charge meant, entirely failed on the evidence for the prosecution; and no one has yet been so absurd as to say that, when the prosecution disproves the charge, the onus is still upon the accused to prove that he is not guilty of it; but, if it were, he proved it.

What was proved for the prosecution was possession of liquor for sale out of Ontario only; and so sec. 88 never came into effect.

On all grounds the conviction is quashed.

Conviction quashed.

MAN.

K. B.

DORSETT v. DORSETT.

Manitoba King's Bench, Mathers, C.J.K.B. January 18, 1921.

DIVORCE AND SEPARATION (§ IIIA—15)—LEGAL CRUELTY—WHAT CONSTITUTES—ADULTERY BY HUSBAND IN RESIDENCE OCCUPIED BY WIFE—NO IMPAIRMENT OF HEALTH—JUDICIAL SEPARATION.

Adultery committed by a husband in his own residence, where the wife is staying during convalescence, having been removed there with the husband's consent when suddenly taken ill, although having a separate residence of her own, does not constitute legal cruelty which entitles her to a divorce, there being no evidence that her health was in any way impaired thereby.

[Review of authorities. See Annotation, Divorce Law in Canada, 48 D.L.R. 7.]

Statement. PETITION by wife for a divorce on the ground of cruelty and adultery. Judicial separation granted.

A. G. Buckingham, for petitioner; *S. H. McKay*, for respondent.

Mathers, C.J.K.B. MATHERS, C.J.K.B.:—This is a divorce petition tried before me at the recent sitting of the Court at Brandon. The petition is by the wife and the prayer for dissolution of the marriage is based upon the allegations of adultery and cruelty. There were three children of the marriage and the petition asks that the custody of these children be awarded to the petitioner.

The respondent answered the petition, denying the allegations of adultery and cruelty and charging the petitioner with having committed adultery with four named persons in the city of Brandon. In answer to the application for custody of the children it is alleged that the petitioner by writing under seal, dated December 31, 1918, released to the respondent the custody of the children. The petitioner replied that the agreement referred to contained a provision that in case the parties should at any time thereafter with their mutual consent cohabit as man and wife then in such case the payments provided for should not longer be payable and all the covenants contained in the agreement should become void; and that they afterwards had so cohabited.

The evidence shewed in the most clear and convincing manner that the respondent had committed adultery, in fact, that he is now living in adultery with one Edith Swindell.

The charges of adultery against the petitioner I find to be untrue although there was much in her conduct to excite suspicion.

This leaves only two questions to be disposed of, viz., the allegations of cruelty against the respondent, and the custody of the children.

No attempt has ever been made by any Court charged with the administration of the divorce laws to specifically define cruelty. This applies to the Ecclesiastical Courts as well as to the Courts to which jurisdiction in divorce was transferred by the Act of 1857, 20-21 Vict. (Imp.), ch. 85. Whether or not cruelty in the legal sense has been proved is a question of fact: *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168; and the most that has ever been attempted is to state certain rules by which a Court should be governed in deciding on such a question. The term is not used in its loose popular sense but in a very much more restricted sense. Acts and conduct which in every-day life might be thought cruel may nevertheless fall very far short of constituting cruelty in the sense that term is used in the divorce laws. Words of reproach or assault, however galling, not amounting to menace importing actual bodily harm, are not sufficient: *Oliver* v. *Oliver* (1801), 1 Hag. Con. 361, 161 E.R. 581.

Lord Stowell in *Evans* v. *Evans* (1790), 1 Hag. Con. 35, 161 E.R. 466, in a judgment which has become a classic, has pointed out that it is the duty of the Courts to keep the rule extremely strict; that the causes must be grave and weighty and such as shew an absolute impossibility that the duties of married life can be discharged and what falls short of a state of personal danger is with great caution to be admitted. He says, at pp. 38, 39, 40, E.R. at pp. 467, 468:—

> What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, or want of civil attention or accommodation, even occasional sallies of passion, if they do not threaten bodily harm do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly not innocent surely in any state of life but still they are not that cruelty against which the law can relieve, . . . If it be complained that by this inactivity of the Courts much injustice may be suffered, and much misery produced, the answer is, that Courts of justice do not pretend to furnish cures for all the miseries of human life; they redress or punish gross violations of duty, but they go no further; they cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. . . . In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited; the Court has never been driven off this ground; it has been always jealous of the inconvenience of parting from it, and I have heard no one case cited, in which the Court has granted a divorce without proof given of a *reasonable appre-*

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hension of bodily hurt. I say an *apprehension*, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be *reasonable*: it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind.

In *Westmeath* v. *Westmeath* (1828), 2 Hag. Ecc. Supp. 1, at p. 72, 162 E.R. 992 at pp. 1016, 1017, Sir John Nicholl adopted the principles enunciated in *Evans* v. *Evans*, and after quoting largely from that case said:—

These then are the principles by which these Courts have been governed and according to which it is my duty to decide. There must be ill-treatment and personal injury or the reasonable apprehension of personal injury. What must be the extent of the injury or what will reasonably excite the apprehension will depend upon the circumstances of each case.

When *Evans* v. *Evans*, and *Westmeath* v. *Westmeath* were decided, no tribunal had power to dissolve the marriage tie; the most that could be done was to decree a divorce *a mensa et thoro*.

The power to dissolve marriage by judicial process was first given by the Divorce and Matrimonial Causes Act, 1857, 20-21 Vict. (Imp.), ch. 85, by which all the jurisdiction theretofore exercised by the Ecclesiastical Courts in respect of matrimonial causes was vested in a Court created by that Act called the Court of Divorce and Matrimonial Causes. By sec. 22 of that Act the newly created Court was directed to follow the principles and rules upon which the Ecclesiastical Courts had theretofore acted in all proceedings other than for the dissolution of marriage as to which the Ecclesiastical Courts had no jurisdiction.

After 1858, when the Act came into force, the principles on which the Ecclesiastical Courts had acted in deciding the question of cruelty were adhered to as the statute directed in suits for judicial separation, which took the place of the former divorce *a mensa et thoro*.

The Act came into force on January 11, 1858, and on May 4 following, *Tomkins* v. *Tomkins* came on for hearing before the Judge Ordinary and a common jury. In directing the jury the Judge read a passage from the judgment in *Evans* v. *Evans*, and continued, at pp. 171-172:—

Danger of life, limb, or health, has continued in substance the rule upon which the Courts have acted; the phrase has sometimes been varied. Sir John Nicholl has used the expression "injury to person or to health" which I am inclined to take in conjunction with Lord Stowell's expression, for there might be a great deal of suffering and brutal usage without coming strictly within the terms of the latter. There must, however, be bodily hurt—not trifling or temporary pain, or a reasonable apprehension of bodily hurt.

In *Curtis* v. *Curtis* (1858), 1 Sw. & Tr. 192, decided a month later, the law was stated in similar terms.

Subsequently the question was much discussed in the celebrated *Russell* v. *Russell* case, [1895] P. 315; [1897] A.C. 395. The Countess of Russell petitioned for restitution of conjugal rights and her husband counter-petitioned for judicial separation upon the ground of cruelty. The cruelty alleged was that his wife had publicly charged him with the commission of an unnatural offence and had persisted in the charge when she knew it to be false. The question was, did the making of this false charge constitute cruelty? The case finally reached the House of Lords where it was decided by five to four that the facts alleged and proved did not amount to cruelty entitling the husband to a judicial separation. The case revealed an extraordinary divergence of judicial opinion on the subject. Throughout the litigation 13 judicial opinions were expressed. Of these, six thought the acts charged amounted to cruelty and seven that they did not. In the House of Lords, Lord Herschell delivered a speech which was concurred in by the majority consisting of Lords Watson, Macnaghten, Shand and Davey. Summing up the result of the authorities prior to the Divorce and Matrimonial Causes Act, 1857, he said, at p. 456:—

> I think it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted unless there had been bodily hurt or injury to health, or a reasonable apprehension of one or other of these. And it may with equal confidence be asserted that no other test was ever applied when it had to be determined whether a sentence of divorce on the ground of cruelty should be pronounced.

Referring to the cases decided since the coming into force of the Divorce and Matrimonial Causes Act, 1857, he says, at p. 457, that, "The law has never been enunciated in other terms, and no other test has been suggested as the correct one."

He approves of the rule as laid down by Sir Cresswell Cresswell in charging the jury in *Tomkins* v. *Tomkins*, *supra*, as a clear and "an accurate statement of the law administered by the Ecclesiastical Courts." He said, at p. 458:—

> It has been suggested, that it was not a complete exposition of the law, but merely such a statement as was necessary, having regard to the facts proved in the particular case. I am unable to so regard it. It purports to inform the jury what legal cruelty is. The learned Judge speaks of danger of life, or limb, or health, as "the rule on which the Courts have acted." There

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is, surely—I say it with respect—a fallacy in speaking of the law laid down as sufficient for the purposes of the particular case. If acts which did not involve danger to person, or health, would have entitled the jury to find that cruelty had been established, if the real question was whether the circumstances were such as to render the discharge of the marriage duties impossible, the Judge was, I think, bound so to direct the jury. Moreover, so far as I can discover, Sir Cresswell Cresswell never gave any jury a different direction from that to be found in *Tomkins* v. *Tomkins*, or expounded the law otherwise.

From the foregoing it appears that the essential features of cruelty both before and after the Divorce and Matrimonial Causes Act, 1857, which would entitle a petitioner to a divorce *a mensa et thoro*, or a judicial separation, was bodily or mental injury, or a reasonable apprehension of one or the other, or as stated by Lopes, L.J., in delivering the majority judgment of the Court of Appeal in *Russell* v. *Russell*, [1895] P. at p. 322, "there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it to constitute legal cruelty."

As before pointed out, in all proceedings except those for dissolution the Court was bound by sec. 22 of the Act to follow the principles and rules of the Ecclesiastical Courts and it was to be expected therefore that in suits for judicial separation, or restitution, the law as laid down by the Ecclesiastical Courts with respect to cruelty should be adopted by those Courts which succeeded to their jurisdiction in matrimonial causes. There was no such limitation imposed with respect to suits for dissolution of marriage but I find that in such suits where cruelty has been an issue, the same criteria has been adopted and no other has ever been suggested or applied. Indeed, it would be difficult to suggest a reason why one rule for the ascertainment of cruelty should be used in one class of action and a different rule applied for the same purpose in the other. I find that the Courts have not done so but have defined cruelty when it is an element in a dissolution suit in exactly the same terms as in any other matrimonial cause in which it is a question for decision. Thus in *Milford* v. *Milford* (1866), L.R. 1 P. & D. 295, at p. 299, a dissolution action, Lord Penzance said:—

> The essential features of cruelty are familiar. There must be actual violence of such a character as to endanger personal safety, or there must be a reasonable apprehension of it. The Court, as Lord Stowell once said, has never been driven off this ground. Nor do the cases cited in the argument, whatever expressions may have fallen from the Court, affect to decide that anything short of this will be sufficient to found a decree upon cruelty.

And in *Birch* v. *Birch* (1873), 28 L.T. 540, also a dissolution action, Sir James Hannen said, at p. 541:—

I must hold fast to the rule of my predecessors, that cruelty must be of such a character that it is dangerous to life, limb, or health. In saying that it must be such as is injurious to health, it does not follow that it must actually have reached that point at which injury has been caused. If there is reasonable ground to believe that it will be persisted in so as to cause mischief, then the party may bring that matter into Court, because it is not necessary that he or she should wait until violence has actually occurred.

In 16 Hals., para. 975 at pp. 473, 474, the law is thus stated:—

Cruelty may be defined as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such a danger. It is important to observe, in considering the many and varied cases on this subject, that the word "cruelty" appears to have been used not only in this but, not infrequently, also in a wider and more popular sense.

Instances of its use in a popular sense are referred to by Lord Herschell in *Russell* v. *Russell*, [1895] P. at p. 449.

Several cases speak of actual or apprehended violence as an essential element but the more recent decisions shew that without any actual or apprehended violence, reproaches, abuse, and threats, persisted in to the extent of injuring health is within the decision in *Russell* v. *Russell*, and is sufficient: *Moss* v. *Moss* [1916] P. 155, at p. 162.

This view of the law is confirmed by the Court of Appeal in *Baker* v. *Baker*, reported, so far as I am aware, only in the *London Times* of December 11, 1919. That was a petition for dissolution on the ground of adultery and cruelty. The adultery was admitted but it was denied that the acts charged constituted legal cruelty. The petitioner was a theatrical singer and the cruelty charged was that the respondent for a long time had persisted in writing letters to her threatening to commit suicide when she was about to perform at the theatre. The evidence shewed that the letters had a serious effect on her health. They were manifestly written with the object of causing her annoyance and mental anguish and as her health was seriously affected by them the Court, following *Moss* v. *Moss*, held that they constituted legal cruelty. Scrutton, L.J., said the law of cruelty in divorce should be closely watched against a tendency to take a too lenient view of what constituted cruelty. The Court ought to act on the view of Lord Stowell that it was the duty of the Court to keep the rule extremely strict. The causes must

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be grave and weighty and such as shew an absolute impossibility that the duties of married life can be discharged. It was not every conduct which caused injury to health which could be considered cruelty. He then said that the sending of the letters when she was about to perform at the theatre was a course of conduct which was cruel and which, in fact, injured her health, and the decree should be granted.

In Canada the question of what constitutes cruelty entitling the aggrieved party to decree *a mensa et thoro*, or its modern equivalent, a judicial separation, or to a dissolution of marriage, has seldom come before the Courts, the reason no doubt being that until recently divorce jurisdiction was exercised only by the Courts of the Maritime Provinces and British Columbia. In the few cases in which the question has called for a decision the principles enunciated by the English Courts have uniformly been followed.

Hunter v. *Hunter* (1863), 10 N.B.R. 593, was a petition for a decree *a mensa et thoro* upon the ground of cruelty. It was there held, following *Evans* v. *Evans*, 1 Hag. Con. 35, 161 E.R. 466, that to sustain the petition there must be evidence of acts of violence or ill-treatment endangering life or health, or threats of such violence or ill-treatment and a reasonable apprehension that they may be carried out. As the evidence fell short of this the petition was dismissed. That case was decided before *Russell* v. *Russell*, *supra*. Since the latter decision the rule laid down by Lord Herschell has been acted upon: *Edmonds* v. *Edmonds* (1912), 1 D.L.R. 550, 17 B.C.R. 28; *Walsh* v. *Walsh* (1914), 20 B.C.R. 482; *Timms* v. *Timms* (1910), 15 B.C.R. 39. The same may be said with respect to actions for alimony: *Willey* v. *Willey* (1908), 18 Man. L.R. 298; *Moon* v. *Moon* (1913), 9 D.L.R. 679, 6 S.L.R. 41; *Whimbey* v. *Whimbey* (1919), 48 D.L.R. 190, 45 O.L.R. 228.

It will be found by reference to the Australian and New Zealand reports that a similar rule prevails there: *Hume* v. *Hume* (1890), 11 N.S.W. L.R. (Divorce) 1; *Oliver* v. *Oliver*, 12 N.S.W. W.N. 65. In *Topp* v. *Topp*, [1920] N.Z.R. 442, the rule is thus stated: "To constitute legal cruelty there must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it."

That is the rule as formulated by Lopes, L.J., in *Russell* v. *Russell*, [1895] P. 315, when it was before the Court of Appeal and which was afterwards affirmed by the majority of the House of Lords, [1897] A.C. 395. It is the rule which has been followed by all the Courts in the British dominions since that time and to which the Courts of this Province are bound to adhere.

I have discussed the question of legal cruelty at this great length to shew that the term is used in the divorce laws in a much more restricted sense than it ordinarily bears when used in a popular sense.

The question I must now decide is whether the evidence sustains the charge that the respondent has been guilty of what the law regards as cruelty towards the petitioner.

The parties were married on December 25, 1905, and thereafter they lived together as husband and wife at Brandon with short intervals elsewhere until the respondent left for overseas as a member of the 79th Battalion in 1916. During that period their married life may be described as fairly harmonious and they parted on good terms. In December of that year she, with his consent, followed him to England bringing the children with her. He had rented a flat in London in which they took up housekeeping. Some time afterwards a cousin of hers, the woman Edith Swindell, by her invitation, began at first to spend week ends and towards the end of 1917 to live with them. The petitioner became jealous—and not without cause as subsequent events have shewn—of the conduct of the respondent with this woman. This led to quarrels which culminated in an angry scene on December 24, 1918, resulting in the agreement to live separate and apart already referred to. The petitioner at once left the respondent's flat and went to live with some relatives in Kent.

In April, 1919, she returned to Brandon and after spending some time with her friend Mrs. Webb obtained a cottage of her own in which she still lives. After the separation agreement the respondent continued to live in the London flat with Miss Swindell and the three children. About the end of May, 1919, he returned to Brandon with the children and obtained a house in which he and they took up their residence. After a time the petitioner began to visit the respondent. She was employed during the day but in the evening she visited him at his home

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and washed and mended the children's clothes. She says that such visits extended over a period of nearly two months and that during that time she remained all night and that she and the respondent occupied the same bed. He admits she remained one night but that they did not sleep together. Except for its bearing upon the question of whether or not there was a resumption of cohabitation so as to nullify the separation deed, it is immaterial whether they slept together or not. As it may be material in that view I find, notwithstanding his denial, that they did resume marital relations for the time stated by the petitioner. She still continued to occupy her own cottage as a separate residence and except for this period mentioned slept there.

She was then employed at the Prince Edward Hotel and one day she became suddenly and seriously ill. Her ailment took the form of a nervous breakdown and she was taken to the house of her friend Mrs. Webb. The respondent was sent for and upon the suggestion acquiesced in by him that she should be removed to his house, she was taken there. A day or two afterwards and while still unwell, though greatly improved, the respondent shewed her a telegram he had received from Edith Swindell stating that she had arrived at Montreal. As a matter of fact he had sent for Miss Swindell with a view to renewing their adulterous intercourse. A few days afterwards he went to Winnipeg to meet her and after an absence of two days he and Miss Swindell arrived late at night at his house. And now there took place the incident upon which the charge of cruelty is chiefly based. The respondent and Miss Swindell went to bed together leaving the petitioner to sleep on a couch in the sitting-room. Such profligate and bare-faced adultery was no doubt calculated to outrage the feelings of a wife and she says that she fainted after leaving the house the next morning. She, however, went back and remained another night in the respondent's house after which she left and has not since visited him.

Evidence was given of two acts of actual violence both of which may be dismissed with a very brief notice. Some time before he left for overseas he slapped her on the cheek with his open hand. The incident was not regarded as serious by her and was completely forgiven long before he went away. In any event the respondent was at the time greatly provoked by the

petitioner using vile language to him before the children, a circumstance which though not justifying it deprives it of much of the significance which otherwise might be attached to it.

The other incident took place on December 24, 1918, during the scene already referred to. The petitioner admits that on that occasion she used very bad language in the presence of the children; that although she did not up to that time believe her husband had been guilty of any matrimonial offence, she offered to place her bed at the disposal of himself and Miss Swindell. By reason of her bad language the respondent pushed her out of the room. She admits the language she used was such as no woman should have used. It was of such a character that although invited to repeat it in Court she declined to do so. For a couple of weeks before the respondent had not spoken to her and had occupied a separate bed.

I am satisfied that neither of the acts of violence deposed to would have occurred had they not been provoked by the conduct of the petitioner herself. While he cannot justify these acts of violence, on the other hand she has no right to complain of conduct of which she was herself the authoress unless the violence of his retaliation was out of all proportion to the provocation. I do not think his conduct on either of these occasions can be so described. These acts of violence are not alone sufficient to warrant a decree.

There is no evidence that up until December 24, 1918, the conduct of the respondent with Miss Swindell had gone beyond indiscreet familiarity. The petitioner, who was in the best position to judge and who, under the impulse of jealousy, was alert to discover wrongdoing, did not believe that their familiarity had gone so far. She agreed to a separation and took up a separate residence and knew that after her departure Miss Swindell continued to live in the respondent's flat.

Then, was the conduct of the respondent the night of Miss Swindell's arrival in Brandon cruelty in the legal sense?

No Court has ever held that adultery committed in the household, either with or without the knowledge of the wife, constitutes legal cruelty unless it appears that the wife's health, physical or mental, was affected or was likely to be affected thereby.

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In *Cousen* v. *Cousen* (1865), 4 Sw. & Tr. 164, 12 L.T. 712, the evidence disclosed that the husband had treated his wife with great coldness and neglect and unknown to her was carrying on an adulterous intercourse with a female servant. The Judge Ordinary in refusing the wife's petition for a dissolution upon the ground of adultery and cruelty, pointed out that the Divorce and Matrimonial Causes Act, 1857, had made it a condition of granting a divorce to a wife that the husband should be shewn to have been guilty of adultery coupled with cruelty or desertion, or certain aggravated kinds of adultery such as incestuous adultery, bigamy and adultery, but had not said that adultery in the household should be sufficient. It could not be classed as cruelty because the wife had no knowledge of it, and her health could in no way be affected by it.

In *Le Couteur* v. *Le Couteur*, reported only in *The Times*, March 2, 1896, and in a note in Gwynne Hall on Divorce and Matrimonial Causes 386, the husband had persisted in treating his wife as a menial and putting her in a subordinate position while openly carrying on an adulterous intercourse with another woman in the family residence, and had threatened that if she made any fuss he would go abroad with the woman. In consequence of this treatment the wife became ill both physically and mentally. The Court, following *Kelly* v. *Kelly* (1869), L.R. 2 P. & D. 31, said the wife had been exposed to insults of the worst kind which, having caused a breakdown of her health, was cruelty of a very gross kind.

The evidence in this case does not carry it so far. The house occupied by the respondent when Miss Swindell came to live with him was his own and not the joint house of himself and the petitioner. She was there during convalescence and although she desired to resume cohabitation with him as his wife she still retained her own separate residence. It does not appear that he had agreed to resume cohabitation or that he had received her into his house for any other reason than that she was ill, and only during her illness. She, however, was there and no doubt entertained the hope of being allowed to remain, all of which was blasted by the arrival of Miss Swindell and his open and flagrant adultery with her.

The conduct of the respondent in thus brazenly committing adultery with his paramour without any attempted concealment and in utter disregard of all decency, no doubt constituted cruelty in the popular sense, but was it cruelty in the legal sense? The petitioner's health was not impaired by it and therefore it lacked the essential element of cruelty. The illness of which she was then suffering was of course not produced by this incident as it began several days before Miss Swindell arrived. The petitioner says that the next day after the Swindell woman came she (the petitioner) fainted on the street. There is no corroboration of her statement but accepting it as true it does not appear that her fainting was due to what took place the night before. In any event it was but a temporary giddiness from which she quickly recovered. The best evidence that her health has not suffered by her husband's treatment of her is the fact deposed to by her most intimate friends that she is now in good health.

After considering the evidence with the most anxious care I cannot find that the acts of cruelty relied upon, viewed either singly or in their cumulative effect, have resulted in any present or apprehended impairment of the petitioner's health. As there has been no suggestion of cruelty in any other sense, except the two acts of violence before referred to, I hold that the petition insofar as it prays for a dissolution of marriage fails.

Her counsel asked that she be granted a decree of judicial separation in the event of it being held that legal cruelty had not been made out. To entitle her to such a decree proof of adultery alone is sufficient. She is, therefore, entitled to a decree of judicial separation.

I am not at present prepared to deal with the custody of the children, or alimony, or maintenance. Before doing so I require further evidence, which may be supplied upon affidavit. The application should be made before the final decree is issued.

The petitioner is entitled to costs of the petition.

Judgment accordingly.

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UPPER CANADA COLLEGE v. SMITH.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur, and Mignault, JJ. December 20, 1920.

STATUTES (§II D—125)—STATUTE OF FRAUDS—CONSTRUCTION—NEW ENACTMENT—RIGHT OF ACTION TAKEN AWAY—NOT APPLICABLE TO EXISTING RIGHTS.

Section 13 of the Statute of Frauds, R.S.O. 1914, ch. 102, as enacted by 6 Geo. V., ch. 24, sec. 19, and amended by 8 Geo. V., ch. 20, sec. 58, being an enactment which has the effect of taking away a right of action and not merely regulating practice and procedure, should not be construed as having a retrospective operation or as taking away a right of action existing at the time of its passage, there being no clear intention expressed of giving the enactment such retrospective operations.

[Review of authorities: *Smith* v. *Upper Canada College* (1920), 54 D.L.R. 548, 48 O.L.R. 120, affirmed.]

Statement.

APPEAL by defendant from the judgment of the Supreme Court of Ontario, Appellate Division (1920), 54 D.L.R. 548, 48 O.L.R. 120, reversing the judgment of Middleton, J., dismissing the action upon the determination in favour of the defendants of a question of law raised in the statement of defence. Affirmed.

Frank Arnoldi, K.C., for appellant.

A. G. F. Lawrence, for respondent.

Davies, C.J.

DAVIES, C.J.:—I concur in the opinion of Anglin, J.

Idington, J.

IDINGTON, J. (dissenting):—This is an action for the recovery of a commission on the sale of land under a mere verbal contract which would have entitled the respondents to succeed but for the provisions of the amendment, by 6 Geo. V., ch. 24, sec. 19, and 8 Geo. V., ch. 20, sec. 58, to the Ontario Statute of Frauds, which reads as follows:—

> No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

The parties stated in their respective pleadings their respective contentions and agreed that the issues should be disposed of thereon under R. 122 of the Ontario Judicature Act, R.S.O. 1914, ch. 56.

Upon argument before Middleton, J. (1920), 47 O.L.R. 37, he held that under the imperative requirements of said amendment, the respondent's action must fail, and dismissed it accordingly.

On appeal to the Appellate Division (1920), 54 D.L.R. 548, 48 O.L.R. 120, they all seemed impressed with the correctness of that decision of the case presented to him but, upon the suggestion of Riddell, J., that the action had been misconceived and should

have been founded upon facts which seemed to imply, in his view, a legal obligation resting upon appellant not to interfere with respondent's right to earn said commission, a judgment was reached, concurred in by the majority, that the appeal should be dismissed and leave given to amend and substitute a new action founded upon such implication.

When I say "concurred in by a majority" it is to be observed that one of the three constituting the majority did so hesitatingly.

The others expressed their view by the opinion written by Masten, J., in which Mulock, C.J. Ex., concurred, holding that the case as presented had been properly decided, but apparently assented to the permission to amend should that be made within 10 days, and default thereof, the appeal and action should be dismissed with costs.

No such amendment has been made and the case has been argued before us upon its original footing.

We are always reluctant to interfere with mere matters of procedure in the Courts below, but is this proposed alteration of the record a matter merely of procedure? I think not in light of the fact that respondent has not accepted what has been proffered.

The amendment, if made, would only result in the trial of an action for damages upon the implication of contract and breach thereof, which never could result in any substantial damages.

How can there be substantial damages for breach of an implied contract upon which, in the ultimate result, the respondent could not shew that he had lost anything because he was only deprived of the possibility of acquiring a result upon which in law he could never recover?

I think this cause, in any form it is put, is hopeless in light of the imperative requirements of the above quoted amendment, and hence that this appeal should be allowed with costs here and below, and the judgment of the trial Judge be restored.

DUFF, J.:—The principle which in my judgment governs this appeal can be stated in the language of Willes, J., delivering the judgment of the Exchequer Chamber and speaking on behalf of a Court of six in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, at p. 23. The passage is as follows:—

> Retrospective laws are, no doubt, *primâ facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of

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mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. "*Leges et constitutiones futuris certum est dare formam negotiis non ad facta praeterita revocari; nisi nominatum et de praeterita tempore et adhuc pendentibus negotiis cautum sit.*" Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the Legislature.

I think the case falls within the principle because, 1st, the considerations upon which that principle rests apply to their full extent to the statute before us and 2nd, the conclusion is powerfully supported by the decisions of the Courts in cases in which the principle has been applied.

The well known passage may be recalled in which Lord Coke (2 Institutes of the Laws of England, 292) lays it down that it is "a rule and law of Parliament that regularly *nova constitutio futuris formam imponere debet non praeteritis*," and the rule that statutory enactments generally are to be regarded as intended only to regulate the future conduct of persons is, as Parke, B., said in *Moon* v. *Durden* (1848), 2 Exch. 22, at p. 43, 154 E.R. 389, at p. 398, "deeply founded in good sense and strict justice," because, speaking generally, it would not only be widely inconvenient but a flagrant violation of natural justice to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

The plaintiff had a contract with the defendants. Under that contract he was entitled, upon the performance of certain conditions, to be paid by them a certain sum of money. He was entitled also to have them refrain from taking steps which would prevent him earning his right to be paid by hindering him in the performance of the conditions. The effect of the statute construed, as we are asked to construe it, on behalf of the defendant, was to enable the defendant to refuse to pay, to refuse to perform their obligations under this contract because the plaintiff could never acquire a right to bring an action upon it unless the defendants consented to sign a memorandum complying with the provisions of the statute. It is quite true that the statute does not in terms declare such a contract to be void but the effect of taking away the right to bring an action is that practically as regards the power of the plaintiff to secure the right which the contract gave him

according to the law as it then was, the contract is reduced to an abstraction. The plaintiff's right at the time of the passing of the Act was a valuable right, a right capable of being appraised in money; after the passing of the Act it became, if the defendant's construction is the right one, deprived of all value. It is not of any importance that the right of action had not accrued when the statute was passed, for, as Lord Selborne says, in *Main* v. *Stark* (1890), 15 App. Cas. 384, at p. 388, "words not requiring a retrospective operation so as to affect an existing status prejudicially ought not to be so construed."

The application of the principle is disputed on two grounds: 1st, and this is the ratio of the judgment of Middleton, J., it is said that the statute is a statute relating to procedure and the case therefore falls within the rule thus expressed by Lord Penzance, then Wilde, B., in his judgment in *Wright* v. *Hale* (1860), 6 H. & N. 227, at p. 232, 158 E.R. 94 at p. 96, "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," and the 2nd: It is said that the language of the statute sufficiently expresses the intention of the Legislature that it should govern all actions without exception begun after the date fixed by the statute itself for the commencement of its operation.

To consider first the language of the statute. As Parke, B., said in *Moon* v. *Durden*, 2 Exch., at p. 43, 154 E.R., at p. 398, the rule is "one of construction only" and "will certainly yield to the intention of the Legislature"; and that intention may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the circumstances in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended only to be prospective in its operation. Examples might be multiplied in which Judges of very high authority have said that the intention to affect prejudicially existing rights must appear from the express words of the enactment, *e.g.*, by Fry, J., in *Hickson* v. *Darlow* (1883), 23 Ch. D. 690, at p. 692, "they are not to have a retrospective operation unless it is expressly so stated." And even more numerous instances might be adduced of dicta enunciating the doctrine that the intention must appear from the words of the statute itself.

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Rolfe, B., in *Moon* v. *Durden*, 2 Exch., at p. 33, 154 E.R., at p. 394, says:—

> The principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively.

In *The Midland R. Co.* v. *Pye* (1861), 10 C.B. (N.S.) 19, at p. 191, 142 E.R. 419, at p. 424, there is a passage in the judgment of Erle, C.J., approved by the Privy Council in *Young* v. *Adams*, [1898] A.C. 469, at p. 476. It is in these words:—

> Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation unless the intention of the Legislature that it should be so construed is expressed in clear plain and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

Again in *Perry* v. *Skinner* (1837), 2 M. & W. 471, at p. 477, 150 E.R. 843, at p. 845, Parke, B., in a passage approved in the last cited case says that "the law will not give [retrospective effect] to any Act of Parliament unless the words are manifest and plain." The foundation of the rule being, as Lord Coke says, that it is a "rule and law of Parliament that regularly *nova constitutio*" *non praeteritis "formam imponere debet,"* this practice of Parliament itself would seem to be an adequate justification for the practice of the Courts in restricting the application of statutes to the future unless the intention that they are to have a wider effect is perfectly plain.

Decisions seemingly inconsistent with this principle may generally be explained as having proceeded from the view that either the subject matter or the circumstances of the legislation excluded the application of the consideration of justice and convenience upon which the practice of Parliament is based. In *Cornill* v. *Hudson* (1857), 8 El. & Bl. 429, at pp. 437-438, 120 E.R. 160, at p. 163, for example, the Court had to decide the question whether sec. 10 of the Mercantile Amendment Act, 19-20 Vict., 1856 (Imp.), ch. 97, providing that the limit of the Statute of James should not be extended by reason of a person, in whom the right of action was vested, being at the time the cause of action accrued, beyond the seas or in prison. Lord Campbell, C.J., in delivering the judgment of the Court said:—

The intention was to prevent actions thereafter to be brought whether on past or future transactions. Does that tend to injustice? I see none. It only carries out what was probably the intention of the Legislature, that persons should not, by merely remaining abroad, now that travelling is so easy and directions are so readily transmitted, be enabled indefinitely to prolong the time within which they may commence their actions. The period might extend to fifty years. Then as to imprisonment. An imprisonment of six years for crime is extremely rare in this country: persons might often commit the grossest injustice by remaining voluntarily in prison to keep alive the right of action. The Legislature intended to prevent this vexatious prolongation of the right. I see no injustice in this intention, which may fairly be collected from the words of the 10th section.

On the other hand, in *Jackson* v. *Woolley* (1858), 8 El. & Bl. 784, at pp. 787-8, 120 E.R. 292, at p. 293, the Court of Exchequer Chamber held that sec. 14 of the same Act should not be applied in such a way as to deprive the plaintiff of a right of action existing at the time the statute was passed and the rule of construction laid down by Lord Cranworth, then Rolfe, B., in *Moon* v. *Durden*, 2 Exch. 22, at p. 33, 154 E.R. 389, at p. 394, quoted above, was approved. Lord Hatherley, L.C., *Pardo* v. *Bingham* (1869), L.R. 4 Ch. 735, at p. 740, seems to have thought that *Cornill* v. *Hudson*, *supra*, had been overlooked by the Judges who decided *Jackson* v. *Woolley*, *supra*, but the report shews that *Cornill* v. *Hudson* was cited before the Exchequer Chamber; and in *Williams* v. *Smith* (1859), 4 H. & N. 559, at pp. 563-4, 157 E.R. 960 at p. 962, it was stated by Erle and Crompton, JJ., that all the Judges of the King's Bench (the Judges who decided *Cornill* v. *Hudson*) agreed with the opinion of the Exchequer Chamber, and Crowdy, J., explicitly adopted the passage quoted above from the judgment of Rolfe, B., in *Moon* v. *Durden*. Singularly Lord Hatherley does not refer to *Williams* v. *Smith*.

West v. *Gwynne*, [1911] 2 Ch. 1, a decision of the Court of Appeal, is another case in which the point of view exemplified by the judgment of Lord Campbell in *Cornill* v. *Hudson*, *supra*, dictated the opinion of the Court and it was held that the general words of a statute passed for the purpose of correcting a state of law lending itself to grave abuse should not be restricted for the purpose of enabling people to exercise their legal rights unreasonably or oppressively from the vantage ground of the *apex juris*. Emergency statutes passed during the war providing for the suspension of particular remedies and intended only to be measures of temporary

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duration (see *Welby* v. *Parker*, [1916] 2 Ch. 1), have been held to apply to existing contracts and securities on the ground that the language was clear and that the object of the legislation would otherwise be defeated.

Now, coming more precisely to the language of the statute before us, there is one peculiarity of it which brings it within the scope of judicial comment of high authority, namely, the fact that the words "shall be in writing" point to a writing to be brought into existence after the passing of the Act. Because of the corresponding language of the Statute of Frauds, Platt, B., said, in *Moon* v. *Durden*, 2 Exch. 22, at p. 27, 154 E.R. 389, at p. 392, that the "form of the condition on which the right to bring an action was made to depend, imported that future agreements alone" were struck at; and Rolfe, B., in his judgment delivered in the same case, 2 Exch., at p. 36, 154 E.R., at p. 395, expressed the opinion quite decidedly that the previous decision in *Towler* v. *Chatterton* (1829), 6 Bing. 258, 130 E.R. 1280, was open to criticism on the ground that the similar language in Lord Tenterden's Act "points to a writing to be signed by the parties, that is to future acts only." And the form of this phrase appears to be a complete answer to the suggestion made by Mr. Arnoldi that the postponement of the date of the coming into operation of the statute is in itself a ground for thinking that it is to have a retrospective effect. As to this point, moreover, it could have little weight in relation to the bearing of the statute upon *negotia pendentia* in respect of which, of course, a cause of action might not accrue until after the date named.

I come now to the first mentioned ground upon which the appellant relies; the ground upon which Middleton, J., proceeded. Is this a statute prejudicially affecting rights as contemplated by Lord Coke's canon or is it a statute relating to procedure only within the rule stated by Lord Penzance? The last mentioned rule rests upon the simple and intelligible reason stated by Mellish, L.J., in *Republic of Costa Rica* v. *Erlanger* (1876), 3 Ch. D. 62, at p. 69, in these words: "No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed provided, of course, that no injustice is done."

True, in the application of this rule difficulties and differences of opinion frequently arise. In *Wright* v. *Hale* (1860), 6 H. & N. 227, 158 E.R. 94, already referred to, it was held that a statute enabling a Judge to deprive the plaintiff of costs in a case in which, but for the statute, he would have had an unqualified right to receive costs, was a statute relating to matter of procedure only (23-24 Vict., 1860 (Imp.), ch. 126, sec. 34); but in a subsequent case, *Kimbray* v. *Draper* (1868), L.R. 3 Q.B. 160, Cockburn, C.J., and Blackburn, J., used language indicating that in their view the decision in *Wright* v. *Hale* was not a proper application of Lord Penzance's principle.

The rule, of course, does not imply that all new laws prejudicially affecting remedial rights are *primâ facie* retrospective. Both Lord Penzance and Mellish, L.J., used very guarded language, the former limiting the application of the rule to statutes which affect procedure alone and the latter excluding it where the effect of applying it would be to make the statute an instrument of injustice. It seems too obvious for argument that a statute declaring contracts enforceable by the usual method (that is to say by action) for the breach of which either party may recover damages, to be no longer enforceable by action so that the parties have no longer any legally enforceable right under such contracts, is a statute which, if our language is to have any relation to the facts of the economic world, abrogates or impairs rights just as a statute taking away property does. A right in the legal sense, not only in the common language of men, but in the language of common lawyers everywhere connotes a right which the Courts will protect and enforce by some appropriate remedy.

This may be illustrated by a reference to statutes giving or taking away a right of appeal. A right of appeal is, of course, a remedial right and the Courts have had to consider frequently the question whether a statute giving or taking away a right of appeal should *primâ facie* be construed as affecting the parties to pending litigation. If such statutes are to be regarded as regulating procedure only within the meaning of this rule, then *primâ facie* their application would not be restricted to proceedings subsequently instituted. Speaking broadly, the Courts have persistently refused to take this view of such statutes; they have almost uniformly been held not to fall within the category of

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statutes relating to procedure only on the reasoning expressed in these words by Lord Macnaghten in *The Colonial Sugar Refining Co. Ltd.* v. *Irving*, [1905] A.C. 369, at pp. 372-373:

> On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is: Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

There is, however, a group of authorities, which in this connection merits some discussion—cases relating to the construction of statutes dealing with the limitation of actions.

First, a word as to the decisions under the Statute of William IV. The language of sec. 8 of 3-4 Wm. IV. 1833 (Imp.), ch. 27, was held to be retrospective. *Doe d. Jukes* v. *Sumner* (1845), 14 M. & W. 39, 153 E.R. 380; *Doe dem. Angell* v. *Angell* (1846), 9 Q.B. 328, 115 E.R. 1299. That section is declaratory in its terms and was said by Parke, B., 14 M. & W., at p. 42, 153 E.R., at p. 381, in the first mentioned of these cases, speaking on behalf of the Exchequer Chamber, to effect a "parliamentary conveyance." In *Doe d. Evans* v. *Page* (1844), 5 Q.B. 767, 114 E.R. 1439, it was held by the Court of Queen's Bench that sec. 7 of the Act was not retrospective.

In *Towler* v. *Chatterton*, 6 Bing. 258, 130 E.R. 1280, it was held that 9 Geo. IV., 1828 (Imp.), ch. 14 (Lord Tenterden's Act), prevented the plaintiff recovering in an action brought after the passing of the Act based upon an oral promise made before the passing of the Act but 6 months after the cause of the action first accrued. The decision there rested upon the fact that an express provision of the statute postponed the operation of it for a period of 7 months after the date of its passing and this provision, it was held, enabling plaintiffs to protect themselves by commencing their action before the Act should take effect removed all possibility

of the mischief which the canon was intended to prevent. With this decision Rolfe, B., disagreed. *Moon* v. *Durden*, 2 Exch. 22, 154 E.R. 389. The same kind of question arose in *The Queen* v. *Leeds and Bradford R. Co.* (1852), 18 Q.B. 343, 118 E.R. 129, where the Court of Queen's Bench had to consider a statute imposing a limitation of 6 months in respect of certain proceedings before a Justice of the Peace which provided that the enactment should not come into force until the expiration of 7 weeks after its passing. The Court held the statute to apply to proceedings taken after the passing of the Act in respect of a ground of complaint which had arisen before; but Lord Campbell is reported to have said in giving judgment, 18 Q.B., at p. 346, 118 E.R. 130, "if it had been enacted that the provisions of the statute should come into operation immediately I should have said that there was a hardship in their being construed retrospectively and I should not have been willing so to construe them." Crompton, J., added (at p. 347), "all the words of enactment on the subject might be carried out without unjustly excluding any remedy for existing complaints." Two decisions, both reported in 8 El. & Bl. [120 E.R.], illustrate the manner in which the Courts have dealt with such statutes. In *Jackson* v. *Woolley*, 8 El. & Bl. 784, 120 E.R. 292, the Court of Exchequer Chamber had to consider the effect of sec. 14 of the Mercantile Amendment Act, 19-20 Vict. 1856 (Imp.), ch. 97. The precise point to be determined was whether (payments having been made within 6 years before suit by a co-contractor of the defendant and before the passing of the Act) the effect of that action was to deprive the plaintiff of his right of action. The Court, (Williams, J., Martin, B., Willes, J., Bramwell, B., Watson, B., and Byles, J.) held that such operation could not be given to that section without offending against Lord Coke's canon. The other case is *Cornill* v. *Hudson*, 8 El. & Bl. 429, 120 E.R. 160, already discussed.

The combined effect of these two decisions apparently is that a statute dealing with the subject of time limit upon actions is not to be given a retrospective effect and is not to be applied in such a way as to deprive the plaintiff of a right of action which he had at the time when the statute was passed unless the Court can clearly see from the provisions of the statute that such was intended to be the effect of it or unless the circumstances in which the

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statute was passed shew that no injustice of the kind struck at by Lord Coke's maxim would result from giving such operation to it. The last of the relevant authorities dealing with statutes on this subject is *The Ydun*, [1899] P. 236, in which it was held that the Public Authorities Protection Act, 56-57 Vict. 1893 (Imp.), ch. 61 (prescribing a time limit of 6 months for actions against public authorities and imposing a liability to costs as between solicitor and client upon the unsuccessful plaintiff in any such action), was an answer to an action commenced after the passing of the Act and after the expiration of the period of 6 months limited by the statute. The trial Judge, Jeune, P., seemed to think the language of the Act too clear to admit of the application of any rule of construction but proceeded to say that it was a case of a statute relating to procedure and that, at all events, there was no hardship because of the fact that some weeks had elapsed between the passing of the Act and the date on which it was to come into force. In the Court of Appeal A. L. Smith, L.J., and Vaughan Williams, L.J., treated the Act as an Act dealing with procedure only and therefore retrospective. Romer, L.J., expressed the opinion that the Act was retrospective but gave no reasons for his opinion.

With great deference, it is questionable, I think, whether the judgments in this case are of such a character as to afford any real guide for the interpretation of another statute in so far as they profess to lay it down that an Act attaching a time limit to the assertion of rights of action is within the rule an enactment relating to procedure only. Such a proposition is difficult to reconcile with *Jackson* v. *Woolley*, 8 El. & Bl. 784, 120 E.R. 292, and it was not competent to the Court of Appeal in 1899 to overrule a decision of the Court of Exchequer Chamber in 1858. I am not suggesting that the decision in 1899 was an erroneous decision or that the Court of Exchequer Chamber would have decided that case otherwise. I am inclined to think that the language of the Public Authorities Protection Act points very clearly to an intention that the Act should apply to existing causes of action as well as to causes of action arising after the passing of the Act. But the judgment in the later case, cannot, in face of *Jackson* v. *Woolley*, be regarded as satisfactorily establishing the general proposition that such statutes are to be regarded as statutes dealing with procedure only and therefore *primâ facie* retrospective.

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But a complete answer to all the reasoning based upon these decisions touching legislation upon limitation of actions is afforded by the decisions on sec. 4 of the Statute of Frauds. The language of the statute now under consideration, so far as relevant to the present question, reproduces the language of that section almost *ad verbum:* and if a decision upon one statute can ever be a conclusive authority for the construction of another statute these decisions upon the Statute of Frauds if not overruled would appear conclusive here. Of these there are two: *Helmore* v. *Shuter* (1678), 2 Show. 16, 89 E.R. 764, and *Ash* v. *Abdy* (1678), 3 Swan. 664, 36 E.R. 1014. The first is a decision of the Court of King's Bench, the second of Lord Nottingham, L.C. Both were decided in 1678. The second is never cited and its value as an authority, for the reasons given by Lord Campbell in the well known passage in vol. 4, Lives of the Chancellors, p. 271, may be slight. But no such doubt rests upon the decision of the King's Bench. In *Moon* v. *Durden*, 2 Exch. 22, 154 E.R. 389, *Helmore* v. *Shuter* was accepted expressly by three of the Judges, Platt, Rolfe, and Parke, BB., as being unquestionably a sound decision. And Rolfe and Parke, BB., explicitly treated it as an example of the application of the rule that *primâ facie* statutes are to be construed as prospective, which indeed is the ratio upon which the decision was in terms put by the Court that pronounced it. It was accepted as not open to dispute that the rights of promisees would be prejudiced if the statute were held to relate to past promises. The view which appears to have decided Middleton, J., in declining to apply the principle of these decisions is that the authority of them disappears in consequence of the distinction which in modern times has been drawn between statutes directly invalidating contracts and statutes forming part of the *lex fori* as only affecting remedial rights; and the Judge considers (47 O.L.R., at p. 42) that because the effect of a statute is only to bar the "legal remedy by which the contract might otherwise have been enforced" without directly invalidating the contract, it should for the present purpose be regarded as a statute relating to procedure only. The view of sec. 4, which was taken in *Leroux* v. *Brown* (1852), 12 C.B. 801, 138 E.R. 1119, is that while contracts affected by it are not immediately vacated, the Courts are prohibited from enforcing them, in other words, the right of action is taken away; this

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distinction was held to be sufficient to support the conclusion that the statute was a part of the *lex fori*. Upon that point the soundness of the decision has been doubted by at least one very eminent Judge; see judgment of Willes, J., in *Gibson* v. *Holland* (1865), L.R. 1 C.P. 1, at p. 8, and 1 *Smith's Leading Cases*, 5th ed., p. 272, and *Williams* v. *Wheeler* (1860), 8 C.B. (N.S.), 299, at p. 312, 141 E.R. 1181, at p. 1187.

It is quite clear, nevertheless, as Middleton, J., says, that the rule of *Leroux* v. *Brown*, that sec. 4 of the Statute of Frauds governs the proceedings on contracts in suit before an English Court wherever made, is accepted law. *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, and *Morris* v. *Barron & Co.*, [1918] A.C. 1. And it is quite true, also, that Lord Blackburn, in *Maddison* v. *Alderson*, at p. 488, seems to say that the effect of sec. 4 of the Statute of Frauds is only to prescribe certain indispensable evidence "when it is sought to enforce the contract." It may be doubted whether Lord Blackburn was for the moment adverting to the decisions in which (as Willes, J., observed in *Williams* v. *Wheeler*, at p. 312, and in *Gibson* v. *Holland*, at p. 9) it had been held that the existence of the memorandum at the time of the commencement of the action is a condition of the right to sue, a rule as Lindley, L.J., said in *In re Hoyle*, [1893] 1 Ch. 84, at p. 97, is "founded upon the words of the statute"; and Lord Selborne, at all events, 8 App. Cas. 467, at p. 474, ascribes to the statute the wider effect of "barring the legal remedies" which but for the statute might have been available.

I will not repeat what I have said above in answer to the contention that a statute abrogating a right of action which otherwise a party to a contract might have asserted is not a statute prejudicially affecting an "existing legal right or status" but an enactment relating merely to procedure. With great respect, I think for the reasons mentioned it is one thing to affirm that a statute is a part of the *lex fori* but to conclude that it is consequently retrospective as relating to procedure only involves a *non sequitur*. The appeal ought therefore to be dismissed.

But I am unable to concur with the view of the majority of the Court that the judgment of the Court below is the right judgment. The appeal from the judgment of Middleton, J., ought, in my opinion, to have been allowed and the defendant's motion to dismiss the action dismissed with costs.

Two paragraphs in the judgment of Riddell, J., 54 D.L.R. 548, at p. 553, 48 O.L.R. 120, at p. 126, give the grounds upon which the Appellate Division proceeded:—

In the view I take of the case the statutes have no bearing: the case has not been placed on the right basis. The real action is not to recover commission at all. Admittedly commission cannot be recovered under the contract between the parties and on its terms, for the money has not been received by the defendants, and therefore it is not payable to the plaintiff on the terms of the contract: *Alder v. Boyle* (1847), 4 C.B. 635, 136 E.R. 657.

The real cause of action is for damages for breach of the implied agreement on the part of the defendants not to do anything to prevent the payment by the purchaser of the purchase-money out of which the plaintiff was to receive his commission. I place this duty on a minimum basis when so expressing it.

The statement of claim alleged facts giving rise to a cause of action at least for damages on the principle stated by Willes, J., in *Inchbald* v. *The Western Neilgherry Coffee &c. Co., Ltd.* (1864), 17 C.B. (N.S.) 733, 144 E.R. 293, in a passage cited with the approval of the Judicial Committee in *Burchell* v. *Gowrie & Blockhouse Collieries, Ltd.*, [1910] A.C. 614, at p. 626, in the following words:—

I apprehend that whenever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it;

and I have no doubt that the facts disclosed in the statement of claim *primâ facie* establish the right of the plaintiff to have the damages measured by the commission he would have been entitled to receive had the business proceeded to its conclusion in the ordinary course. See *per* Lord Atkinson, *Burchell* v. *Gowrie*, at p. 626.

I do not discuss the question whether the statement of claim does or does not disclose a cause of action for the commission itself. I think that may be an arguable question, see the judgment of Lord Watson, in *Mackay* v. *Dick* (1881), 6 App. Cas. 251, at p. 270, in addition to the judgment of Willes, J., in the case already cited. I do not pursue the point, it is enough to say the statement of claim (whose function it is not to cast the plaintiff's right of action into formal legal shape but to state the constitutive facts giving rise to the right upon which he relies and to formulate the relief he demands), does state facts constituting a good cause of

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action and does ask for relief to which, as I have said, he is *primâ facie* entitled, namely, the recovery of a sum equivalent to the amount of the commission to which he would have been entitled had matters proceeded in their normal course. True it is commission is claimed as commission and no doubt, if the view of the Court of Appeal, 54 D.L.R. 548, 48 O.L.R. 120, be the right one, namely, that a right of action for the commission as such does not arise out of the facts stated, this in that view was not strictly accurate pleading; but there was a claim for "further and other relief" and, with all due respect, I am unable to perceive upon what ground it could be successfully contended that this claim for "further and other relief" would not embrace a claim for the amount of the commission as damages.

We have not been referred to the particular rule in the Ontario Rules of Procedure, but no doubt under the Ontario practice as in the other judicature systems a prayer for further or other relief was unnecessary, the Court having full power to grant such relief as it might deem to be just in addition to the specific relief claimed; this power being limited by two conditions as Fry, J., said in *Cargill* v. *Bower* (1878), 10 Ch. D. 502, at p. 508, 1st, that the plaintiff is entitled to such relief upon the facts alleged and, 2nd, that it is not inconsistent with the relief specifically prayed. It is unnecessary to point out that no such inconsistency could be suggested as between the claim for commission as commission on the principle stated by Willes, J., and a claim for damages measured by the amount of the commission which the plaintiff ought to have been allowed to earn. In *Inchbald's* case, 17 C.B. (N.S.) 733, 144 E.R. 293, the plaintiff claimed payment of the commission as such and the Court held that he was entitled not to the full amount of the commission but to the amount which, making allowance for the chances against him, it was probable he would have earned but for the conduct of the defendants.

But apart from all this, I cannot refrain from observing that the defendant's proceeding was a proceeding taken under consolidated Rr. 122 and 123, and that the point of law raised under the first mentioned rule was strictly limited to this, namely, that the statute was an answer to the action, and that the proceeding before Middleton, J., was a proceeding taken by consent for the purpose of having that specific question decided under that rule.

And indeed as one might have expected in these circumstances the only point raised before Middleton, J., and the only point dealt with by him, indeed, the only point raised by counsel for the defendants prior to the judgment of the Appellate Division was that specific point.

I assume that in the proceeding under R. 122, a Judge might (according to the Ontario practice) have power to dismiss an action on the ground that the statement of claim disclosed no reasonable cause of action; but that is a power which could not properly be exercised where the facts stated in the statement of claim did disclose a cause of action however inappropriate the relief demanded might be unless it should appear that the action was brought solely for the purpose of obtaining some relief which the Court had no power to grant, as in *Dreyfus* v. *Peruvian Guano Co.* (1889), 41 Ch. D. 151.

Anglin, J.

ANGLIN, J.:—A curious situation is presented by this appeal. The action is brought on a contract made in 1913, to recover commission on a sale of land. The facts stated, 47 O.L.R. 37; 54 D.L.R. 548, 48 O.L.R. 120, disclose rather a cause of action for damages for breach by the defendant of an implied term of the contract sued upon whereby it made the coming into existence of the state of facts on which the plaintiff would have been entitled to payment of the commission sued for impossible. Amongst other defences sec. 13 of the Statute of Frauds, R.S.O., ch. 102, first enacted by 6 Geo. V., 1916 (Ont.), ch. 24, sec. 19, assented to on April 27, 1916, and amended by 8 Geo. V., 1918 (Ont.), ch. 20, sec. 58, was pleaded. That provision is as follows:—

> No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing (separate from the sale agreement) and signed by the party to be charged therewith or some person thereunto by him lawfully authorized. This section shall come into force on the 1st day of January, 1917.

The words which I have put in brackets were added by the amendment of 1918.

The applicability of this statutory provision was brought before Middleton, J., for determination as a point of law, under Ont. Con. R. No. 122. That Judge, while fully recognising the general rule excluding retrospective construction, *Gardner* v. *Lucas* (1878), 3 App. Cas. 582, at p. 601, on the authority of

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Towler v. *Chatterton*, 6 Bing. 258, 130 E.R. 1280, and *Grantham* v. *Powell* (1853), 10 U.C.Q.B. 306, held the statute applicable, notwithstanding that the plaintiff was thereby deprived of a right of action, complete or accruing, existing when it was enacted. *Moon* v. *Durden*, 2 Exch. 22, 154 E.R. 389, and *Gillmore* v. *Shooter* (1678), 2 Mod. Rep. 310, 86 E.R. 1091 (see Jones T. 108, 84 E.R. 1170), had been relied on by the plaintiff. The Judge distinguished the former on the ground that by the statute there in question the contracts affected by it were declared null and void, and the latter he held in effect overruled by the distinction made in *Leroux* v. *Brown*, 12 C.B. 801, 138 E.R. 1119, between statutes which avoid contracts and those that have to do merely with the enforcing of them by action. The statute now before us, says the Judge, 47 O.L.R., at p. 42, "bars the legal remedy by which the contract might otherwise have been enforced," and so affords an answer to this action not by any retrospective effect but because it speaks from its date and prohibits the action." He accordingly directed judgment dismissing the action.

On appeal the Second Divisional Court of the Appellate Division, 54 D.L.R. 548, 48 O.L.R. 120, made an order setting this judgment aside and allowing the plaintiff to amend his statement of claim within a stated period, but in default of such amendment being made confirmed the dismissal of the action. The amendment contemplated, as appears from the principal judgment delivered by Riddell, J., and concurred in by Clute, J., and *sub modo* by Sutherland, J., was the substitution of the claim for damages, above indicated, for that to recover commission which, it was thought, must fail because the conditions on which the commission claimed would have become payable (through whose fault is not material) had not been realised.

The making of this order would seem to imply that the Divisional Court, or at least a majority of the Judges composing it, held the view that although the statute invoked would afford a defence to the action as presented, it would not be an answer to it if amended as suggested. That was certainly the opinion of Sutherland, J., who expressly states his agreement with Middleton, J., and, unless it was shared by Mulock, C.J. Ex., and Masten, J., inasmuch as they also agreed with Middleton, J., I find it difficult to understand their concurrence in the order allowing the plaintiff to amend.

Counsel for the respondent, however, stated, with the assent of counsel for the appellant, that Riddell, J., had subsequently intimated that in his opinion the statute was not applicable to the action in either form. That may be what the Judge meant when he wrote, 54 D.L.R., at p. 553, "In the view I take of the case the statutes have no bearing; the case has not been placed on the right basis." Counsel for the respondent contended that sec. 13, if applicable at all, would afford the same defence to the action whether amended as proposed or as originally framed. With great respect for the Judges of the Divisional Court who appear to have thought otherwise, I share that view. Both actions are based on the contract for payment of commission. Both alike require proof of it in support of the claim made. That proof under the statute, if it applies, must be made in writing and if such evidence be lacking any remedy by action is taken away.

Counsel for the respondent (plaintiff) then stated that the determination of the issue as to the applicability of the statute to the action in either form is what his client really desires. But he omitted to give notice of intention to cross-appeal, as prescribed by our R. 100, from the portion of the judgment of the Divisional Court which directs the dismissal of the action in default of the amendment allowed being made.

On the other hand, the only part of that judgment from which the defendant can appeal is that setting aside the judgment of Middleton, J., and allowing the plaintiff to amend. In so far as that order may be regarded as discretionary an appeal from it does not lie. But if the action, in the form which the Divisional Court proposes it should take, would be equally open to the statutory defence invoked by the defendant, the order allowing the amendment could scarcely be upheld as an exercise of discretion. There can be no discretion to direct a futile amendment. It should be assumed that the amendment was allowed only because in the opinion of the Court, or a majority of its members, the statute would not preclude the action so amended being maintained. On the questions whether the statute applies to an action based on a pre-existing contract and if so whether the claim, if amended as proposed, will be equally within its purview with that originally preferred, the defendant's appeal may be entertained and, the purpose of a cross-appeal by the plaintiff being thus attained, it

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probably becomes unnecessary to accede to his request for a dispensation from R. 100.

I am, with great respect, of the opinion that the rule against the retrospective construction of statutes, which is fundamental in English law, *Lauri* v. *Renad*, [1892] 3 Ch. 402, at p. 421, applies to this case. In the first place, sec. 13 of the R.S.O., ch. 102, "is not retrospective by express enactment or by necessary intendment." On the contrary, the words "unless the agreement shall be in writing" point rather to future contracts than to those already made. See observations of Baron Platt in *Moon* v. *Durden*, 2 Exch. 22, at p. 30, 154 E.R. 389, at p. 393. The negative implication in sec. 5 of the Interpretation Act, R.S.O. 1914, ch. 1, should also not be overlooked.

The language of sec. 13 is the same as that of the fourth section of the Statute of Frauds: "No action shall be brought (whereby) to charge any person, etc., unless, etc." We have in *Ash* v. *Abdy*, 3 Swan. 664, 36 E.R. 1014, the view of Lord Nottingham (who states that "he brought the Bill into the Lords' House") that the Statute of Frauds (29 Car. 2) did not apply to an action which though begun after was brought on a contract made before its enactment. His Lordship overruled a demurrer based on the statute. It is no doubt to *Gillmore* v. *Shooter*, 2 Mod. Rep. 310, 86 E.R. 1091, at 1092, that Lord Nottingham refers as "another case in the King's Bench this very term where the same point being specially found was likewise adjudged upon argument." It was there held that "it could not be presumed that the Act has a retrospect to take away an action to which the plaintiff was then intituled." Lord Nottingham naively adds, "which I was glad to hear of, but said, if they had adjudged it otherwise, I should not have altered my opinion." *Gillmore* v. *Shooter* has never been overruled. It is cited in many later cases without a question or adverse comment (*e.g.*, *In re Athlumney*, [1898] 2 Q.B. 547, at p. 552), and is referred to as authority in such standard text books as Maxwell on the Interpretation of Statutes, 6 ed., 384; Craies' Hardcastle on Statutes, 2 ed., 348, and Potter's Dwarris on Statutes, 163; see too, 27 Hals., para. 305, at pp. 159-160. We thus have that "*contemporanea expositio*" which the oft quoted maxim declares to be "*optima et fortissima in lege.*" Maxwell, 6 ed., p. 531, *et seq.*

It was as an addition to the Statute of Frauds, incorporated in the R.S.O. 1914 as ch. 102, that the legislation now under consideration was enacted. The same form of words is used as is found in what is perhaps the most important provision of the principal Act. It is not unreasonable to assume, notwithstanding sec. 20 of the Interpretation Act, that these words were intended to bear the same meaning. *Casgrain* v. *Atlantic & North West R. Co. etc.*, [1895] A.C. 282. At all events the construction put upon the like words used elsewhere in the same statute is perhaps the safest guide to their construction in sec. 13 (*Blackwood* v. *The Queen* (1882), 8 App. Cas. 82, at p. 94; *Cox* v. *Hakes* (1890), 15 App. Cas. 506, at p. 529); and authorities dealing with them should be followed rather than decisions upon the language of other Acts however close the resemblance. I therefore abstain from examining numerous decisions upon other statutes in which the same construction as prevailed in the *Gillmore* and *Ash* cases was put upon provisions somewhat similar to that of sec. 4 of the Statute of Frauds. A collection of them will be found in 27 Hals., para. 305, note h.

Towler v. *Chatterton*, 6 Bing. 258, 130 E.R. 1280, and *Grantham* v. *Powell*, 10 U.C.Q.B. 306, cited by Middleton, J., deal with Lord Tenterden's Act, the latter merely following the former. Of *Towler* v. *Chatterton*, Baron Rolfe says, in *Moon* v. *Durden*, 2 Exch. 22, at p. 36, 154 E.R. 389, at p. 395, that:—

> It is however worthy of remark that Lord Tenterden's Act points to a writing to be signed by the parties—that is, to future acts only; and consequently, the decision, giving to that section a retrospective operation, was not a just one, even in conformity with the most narrow construction of its language.

Some observations on one of the chief factors in the decision of the *Towler* and *Grantham* cases will be found in *In re Athlumney*, [1898] 2 Q.B. 547, at p. 553.

While *Moon* v. *Durden* may not aid the respondent as much as it would if the action there dealt with had not been begun before the statute came into force, it is of value because *Gillmore* v. *Shooter*, *supra*, is cited by Barons Platt, Rolfe and Parke, as authority on the construction of the Statute of Frauds. Baron Parke certainly did not regard the second member of the section of the Gaming Act under consideration in that case—"No suit shall be brought or maintained in any Court, etc."—as an enactment

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merely affecting procedure, because he thinks, (2 Exch. p. 44, 154 E.R. p. 398), that if it stood alone it would not apply to pending actions. The case of *Knight* v. *Lee*, [1893] 1 Q.B. 41, dealing with a similar provision of the Gaming Act, 55-56 Vict., 1892 (Imp.), ch. 9, may also be referred to. Bruce, J., there says, at p. 44, "Here the plaintiff had a vested right of action acquired before the statute came into force and it cannot be supposed that the statute was intended to take such right away."

When carefully considered the foundation of Middleton, J.'s judgment holding the section now under construction applicable to the present action, seems to be that it falls within the exception made, in the case of statutes dealing with procedure, to the general rule prohibiting retrospective construction. The Judge in his reference to *Leroux* v. *Brown*, 12 C.B. 801, 138 E.R. 1119, indicates that he thought the effect of that decision was to bring the fourth section of the Statute of Frauds within that exception. What *Leroux* v. *Brown* actually decided was that as a provision dealing with and affecting merely the remedy for, and not the right created by a contract, sec. 4 of the Statute of Frauds forms part of the *lex fori* and as such is applicable to all actions brought in English Courts to enforce contracts within its purview wherever made. No doubt Jervis, C.J., does say that the fourth section "relates only to procedure," but he uses the word procedure in contra-distinction to "the right and validity of the contract itself" and probably meant no more than that it formed part of the adjective law. In the same sense Maule, J., says, 12 C.B., at p. 827, 138 E.R. 1130: "It is parcel of the procedure and not of the formality of the contract"; and Talfourd, J., at same page, says: "That section has reference to procedure only and not to what are called by jurists the rights and solemnities of the contract." "Procedure" in the exception to the rule of construction under consideration is used in a more restricted sense. It has to do with the method of prosecuting a right of action which exists, not with the taking away of such right of action. As Lord Hatherly, L.C., observes, in *Pardo* v. *Bingham*, L.R. 4 Ch. 735, at p. 740, referring to sec. 10 of the Mercantile Law Amendment Act (19-20 Vict., 1856 (Imp.), ch. 97), which did away with the disability of absence overseas as an answer to the Statute of Limitations (21 Jac. 1, 1623 (Imp.), ch. 16). "There is a considerable difference between

this case and a case where the right of action is actually taken away." Although statutes creating new remedies have sometimes been held available to enforce rights which had accrued before they were enacted, *The Alex. Larsen* (1841), 1 Wm. Rob. 288, at p. 295, *Boodle* v. *Davis* (1853), 22 L.J. (Ex.) 69, it is a very different thing to hold that a statute has, in the absence of express provision or necessary intendment, the effect of destroying an existing right of action. The taking away of a right of action is more than mere procedure and a statute which has that effect is *primâ facie* within the general rule and not within the exception.

"In dealing with Acts of Parliament which have the effect of taking away rights of action," says Baron Channell, in *Wright* v. *Hale*, 6 H. & N. 227, at pp. 231-232, 158 E.R. 94 at p. 95, "we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the Legislature; but the case is different where the Act merely regulates practice and procedure"; and Baron Wilde adds, at p. 232, [E.R. at p. 96].

> The rule applicable to cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. 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.

This passage from the judgment of Baron Wilde is expressly approved in *The Ydun*, [1899] P. 236, at p. 245.

The thirteenth section under consideration prohibits the bringing of an action. Therefore, if retrospective, it takes away the right of action itself. It does more than prescribe "what evidence must be produced to prove particular facts," which Pollock, C.B., in *Wright* v. *Hale*, *supra*, describes as a matter of procedure merely. It does not merely regulate the method or the means of enforcing the remedy; it takes the remedy wholly away. This subject is satisfactorily dealt with in Craies' Hardcastle on Statutes, 2 ed., pp. 343-355.

When it is borne in mind that statutes excepted from the application of the general rule because they deal with procedure are held to apply to pending actions unless the contrary intention appears, *In re Joseph Suche & Co., Ltd.* (1875), 1 Ch. D. 48, at p. 50, the decisions with regard to the operation of statutes taking away rights of appeal appear to be in point. Of these perhaps *The Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369, may best

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be referred to. The right to appeal from the Supreme Court of Queensland to His Majesty-in-Council given by the Order in Council of June 30, 1860, was taken away by the Australian Commonwealth Judiciary Act of 1903 and an appeal to the High Court of Australia substituted therefor. This legislation was held not to affect the right of appeal to the King-in-Council in a suit pending when the Act was passed, but decided by the Supreme Court afterwards. Lord Macnaghten, [1905] A.C. 369, at pp. 372-373, after adverting to the general rule and the exception and to the fact that "the Judiciary Act is not retrospective by express enactment or necessary intendment," proceeded as follows:—

> And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure . . . There is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

The same view had prevailed in this Court in *Hyde* v. *Lindsay* (1898), 29 Can. S.C.R. 99, and their Lordships' decision was followed and applied in *Doran* v. *Jewell* (1914), 16 D.L.R. 490, 49 Can. S.C.R. 88. If the right to appeal be a right of such a character that its abolition is not a matter of procedure, *a fortiori*, the taking away of an existing right to bring an action would seem to be so and the construction of sec. 13 involving that result, "an interference with existing rights contrary to the well-known general principle."

As Baron Parke said, in *Moon* v. *Durden*, 2 Exch. 22, at p. 43, 154 E.R., at p. 398: "It seems a strong thing to hold that the Legislature could have meant that a party who under a contract made prior to the Act had as perfect a title to recover a sum of money as he had to any of his personal property should be totally deprived of it without compensation." I am for these reasons of the opinion that sec. 13 of the Statute of Frauds, R.S.O., ch. 102, does not apply to this action either as originally framed or as it is proposed that it should be amended.

Rule 122, under which the proceeding now in appeal was instituted by consent, provides for the disposition before the trial

of points of law raised on the pleadings. It is common ground upon the pleadings that the defendants have received only $244,000 (in payment in full for one parcel) of the purchase moneys payable under the agreement for sale in respect of which commission is claimed by the plaintiff and that the plaintiff has been paid $6,100, which exceeds the proportion of commission payable to him in respect of the moneys so actually received by the defendants. It is also common ground that as to the rest of the property the agreement for sale has been rescinded by mutual consent of vendor and purchaser. By the third paragraph of the statement of claim the plaintiff avers that the sum of $25,000 which he was to receive as a commission for affecting the sale, was made payable proportionately as the purchase money for the property should be paid. An issue of law is thus presented involving the plaintiff's right to maintain this action in the form in which it was launched, *i.e.*, to recover the balance of the $25,000 commission. If of the opinion that the position taken in the defence, that under the stipulation of the contract admitted in the third paragraph of the statement of claim, commission cannot be recovered on unpaid purchase money, is sound, it was within the discretion of the Appellate Divisional Court instead of dismissing the plaintiff's action because upon the facts stated by him it was wrongly conceived, to permit an amendment of the statement of claim. The exercise of that discretion, as already stated, is not a proper subject of appeal to this Court. But, in so far as it may be appealable, I should incline to support the order made. I should have thought the allowance of such an amendment under the circumstances almost a matter of course in modern practice. There is no appeal by the plaintiff against the holding that he had misconceived his remedy.

I am by no means so well satisfied, however, that, as Riddell, J., puts it, 54 D.L.R. 548, at p. 554, 48 O.L.R. 120, "the amount of money he (the plaintiff) would have received had the defendants not broken their implied contract with him, will give a very satisfactory measure of damages." In the third paragraph of the statement of defence it is alleged that it was expressly stipulated and agreed by the plaintiff that in the event of the contract of sale being rescinded as to any portion of the lands embraced in it for any cause whatever, all right and claim of the plaintiff to com-

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mission in respect of such lands should be thereby determined and the contract therefor rescinded. This allegation is denied in the reply. The existence of the implied term of which the breach would be alleged in the action, if amended as proposed, is thus in issue. Moreover, other circumstances beyond the control of the defendants might have resulted in the purchase moneys not being paid in full. In this connection reference may be had to the recent decision of this Court in *Gold* v. *Stover* (1920), 57 D.L.R. 64, at pp. 70-71, 60 Can. S.C.R. 623, at p. 632. But these are questions with which we are not presently concerned. They will have to be considered when the action comes to trial.

The appeal should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—I concur with my brother Anglin.

Mignault, J.

MIGNAULT, J.:—If the construction of sec. 13 of the Statute of Frauds, R.S.O. 1914, ch. 102, added by 6 Geo. V., 1916 (Ont.), ch. 24, sec. 19, as amended by 8 Geo. V., 1918 (Ont.), ch. 20, sec. 58, be still open to us, in view of the decisions under sec. 4, my opinion would be that this section does not apply to actions brought after the statute on agreements for the payment of a commission on the sale of real property made before its enactment and which, before this statute, did not require to be in writing. This section reads as follows:—

> No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

If the question of the meaning of this provision be not concluded by authority, I would have no hesitation in saying that, in my opinion, it applies to subsequent agreements only. The language of the statute clearly shews this. "No action *shall* be brought . . . unless the agreement . . . *shall* be in writing." I cannot conceive this language being applied to prior agreements, for if that had been the intention, the natural language would be "unless the agreement *is* in writing." The word "shall" refers to the future, and is used in connection with both the bringing of the action and the form of the agreement. If saying that the agreement *shall* be in writing means past as well as future agreements, then stating that no action *shall* be brought unless the agreement *shall* be in writing would bar actions validly brought

before the amendment but not decided at the time it came into force. Therefore if the appellant's counsel be right in applying sec. 13 to an agreement made before, where the action is brought after, the statute, he would also be right in extending it to actions brought before the statute on a parol agreement for commission, where the action was still pending at the time of the enactment, that is to say, to pending cases. I cannot think that such was the intention of the Legislature.

This is my reading of the statute if its construction be still open to us. My brother Anglin has shewn that it is still open, his quotation of the words of Lord Nottingham in *Ash* v. *Abdy*, 3 Swan. 664, 36 E.R. 1014, being especially illuminating. It is with considerable satisfaction, therefore, that I concur in my brother's judgment.

I also agree that the appeal should be dismissed with costs.

Appeal dismissed.

BRADLEY v. BAILEY AND JASPERSON.

Ontario Supreme Court—Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. December 30, 1920.

DAMAGES (§ III A—75)—SALE OF GOODS—PASSING OF PROPERTY—REFUSAL OF PURCHASER TO TAKE DELIVERY—DETERIORATION—SALE TO THIRD PARTY—CONTRACT PRICE—VALUE OF GOODS AT TIME OF SALE

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 risk of depreciation in value from moulding or improper storing before the property in such goods has passed, is upon the vendor, who is entitled on the refusal of the purchaser to take delivery, to the difference between the contract price and the market value of the goods when they were refused, and not to the difference in the value of the goods when they were actually sold to a third party.

[*Mason & Risch Ltd.* v. *Christner* (1918-20), 46 D.L.R. 710; 54 D.L.R. 653, referred to. See annotation, Sale of Goods, 43 D.L.R. 165.]

Statement.

APPEAL by defendants from the judgment at the trial, awarding the plaintiff damages for loss occasioned by the defendants' refusal to accept and pay for a quantity of tobacco. Reversed.

The judgment appealed from is as follows:—

LATCHFORD, J.:—This action arises under a contract made between the plaintiff and the defendants on October 17, 1918, whereby the plaintiff sold to the defendants and the defendants bought from the plaintiff the plaintiff's crop of 30 acres of Burley Leaf Tobacco, grown in 1918, at 30 cents per pound for the No. 1 leaf and culls.

The defendant's agent had seen the plaintiff's tobacco while it was growing, or one of their agents had seen that tobacco; my impression is that more than one had seen it. Bailey himself, accompanied by one of his men,

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had on two occasions inspected the tobacco after it had been hung in the two large barns owned by the plaintiff. The inspection was careful and minute. All the tobacco was examined, and a number of "bands" selected from the racks in the barns were thrown down upon the floors. From these the defendants or their representative selected samples on at least one occasion, saying to the plaintiff that they were taking them away to be dried or otherwise tested by curing processes.

After they had taken the samples away they returned, expressed their satisfaction with the quality of the tobacco which they had seen and tested, and then, and only then, made the contract to which reference has been made. What they bought was all the plaintiff's crop as it was in those barns. No. 1 leaf and culls comprised, I find, the whole of the tobacco that was in those barns, and that the defendants bought.

Certain things were to be done by the plaintiff. The culls were to be baled separately, and leaf and culls were, I understand, to be delivered when ready up to March 31, 1919, that is the following year, at Jeanette's Creek or Paincourt, two points near the plaintiff's farm.

The tobacco was to be thoroughly cured and stripped, that is removed from the stalks when sufficiently dried, tied in bands, and then placed in bales of about 50 pounds. Then the tobacco was not to be pressed by lever. It was to be free from barn-burn, water, dust, dirt, fatty stems, suckers and frozen leaf, and to be in marketable condition, and not too high in "case."

There is a complaint that the culls were not baled separately. I find that as far as is ever practicable the culls were baled separately. To make an absolute separation of the smaller or defective leaves or "bands" is impossible, but within the meaning of the contract the culls, I find, were baled separately.

Was the tobacco delivered? I find it was delivered. Five loads were delivered to the defendants and were paid for by the defendants.

Was the tobacco thoroughly cured? I think it was.

Was it stripped in small bands? It is not pretended it was not stripped.

Was it packed in bales of 50 pounds? It is not pretended it was not baled in such bales.

There is a term in the contract that the tobacco is not to be pressed by a lever. There is no evidence that it was pressed by a lever.

There is absolutely no evidence regarding barn-burn, water, dust, dirt, fatty stems, suckers or frozen leaf.

There is a dispute as to two other terms of the contract, that is, whether the tobacco was in a marketable condition or not, and whether it was too high in case. These are the matters that are mainly in dispute between the parties.

The evidence is contradictory, and I have to find as best I can where the truth lies. I regret to have to set the evidence of one man higher than the evidence of another; but when the occasion arises that is a duty which must be performed, however unpleasant it may be felt to be.

I find that no serious objection was taken to the five loads first delivered. There may have been some slight complaint such as buyers of other commodities than tobacco sometimes make to the person who is delivering under a contract; but there was nothing more.

Jasperson has stated that while one or other of the first five loads was being delivered he stated to Bradley that if the remaining tobacco was no

better he would refuse to accept it. I think, speaking charitably, that Jasperson is mistaken on that point, and that, if any conversation of the kind which he has in mind took place it took place in Toronto afterwards, when Bradley was trying to induce Jasperson to make a contract extending over a term of 5 years. Jasperson did not want to make a contract for the kind of tobacco he had bought from Bradley for any such term. I think that Jasperson is confusing what was said at Toronto with what was said at Chatham or some other point where delivery was being made by Bradley.

It appears upon the evidence that tobacco, if too high in case, is liable to mould, or that when bacterial action sets in in warm or damp weather and the tobacco is in bales the tobacco will deteriorate, mould, and in fact rot, if kept baled; so that tobacco should not be baled when too high in case.

The defendants contend that this tobacco was baled when too high in case. The plaintiff swears it was not baled when too high in case. Having regard to the evidence on one side and the other, I find as a fact that the tobacco was not too high in case when baled.

Then as to whether the tobacco was or was not in a marketable condition, the time when it was to be in a marketable condition was the time of delivery and not the time when the tobacco was inspected on April 7, or at a time a week or two weeks subsequent to the delivery of the 17,000 odd pounds at Paincourt.

I therefore think the plaintiff performed his contract, did all that the contract called upon him to do, and that the defendants, for some reason other than the reasons which they allege here, declined to take the tobacco. It is possible that there was a falling market at the time, I do not know that, but that is the usual reason why purchasers refuse to carry out their contracts.

It is said that one expert who examined this tobacco at an early date found it in a defective condition. I refer to Copeland, who made a hurried visit to Paincourt during the time when a trolley car arriving at Paincourt from Chatham was getting ready to go back from that terminal point. He sought out, after some delay, the witness Bourassa, and Bourassa, having some connection with the United Farmers' warehouse at that point, went to the warehouse where a quantity of this tobacco was at the time. Not having the key, Bourassa pried off the lock or the staple and pulled open the door a certain distance. Copeland says he spent considerable time examining that tobacco, sufficient time to enable him to speak as to its quality. His visit is important because it took place soon after the tobacco was delivered at Paincourt. I find that his visit was so hurried that while he may have been able to snatch a few hands of tobacco out of the bales near the door, he could not possibly between the time of the arrival and departure of the car have properly inspected that tobacco. There was no inspection properly so called at that time by Copeland.

The subsequent inspections, when at least part of this tobacco was not in a marketable condition, were made after a lapse of about 3 weeks. The season was advancing, and we have evidence that in March a great deal of snow and some rain had fallen, and that early in April, there was more rain. I am not quite sure as to the dates in April, but there was rain as early as March 17, and again on the 26th, and in April there was rain on the 3rd and 6th, so that there were four rainfalls of some moment before the inspection made on April 7.

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The tobacco should have been accepted and removed and paid for by the defendants within a reasonable time after they were notified of its delivery at Paincourt, or about March 18 or 19. They allowed it to remain there during a damp and increasingly warm season; I say "increasingly warm" because while it had snowed early in March, rain had fallen later, shewing that the temperature had moderated. At that season of the year, according to the evidence of Biggar, which I accept wholly, bacterial action takes place in tobacco and the tobacco becomes apparently increasingly damp in appearance and more liable, because the leaves become thinner, to become mouldy if the bales are left piled up, as they necessarily were at the time in the warehouse where they were stored. The plaintiff, fearing that possible condition, had placed them on end, in which position they were less liable to serious damage than if left piled bale upon bale.

On April 7, some of that tobacco, between 15 and 20 bales, was not, in part at least—not wholly—in marketable condition. The centre of the bale would necessarily be that in which there would be the greatest heat if the bales were put upon end, and the samples selected at that time which were mouldy or becoming so, were taken from the centre of the bales. It does not follow that because the tobacco was not marketable on April 7, or even at a somewhat earlier date, that it was not marketable when delivered. It was delivered within the time of the contract, and it was as of that time that the test of marketability is to be applied, and not as of a later date.

When the defendants refused to accept and pay for the tobacco, no course was open to the plaintiff but to sell it at the best price he could obtain. Did he do that? I think he did. Why did not he get more than 6 cents a pound for it? The reasons have been stated by a number of witnesses: Tobacco buying had ceased. The buyers had packed up and gone away to other places where the seasons are different, and some had abandoned their drying machines for the time being and discharged their help, and were not in a position to buy. I do not think that the plaintiff could have done anything more than he did. He communicated with all the buyers in the neighborhood requesting them to come and see the tobacco and purchase it. They did not come, and he sold it for the best price he could get. In doing so he discharged his whole duty. The difference between the price he sold it at and the price the defendants agreed to pay him for it represents his loss; and for this the defendants are liable. What that amount is may be made up in a few moments. If counsel cannot agree upon it in a short time I shall take the trouble to make it up myself. There are some charges in the statement of claim which I am satisfied the plaintiff is not entitled to make. One of these is time lost and expenses on three trips. I do not think that can be allowed to the plaintiff, nor interest at 7%. That, of course, must be 5%. There is nothing in the contract that I can see covering interest—is there anything?

"Mr. Lewis: No, my Lord. The plaintiff did that because the bank charges that much to carry him. His Lordship: He cannot charge the defendants with that. There is no dispute about the correctness of the amounts credited here. The plaintiff admits he received them. The defendants do not pretend they paid anything more. The balance will be diminished by the amounts I have indicated and by no more, and for the amount so diminished the plaintiff is entitled to judgment. Mr. Rodd: Would you say he is entitled for rehandling and time lost? His Lordship: That was neces-

sary. Mr. Rodd: Does your Lordship say that was a proper charge? His Lordship: I did not object to these charges and storage charges, but I do strike out time lost and expenses. I do not object to the insurance. Mr. Rodd: Does your Lordship think that is a proper charge? His Lordship: Yes. Mr. Rodd: And the storage? His Lordship: Yes. Mr. Rodd: And re-handling? His Lordship: Yes, all these were necessary to protect that property. Mr. Rodd: Then your Lordship gives judgment for those sums? His Lordship: Yes. Mr. Rodd: Those are to be included in the sum to be settled? His Lordship: Yes. Mr. Rodd: I cannot agree that those sums should go in, my Lord. His Lordship: There will be a stay of ten days."

There was one feature of this that I had in mind at some time that I think I omitted to deal with: There came a time in the dispute between the plaintiff and the defendants when an effort was made by the plaintiff to have the matter settled. That was on April 7, when the tobacco was inspected at Painecourt. The plaintiff then offered to throw off a ton of this tobacco provided the defendants would pay for the rest and pay then. That offer was, I find, on the evidence of Deacon, without prejudice, and having been rejected by the defendants they cannot now invoke it in reduction of the amount of damages.

"His Lordship: If you will work out the amounts I will enter the judgment. Mr. Rodd: If your Lordship holds that these charges are proper charges I cannot agree. His Lordship: Then I will work it out. I thought I might have your assistance. Mr. Rodd: I do not think—His Lordship: Please do not say another word about it. Mr. Rodd: All right. There are some charges that I do not think ought to be allowed. What right have they to insure? Supposing it had been destroyed? His Lordship: I will take off the insurance. Mr. Lewis: We are not worrying on the question of these amounts if my learned friend says this is going to be settled finally. Mr. Rodd: I am not saying anything; I am only stating that I think these are improper charges. Mr. Lewis: Do I understand my learned friend is accepting the judgment as final if we forego the allowances? Mr. Rodd: I am not saying anything. His Lordship: I will take off the insurance. Let judgment be entered in favour of the plaintiff for $4,550.25 and interest from date of writ and costs. Mr. Lewis: We are entitled to interest, my Lord. Mr. Rodd: They are not only getting the pounds of tobacco but also their pound of flesh. His Lordship: They are entitled to be put into the position they would have been if the contract had been carried out. There will be a stay of ten days. Mr. Rodd: That is added to the amount, the charges and the storage? His Lordship: Yes."

J. H. Rodd, for the appellants.

O. L. Lewis, K.C., and *J. M. Pike*, K.C., for the plaintiff.

FERGUSON, J.A.:—The appellants urge the following reasons for their appeal:— Ferguson, J.A.

(1) That the goods were not prepared and delivered in accordance with the contract.

(2) That the property in the goods never passed to the defendants.

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(3) That, consequently, the defendants are not responsible for any loss occasioned by depreciation in the value of the goods through deterioration.

(4) That, the goods having deteriorated before resale, the difference between the price realised on such resale and the contract-price was not the proper measure of damage.

As much turns on the intention of the parties, particularly on the intention of the plaintiff as to the passing of the property, the cause of action and the form of the plaintiff's claim are, I think, important, and I therefore quote paragraphs 2 to 5 of the statement of claim:—

"2. On or about the 17th day of October, A.D. 1918, the defendants entered into an agreement in writing with the plaintiff for the purchase of the plaintiff's tobacco crop, the said agreement being in the words and figures following, that is to say:—

'Contract.

'The Bailey Tobacco Co., Kingsville, Ont. Payment at time of delivery—B.T.Co. & G.J.—per E.B.

'I have this day sold to the Bailey Tobacco Co. my crop of 30 acres of Burley leaf tobacco grown in 1918 at 30c. per lb. for the No. 1 leaf and culls. Culls to be baled separately, to be delivered when ready up to March 31/1919 at Jeanette's Creek or Paincourt. Tobacco to be thoroughly cured and stripped in small hands, and in bales about 50 lbs. Tobacco must not be pressed by lever. To be free from barn-burn, water, dust, dirt, fatty stems, suckers, and frozen leaf, and to be in marketable condition and not too high in case. Will advise when to deliver.

'We hereby accept and agree to this contract—

'Dated Oct. 17, 1918.

'The Bailey Tobacco Co. & Geo. Jasperson,

'Per E. Bailey.

'Copy of this contract acknowledged by me, signature, 'Bruce F. Bradley.'

"3. The plaintiff grew the tobacco on his farm in Dover, pursuant to the said agreement, and delivered 14,829 pounds of the said tobacco to the defendants, which were accepted by the defendants, and for which the defendants paid the plaintiff the sum of $4,449.30.

"4. The balance of the said tobacco, amounting to 17,830 pounds, the plaintiff delivered, pursuant to the said contract, at Paincourt mentioned in the said contract, but the defendants refused to accept the said balance of said tobacco and to carry out their contract and to pay for the balance of said tobacco.

"5. The plaintiff, on account of the defendants' refusal to accept and pay for the balance of said tobacco, amounting to 17,830 pounds, was compelled to pay storage charges and rehandling charges, and was compelled to make three trips to Kingsville to induce the defendants to take delivery of said tobacco, and also had to keep the said tobacco insured, and, by reason of the defendants' breach of said contract and failure to accept and pay for the said balance of said tobacco, the same became damaged and deteriorated, and the plaintiff was compelled to sell the same at 6 cents per pound instead of 30 cents per pound, as mentioned in the said contract, and the tobacco had also lost in weight, so that when the plaintiff came to sell the same there only remained 16,140 pounds, which the plaintiff sold."

It is not pretended that it was intended that the property in the goods should pass until all things stipulated in the contract to be done to the tobacco to prepare it for the market had been done.

The trial Judge has found that everything the plaintiff had to do to put the tobacco in condition for delivery was done, and that the defendants wrongfully refused to take delivery and pay. He does not, however, find that the property in the goods passed.

I think we must, on the question raised as to the condition of the tobacco when taken to Paincourt, accept the findings of the learned trial Judge, made on contradictory evidence; and therefore the question is: Was there a transfer of title by the plaintiff and some act of assent to such transfer by the defendants? That question is, I think, to be answered by ascertaining the intention of the parties, as evidenced by what took place at the time of the offer to deliver, and by the frame of the plaintiff's action.

The wording of the contract as to delivery is not clear. The stipulations are: "to be delivered when ready up to March 31/1919 at Jeanette's Creek or Paincourt. . . . Will advise when to deliver." "Payment at time of delivery."

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In reference to part of the tobacco, this course was followed, but in February there still remained in the plaintiff's possession a balance of about 17,000 pounds. The evidence is that the roads were breaking up, and that the plaintiff asked the defendants to give orders for delivery; that the defendants answered, under date the 26th February:—

"We find we cannot get enough leaf to fill a car this week from Chatham, so will let you know as soon as possible when we can take delivery of the balance of our contract."

The plaintiff did not wait for orders to deliver at Paincourt, but, fearing that the roads would break up and that it would be next to impossible to make delivery in the latter part of March, teamed the balance of his tobacco to Paincourt, and there stored it under lock and key in two warehouses, and on the 18th March notified the defendants of what he had done. His letter reads as follows:—

"I have about 8½ tons of Burley tobacco in warehouse at Paincourt, Ont., constituting the balance of tobacco to be delivered under my contract with you and the Bailey Tobacco Company and George Jasperson. The tobacco is ready for shipment any day, and this letter is to insist that you accept the tobacco and pay for it at once in accordance with the terms of my contract with you. I will be glad to assist you in making arrangements for the shipment. I stand ready to carry out my part of this contract. Now it is up to you to do your part. Kindly let me hear from you by return mail."

In consequence of that letter, the defendants sent a man to inspect the tobacco. To do this, it was necessary for him to pry off the lock or break open the door of the storehouse. This man says he inspected the tobacco, and that it was too high in case, and otherwise not in accordance with the contract; but the learned trial Judge finds that the man did not make an adequate inspection. As a result of the inspection by this agent of the defendants, they notified the plaintiff that they would not accept the tobacco, and advised him that, stored in the condition and manner it was, it was liable to become mouldy and heated, and thus depreciate in value, and that he ought to take some means to prevent this.

As a result, the plaintiff moved some of the tobacco, standing the bales on end instead of leaving them in piles. The plaintiff then went to the defendant Jasperson and insisted that the tobacco was in accordance with the contract, with the result that Jasperson caused the tobacco to be, on the 28th March, inspected again; and, though he again refused the tobacco, he advised the plaintiff to see his co-defendant Bailey. The plaintiff went to Bailey, and, as a result of their interview, Bailey inspected the tobacco or caused it to be inspected on the 7th April. Even the plaintiff admits that some of the tobacco had become mouldy on the 7th April; and, while the learned trial Judge finds that the tobacco was not mouldy, heated, or too high in case when put in the warehouse at Paincourt on the 16th or 17th March, he does not find that it was not heated, too high in case, or mouldy on the 28th March, or on the 7th April, but points out that the conditions of the weather and the manner of storing would account for the moulding, heating, and sweating, which condition no doubt developed in the tobacco, if not before the 28th March, at least very shortly after that date.

Though the defendants did not object to the time or place of delivery, it is noticeable that the plaintiff was careful to keep dominion and control of the tobacco. Had he, on the 18th March, when the tobacco was, according to the finding of the trial Judge, in proper condition, weighed and delivered possession and control of the tobacco to the defendants, and had they assented to his doing so, this case would have come within the principles enunciated in *Wilson* v. *Shaver* (1901), 3 O.L.R. 110; the property would have passed to the defendants, and been at their risk, and they would have been liable in an action for the price: *Simmons* v. *Swift* (1826), 5 B. & C. 857, 108 E.R. 319; but I do not think that it can be successfully contended that the circumstances here shew an intention on the part of the plaintiff to pass the dominion and control of the tobacco to the defendants until it had been weighed and paid for. There is nothing in the evidence to justify a finding of assent by the defendants to such a passing over of dominion and control. The plaintiff's claim is not one for the price of goods sold and delivered, but an action for damages for refusal to accept, and is only consistent with an intention on his part to retain the ownership.

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All the authorities were collected and considered in *Wilson* v. *Shaver*, and it is not necessary for me to review them here. See also the Sale of Goods Act, 1920 (Ontario), 10 & 11 Geo. V. ch. 40, sec. 20, Rule 3. The effect of the *Wilson* case is stated in the head-note thus:—

"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."

Having read the evidence with care and considered it in the light of the arguments of counsel, my conclusions are that the plaintiff did not intend to part with the property in the goods; that the defendants did not intend to take the property in the goods, and that the property therein did not pass; that, consequently, the risk of depreciation in value from moulding, sweating, heating, or from improper storing, was the plaintiff's and not the defendants', and the damages have been assessed on an improper basis; that there should be a re-assessment of damages on the basis that the plaintiff is entitled to the difference between the contract-price and the market-value of the goods when they were refused on the 18th March; or, if there was no market there, then to the difference in the value of the goods in the condition they then were, and the contract-price; and not for the difference between the value of the goods when they were sold in May and the contract-price: see *Mason & Risch Limited* v. *Christner* (1918-20), 44 O.L.R. 146, 47 O.L.R. 52, and 48 O.L.R. 8, 46 D.L.R. 710, 54 D.L.R. 653.

I would set aside the judgment appealed from and refer the matter to the Master to re-assess the damages; the plaintiff to be entitled to costs down to the trial; the defendants to the costs of this appeal; the costs of the reference and further directions to be reserved.

Meredith, C.J.O. Hodgins, J.A.

MEREDITH, C.J.O., and HODGINS, J.A., agreed with FERGUSON, J.A.

Magee, J.A.

MAGEE, J.A., agreed in the result. *Appeal allowed.*

GREAT NORTH WESTERN TELEGRAPH Co. v. TREMBLAY.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 4, 1920.

LIMITATIONS OF ACTIONS (§ III F—131)—WORKMEN'S COMPENSATION ACT, QUEBEC—PRESCRIPTION—HOW INTERRUPTED.

Under the Quebec Workmen's Compensation Act, R.S.Q. 1909, art. 7347, the victim of an accident before he appears in Court must appear before a Judge in Chambers to obtain his authorisation to sue. This authorisation is not a judicial demand within the meaning of art. 2224 of the Civil Code, but is a conciliatory procedure partly for the purpose of allowing a settlement and does not interrupt prescription, but if a settlement is impossible between the parties the plaintiff must then commence an action by means of a writ of summons and this judicial demand properly served interrupts prescription under the article.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of the trial Court (1919), 57 Que. S.C. 168, and maintaining the respondent's, plaintiff's, action. Reversed.

The facts of the case are as follows:

The respondent was a lineman engaged by a telegraph company, the appellant. When repairing its lines, he met with a serious accident resulting from an electric current coming from the line of another company, both wires being attached to the same pole. The accident occurred on August 17, 1917. The petition for authorisation to sue under the Workmen's Compensation Act, R.S.Q. 1909, art. 7347, was presented and granted on July 30, 1918. A first action for compensation was taken by respondent on August 5, 1918, and was dismissed on December 23, 1918, on the ground that the statement of claim did not disclose that such petition had been granted and that the respondent was proceeding under the Workmen's Compensation Act. Article 7345 of R.S.Q., 1909, enacts that any action under the Act shall be instituted before the expiration of one year after the accident. The respondent then took a second action on February 25, 1919, using the same authorisation to sue as granted for the issuing of the first action.

A. Taschereau, K.C., for appellant.

Alleyn Taschereau, K.C., for respondent.

Idington, J.

IDINGTON, J.:—This appeal presents a number of curious points for our consideration. Some of them suggest the reflection that a plaintiff having a rather difficult problem for solution in order to found his action, might, by a little care, have avoided the needless complications that have ensued.

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The important question raised is whether or not a lineman, engaged by a telegraph company, as the appellant is, in repairing its lines, when meeting with a serious accident resulting from an electric current, is entitled to claim relief under the Quebec Workmen's Compensation Act.

The electric current which produced the injury was that from another line than the one belonging to appellant.

However, both that wire and that of the appellant on which respondent was engaged were attached to the same poles.

These facts need not be considered further than to illustrate the nature of the service which respondent was engaged in and the risks attendant thereon.

The statute relied upon is rather curiously worded. And to interpret its language, said facts, and possibly many others of a like nature which may exist in carrying on the business of a telegraph company, suggest that the Legislature, in framing an Act designed to protect workmen engaged in employments of a rather more hazardous character than those of mere mercantile enterprises, could hardly be supposed to have intentionally left workmen so engaged as respondent was, outside such protection.

Section 7321 defines the industries covered by the Act:

> 7321. Accidents happening by reason of or in the course of their work, to workmen, apprentices and employees engaged in the work of building, or in factories, manufactories or workshops: or in stone, wood or coal yards: . . . or in any gas or electrical business . . . or in any *industrial enterprise*, in which explosives are manufactured or prepared, or in which machinery is used, moved by power other than that of men or of animals, shall entitle the person injured, etc., etc.

If the fact that the basis of the telegraph business is the application and use of electric force and necessarily implies the use of the mechanical contrivances adapted for its control, and in turn the application of means such as wires and poles for conducting it, do not constitute the business an electrical business, I fail to see how it can be classified.

It is quite beside the question to say that it is a commercial enterprise or business. It would be hard to conceive of anything in the way of business which in one sense is not commercial.

Nor does the innocent minded argument demonstrating how little risk is run from the very moderate current ordinarily used in the actual operation of the line to produce the mechanical results needed, seem to me a very convincing reason for holding that it cannot be designated as essentially an electrical business.

And it is none the less so because by reason of commercial and other necessities, it is being forced to keep the company of other electrical businesses, using the same poles to carry wires charged with a heavier current and possibly neither being proof against the induction we sometimes hear of.

I am of the opinion that the telegraph business falls within the very language of the statute above quoted.

Idington, J.

Passing to the legal curiosities which respondent's stumbling efforts to claim the benefit of the Act have developed, I do not think that the production of an abortive declaration which failed to disclose or allege the existence of the essential factors of the claim being within the Act, can be said to have been any proper exercise of the permission that was given, not to proceed to produce an abortive but a real and valid assertion of claims within the scope of the permission given.

The resultant judgment given, on that abortive declaration, can neither be set up as an exercise of the permission given, nor as a *res judicata* to answer the declaration herein upon which the Court below has given relief by the judgment appealed from.

The other point raised that the action is prescribed might have been fairly arguable before the jurisprudence of Quebec had established that the application for permission having been heard in presence of all those concerned, and the order made therefor, suspends the operation of the prescription relied upon, but in face of such a jurisprudence, so well established, does not seem to me now arguable.

Since writing the foregoing I have read the opinions of my brothers Brodeur and Mignault holding that the Quebec jurisprudence relative to prescription has not been definitely settled and in deference thereto I, somewhat hesitatingly, assent to their view relative to a point in which local opinion should govern.

Duff, J.

DUFF, J. (dissenting):—The appeal in my judgment fails on all points and should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I have had the advantage of reading the opinions to be delivered by my brothers Brodeur and Mignault. I entirely concur in their conclusion and in the reasons on which they base it.

The terms of art. 7347 R.S.Q. 1909, make it clear that the petition for authorisation to sue, which it prescribes, is not a part of the action which, under art. 7345, is "subject to a prescription

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of one year." The petition is a proceeding which the plaintiff is obliged to take "before having recourse to the provisions of this Act"—a preliminary step requisite to qualify him or give him a status to bring the action. On the other hand, if it had been an integral part of the first action, as held by Gibsone, J., it must have fallen with it and the plaintiff would lack the authorisation necessary to maintain the present action.

In the absence of special provision in the statute, any question of interruption of the prescription which it imposes must be determined by reference to the articles of the Civil Code dealing with that subject. In answer to the plea of prescription the respondent relies upon arts. 2224 and 2227 C.C. (Que.), which he successfully invoked in the Court of King's Bench. The Quebec Civil Code has not reproduced art. 2245 of the Code Napoleon.

As to art. 2224 C.C. (Que.), my brother Brodeur has fully stated the reasons why the petition for authority to sue cannot be regarded as "a judicial demand" within its purview. An additional ground for that view is afforded by the express enumeration in its second paragraph of "seizures, set-off, interventions and oppositions." The plaintiff's first action having been dismissed cannot serve as an interruption of prescription. Art. 2226 C.C. (Que.).

As to the payments made by the appellants to the respondent, those prior to the month of May would rather seem to have been compassionate in their character and the subsequent payments were merely of wages earned by the respondent after his re-engagement by the appellants. The burden is on the respondent to establish an interruption of prescription. In order that payments made by the appellants may avail him for that purpose he must adduce evidence of circumstances warranting an inference that they implied recognition by the appellants of a legal obligation, either under the Workmen's Compensation Act or at common law, to compensate him for his injuries. Unless that inference can properly be drawn payments made to the respondent cannot be successfully invoked by him. *Hall* v. *Devany* (1871), 3 Rev. Leg. 453. There are no circumstances in evidence, in my opinion, which would justify the conclusion that in making the payments in question the appellants acknowledged any legal obligation to compensate the respondent. On the contrary, from the first they

appear to have challenged his legal right to claim compensation from them and from that position they never varied.

BRODEUR, J.:—This is an appeal from a judgment of the Court of King's Bench which reversed the decision of the Superior Court, 57 Que. S.C. 168.

The present action was brought by the respondent against the appellant under the Workmen's Compensation Act, R.S.Q. 1909, arts. 7321 and following.

The accident for which the respondent claims an indemnity took place on August 17, 1917.

On July 30, 1918, the respondent presented a petition to the Judge in accordance with the provisions of art. 7347 R.S.Q. 1909, to obtain authorisation to sue the appellant. The record does not shew whether the Judge who had to consider the petition tried to bring the parties together and thus avoid a suit, as the Act authorises him to do, but there is no doubt that the Judge must have taken authority from the provisions of this art. 7347 to bring the parties to a settlement, and that his efforts were unsuccessful; and he then simply granted the petition authorising the suit.

On August 5, 1918, the first action was brought, but as the plaintiff had failed to allege in his declaration that the company defendant was subject to the Workmen's Compensation Act the action was dismissed on December 23, 1918, on the ground that the plaintiff had not alleged the facts and conditions which gave the plaintiff the right to sue under the Workmen's Compensation Act.

The Court might, it seems to me, instead of dismissing the action, have allowed an amendment of the declaration to allege that the company defendant was really subject to the Workmen's Compensation Act, and thus have avoided the costs of a new suit and the exposing of the new action to dismissal on the ground that the right of action was prescribed. In fact, the law provides that actions in recovery of the indemnities are prescribed by one year (art. 7345 R.S.Q.), and as the action took place in August, 1917, it would be too late to institute a new action in December, 1918.

In any case, a new action, the present one, was taken on February 25, 1919, and the company defendant among its grounds of defence set up prescription.

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The defendant also pleaded (1) That telegraph companies are not subject to the Workmen's Compensation Act. (2) That there was *res judicata*. (3) That the plaintiff should have been authorised to bring the present action.

In view of the conclusion I have arrived at on the question of prescription it is unnecessary for me to examine these latter grounds of defence.

The plaintiff pretends that prescription was interrupted by the petition for authorisation and conciliation which was presented to the Judge under art. 7347 R.S.Q. 1909.

This is what that article says:—

> Before having recourse to the provisions of this sub-section, the workman must be authorised thereto by a Judge of the Superior Court upon petition served upon the employer. The Judge shall grant such petition without the hearing of evidence or the taking of affidavits, but may before granting the same use such means as he may think useful to bring about an understanding between the parties. If they agree, he may render judgment in accordance with such agreement, upon the petition, and such judgment shall have the same effect as a final judgment of a competent Court.

The article of the Civil Code (Que.) which relates to the question of interruption of prescription is art. 2224, which is in the following terms:—

> A judicial demand in proper form, served upon the person whose prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when a personal service is not required, creates a civil interruption.
>
> Seizures, set-off, interventions and oppositions, are considered as judicial demands.
>
> No extra-judicial demand, even when made by a notary or bailiff, and accompanied with the titles, or even signed by the party notified, is an interruption, if there be not an acknowledgment of the right.

This art. 2224 is a reproduction of arts. 2211 and 2244 of the Code Napoleon.

But in the Code Napoleon there is another article on the question of interruption of prescription, which is not reproduced in the Quebec Code, namely, art. 2245, which declares that a summons in conciliation interrupts prescription.

The proceedings in conciliation of the French civil law have never formed part of the old Canadian law. They were only enacted in France in the 19th century; they are not dealt with in the Ordinance of 1667 which was in force in the Province of Quebec until our laws of procedure were codified in 1867.

When the civil laws were codified in 1866 there was no question of a summons in conciliation interrupting prescription for the good reason that it was unknown in our laws of Quebec.

In 1909 the Quebec Legislature decided to legislate regarding workmen's compensation and it was evidently inspired by the law which had been adopted by France in 1898 in the same matter. We find in the Quebec law almost the same provisions as those in the French law of 1898, same industrial establishments, same basis of salary and indemnity, same prescription and same petition for authorisation and conciliation.

But it omits regarding the subject of conciliation to declare that it interrupts prescription. It was not necessary to declare this in the French law for the good reason that there was already a provision to that effect in art. 2245 of the Civil Code.

Also when the French Courts were called in to examine the effect of the petition in authorisation or in conciliation under the Workmen's Compensation Act, they decided that it interrupted prescription. Sirey—1907-1-183-416. Sachet, vol. 2, n. 1299.

In France the question was whether the summons in conciliation was to be considered as a notice to appear before the Justice of the Peace under the terms of a law of 1855 which was not interruptive of prescription, or as a summons in conciliation which under the terms of art. 2245 C.N. interrupts prescription. The Courts as I have just said concluded that it was a summons in conciliation.

I am of the opinion that our art. 7347 is a proceeding in conciliation. And as we have no provision in the Civil Code declaring that this procedure interrupts prescription as in France, these decisions or opinions of French authors cannot be invoked. May it not be said, however, that the petition in question constitutes a judicial demand as referred to in art. 2224 of the Civil Code? What is a judicial demand? Pigeau says that it is the exercise of an action, that is to say, of the right to sue for the thing due or for damages caused.

But before bringing an action it is necessary to consider what must be done before that right can be exercised. Among the conditions required prior to the taking of an action are the petitions for authorisation to sue that women and others are obliged to make. Garsonnet says, Precis de Procedure Civile, ed. 1885,

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pp. 391-392: Procedure has for its end the obtaining of a judgment. How is a judgment obtained? By demanding it. The judicial demand, by which all actions are begun, may however be itself preceded by certain formalities. 2. Some demands cannot be made without a judicial authorisation; such are actions in separation as to property or in separation as to bed and board. 4. Demands by which action is taken and which are susceptible of settlement, before they are heard by the Court of first resort, are subject to a tentative or preliminary attempt at conciliation at the office of the peace or the conciliation office, this preliminary having been instituted by the legislator with a view to promoting agreement and philanthropy, in the public and private interest.

This last case is precisely that referred to in art. 7347 of the Workmen's Compensation Act. Before he appears in Court the victim of the accident is held to appear before the Judge in Chambers to seek his authorisation to sue and at the same time to allow an opportunity of settlement between the parties. Naturally, if this conciliatory procedure is unsuccessful, the plaintiff must bring his action by means of a writ of summons (art. 117 C.C.P.). This is the judicial demand itself, properly served, which interrupts prescription under art. 2224 of the Civil Code. The demand of judicial assistance to bring an action does not interrupt prescription. Laurent, vol. 32, nos. 87 and 92; Huc, vol. 14, no. 385; Baudry-Lacantinerie, vol. 25, no. 479; *Dupuis* v. *Canadian Pacific R. Co.* (1897), 12 Que. S.C. 193.

In the present case there has not been any interruption of prescription by the simple presentation of the petition, because the petition does not constitute a judicial demand, but is simply a formality which must precede the demand itself. The first action taken by the plaintiff was dismissed for insufficiency of its allegations (art. 2224 C.C. (Que.)).

The Quebec jurisprudence has wavered on this question. It was first decided that the petition did not interrupt prescription, in a case of *Ruffinen* v. *Quebec and St. Maurice Industrial Co.* (1914), 20 Rev. Leg. 85. The contrary view was upheld by the Superior Court in the case of *Francoeur* v. *Cairnie* (1914), 16 Que. P.R. 118, and also by the Court of Review in *Fontaine* v. *Cabana and East Smelting Co.* (1915), 48 Que. S.C. 230, and *Squizzato* v. *Brennan* (1916), 51 Que. S.C. 301. This last decision

was rendered about 2 years ago. I note that it is based principally on the opinion of Sachet, vol. 2, no. 1299. This author, however, relied on art. 2245 of the Code Napoleon which is not reproduced in the Civil Code of Quebec. The opinion of Sachet cannot therefore be invoked to dispose of the question under our law.

The plaintiff further claims as an interruption of prescription the payments of salary made by the company-appellant to the plaintiff when the latter was disabled from working. It is possible that in some cases payments of salary might be held to constitute an acknowledgment of liability. Ordinarily, however, they ought to be considered simply as acts of charity. Under the circumstances, I have no hesitation in finding that these payments did not constitute an acknowledgment sufficient for the purpose of interrupting prescription.

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I have therefore come to the conclusion that the judgment *a quo* must be reversed with costs in this Court and in the Court of Appeal. I would re-establish the conclusions of the judgment of the Superior Court, but I cannot approve of the considerants of this judgment, wherein it is held that the petition for authorisation to sue may interrupt prescription and forms an integral part of the original action.

MIGNAULT, J.—I agree entirely with my brother Brodeur, that the respondent's action was prescribed long before it was taken. I am also of the opinion, for the reasons given by my brother, that the petition for authorisation to sue did not interrupt the prescription of the action taken several months after the authorisation had been granted. The respondent took a first action against the appellant without setting up the authorisation to sue which he had obtained and which should have appeared of record. He also failed to allege that the appellant was subject to the provisions of the Workmen's Compensation Act. This action was dismissed by Belleau, J., 17 months after the accident, on the ground that plaintiff's allegations were not sufficient to entitle him to be indemnified by his employer under the provisions of the Workmen's Compensation Act. At the time of this judgment plaintiff's right of action was already prescribed, and by the judgment dismissing his claim, he lost the benefit of his first action as an interruption of prescription. With all due respect it

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seems to me that under the circumstances, since he considered the allegations insufficient, the trial Judge should have given the plaintiff the opportunity of amending his declaration before dismissing his action, and if the plaintiff had then decided to take the risk of leaving his action unamended, he should have noted this fact in his judgment. If plaintiff had appealed from the judgment of Belleau, J., I would have been inclined to order all such amendments as might be necessary to do justice to plaintiff, as we are allowed to order under sec. 54 of the Supreme Court Act, R.S.C. 1906, ch. 139. The Code of Civil Procedure ought to grant this same right to the Court of Appeal, to avoid the useless return of a case to the Court of original jurisdiction. Unfortunately we can do nothing to help the plaintiff as the only action before us is an action which was prescribed before it was taken.

I am also of the opinion that the payments made by defendant to the plaintiff do not constitute an acknowledgment of debt and are not therefore interruptive of prescription. The only evidence as to these payments is found in plaintiff's deposition. He says that while he was in hospital the defendant paid him his entire salary, and from the month of December placed him on half-pay. In May he returned to work with defendant and received higher wages than he had received before the accident. It is clear that humanity was the motive for the payments made up to the month of May, for defendant always denied that it was subject to the provisions of the Workmen's Compensation Act, and could not therefore have in mind an acknowledgment of a liability which it absolutely denied. Besides the amounts paid to the plaintiff were far in excess of what he would have received had the Workmen's Compensation Act applied. From the month of May, plaintiff was paid for his work, and nothing more. I think that under the circumstances it is clear that these payments did not interrupt prescription.

Not without regret I express my opinion that the appeal should be allowed and the conclusions of the judgment of the Superior Court restored, with costs against the plaintiff in this Court and in appeal. *Appeal allowed.*

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.

In re THE SHIP "SAMUEL MARSHALL." CAN.

Exchequer Court of Canada in Admiralty, Cassels, J. January 23, 1921. Ex. C.

ADMIRALTY (§ II—5) — *Practice — Shipping — Appeal from Deputy Local Judge—Bond—Rules 158 and 174.*]—In an action for wages the Deputy Local Judge of the Quebec Admiralty District had given judgment for the plaintiff in an amount of $66.50 against the ship. An application in the first instance to the Local Judge in Admiralty for an order authorising the security on appeal by the defendant ship to the Exchequer Court to be given in the form of a bond. This application was refused by the Local Judge. Thereupon an application to the Judge of the Exchequer Court to allow the bond as security was made by the appellant.

T. M. Tansey, K.C., for appellant.

H. E. Walker, for respondent.

Per Curiam:—Upon a proper interpretation of R. 158 the security therein referred to may be given by way of a bond approved by the Registrar of the Court.

Under the provisions of R. 174, while in such a case the application must be made in the first instance to the Local Judge in Admiralty, yet where such Judge refuses the application a substantive application may be made to the Judge of the Exchequer Court, and that application is not by way of appeal from the refusal of such a prior application by the Local Judge in Admiralty. *Cropper* v. *Smith* (1883), 24 Ch. D. 305, referred to.

IMPERIAL BANK v. TRUSTS AND GUARANTEE Co. ALTA.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 7, 1921. S. C.

EVIDENCE (§ VI F—540)—*Promissory note—Death of endorser—Action against administrators—Proof of notice of dishonour—Corroborative evidence—Waiver.*]—Appeal by defendants from the trial judgment in an action on a promissory note. Affirmed.

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

Frank Ford, K.C., and *G. H. Ross*, K.C., for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—The defendants are the administrators with the will annexed of I. S. G. Van Wart, deceased, against whom, before his death, this action was begun upon a promissory note of which he was an endorser. A defence was set up that no notice of dishonour was given, whereupon the plaintiffs amended by setting up an alternative claim on an earlier note in respect of which notice of dishonour could be proved. On the trial before Hyndman, J., judgment was given for the plaintiffs upon the last note which was first set up. This appeal is from that judgment. The only specific grounds of appeal are: 1. That there was no sufficient "corroboration as required by law of the plaintiff's claim," and 2, that interest was improperly allowed at 8%.

It was pointed out in the argument that though the trial Judge had given the plaintiffs liberty to sign judgment for an amount including interest at 8%, as provided by the note, the interest for which the formal judgment was actually signed was computed at 5%. This leaves only the ground of want of corroboration.

The Alberta Evidence Act, 1 Geo. V., 1910, ch. 3, sec. 12, provides that:—

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

The note in the present case was protested but the notice sent to the deceased did not, in my opinion, comply with the Bills of Exchange Act, R.S.C., 1906, ch. 119. The statement of claim alleges that the failure to give the statutory notice of dishonour was waived. There is evidence from which it may be inferred that notice of dishonour was given to and received by the deceased, but not the notice the statute calls for. And it is sworn by a witness, who says he is the secretary of the bank, that thereafter in compliance with a request sent him, the deceased called and had an interview with him regarding his liability and that the deceased told him that the maker of the note was the primary debtor and asked for time to communicate with him and requested the bank

not to sue. The witness promised not to sue upon his agreeing to pay within a reasonable time.

This is the evidence which the defendants contend requires corroboration under the above statutory provision.

On the day of the interview mentioned the secretary wrote a letter which the defendants put in evidence which confirms in part the evidence he gives of the nature of the interview but does not say that any promise was given to pay.

I feel some doubt, as the trial Judge did, whether this letter is really corroborative evidence, but there were other letters in evidence which were sent to the deceased, which it may be inferred from other evidence were received by him and the circumstances connected with these letters and his conduct thereon, might, it seems to me, perhaps not improperly be considered as corroborative of the witness' testimony. I do not, however, find it necessary to determine whether there was in fact any corroborative evidence because in my opinion the statutory provision does not apply. It only provides that the evidence of "an opposite or interested party" must be corroborated. Now the evidence in this case is that of an employee of the party. Whether under any circumstances the section could apply where the interested party is a corporation which is incapable of giving evidence is very questionable, but I see no reason why it should apply to the evidence of an agent or employee of an artificial person any more than it would to the agent or employee of a natural person and it certainly does not in terms apply to the latter case. No doubt the supposition that it applies in such a case as this is because a corporation cannot give evidence otherwise than by its officers or employees but it does not necessarily follow that such evidence, though adduced on behalf of, is the evidence of the corporation. In the case of a natural person no confusion would arise. Wigmore on Evidence, paras. 578 and 2065, points out that this provision for corroborative evidence is a substitute for the survival which still exists in some jurisdictions of the absolute exclusion of the evidence of an interested party in the case where the opponent is deceased. Until the middle of the last century the exclusion of the evidence of the parties was general and such exclusion was based upon the view that because of their financial interest in the subject of litigation their evidence would be untrustworthy. That being the principle

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upon which such exclusion was upheld and the corroboration under our statute is required the limit of its application must be determined by the financial interest of the witness. Such being the case there seems no reason why the evidence of an employee should be considered for the purpose either of exclusion or of corroboration. In the case of a corporation it is the shareholders and perhaps the bondholders rather than the officers, or managers, or employees, who are financially interested and if the statute is to apply to corporations, on principle they would seem to be the persons whose evidence would require corroboration. If no corroboration was required by law then the only ground of appeal fails.

Counsel for the appellant, however, argued that the evidence does not establish waiver. Counsel for the respondent objected that this was not open on the notice of appeal and counsel for the appellant asked if that were the case that he be allowed to amend.

I am by no means sure that the Court in the exercise of a reasonable discretion ought to grant at this stage such an amendment simply to permit a defendant to escape from a just obligation by reason of a slight omission which in no way prejudiced him but which would constitute a legal defence. I do not, however, find it necessary to decide that point for I feel no doubt that the evidence, if believed, and the judgment leaves no doubt that it was believed, establishes not merely a waiver but something more than a simple waiver, for a promise to pay in consideration of time given to the debtor is, I think, more than simply waiver but, on the authorities, it seems quite clearly to be sufficient to justify a disregard of the failure to give the requisite notice of dishonour. The question of the admissibility of the affidavit of the deceased and one or two other questions raised on the argument do not call for consideration in view of the conclusion on the points considered.

I would dismiss the appeal with costs.

Appeal dismissed.

McCULLOUGH AND FORSTER v. ELLIOTT AND PELTON.

Alberta Supreme Court, Hyndman, J. March 29, 1921.

MORTGAGES (§ II A—35)—*Priority — Registration — Assignment—Subrogation.*]—Application for the purpose of determining the right of priority of the plaintiff against sects. 2 and 11 in Tp. 14,

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Range 23, West of the 4th Meridian by reason of the subrogation of the plaintiffs to the Guelph and Ontario Savings Company, mortgagee and Gerald Hamilton, mortgagee, in two certain mortgages registered against the said sections given by virtue of a judgment of Walsh, J., in Supreme Court case number 13303, in which the said McCullough and Forster were plaintiff and the Toronto General Trusts Corporation, administrator of the estate of Henry Marsden, Jr., deceased, was defendant.

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

D. S. Moffat, for defendants.

A. B. Hogg, for administrator.

HYNDMAN, J.:—The facts upon which the said judgment was based are set out in the judgment of Walsh, J. (1918), 14 Alta. L.R. 94, and in the judgments of Beck and Simmons, JJ., in the Appellate Division (1919), 45 D.L.R. 645, and it is unnecessary to repeat them here.

The said Elliott and Pelton are now holders of a mortgage registered subsequently to the said two recited mortgages and which latter mortgage, which I will call the third mortgage, is numbered 3727BL, dated February 15, 1915, and registered in the South Alberta Land Registration District on April 29, 1916, was made by the said Henry Marsden, Jr., to John D. McDonald and Malcolm C. Elliott, the said McDonald having assigned his interest to the above defendant Pelton, and prior to the administration of the estate by the Toronto General Trusts Corp. the interest of the said Marsden was encumbered by the said three mortgages.

In the action above referred to the third mortgagees were not parties and consequently it is necessary to determine the rights as between them to the subrogated mortgagees McCullough and Forster.

It is admitted that the payments to the first and second mortgagees of $1,506.20 and $7,000 were made out of the plaintiffs' monies at a date prior to the making or registration of the defendants' third mortgage. Under the circumstances therefore it is my opinion that the right to subrogation declared by the judgment above referred to arose immediately the payments were made to the first and second mortgagees and consequently was in existence and attached prior to the defendants' mortgage and

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therefore should take precedence over the defendants' third mortgage. As I see it in effect the first and second mortgages, *qua* the said payments, at least in the absence of estoppel, stand as though they had never been reduced, the parties subrogated occupying the position of the mortgagees to the extent of the payments made out of their funds.

It was stated at the argument that as a matter of fact the defendants had no information as to the state of the accounts between the first and second mortgagees and so far as they were concerned the mortgagees might have existed to the extent of their full face value. That being the case there could be no real injustice it seems to me in declaring the defendants' rights to be subject to those of the plaintiffs. Had the facts been however that on proper inquiry from the first mortgagees they had received information that the mortgages had been so reduced, and being ignorant of the surrounding facts with regard to the plaintiffs' rights of subrogation and *bonâ fide* advance the money on the assumption that such mortgages had been so reduced then I would think that the defendants' mortgage would take priority on the principle that where one of two innocent persons must suffer by the act of a third, he who enables such person to occasion the loss must sustain it. Here the lack of vigilance or of providing proper safe-guards on the part of the plaintiffs as against improper use of their money by their agent would constitute the enabling act. However, it is not necessary to consider this point, inasmuch as the position of the prior mortgagees so far as it appears did not in any way influence their conduct or dealings with the mortgagor.

The result must therefore be that as between the parties to this motion the rights of the plaintiffs will take priority over those of the defendants.

The question of costs was raised by the administrator. It was decided in the judgment of Walsh, J., 14 Alta. L.R. 94, and the Appellate Division, 45 D.L.R. 645, in the action referred to that the costs of the administrator should take priority over the plaintiffs' claim for the reason set out in the said judgment, but I am unable to see upon what principle the defendants' mortgage should be made subject to such costs. It would seem to me too that in case of a deficiency on the distribution of the assets there must be an adjustment with reference to the costs as between the

plaintiff and defendant herein and the administrator. To put the matter in a practical way I think that the assets should be distributed between these creditors and the administrator on the following basis and in the following order:—

(1) The whole of the first two mortgages, including the plaintiffs' subrogated mortgage, subject to what I say below under item three. (2) Defendants' mortgage. (3) The costs of administration, providing that should there not be sufficient remaining to pay such costs or a portion of them, then the amount of the deficiency should be deducted from that portion of the first mortgage to which the plaintiffs have been subrogated.

There will therefore be judgment that the plaintiffs' subrogated rights under the mortgages in question shall take priority over those of the defendants on the terms and condition above set forth. Costs of this application to be costs payable out of the estate, but in case there shall not be sufficient moneys in the hands of the administrator to pay such costs on a final distribution then the costs of this motion shall be payable by the defendants.

Judgment accordingly.

MUIR v. CANADIAN PACIFIC R. Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 11, 1921.

MASTER AND SERVANT (§ II B—146)—*Assumption of risk—Mining shaft—Omission to give signal to engineer to hold cage—Descent of cage—Injury—Liability—Workmen's Compensation Act.*] —APPEAL by defendant from a judgment for the plaintiff for $10,433.79 damages for injuries received by being struck by a descending cage in a mine. Reversed.

G. A. Walker, K.C., and *J. McCaig*, for appellant.

A. M. Sinclair, K.C., and *H. Ostlund*, for respondent.

The judgment of the Court was delivered by

STUART, J.:—The plaintiff was a miner in the employ of the defendant company who was operating a coal mine near Lethbridge, known as "Mine No. 6." His employment was as a toolsman looking after tools and timbers and he was also required to examine, and if necessary, repair the shaft leading down to the mine and the machinery in connection with the cages operating therein. There was also imposed upon him one other duty during the performance of which the accident happened. The shaft was some 400 ft. deep and at the bottom of it there was an excavation of the same size

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as the shaft, some 14 ft. deep, known as the "sump," into which the water of the mine was drained and from which it was pumped. This sump was covered with heavy timbers upon which the cages rested when they were at the bottom of the shaft. There was a small trap door, about 20 inches square, covering an entrance to the sump. This entrance or opening was used as a means of examining the sump, *i.e.*, seeing how much water there was there and if it needed pumping, etc. Two cages operated up and down the shaft for the purpose of raising the cars of coal to the tipple above and for lowering men and material into the mine. These cages moved alternately, *i.e.*, as one went up the other came down. When one was at the bottom of the shaft the other would be up at the tipple considerably above the surface of the ground. Persons desiring to go down into the mine would enter at the surface where a cage would be stopped for that purpose. The cages were operated by an engine and cables. The engine room was on the surface of the ground about 30 or 40 ft. from the entrance to the shaft. An engineer operated the engine and cables, taking his orders by a system of electric bell signals. There was a bell at the bottom of the shaft which could be rung by a push on a button in the engine room. There was reversely a bell beside the engineer in the engine room, which could be rung by a push on a button at the bottom of the shaft and there was also a button at the surface of the shaft which operated a bell in the engine room. There was also a telephone between a point near the bottom of the shaft and the engine room.

The plaintiff was accustomed to examine the sump on holidays, usually on Sunday, when the mine was not in operation and the cages not moving frequently. He had been ordered on a Thursday to inspect the sump on the following Sunday, which was March 11, 1917. He accordingly came to the shaft to go down for that purpose at about 7.30 a.m. In his evidence he swore positively that he first went into the engine room and told the engineer, one Tobachi, that he was going down to examine the sump. This the engineer as positively denied. He then went and rang the bell which would indicate to the engineer that he desired a cage. This was brought to the surface, he entered it and went to the bottom of the shaft, where he left the cage. He then rang the bell to the engine room in a way to indicate, according to the code

of signals, that he was out of it and that the engineer could have it. The engineer then hoisted the cage about 30 ft. and stopped it there, which was the usual position when the cages were not required. The plaintiff then went along a corridor of the mine some 158 ft. to the cabin of the pit boss, one Reber, and remained in conversation with him for some time, somewhere between ten minutes and half an hour, and he and Reber then returned to the bottom of the shaft. Reber went around a man-way on some other duty and the plaintiff proceeded to examine the sump by opening up the trap door referred to. He said that before doing so he noticed that the cage in which he had descended was stationary some 30 ft. above him. While he was upon his knees about to look into the sump, the other cage, which was the one immediately above the trap door, came down upon him from above and he was very seriously injured.

The particulars of negligence charged by the plaintiff against the defendant were, when sifted down to distinct allegations: 1. In not warning the plaintiff of the lowering of the cage. 2. In not providing a proper system for the warning of workmen engaged at the bottom of the shaft that the cage was being lowered. 3. In not having a person at the bottom of the shaft to warn the workmen that the cage in the said shaft was being lowered. 4. In not providing a proper system of bells or other equipment in the engine room by which workmen at the bottom of the shaft could warn the engineer that employees were engaged at the bottom of the shaft and the cage should not be lowered until further signals were given.

The defendant in addition to general denials pleaded: 1. That the accident was wholly caused by the plaintiff's own negligence. 2. That the plaintiff, before the action was begun, claimed and received from the defendant a payment of and in respect of compensation under the Workmen's Compensation Act 1908 (Alta.), ch. 12, for the personal injury in question and that by the terms of that Act the plaintiff was thereby barred from any common law remedy.

At the trial the presiding Judge did not ask questions of the jury but left it to them to bring in a general verdict. Instead of doing so in simple language, the jury handed in a written verdict of some length, which read in part as follows:—

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There is no evidence in our opinion that the plaintiff ever put in any application for compensation. We therefore cannot consider the cheque for $165.71 accepted by the plaintiff as being on account of compensation.

Evidence shews that during week-days a cage man is continuously in charge of cage while in operation but on Sundays and idle days no cage man is employed. We are therefore of opinion that a cage man should be in charge of cage at all times while in operation and if this precaution had been employed this accident to the plaintiff would not have occurred. We therefore believe that the defendant is responsible for injuries done the plaintiff.

They then gave an itemised assessment of damages amounting in all to $10,433.29.

The defendant raises several grounds of appeal, the chief of which are these: 1. There was no evidence from which the jury could reasonably infer any negligence on the part of the defendant or from which they could infer that any negligence of the defendant was the cause of the accident. 2. The evidence shewed that the accident was the result of and caused by the plaintiff's own negligence. 3. That the evidence shewed that the plaintiff had accepted compensation under the Workmen's Compensation Act. 4. That the jury's finding that the plaintiff had not accepted compensation because he had made no claim for it, was not really a finding that he had not accepted compensation. 5. That the jury returned no finding as to whether or not the plaintiff had been guilty of negligence which was the cause of the accident.

Now it is clear that on the face of the verdict returned by the jury there is only one ground of negligence sustained. They say that the defendant company should have had a man at the cage at the bottom of the shaft on Sundays as it did on other days and that the accident would not have happened if such a man had been there, and that *therefore* the company was responsible for it.

The first question to decide, therefore, is whether there was any evidence from which a jury could reasonably come to such a conclusion.

The plaintiff admitted in his evidence that he could, by the use of certain signals to the engineer, which were well known to and understood by him, have kept the control of the cages in his own hands. After he had left the cage and rung the bell to indicate to the engineer that he might take the cage away, it was, according to the admitted rules, quite within his power to start the cages by another ring and then stop them by still another

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one whereupon the engineer was by rule forbidden to move the cage until he got a signal from the same push button or a message on the telephone from below. It was thus absolutely in the power of the plaintiff to have protected himself completely. He admits in his evidence that he could have done so in this way, and in talking of the accident afterwards to the pit boss, Reber, who was his friend, he admitted that he was himself to blame. This is the evidence given by Reber:

Q. Did he tell you on that occasion that it was his fault because he should have called up the engineer and told him he was going to examine the shaft? A. Well he didn't tell me straight that, you know, we were talking about the work. Q. What did he say? A. Well he said . . . Q. Did he tell you anything like that? A. He says he ought to notify the engineer, that is about all. Q. He says he should have notified the engineer? A. Yes, but he didn't tell me straight that it was his fault. Q. He didn't use the word fault? A. No. Q. But in talking about the accident he told you he ought to have notified the engineer? A. Yes, he told me he ought to have notified him but he thought it was going to take him only a few minutes to look in there and he thought it would be all right.

Reber was a witness for the plaintiff and this evidence was given on his cross-examination and of course the plaintiff did not contradict it.

It is true that the plaintiff in his evidence endeavoured to assert that the engineer should have rung two bells from above before lowering the cage but there was no other evidence to support his assertion that this was the rule or the engineer's duty, it is inconsistent with his admission to Reber and the jury have not found that the engineer was at fault in this respect or in any respect.

Upon his own admission the plaintiff knew the cages were liable to be moved at any moment, he knew that by the simple expedient of giving two separate signals he could secure complete control of the cages and be absolutely safe, yet (as he told Reber in effect) he took the chance because he thought he would be "there only a few minutes."

I am unable to discern how any jury could reasonably infer in the face of such evidence that it was the absence of a cage man that was the real cause of the accident. It is simply a *non sequitur* to say that because the accident would not have happened if a cage man had been there, therefore the failure to have a cage man there was the cause of the accident. The plaintiff knew there

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was no cage man there. His own omission to do what he admitted he ought to have done in those circumstances was obviously the real cause of the accident.

The case of *Canadian Pacific R. Co.* v. *Frechette*, 22 D.L.R. 356, [1915] A.C. 871, 24 Que. K.B. 459, 18 Can. Ry. Cas. 251, is quite sufficient authority for taking this view as the situation was there substantially the same as here, except that there the plaintiff did something which he knew he should not have done, while here, the plaintiff was guilty of a culpable omission.

This is sufficient, I think, to defeat the plaintiff's claim at common law and it is, therefore, unnecessary to deal with the other defences raised. The appeal should be allowed with costs, and the action dismissed with costs.

As the defendant admitted that the plaintiff is entitled to compensation under the Workmen's Compensation Act, the plaintiff will no doubt take the necessary steps to have the amount ascertained. *Appeal allowed.*

In re TREVANIAN, A SOLICITOR.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 11, 1921.

SOLICITOR (§ III—45)—*Services rendered—Criminal matter—Dispute as to charges—Duty of Court to investigate—Taxation of costs.*]—Appeal from the trial judgment in an action against a solicitor. Reversed.

A. H. Goodall, for appellant; *O. E. Culbert*, for Trevanian.

The judgment of the Court was delivered by

HARVEY, C.J.:—Inasmuch as the services rendered by the solicitor were due to his being a solicitor and an officer of this Court, it is the duty of the Court, if called on, to ascertain whether his charges are consistent with his duty as an officer of the Court, and notwithstanding the fact that there is no tariff of fees for services in criminal matters and the Rules of Court respecting taxation are in relation to civil matters, there seems no good reason why resort should not be had to them for the purpose of starting proceedings if objection is not made as was the case here.

The client is entitled to have the question of the alleged agreements and their binding character determined by a Judge and if

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it is found that he is at liberty to go into the question of the reasonableness of the charges to have that question also dealt with by the Judge.

The appeal will, therefore, be allowed and the whole matter remitted to a Judge for consideration to be brought up on notice to be given by the client. It is apparently impossible to bring before the Judge the evidence taken before the Clerk so it will be necessary for him to deal with it *de novo*.

It seems a proper case to leave to him the question of all the costs of the proceedings including the cost of the appeal and the other proceedings already had and in disposing of them it will be proper for him to consider the Rule of the Court as to costs in the ordinary taxation of costs as between solicitor and client.

Judgment accordingly.

REX v. SAMUEL DIAMOND; REX v. JOS. DIAMOND; REX v. TABOR; REX v. GOTTSCHALK.

Alberta Supreme Court, Ives, J. March 8, 1921.

INTOXICATING LIQUORS (§ III A—55)—*Unlawful sales—Persons aiding or abetting—Liability—Alberta Liquor Act (1916), Alta., ch. 4, sec. 75.*]—Appeal from a magistrate's conviction under the Alberta Liquor Act.

A. A. McGillivray, K.C., for the Diamonds; *F. C. Moyer*, for Tabor.

J. B. Barron, for Gottschalk; *H. W. Lunney*, for the Crown.

IVES, J.:—Except as to the defendant Tabor, it is only necessary to read the evidence and examine the exhibits to arrive at an irresistible conclusion of guilt. Any magistrate could come to no other conclusion. But in the case of the defendant Tabor, I regret that the police did not give him a little more rope. I have no doubt in my own mind of his guilt, but, as the evidence is, the conviction against him must be quashed without costs and with the usual order protecting the magistrate.

As to the two defendants Diamond, their counsel cites the authority of *Rex* v. *Martin* (1916), 28 D.L.R. 578, 26 Can. Cr. Cas. 42, 9 Alta. L.R. 265. While I am bound by that judgment, where it is applicable, I do not agree with the statement of the law there. I concur with the dissenting judgment of Stuart, J. However, that judgment was under the Liquor License Ordinance,

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Cons. Ord. of N.W.T. (1898), ch. 89, now repealed, and dealt with the relationship of employer and employee. It should not, in my opinion, be extended beyond the facts upon which that case was stated. Under the present Liquor Act, 1916 (Alta.), ch. 4, we have in sec. 75 (a new section added by ch. 22, sec. 15 of the statutes of 1917) this specific declaration of the law:—

Everyone is a party to and guilty of an offence against this Act who—(a) actually commits it; (b) does or omits any act for the purpose of aiding any person to commit the offence; or (c) abets any person in commission of the offence; (d) counsels or procures any person to commit the offence

In the face of this section I think *Rex* v. *Martin* is no longer an authority.

The applications, then, on behalf of the Diamonds and Gottschalk are refused and the convictions affirmed with costs.

There is the further application on behalf of Gottschalk that the magistrate's order forfeiting the liquor be set aside. This, I am bound to do because the provisions for forfeiture apply only where the conviction is upon the charge of having or keeping for sale. But I will make no order restoring the liquor. Gottschalk says it is not his, hence a restoration to him would but involve him in further trouble. The Diamonds have received payment for this liquor, hence they have no beneficial interest and, of course, Tabor was not interested except in getting a free sleigh ride.

The only reasonable thing to do is to leave the possession of it with the Crown, pending an application by an owner and where such is made, I have no doubt the applicant's title and right to possession will be subjected to careful scrutiny in view of the evidence in the present case.

Judgment accordingly.

WINFREY v. WINFREY AND CLUTE.

Alberta Supreme Court, Scott, J. March 26, 1921.

HUSBAND AND WIFE (§ III A—143)—*Action by husband for divorce—Alienation of wife's affections by co-respondent—Resumption of cohabitation between husband and wife—Discontinuance of divorce action—Action for alienation proceeded with—Amendment of statement of claim—Necessity for.*]—ACTION by husband for damages for alienation of wife's affections.

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G. W. Massie, for plaintiff.

W. J. A. Mustard, for defendant Winfrey.

N. D. Maclean, for defendant Clute.

SCOTT, J.:—This was originally a divorce action in which the defendant Clute was added as a defendant by order of Hyndman, J.

In the statement of claim it is charged, among other things, that the plaintiff and the female defendant were married in 1912; that in May, 1920, the latter quit the bed and board of the plaintiff at the suggestion and instigation of her co-defendant and has since remained away therefrom; that at certain specified times and places the defendants together committed adultery; that the plaintiff has suffered damage by the defendant Clute wrongfully alienating the affections of his co-defendant and enticing her, knowing her to be the plaintiff's wife, unlawfully against his will to depart and remain absent from his house and society; and that by reason thereof he has been deprived of the comfort, affection, society and services of his wife and of cohabitation with her and has suffered much mental anxiety and has incurred sundry expenses. The plaintiff's claim, as against his wife, was for dissolution of the marriage and the custody of his children, and as against defendant Clute, special and general damages and costs.

The defendants subsequently applied to the Master at Edmonton to dismiss the action on the ground that the plaintiff had resumed cohabitation with his wife and it was admitted that cohabitation between them had been resumed. The plaintiff, however, desired to proceed with the action against defendant Clute for damages for alienating his wife's affections and enticing her away. The Master held that he had right to do so and, by his order now appealed against, he gave him leave to amend his statement of claim, such amendment to be made within 15 days from the date of the order and the action entered for trial within 2 months from that date with costs to defendant Clute in the cause.

The plaintiff elected not to amend under the order and, by consent of the solicitors for the parties, that part of the Master's order relating to such amendment was abandoned. On February 3, 1920, the plaintiff gave notice of the discontinuance of the action as against his wife.

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The action was originally a divorce action coupled with an action against the defendant Clute for alienating the affections of the plaintiff's wife. The action having been discontinued as against the latter it is no longer a divorce action but merely an action against defendant Clute alone for such alienation. This constitutes a good ground of action and the allegations in the statement of claim are sufficient to disclose such a cause of action. It is true that it contains allegations which have no bearing upon such a claim and are therefore redundant but I cannot see that the defendant is in any way prejudiced by them.

I dismiss the appeal with costs.

Judgment accordingly.

B. C.

S. C.

REX v. CHOW CHIN.

British Columbia Supreme Court, Hunter, C.J.B.C. October 26, 1920.

COURTS (§ II A—175)—*Conviction under Criminal Code—Appeal to County Court Judge—Refusal of County Judge to issue bench warrant for production of witnesses—Refusal to grant adjournment—Conviction affirmed—Appeal under sec. 750 Criminal Code—Habeas corpus—Certiorari—Jurisdiction of Supreme Court to review proceedings before County Court.*]—Application for a writ of *habeas corpus* with *certiorari* in aid.

The facts of the case are as follows:—

The accused was convicted by H. C. Shaw, Police Magistrate in and for the City of Vancouver, on March 16, 1920, for that he did on February 22, 1920, at the city of Vancouver, without lawful or reasonable excuse, have in his possession drugs, to wit: cocaine, morphine and heroin, for other than scientific or medicinal purposes, for which offence he was sentenced to one year in jail and to pay a fine of $500 or in default 3 months' imprisonment.

The accused appealed to Cayley, Co. Ct. J., on May 26, 1920, who affirmed the conviction of the police magistrate. During the trial before Cayley, Co. Ct. J., counsel for the accused applied to the Court to have a bench warrant issued for the arrest of two witnesses who had failed to appear, after having been served with subpoena.

The accused, in his defence, alleged that two other Chinamen resided in the house where the drugs were found, and that he had nothing to do with them.

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These other two Chinamen were the witnesses who had failed to appear under a subpoena.

The County Court Judge refused to issue a bench warrant for the production of the two witnesses, or to grant an adjournment for this purpose, and proceeded with the hearing of the appeal.

Application was made to Hunter, C.J., for a writ of *habeas corpus* with *certiorari* in aid and came on for hearing on October 26, 1920.

Upon the application coming on for hearing, W. M. McKay, counsel for the Crown, took preliminary objection that the County Court was a Court of Record, and the proceedings before the County Court Judge could not be reviewed on the present application.

R. L. Maitland, for the accused. As to the right to *certiorari* to review the proceedings before the County Court, see 10 Hals., p. 155, para. 310, p. 160, para. 320; see also *Rex* v. *Emery* (1916), 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139; *The King* v. *Forbes* (1904), 36 N.B.R. 580; *Rex* v. *Evans*; *Re Fisher* (1915), 24 Can. Cr. Cas. 125, 21 B.C.R. 322; *Ex parte Roy* (1907), 12 Can. Cr. Cas. 533; *Rex* v. *Allingham*; *Ex parte Keefe* (1913), 12 D.L.R. 9, 21 Can. Cr. Cas. 268; *The Queen* v. *Ellis* (1866), 25 U.C.R. 324; *The Queen* v. *Peterman* (1864), 23 U.C.R. 516; *The Queen* v. *McAnn* (1896), 3 Can. Cr. Cas. 110, 4 B.C.R. 587; *Rex* v. *Lewis* (1918), 25 B.C.R. 442. As to the merits, there is a distinction between an ordinary adjournment and the present case, where the accused has invoked the only procedure open to procure the attendance of his witnesses. This amounts to a failure to permit the accused to make full answer and defence and goes to jurisdiction. See *The King* v. *Farrell* (1907), 12 Can. Cr. Cas. 524; *The King* v. *Lorenzo* (1909), 16 Can. Cr. Cas. 19; *Reg.* v. *Eli* (1886), 10 O.R. 727; *The King* v. *Nurse* (1904), 8 Can. Cr. Cas. 173.

W. M. McKay, for the Crown. *Certiorari* is taken away by sec. 12 of the Opium Act, 1-2 Geo. V. ch. 17. The application is based on a matter of procedure only, and does not go to the jurisdiction. *Rex* v. *O'Brien*; *Rex* v. *Theriault* (1917), 41 D.L.R. 97, 29 Can. Cr. Cas. 141; *Rex* v. *Warne Drug Co. Ltd.* (1917), 37 D.L.R. 788, 29 Can. Cr. Cas. 384, 40 O.L.R. 469; *Rex* v. *Cantin*; *Rex* v. *Weber* (1917), 28 Can. Cr. Cas. 341, 39 O.L.R. 20; *Rex* v.

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Chappus (No. 2) (1917), 28 Can. Cr. Cas. 411, 39 O.L.R. 329; *Rex* v. *McLatchy* (1916), 28 Can. Cr. Cas. 277, 44 N.B.R. 402; *The King* v. *Lawlor*; *Ex parte Doyle* (1916), 31 D.L.R. 90, 27 Can. Cr. Cas. 60, 44 N.B.R. 90, which follows: *Ex parte Morison* (1909), 16 Can. Cr. Cas. 28, 39 N.B.R. 298; *Rex* v. *Pudwell* (1916), 26 Can. Cr. Cas. 47; *Rex* v. *Carter* (1916), 28 D.L.R. 606, 26 Can. Cr. Cas. 51, 9 Alta. L.R. 481; *The King* v. *Shaw*; *Ex parte Kane* (1915), 27 D.L.R. 494, at p. 496, 26 Can. Cr. Cas. 156, at p. 158; *Rex* v. *Hoare* (1915), 24 Can. Cr. Cas. 279, 49 N.S.R. 119; *Ex parte Monahan* (1909), 17 Can. Cr. Cas. 53, 39 N.B.R. 430; *The King* v. *Horning* (1904), 8 Can. Cr. Cas. 268; *Reg.* v. *Dunning* (1887), 14 O.R. 52. See also secs. 752, 1121 and 1122. There was plenty of evidence in this case.

HUNTER, C.J.B.C.:—This is a pure question of principle and I do not think it is a principle that we can safely depart from. Where it is alleged by counsel that there are witnesses under subpoena who can probably give material evidence, and so request, it is the duty of the Court, if possible, to secure the attendance of those witnesses, unless the Court is of the opinion that the application is not made in good faith. I have no doubt in this particular case that there was overwhelming evidence given to convict the Chinaman, unless fully met, but I have often had occasion to say that a man may be ever so guilty, but he must be convicted according to law. That does not mean that every technicality can be successfully resorted to in criminal proceedings. But, in this particular case, I consider there was an unfortunate departure from the observance of one of the fundamental principles—which is to hear the whole case and to allow a full defence. The order will be made absolute. There will be no costs and no action against any one concerned. *Judgment accordingly*

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C. A.

MARGUSON v. GRANT.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. January 4, 1921.

DAMAGES (§ III G—151)—*Eviction from house—Justification—Resistance—Injuries—Reasonable force.*]—Appeal from the judgment of Murphy, J., in an action for damages for injuries received while being put out of defendant's house. Reversed.

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L. G. McPhillips, K.C., for appellant.

J. Martin, K.C., for respondent.

MACDONALD, C.J.A.:—The only question of importance involved in this appeal is, did defendant use greater force than, in the circumstances, he was justified in using to put the plaintiff out of his (defendant's) house? That he had the right to put her out is not disputed. That she was acting towards him in a most unreasonable, if not violent manner at the time is quite apparent. Her evidence was not entirely believed by Murphy, J. She said defendant had struck her a blow and on this point the Judge says: "I am not at all sure that that blow was struck, it may have been; she was grasped by the arm and thrust out, that is what I think happened."

I entirely agree with this finding of fact. There is, I think, no evidence to shew that excessive force was used. The plaintiff refused to go after repeated demands that she should do so. That she resisted, and perhaps violently resisted, is indicated by her own statement in the following words, she said: "He had quite a time to drag me out."

The only evidence upon which an inference can be drawn that much force was used is that relating to her injuries. These injuries appear to have been painful but were not of such a nature as to justify the conclusion that more force was used then was necessary to effect her expulsion. The defendant took her by the arm and thrust her out. She might easily suffer in her resistance, a wrench, for which her own resistance was responsible and not defendant's fault. The defendant was engaged in a lawful purpose and the plaintiff was unlawfully resisting him. Now, while he must, as the trial Judge has said, take some risks in taking the law into his own hands, plaintiff on the other hand must take some risk in resisting. In my opinion she has not made out her case. I would allow the appeal and dismiss the action.

GALLIHER, J.A.:- With every respect for the views of the trial Judge, I cannot conclude upon the evidence which I have carefully read throughout that the defendant used unnecessary force in putting the plaintiff out after she had repeatedly refused to go.

I do not wish to comment on the evidence further than to say that if the injuries the plaintiff complains of were caused by anything that took place that evening, the inference I draw would

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be that it was by reason of the excited state she allowed herself to get into and that what took place was not sufficient to warrant any such condition.

I would allow the appeal.

MCPHILLIPS, J.A. (dissenting in part):—The trial Judge arrived at the conclusion upon the facts that the appellant used more force than was necessary in turning out the respondent, *i.e.*, that the force used was excessive, *Ball* v. *Axten* (1866), 4 F. & F. 1019. The evidence cannot be said to be very satisfactory, yet, I am unable to say that the trial Judge had no evidence upon which he could reasonably so find, and such being the case, I am not of the opinion that the Court of Appeal should reverse this finding. See *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 21 Can. Ry. Cas. 377, 38 O.L.R. 556, Lord Buckmaster, L.C., at pp. 193-194 (33 D.L.R.).

As to the damages, however, I take a different view, with great respect, to that arrived at by the trial Judge. I cannot satisfy myself that the serious illness she later suffered from, the effects of which are to some extent still present, can be attributed to her ejection from the house of the appellant. The medical doctor the respondent first consulted was not called to give evidence as to his examination of the respondent, and the later medical opinion some considerable time after the alleged injuries were suffered, in my opinion, cannot be said to establish any reasonable foundation for the belief that the then state of health of the respondent was at all consequent upon the injuries received at the time of her ejection from the premises of the appellant. A reasonable assessment of damages as I would view it would be the fixing of same at $100, and I would so reduce the damages.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

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REX v. WESTMINSTER BREWERY LTD.

British Columbia Supreme Court, Morrison, J. January 13, 1921.

INTOXICATING LIQUORS (§ III A—55)—*Unlawful sales—British Columbia Prohibition Act, 6 Geo. V., 1916 (B.C.), ch. 49—Summary conviction—Delivery by brewery by mistake of beer over allowed strength to hotel—Evidence.*]—Case stated and signed under the

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provisions of the Summary Convictions Act, 5 Geo. V., 1915 (B.C.) ch. 59, to be heard and determined by the Supreme Court of British Columbia, as follows:

The defendant was charged before me for that the defendant on December 27, 1919, at the city of New Westminster aforesaid, within the Province of British Columbia, did unlawfully sell liquor contrary to the form of statute, 6 Geo. V., 1916 (B.C.), ch. 49, in such case made and provided.

I convicted the defendant on February 2, 1920, and imposed a fine of $1,000, which fine was duly paid under protest, but the defendant claiming to be aggrieved and desiring to question my conviction or determination on the ground that it is erroneous in point of law and has applied to me for a stated case and having complied with the requirements of the Summary Convictions Act in this regard I herein set forth the facts of the case and the grounds upon which the proceeding is questioned for the decision of the Supreme Court thereon.

Prior to December 27, 1919, the Fraser Hotel, in the city of New Westminster, Province of British Columbia, through its bartender ordered seventeen dozen bottles of near beer. Thereafter, on December 27, 1919, the defendant delivered to the said Fraser Hotel seventeen dozen bottles purporting to contain near beer. These bottles were seized by the Provincial Police when delivered at the hotel and the said Provincial Police took three of the said bottles, at the same time advising the bartender that same were for analysis. After the seizure by the police being brought to the attention of Nels Nelson, the defendant's manager, and on the same day the said Nels Nelson telephoned to the hotel that there had been a mistake in the filling of the order and ordered the hotel to put the bottled beer aside and said that the same would be replaced. Such of the said bottles as were then in the possession of the hotel proprietor were put off the shelves and replaced on the following Monday by the brewery who sent near beer under 2½% proof spirit. The analysis shewed that the contents of the three bottles seized from out of the delivery of December 27 ran over 2½% proof spirit.

The defendant by its manager Nelson and his son gave evidence that the contract with the hotel was to sell them only near beer within the limits prescribed by the Prohibition Act and every

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precaution was taken against sending out anything over 2½% proof spirit by periodical tests made by the brewer and reported to Nelson's son who had charge of the bottling.

Previous to December 27, 1919, they had discovered some bottled beer running over 2½% proof spirit and had set it aside in a pile customary for that purpose, and separate from the supply to be sent out, to be poured back into the vats later and brought down under 2½% proof spirit. The shipper being short of stock, used a portion of this pile to complete the Fraser Hotel order. The only evidence on the question of the shipper's knowledge was given by Nelson's son in which he stated that he had not informed the shipper that the separate pile contained stock containing over 2½% proof spirit.

I accept Nelson's evidence and the evidence of the hotel proprietor and find that what both parties had in mind when the contract was made was near beer and the brewery did not intend to sell near beer over 2½% proof spirit. I find as a fact that the brewery did deliver bottled beer over 2½% proof spirit which was later replaced as heretofore stated by beer under 2½% proof spirit. The said delivery was not paid for at the time of seizure by the police, it being customary to pay every Monday

The questions signed and stated for the opinion of the Supreme Court are as follows: 1. Did the delivery of beer over 2½% proof spirit in bottles made under the circumstances hereinbefore set forth amount to a sale under sec. 10 of the British Columbia Prohibition Act? 2. Was I right in holding that the defendant sold liquor as alleged in the information on December 27, 1919? 3. I reserve for the consideration of the Supreme Court of British Columbia the foregoing questions and state and sign the case accordingly.

R. L. Maitland, for applicant.

K. C. Macgowan, for the Crown.

MORRISON, J.:—The answer to both questions is in the negative. The conviction is therefore quashed.

Conviction quashed.

THE KING v. LIMERICK; Ex parte McFARLANE.

New Brunswick Supreme Court, Crocket, J. March 15, 1921.

N. B.

S. C.

CERTIORARI (§ I A—9)—*Intoxicating liquor—Having liquor elsewhere than in private dwelling—Construction.*]—Application on *certiorari* for rule absolute to quash a conviction under the Intoxicating Liquor Act, 6 Geo. V. 1916 (N.B.), ch. 20, on the ground that the magistrate acted without jurisdiction, the information and conviction not disclosing any offence under the Act. Rule discharged.

P. J. Hughes, shewed cause; *J. J. F. Winslow*, in support of rule.

CROCKET, J.:—Return of *certiorari* and order *nisi* to quash a conviction made by the Police Magistrate of Fredericton against the applicant for that at the city of Fredericton in the county of York, on October 29, 1920, he "did unlawfully have intoxicating liquor in his possession elsewhere than in his private dwelling, not having a license so to do, contrary to the provisions of the Intoxicating Liquor Act, 6 Geo. V. 1916 (N.B.), ch. 20."

The defendant was summoned to answer an information laid in the same terms as those above quoted from the conviction. He did not appear and now seeks to quash the conviction upon the ground that the magistrate had no jurisdiction to try this information because it did not disclose an offence under the Intoxicating Liquor Act.

The information was presumably laid under sec. 7 of the Act. This section reads as follows:—

> No person shall within the Province of New Brunswick by himself, his clerk, servant or agent, have or keep or give or attempt to give liquor in any place whatsoever other than in the private dwelling house in which he resides without having first obtained a wholesale license or a retail license under this Act authorizing him so to do, and then only as authorized by such license.

It was argued on behalf of the defendant that the word "place" as used in the section has a particular definite meaning as a selected, ascertained place, such as a shop or an office or some place capable of having an owner or occupier, and that the words as stated in the information and conviction, "elsewhere than in" his private dwelling house, are not therefore equivalent to or of like effect with the words "in *a place* other than his private dwelling" as designated by the words in the quoted section. His counsel relied principally on *Snow* v. *Hill* (1886), 14 Q.B.D. 538, and

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Powell v. *The Kempton Park Racecourse Co., Ltd.*, [1899] A.C. 143.

There is in my opinion no analogy between these cases and the present case. Both of them dealt with convictions under the English Betting Act, 16-17 Vict. 1853 (Imp.), ch. 119, secs. 1,3, where the essential words of the section creating the offence were: "No House, Office, Room or other Place shall be opened, kept or used for the Purpose of the Owner, Occupier or Keeper thereof or any Person using the same . . . betting with Persons resorting thereto," and the judgments proceeded on the ground that the defendants did not open, keep or use a place for the purposes prohibited by the Act, viz. for the purpose of the owner, occupier or keeper thereof or of any person using the same betting with persons resorting thereto. It was clearly pointed out that the thing which the Act made unlawful was the business of a betting house or place, to which people could resort for the purpose of betting, not with each other (in which sense each person who made a bet might be said to have used the place) but for the purpose of betting with the establishment. The cases in no sense decide that such an open, uncovered area as was involved in either case was not a place within the meaning of the Betting Act, but that they were not places which the defendants had opened, kept or used for the purpose prohibited by the Act.

So in *Doggett* v. *Catterns* (1865), 19 C.B. (N.S.) 764, 144 E.R. 987, the Exchequer Court, over-ruling the Common Pleas, held that the habitual use of a particular location under a tree in a public park, for the purpose of betting, was not the use of a place within the meaning of the Act, not because the open space was not a place within the Act, but because, in order to satisfy the words of the statute, it must be a place which is capable of having an owner or occupier. Pollock, C.B., particularly stated that the mere fact of the place being an open one and not being a house, office or room would not alone prevent it from being a place within the Act.

The word "place" as used in sec. 7 of the Intoxicating Liquor Act, is not associated with "house," "office," "room," "owner," "occupier" or any other word or words of limitation beyond the exception, expressly stated as such, in the words "other than in the private dwelling house in which he resides." On the contrary the prohibition here is that: "No person shall within the Province

of New Brunswick . . . have or keep or give or attempt to give liquor *in any place wheresoever* other than in the private dwelling house in which he resides." There is no qualification or limitation, either as to the person or as to the place other than the express exception of "the private dwelling house in which he resides." Any and every other conceivable place, where one can be, whether a church, a hospital or a brothel, or whether indoors or outdoors, is clearly comprised in a phrase of such unlimited scope, unless the words which follow cut down its natural and ordinary meaning, and it is only in the words that follow that any color can be found for the ground upon which this conviction is attacked. The addition of the words, "without having first obtained a wholesale license or a retail license under this Act authorising him to do so, and then, only as authorised by such license," obviously have no sense or meaning, when applied to the words, "no person shall . . . give or attempt to give liquor," for the Act does not provide for the granting of any license, either wholesale or retail, or even to attempt by wholesale or retail to give liquor either generally or in any particularly authorised form. It is manifestly only for the sale of liquor that either wholesale or retail licenses can be obtained. The wholesale license, according to its form as printed in the appendix to the Act, authorises the wholesale licensee "to sell subject to the provisions" of the Act "in the warehouse or store hereinbefore defined such quantities of intoxicating liquors and to such persons as are permitted by the said Act." The retail license authorises the retail licensee "to sell liquor . . . for medicinal and sacramental purposes only in the store hereinbefore defined," etc. If it were not for the fact that the section prohibits the giving of liquor and the attempting to give liquor, as well as the having or keeping of it "without first having obtained a wholesale license or a retail license authorising him so to do," I confess that, seeing that wholesale and retail licenses are issued only for the purposes of sale, and taking that section by itself, I would have been inclined to think, as was argued in behalf of the defendant, that the section prohibited the having and keeping of liquor for the purpose of sale, as it is only in this view that the last three lines of the section can be intelligently applied or given any sense or meaning whatever, for the Act surely never contemplated

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the granting of wholesale licenses or retail licenses for the having or keeping of liquor outside the person's private dwelling house for individual use and consumption any more than the granting of wholesale or retail licenses for giving or attempting to give liquor. On the other hand, if the prohibition of the having or keeping of liquor provided by sec. 7 is construed as the having or keeping of liquor for sale, the section is wholly unnecessary, so far as the having or keeping of liquor is concerned, because sec. 5 prohibits the keeping of liquor for sale and sec. 92 prescribes the same penalty for an offence against sec. 5 as for an offence against sec. 7. The fact of its being unnecessary in this view does not, however, shed much light upon the question, for, if the opposite view be taken, that the intention was to prohibit the having or keeping of liquor for any purpose or under any circumstances, without having first obtained a wholesale or a retail license authorising such having or keeping (for which no wholesale or retail licenses are obtainable), then it may be said with equal reason that three-quarters of the other thirty odd prohibitive sections of the Act, declaring it to be unlawful to do certain things with liquor, which cannot be done without one "having" the liquor, are wholly unnecessary, for anyone who is guilty of such an offence under any one of these numerous sections is necessarily guilty of the offence of "having" liquor under sec. 7.

Mr. Winslow's argument was based on the contention that the "having" of liquor prohibited by sec. 7 was the having of it for the purpose of sale, and that the word "place" construed in this light, means a particular place, selected and occupied for the purpose of selling liquor in the same sense as in the betting cases above cited, and is therefore material and essential in the statement of the offence. Assuming, however, for the purpose of the argument, without venturing to decide it, that the last three lines concerning the wholesale or retail license, thus qualify the words "have" or "keep," I cannot see how they can reasonably be held to narrow or cut down the ordinary and natural meaning of the comprehensive phrase, "in any place wheresoever." A person surely may have or keep liquor for sale without having or keeping it in a place owned or occupied by him. He may have it on his person and carry it about with him for the purpose of sale, and, if he has, whether he be on a moving railway train, in a public

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park, on a public street or in a private alley way, he must have it at some place, for, as it was put by Lord Hobhouse in *Powell* v *Kempton Park Racecourse Co., Ltd., supra*, every human action must be located at some place or other, and on a prosecution the only concern of the magistrate as regards the locality of the offence is that it be within his territorial jurisdiction. I take it therefore that the statement of the information that the defendant at the city of Fredericton in the county of York at the time alleged did unlawfully have intoxicating liquor in his possession "elsewhere than in his private dwelling," not having a license so to do, is a sufficient statement of an offence against sec. 7, whether the prohibition thereby provided be against the having of liquor for the purpose of sale or for the having of it for any purpose whatsoever. See sec. 116, which provides that the description of any offence under the Act in the words of the Act or in words of like effect shall be sufficient, and that any exception, exemption, proviso, excuse or qualification need not be specified in the information but that if it be so specified or negatived no proof in relation to the matter so specified or negatived shall be required on the part of the informant. I can see no distinction between the words, "elsewhere than in his private dwelling," as contained in this information and conviction and the words "in a place other than in his private dwelling," which is the only other form in which it is possible to state an offence under sec. 7. "Elsewhere than" and "in a place other than," being not only expressions of like effect, but absolutely identical in meaning.

I am of opinion that the objection to the conviction is untenable. The order *nisi* to quash must therefore be discharged.

Judgment accordingly.

INGRAHAM SUPPLY Co. v. UNIVERSAL IMPORTING Co.

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Nova Scotia Supreme Court, Harris, C.J., Russell, Longley, Chisholm and Mellish, JJ. January 21, 1921.

SALE (§ II B—35a)—*Of goods—By sample—Fifty per cent. of goods not up to sample—Acceptance by purchaser—Subsequent return to vendor—Vendor's refusal to receive—Damages for breach of warranty—Measure of.*]—Appeal from the judgment of Ritchie, E.J., in favour of plaintiff in an action to recover damages for breach of warranty in connection with a sale of goods.

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F. McDonald, K.C., for appellant.

J. McG. Stewart, for respondent.

HARRIS, C.J.:—The plaintiff company, at Sydney, C.B., purchased from the defendant company at Montreal, a quantity of beans. The sale was made by sample and the trial Judge has found on ample evidence that 50% of the beans were not up to the sample in quality but were unmarketable and of no commercial value.

The plaintiff company, after some time, returned the beans to the defendant company at Montreal, and the defendant company refused to receive them. Ritchie, E.J., found that plaintiff company had accepted the beans and could not rescind the contract but could recover damages for breach of warranty that the bulk should correspond with the sample. I agree with the trial Judge on both points but I fear he has given too small a sum for damages. The beans sold were of three qualities, one X, two XX, and three XXX. The one X kind were to be almost handpicked. The two XX kind were not to contain more than 3 to 4 lbs. of bad beans; and the three XXX kind were not to contain more than 4 to 6 lbs. of bad beans.

A bushel of beans weighs 60 lbs. and if it contained 6 lbs of poor beans they would be 10% of the whole. The price for one X was $8.20 per bushel; for two XX $7.80 per bushel; and three XXX $7.20 per bushel. That is to say, there was a depreciation in the price of $1.00 per bushel for 10% of poor beans.

If the beans were 50% bad it seems to me that they could not in any sense be said to be worth one-half what they would have been worth if they had contained only 10% of bad beans. Unfortunately the case was tried on the theory that the contract was cancelled and there is little or no evidence upon which to base a finding as to the difference between the value of the beans supplied and the beans contracted for. My own view of the matter would be that the beans supplied, if 50% bad, were of little or no commercial value and I should have been disposed to give the plaintiff company a larger sum by way of damages, but I do not feel justified in increasing the amount allowed by the Judge in view of the lack of evidence. It is the plaintiff company's own fault if they have not shewn more clearly what their damages are.

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Under the circumstances I would dismiss defendant company's appeal with costs and plaintiff company's cross-appeal without costs.

RUSSELL, J., concurred with HARRIS, C.J.

LONGLEY, J.:—The Judge after hearing this case gave judgment for the plaintiff for $214.58, which was 50% of the original cost of the beans. An appeal was taken against this order and an elaborate brief was furnished by the counsel for the other side, in which the attempt is made to shew that the pleadings would not warrant such a judgment. This, I think, has originated from an erroneous conception of the pleadings in the case. If the pleadings did not justify such a claim as that, the Court will have abundance of power to make them. In sec. 8 of the statement of claim it is declared that the defendants delivered the required quantity of beans; the beans so delivered were in an unsound and unmarketable condition and not equal to the said samples, etc., which I think is quite sufficient to sustain an action for damages for being below the quality. It is also claimed by the plaintiff on the other hand that the damages are too small, that instead of being 50% of the amount they should be the whole of the amount, because he sent the beans back to Montreal. The defendant has declined to receive the beans and it seems to me to be somewhat of a question whether the plaintiff was right in sending them back; he might very well have seen what he could have done with them and then called upon the defendant to have made good the loss. He did not take this course, however, and I think he must stand or fall upon the course which he took, in which case the judgment of the Judge was about right. There is no data and no figures upon which a different or other judgment could be rendered.

I think the appeal in this case should be dismissed with costs.

CHISHOLM and MELLISH, JJ., concurred with HARRIS, C.J.

Appeal dismissed.

DOUCETTE v. AZAR.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. January 21, 1921.

DAMAGES (§ III J—203)—*Automobile—Left in garage for repair—Lien on car for amount — Contract as to price to be charged — Tender—Replevin—New trial.*]—Appeal from the order for judg-

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ment in plaintiff's favour granted by Longley, J., on findings of the jury, in an action by plaintiff claiming damages, conversion, detainer and for loss of hire of plaintiff's automobile, which was left at defendant's garage for repair, and for the value of the windshield and tools and general damages.

T. R. Robertson, K.C., and *W. R. Tobin*, for appellant.

F. McDonald, K.C., for respondent.

The judgment of the Court was delivered by

HARRIS, C.J.:—The plaintiff, a taxi driver, sues the defendants, garage owners and repairers, for the detention of an automobile which had been taken by plaintiff to defendants' establishment to be repaired. The defendants set up that their bill for repairs amounted to $828.10 and they claimed a lien on the car for the amount. There was a reply setting up a contract to do the repairs for $200 and a further plea of a tender of $250 and later of $300 which it was claimed was more than was justly due and therefore destroyed the defendants' lien on the car.

The plaintiff had also claimed damages for injury to the windshield and loss of some tools while the car was in defendants' garage.

The case was tried with a jury and Longley, J., put only two questions to the jury, viz: 1. Was the contract for materials, work and labour $200? 2. What is the damage for windshield and what amount for tools missing?

The jury answered only the first question and their answer was that there was no contract for $200.

Counsel on the trial asked Longley, J., to put to the jury the question: "Was $200 a reasonable sum or what would you consider a reasonable sum for materials and labour and work done?"

This question was not put, nor was any question put as to whether the amount tendered was or was not sufficient to satisfy defendants' claim.

The plaintiff had replevied the car and upon the finding of the jury the Judge granted an order for the return of the car to the defendants and the plaintiff moved for a new trial.

On the argument of the motion the attention of the Court was called to the fact that at the same term of the Court another action was also tried by the same Judge without a jury in which the present defendants were the plaintiffs and the present plaintiff

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was the defendant, to recover the amount of the account for repairs to this car, $828.10, and in that action judgment was given for the present defendants for $828.10 less the amount claimed by the present plaintiff for injury to the windshield and loss of tools. The present plaintiff had appealed from that judgment but had abandoned his appeal.

That judgment is binding between the parties and it is therefore clear that a new trial of the present action would not have any good result. The judgment in the second action has established the value of the work done by the plaintiff on the car and also that the amount of the tender was insufficient.

Under these circumstances the motion for a new trial will be dismissed with costs.

Motion for new trial dismissed.

McLEAN v. EMBREE.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J, and Chisholm, J. February 19, 1921.

LANDLORD AND TENANT (§ III F—119)—*Lease of land—Failure of tenant to comply with terms—Waste by tenant—Damages—Tenant one of several co-tenants—Action by other co-tenants for damages—Conditional judgment—Stay of execution—Costs—Bankruptcy of landlord—Tenant estopped from denying landlord's title.*]—Motion to set aside findings of the jury in favour of plaintiff and for a new trial in an action by plaintiff to recover damages for various acts of waste committed by defendant while in occupation of land as plaintiff's tenant.

W. A. Henry, K.C., for appellant

J. L. Ralston, K.C., for respondent.

HARRIS, C.J.:—I agree in the result with the decision of Chisholm, J, but I think there should be no costs of the appeal to either party under the circumstances.

RUSSELL, J.:—The only difference of opinion that has arisen in this case relates to the costs of the appeal. I think they will have to follow the usual rule. It would have been a hardship for the defendant if he had been obliged to pay damages in the action brought by the eight others claiming ownership of the property. But, as stated in the opinion of Chisholm, J., the pending of the

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other actions is no defence to this one and the unsuccessful appeal, which is adjudged to have been without foundation, has resulted in relieving the defendant from the presence of the pending suits. To that extent the defendant has profited by the appeal, and with that, I think, he will have to be content.

RITCHIE, E.J., agrees with CHISHOLM, J.

CHISHOLM, J.:—In this action the plaintiff claims that he let his farm to the defendant and that the defendant failed to comply with all the terms of the lease and during the tenancy committed waste on the farm. The plaintiff claims damages in respect of the said breaches and waste. The principal defence is that the farm was let, not to the defendant, but to one James Dixon. The breaches relied on by the plaintiff were also put in issue. The plaintiff put the defendant into possession of the farm.

The writ of summons was issued on June 21, 1919, and the action was tried by Longley, J., with a jury, at the June, 1920, sittings of the Court at Antigonish. The jury found that the defendant was the tenant and fixed the damages at $475. The trial proceeded on the basis of the plaintiff being sole owner of the farm. It appeared that he is one of ten co-tenants who own the farm; and on August 9, 1918, eight of his co-tenants issued a writ against the defendant for damages for trespass for entering upon the farm, cutting down trees, etc.

The issues as to who was the tenant, which Mr. Henry says was the substantial defence, and as to breaches of the agreement to let, appear to have been fairly put to the jury; and I see no ground upon which, by reason of the instructions to the jury, the findings should be set aside. Nor should they be set aside on the ground that they are against the weight of evidence. It would, however, work a hardship if defendant were obliged to pay damages in full to this plaintiff and be compelled in the first action to pay damages to the other co-tenants for the same matters. That contingency can, however, be obviated by the offer made on the argument by Mr. Ralston for the plaintiff that recovery in this action should be conditional upon the other tenants in common executing a release to the defendants of their claims for all damages against him in respect of his work on the farm. Justice will be done in directing a stay of execution on the judgment recovered until such release is executed and the appeal will be disposed of so as to admit of such a solution of the difficulty.

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The question of the costs of the appeal remains to be disposed of. It is well settled law that the tenant is estopped to deny his landlord's title, and that such estoppel does not depend in any way upon the validity of the landlord's title. *Cooper* v. *Blandy* (1834), 1 Bing. (N.C.), 45, 131 E.R. 1034; *Francis* v. *Doe d. Collan Harvey* (1838), 4 M. & W. 331, 150 E.R. 1455; *Cook* v. *Whellock* (1890), 24 Q.B.D. 658.

In *Cook* v. *Whellock*, Lord Esher, M.R., at p. 661, says:—

> The plaintiff, being then an undischarged bankrupt, let certain premises to the defendant, and is now suing him for rent for those premises in arrear. It was said in the first place that the plaintiff was a bankrupt when he let the premises, and was still undischarged and he was not therefore the right plaintiff. That is equivalent to saying that he had no authority to let the premises, and the trustee is really the landlord of them. The answer to such a contention as that is that the defendant is estopped from making it. Having been let into possession of the premises by the plaintiff, he cannot say that the plaintiff is not his landlord but the trustee in bankruptcy.

With the defendant estopped to deny the plaintiff's title, the plaintiff, if he stood on his strict rights, would be entitled to hold the judgment unconditionally and the defendant has not shewn any grounds in law for setting aside the findings of the jury. The pendency of the other action is not a defence. If, as I apprehend it, the defendant was not entitled to succeed on his appeal, the plaintiff should have the costs of the appeal.

Appeal dismissed.

FOURNIER v. McKENNA.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Chisholm and Mellish, JJ. January 22, 1921.

DAMAGES (§ III J—201)—*Automobile—Left in garage for repair—Removal of material from—Exposure to weather—Wrongfully depriving owner of use.*]—Appeal from the judgment of Finlayson, Co. Ct. J., in favour of defendant in an action claiming damages for the removal of material from a car left at defendant's garage for repair, for exposure of the car to the weather and for wrongfully depriving plaintiff of the use of the car. The Judge, in the judgment appealed from, after reviewing the evidence concluded: "The defendant was never in the position of warehouseman or bailee, even gratuitous, of this car. He told the plaintiff in the first instance that he would not be responsible for

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the car if it was left below" (in a part of the building used only for storing old cars and junk); "then he told the plaintiff and Matergio" (a question having arisen as to the ownership of the car) "that he would have nothing to do with the car and that they had better take it away." The exposure to the weather complained of was due to the laying of a concrete floor in the portion of the garage where the car was left, which necessitated the removal of the car out of doors.

F. McDonald, K.C., for appellant; *W. F. Carroll*, for respondent.

RITCHIE, E.J.:—The plaintiff is a taxi driver and the defendant the proprietor of a garage. The plaintiff's car was brought to the defendant's premises for repairs. Damages are claimed for tires and battery removed from the car and for injury to the car from being exposed to the weather. The case was tried before Finlayson, Co. Ct. J., and he has made clear and distinct findings of fact; if these findings of fact are to stand no question of law arises for consideration.

The Judge has found that the plaintiff was told by the defendant that if he left his car in a certain part of the premises the defendant would not be responsible for it.

Harry J. Finlayson swears that he heard the defendant say to the plaintiff: "If you put it there I will not be responsible for the car if you put it down there." The part of the premises referred to was the lower floor of the garage; an unsuitable place, and that is where the defendant put and left the car. The defendant, according to the finding which is supported by evidence, disclaimed any liability if the plaintiff put the car in the prohibited place. It is, I think, not necessary to refer to the other facts in evidence; it is sufficient for me to say that I am in entire agreement with the judgment appealed from and would dismiss the appeal with costs.

RUSSELL and CHISHOLM, JJ., concurred with RITCHIE, E.J.

LONGLEY, J., concurred with MELLISH, J.

MELLISH, J.:—I would dismiss the appeal on the ground that it has not been shewn that the plaintiff has suffered any damage inasmuch as I do not think under the evidence the car can be said to be his property. *Appeal dismissed.*

SCHOONER "LAVONIA" LTD. v. LOWE.

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Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Chisholm, J. December 18, 1920.

CONTRACTS (§ II A—125)—*Construction—Master of schooner—Monthly hiring—Dismissal in foreign country—Expenses back to place of hiring—Draft to cover amount—Profit on American exchange.*]—Appeal by defendant from the judgment of Longley, J., in an action for money had and received. Affirmed.

W. C. McDonald, for appellant.

J. L. Ralston, K.C., for respondent.

The judgment of the Court was delivered by

RITCHIE, E.J.:—The defendant was the master of the schooner "Lavonia," owned by the plaintiff company. The defendant at Gulfport, in the United States of America, made a draft on the plaintiff's agents in New York from which he realised $2,300 and profit on American exchange $138, making the amount received by him $2,438. The plaintiff company in their particulars give the defendant credit for $1,915.10 and the action is brought to recover from him the balance of $522.90. The defendant brings into Court $137.43. He claims to be entitled to the profit on the exchange and as to the balance a set-off is relied on.

To decide the questions raised it is necessary to ascertain the terms of the contract between the parties. The contract was made in Canada. The wages were to be $300 per month. No specified time was mentioned for the continuance of the contract; it was therefore a monthly hiring. It was a term of the contract that in the event of the vessel being sold in a foreign port the plaintiffs were to pay the defendant's expenses back to Halifax and his wages until his return. It was no part of the contract with the defendant that the vessel should return to a home port within any specified time. The fact that in the articles it is provided that the final port of discharge is to be in Canada has nothing whatever to do with the contract between the owners and the master.

So far as the question of exchange is concerned it is, I think, clear that the agent cannot make this profit which rightfully belonged to his principals.

The items of the set-off in dispute are as follows: "Wages from November 22nd to December 9th, $170; shore expenses, Gulfport, $42; railway ticket and sleeper, $97.47; meals on train,

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$15; hotel and meals, New York, $7; hotel at Boston, $5; taxi at New York, $1."

The "Lavonia" was not sold, therefore the term of the contract referring to that event is not invoked by the defendant, but his claim is that he was dismissed in a foreign port and that therefore he was entitled to retain the money represented by the disputed items on his set-off.

It becomes necessary here to decide a question of fact. Was the defendant dismissed at Gulfport, or did the contract of service there come to an end by mutual consent? A close perusal of the contract has convinced me that the contract was ended by mutual consent, and that therefore on the facts the defendant is not entitled to the wages and expenses claimed for.

I do not express any opinion as to what the legal result would have been if the defendant had been dismissed in the foreign port

The appeal should be dismissed with costs.

Appeal dismissed.

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WHITELY v. RICHARDS.

Ontario Supreme Court, Middleton, J. December 29, 1920.

VENDOR AND PURCHASER (§ I E—28)—*Agreement for sale of land—Default of purchaser in making deferred payments—Resale by vendor pursuant to provision in agreement—Right of first purchaser against second—Registry Act—Relief from default—Forfeiture of sale-deposit—Return of other moneys paid.*]—Action by the purchaser for specific performance of a contract for the sale and purchase of land or for a refund of the money paid by the plaintiff on account of the purchase-price.

G. A. Urquhart, for plaintiff; *J. H. Rodd*, for defendant.

MIDDLETON, J.:—On the 24th March, 1920, a formal agreement was made by which the defendant agreed to sell and the plaintiff to purchase certain speculative lands for $15,000: $500 cash; $2,000 by the 1st April, 1920; $1,000 by the 1st May, 1920; $1,500 by the 1st June, 1920; the balance, $10,000, to be secured by a mortgage.

By a preliminary writing the $500 is called "a deposit." The plaintiff did not live up to his agreement, and paid $2,750 in all,

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in various small sums, after much pressure and great procrastination. A promissory note was given for $1,750; this was not intended as a payment, but for the purpose of being discounted at the plaintiff's bank; the bank would not touch it, however, and it was returned. This transaction does not affect the rights of the parties.

The agreement provided for resale upon default; and, default having occurred, the defendant had the right to sell, and resold. The plaintiff has no right as against the new purchaser. The Registry Act protects him as against any unregistered equity the plaintiff might have to be relieved from his default and its consequences.

The plaintiff then claims a refund of the money paid. The agreement contains no provision for the forfeiture of the money paid. *Brown* v. *Walsh* (1919), 45 O.L.R. 646, seems to establish that a purchaser may, by making default in his contract, confer upon himself the right to recover the money he has already paid, unless the contract makes express provision to the contrary, subject to the right of the vendor to claim out of such money sufficient to compensate him for any loss on resale.

The right of the vendor to retain the purchase-money upon the purchaser's default is said (in *Brown* v. *Walsh*) to arise only when there is an express contract, and the earlier case of *Walsh* v. *Willaughan* (1918), 42 O.L.R. 455, 42 D.L.R. 581, is said to be distinguishable upon that ground.

Were it not for *Brown* v. *Walsh*, I should have thought that what was said by Mr. Justice Riddell in *Walsh* v. *Willaughan*, 42 O.L.R. at p. 466, 42 D.L.R. at p. 591, indicated the true ground of the decision: "There is no case in which one who is unable to carry out his contract has been allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation. In the language of Kekewich, J., 'that would be to enable him to do the very thing that Lord Justice Bowen said he ought not to be allowed to do, namely, take advantage of his own wrong—I mean wrong, not in the moral sense, but in the sense that he could not perform his contract.' "

The initial payment of $500 was as a sale-deposit, and so far no case has departed from *Howe* v. *Smith* (1884), 27 Ch.D. 89, that upon default this is forfeited.

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From this time on, all well-drawn contracts will, no doubt, contain apt words to indicate that upon the purchaser's default he shall absolutely forfeit the payments made, but this will not fully protect the vendor, as both cases indicate that, in the exercise of the jurisdiction to relieve against forfeiture, the Court will not allow the terms of the contract to prevail, a most singular result in the light of the impotence of the Courts to afford relief in *Brickles* v. *Snell*, [1916] 2 A.C. 599, 30 D.L.R. 31.

There will, therefore, be judgment for $2,250, and, as success is divided, no costs. *Judgment accordingly.*

MODERN CLOAK Co. v. BRUCE MFG. Co.

Ontario Supreme Court, Meredith, C.J.C.P. December 21, 1920.

DISCOVERY AND INSPECTION (§ IV—20)—*Examination of plaintiff resident abroad—Place of examination—Ont. Rule 328—Practice—Selection of commissioner to take evidence in foreign country.*]—Appeal by the plaintiffs from an order made by one of the Registrars, holding Chambers in place of the Master in Chambers, requiring two of the members of the plaintiffs' unincorporated company—persons living in Maryland—to attend in Toronto for examination for discovery, at the instance of the defendants.

J. A. Macintosh, for plaintiffs; *J. C. McRuer*, for defendants.

MEREDITH, C.J.C.P.:—The order appealed against was made by an acting Master, at Chambers, upon the defendants' application; and it requires that two members of the plaintiffs' unincorporated company, each of whom resides in Baltimore, Maryland, where the company's business is carried on and where the contract in question in this action was made, shall attend, each at a different time, at Toronto, Ontario, and there submit to examination, at the defendants' instance, for discovery in the action.

About the same time another order was made by the same officer, upon the application of the plaintiffs, for the examination on commission of several witnesses for the plaintiffs at Baltimore, so that their evidence so taken might be given at the trial in Toronto in the plaintiffs' behalf.

And the order that the two members of the company should attend at Toronto was made in the face of the oath of one of them:

that the attendance of both or of either of them would involve great hardship and result in a very serious loss of business by the plaintiffs; that the conduct of such business requires an intimate knowledge of the company's affairs and of the goods in which it deals, the conditions of the market, and the relations of the company with its customers and with other concerns; and that such matters are peculiarly within the knowledge of the two persons to be examined; and that there is no person in their employment who can take their places, or be charged with exercising the discretion and judgment which they are called upon daily to use; and that any attempt to delegate their duties to any one would result in difficulties and probably errors involving substantial loss. And not only in the face of such evidence, but also without a word, upon oath or otherwise, in contradiction of it or in the assertion of any kind of loss or inconvenience to the defendants if the examinations are all had in Baltimore at the one time.

It may be added, too, that the action is a simple one, involving only an everyday mercantile transaction; and an action in which the single question involved seems to be whether the defendants, the purchasers of clothing bought to sell again, were entitled to delivery of the goods before payment for them, their order for the goods being in writing signed by them, and subsequent dealings being all through correspondence only.

In these circumstances, the orders in question for these several examinations, and for the more important one—to obtain evidence for the trial—to be taken at Baltimore, whilst the less important ones—discovery only—must be at Toronto, apparently only because no one in Baltimore is competent to take them, seems to me, I feel bound to say, more like a burlesque of a just, impartial, and reasonable administration of justice than the reality of such administration.

There should be no hesitation in allowing this appeal and directing that all examinations be had at Baltimore.

But it is proper to add that the learned officer, seeing the effect of his rulings, endeavoured to avoid it by getting the consent of the defendants that all examinations be had at Baltimore; but, that being refused, he thought that he was bound by the cases *Lick* v. *Rivers* (1901), 1 O.L.R. 57, and *Hamilton* v. *Hamilton* (1920), 47 O.L.R. 359, to make the orders as they are.

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In that he was quite mistaken. The practice is settled by the Rules of Court, confirmed by legislation—Rule 328*—not by judicial opinion. The Rule is plain and explicit: the examination is to be taken at such place and in such manner as may seem just and convenient; both just and convenient, not one or the other; and it is to be observed that it is a Rule applicable to all parties alike. So the power of the Judge or officer making the order is merely to consider what is just and convenient in the case before him; and, no two cases being quite alike, no finding in any one case is binding in any other: though every case may afford some aid; may throw more or less light upon the questions involved in a later case. The exercise of discretion in such cases as these must always "depend upon the circumstances of each particular case:" see *Grant* v. *Banque Franco-Egyptienne* (1876), unreported, cited in *Spiller* v. *Paris Skating Rink Co. Limited* (1878), 27 W.R. 225, at p. 226.

The Chief Justice who decided the case of *Lick* v. *Rivers* made no attempt to lay down any general rule, but very properly dealt with the case upon its own facts, and merely refused to interfere with an order made by a Local Judge for the examination of the plaintiff at the instance of the defendant at a place about half way between the place where the action was brought and the place where the plaintiff resided.

There was no intention in the decision of the case of *Duell* v. *Oxford Knitting Co.* (1918), 42 O.L.R. 408, to question the decision of *Lick* v. *Rivers*. There was no kind of need to do so. The cases were different in their facts and circumstances; and it may be that, if all the facts and circumstances of the latter case were known to me as well as they must have been known to the Judge who decided it, I should be able to agree entirely with the ruling in it.

And I am quite sure that it could not have been meant by the Judge who decided the case of *Hamilton* v. *Hamilton* to adopt any practice inconsistent with Rule 328, or to take from or add to its requirements, or indeed to decide anything but that, on the particular facts of that case, justice and convenience required that the examination should be had in Toronto; and so that de-

*328. Where a party to be examined is out of Ontario the Court may order the examination to be taken at such place and in such manner as may seem just and convenient . . .

cision in no sense bound the acting Master to make the order now appealed against; but, if the learned Judge had any such intention, it would not have been necessary for the decision of the case, and would have been contrary to the rule governing the practice, and so not binding upon any one.

The Judge who decided that case fell into the error of supposing that the case of *Lick* v. *Rivers* was not cited in the case of *Duell* v. *Oxford Knitting Co.*, and of imagining that the two decisions were in conflict with one another.

Lick v. *Rivers* was cited and its effect pointed out during the argument, and it was a case so obviously different in its facts, that it should have been thought a waste of words, and so of expense in reporting, to state again that which had been plainly stated during the argument and seemed to be so obvious.

The sole question must be, in each case, what, upon its facts and circumstances, is most just and convenient. Where the examination is of a defendant, his personal convenience must necessarily be taken into account; and the plaintiff's personal convenience is out of the question when there is no need for him to attend, as almost invariably is the case, and *vice versâ*. Personal convenience is one of the conveniences to be considered and frequently the paramount one; and it is always an important one—though sometimes forgotten—in regard to witnesses inconvienced and put to loss in giving their aid in the administration of justice.

In addition to the Rules referred to in the case of *Duell* v. *Oxford Knitting Co.*, as shewing legislative and judicial solicitude for the convenience of the person to be examined, Rule 275 may be mentioned. It provides for one party requiring an opposite party to attend at the trial for the purpose of being examined as a witness, but only if he reside within the jurisdiction, that is, in this Court, in Ontario; and yet it is proposed to introduce the anomaly of compelling an opposite party out of the jurisdiction to come to the place of trial for examination for discovery; discovery which in the case of a corporation cannot be given in evidence at the trial.

And, continuing the multiplication of inconsistencies which such an order as that in question creates, though a party to be examined for discovery must ordinarily be examined in the county

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in which he resides: Rules 337 and 345; yet, according to the ruling appealed against, if he resides out of the jurisdiction, and so the more needs to be examined at home, he is obliged to come here, no matter how great a distance he must travel—in this case about 500 miles—for a like examination. So too if a plaintiff live in the remotest part of Ontario, though on the boundary-line, he should be examined there, whilst if he live only a step away on the other side of the line, he should come to Toronto.

The like care is shewn for the insured who is in the position of a plaintiff, under the Ontario Insurance Act: R.S.O. 1914, ch. 183, see sec. 201.

I repudiate entirely any such notion as that a foreigner seeking relief in these provincial Courts is under any special disadvantage. All litigants stand upon an equal footing; none can be treated by Judge or Court as seeking any favour from it or him. The right to sue is no privilege for which he may be put to any disadvantage. The needs of trade and commerce, the comity of nations, and the laws of this Province, give to alien friends the same right to resort to these Courts as they give to subjects.

And any suggestion that examinations for discovery, or other purposes, cannot be as well taken in Baltimore as in Toronto, is quite too parochial to be taken seriously. Experience proves that the best examinations often are those taken in Great Britain, and that those taken in the United States of America compare very favourably with those taken in Ontario or elsewhere in Canada.

The suggestion that there has been a practice in this Court requiring all plaintiffs to come to Toronto or elsewhere in Ontario for examination for discovery at the instance of the defendants, is tantamount to saying that Rule 328 is altogether disregarded; that there is in our practice the anomaly, if not absurdity, of requiring a plaintiff to come to Ontario for examination for discovery merely, whilst he may for the purposes of the trial give his evidence, generally, where he resides; and of enabling a defendant to compel a plaintiff to abandon his action rather than come from any part of the world, outside the Province of Ontario, to submit to examination for discovery, or even a pretended discovery; and the suggestion is refuted by the constantly occurring use at trials of depositions taken on such examinations had out of Ontario. The suggestion that a plaintiff may be brought, if the defendants insist upon it,

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from England, or indeed China, for such a purpose or pretended purpose, proves its own worthlessness.

Except *Hamilton* v. *Hamilton*, and in it, Mr. McRuer has not been able to discover a case, line, or word to aid him in supporting the order in question. He could hardly have expected that he should; and, assuredly, it should have been strange if his industry could have made any such discovery.

The consequences of such a practice also condemn it. The results, in this case, of the order appealed against being sustained, might very well be: that this action should be discontinued, and a new action brought at Baltimore, where the contract was made and broken; which would necessitate a trial of the merits there, and the defendants would be subjected to another action here, on, and to enforce, the judgment recovered there, if the plaintiffs were successful in it. Given by the plaintiffs an examination of them for discovery and a trial at their own door, the defendants' too great greed might very well cause them the loss of these advantages bestowed upon them; and the foreigner might very well turn his back upon a Court in which all are not upon an even footing.

The appeal is allowed; all examinations are to be had at Baltimore, and preferably at the one time; costs of this appeal are to be costs in the action to the plaintiffs only.

The defendants now find fault with the commissioner appointed to take the evidence at Baltimore, though it seems that no objection was made at Chambers; but, as the only qualification which the person appointed has is said to be experience in stenography, it is proper that some one more fully qualified should be appointed; and, as there are Judges, attorneys-at-law, and court officers there as numerous and as well qualified as here, one of them should be appointed; though, I am bound to add, if examinations are conducted there as often they are here, the person examined answering or refusing to answer, not on the examiner's ruling, but upon the advice of his counsel or solicitor, or indeed sometimes solicitor's clerk, experience in shorthand writing may be the best if not the only qualification needed; so it is not surprising that parties sometimes agree upon such an examiner.

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MACFIE v. CATER.

Ontario Supreme Court, Meredith, C.J.C.P. December 21, 1920.

ASSIGNMENTS FOR CREDITORS (§ VII B—61)—*Transaction between insolvent trader and creditor (brother)—Sale of goods of insolvent by brother—Proceeds paid to insolvent—Transferred to brother—Real nature of transaction—Assignments and Preferences Act, sec. 6—Exception—Preference—Action to set aside transaction—Reaching proceeds of sale—Costs.*]—Action by the assignee for the benefit of the creditors of a trader to set aside a transaction between the defendant and the trader (his brother) and to recover the price or value of the goods which were the subject of the transaction, for the general benefit of the trader's creditors.

T. G. Meredith, K.C., and *R. G. Fisher*, for plaintiff.

J. M. McEvoy, for defendant.

MEREDITH, C.J.C.P.:—There is little, if any, dispute as to the facts; and if there were there can be no doubt as to them.

The defendant's brother carried on the business of cigar-making for several years, sometimes in partnership with others, but at the time in question alone, though in a firm name.

The defendant from time to time lent money to the concern, and at the time in question there seems to have been about $——— due to him in respect of such transactions.

At and some time before the time in question the brother and his business were in a hopeless state of insolvency, as they, both brothers, well knew.

In these circumstances, they adopted the plan in question for the purpose of giving to the defendant an advantage over all other creditors of the brother.

The brother had in stock a considerable number of cigars, and their plan was: that the defendant should sell them and get the proceeds of the sale.

The defendant had never sold cigars before, but he was a "commercial traveller" in some other "line of business," and the plan was in all respects one that could be easily carried out if no other creditor intervened.

The sale was made for cash, payment to be made by way of a "sight draft," instead of upon the usual credit terms, a discount of ten per centum of the price being allowed to the purchaser for the cash payment.

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An "order" for the goods purchased on these terms was taken by the defendant from the purchaser, directed to the brother in the firm name, and was sent by the defendant to the brother: and the goods were in due course shipped, the draft was drawn and in due course paid by the purchaser; and afterwards a cheque for the amount was given by the brother, in the firm name, to the defendant, and he in that way got the whole benefit of the sale of the cigars. This part of the transaction took place through bankers, other than the brother's bankers, for the purpose of preventing them, as creditors of the brother, applying any part of the money in payment of the brother's indebtedness to them.

The form which the transaction took in the books of the cigar business was: an entry in the defendant's account in these words: "May 20: By cash (McPhail acct.) $1,516.50:" and in the defendant's account, rendered under oath in the insolvency proceedings which followed, it appears in precisely the same manner, the account having been made up from such books. McPhail was the purchaser of the cigars, and his only account was for the price of them.

The date of the order for the cigars is the 7th May; and that of the cheque under which the defendant got the money from the bank is the 22nd May; but the cheque was not accepted by the bank until the 30th May.

On the 31st May, the brother made a general assignment for the benefit of all his creditors, "ratably and proportionably without preference or priority," to the defendant.

The object of the assignment to the defendant, instead of to some one else, was obviously to enable him, the brother, to retain the preference which he had obtained; but that vantage ground was soon lost by the action of the other creditors in appointing the plaintiff assignee in the defendant's place.

And this action is brought by the substituted assignee against his predecessor to set aside the transaction in question and recover the price or value of the cigars for the general benefit of all creditors.

From these circumstances it is obvious that the single question involved in this trial is: whether the whole transaction was really only a "payment of money to a creditor," saved out of the general provisions of the Assignments and Preferences Act (R.S.O. 1914, ch. 134) by its 6th section.

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No case to which I have been referred, nor any of which I am aware, has decided the question, or indeed lends much aid in considering it. Its facts are substantially different from those of all such cases.

If the case were really one of a mere payment, by cheque, of the money in question, to the defendant, by his brother, the case could not present any difficulty, though the payment was made with all the knowledge, for the purpose, and under the plan I have stated.

But I cannot so look upon the transaction: the effect of it was rather to give the stock in trade, which he sold, as a preferential benefit to the defendant. That was the purpose of the parties; that was the plan entered into to benefit him, to the loss of other creditors, in the immediately impending insolvency distribution. Though there was no formal transfer of the property, and though the sale was made by the defendant in his brother's firm name, and though the draft was made in the firm name, and the transaction carried out with the purchaser as if one with the firm, none the less inevitably the price must have gone to the defendant just as if the sale had been made in his own name and he had drawn upon the purchaser for the purchase-price, because that was the two brothers' purpose and plan, and the whole matter was in their hands, there were none to interfere, none to know, at all events until the whole plan had been carried out.

Without the entry in the books, and without the defendant's statement of his claim and affidavit in the insolvency proceedings, no other conclusion could be reached by me; with them it is difficult for me to understand how either brother could well say that the defendant took no interest in the cigars—that the transaction was nothing but a simple payment by a debtor to his creditor on account of the debt.

The case of *Robinson* v. *McGillivray* (1906), 13 O.L.R. 232, was relied upon for the defendant; but it was quite a different case; and is one which lends no aid to the defendant; but indeed is one which points directly to some of the weak points of the defence in this case, for in it Osler, J.A., said (p. 234): "It is conceded that there was no fraudulent arrangement . . . or attempt to 'manage' the transaction in order to put a different face on it from that which the bare relation of the facts discloses.

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Everything was done *bonâ fide*, and the only question is whether as presented the case is one of a fraudulent preference within the Act, or of payment of money to a creditor, or of set-off, which the Act permits."

Here the whole transaction was conceived and carried out for the sole purpose of giving a preference to the brother-creditor over all other creditors, and then making the assignment to him of a well-known to be hopelessly insolvent estate. The question is whether they have so "managed" it as to be within the law.

In my opinion, they have not.

The defendant's reliance can be solely on the exception out of the effect of the Act of a "payment of money to a creditor;" and it is for him who claims the exception to shew that he is within it.

I cannot look upon the transaction in question as one of a mere payment of money; it was rather the taking from the assets, liable to execution, of goods of the debtor and applying them in giving the creditor a preference over all other creditors; the process of reducing the goods into money by the joint action of the debtor and creditor—the brothers—and having that paid to the creditor as the result of their plan and action, cannot, in my opinion, and did not as I find, reduce the whole thing to a mere payment of money by a debtor to his creditor; and, the transaction being substantially an appropriation of the cigars in part payment of a preferred creditor's claim, the proceeds of the sale of them can be reached by the assignee: sec. 13 of the Act; and apart from the Act might be, according to some decisions, in this Province.

The plaintiff is entitled to, and may sign, judgment in the usual form applicable to the case.

But I make no order as to costs. The rule is and should be that the successful party should have his costs; and that rule should not be departed from at caprice or for anything but very good reasons. My reasons are that the question involved is a new one; the law has never been in a very satisfactory state upon the subject; it is difficult to see why money, which is liable to seizure under execution, may be transferred with an intent to give to one creditor and take away from all others, and which has that preferential and injurious effect, whilst other goods cannot: or why an endorsed cheque is not money but a cheque made by the

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debtor is; and, mainly, that the defendant is the largest creditor of the insolvent estate, and so, whatever order as to costs is made or if none is made, he shall be obliged to pay the greater part of them. *Judgment accordingly.*

REX v. SOVA.

Ontario Supreme Court, Middleton, J. December 24, 1920.

INTOXICATING LIQUORS (§ III J—94)—*Second offence against Ontario Temperance Act—Conviction—Punishment—Construction of sec. 58.*]—Motion to quash a conviction of the defendant, by a magistrate, for an offence against the Ontario Temperance Act, upon the ground that the punishment inflicted was unauthorised by the statute. Affirmed.

J. L. Counsell, for defendant; *F. P. Brennan*, for magistrate.

MIDDLETON, J.:—By consent of counsel, to avoid technical difficulties, this motion was argued as upon the return of a *habeas corpus* and *certiorari* in aid.

The question argued is one of great importance, the accused contending that the effect of sec. 58* of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, is not to render the accused liable upon a second conviction to imprisonment unless he is a licensee.

The clause is not well drafted and is obscure; but, when carefully considered, I think that there is no real doubt as to its meaning. It provides for the penalty to be imposed for an offence against the provisions of the Act, and the dominant words

*Section 58, as amended by 7 Geo. V. ch. 50, sec. 21, reads as follows:—

58. Every person who offends against any of the provisions contained in sections 7, 37, 40, 41, 43, 49 and 53 of this Act, or in any of them, shall be liable on summary conviction to a penalty for the first offence of not less than $200 nor more than $1,000, and in default of immediate payment to imprisonment for not less than three nor more than six months, and if the offence was committed by a licensee or by any person acting under his instructions, or with his privity or consent, he shall also be liable in the discretion of the judge, magistrate, justice or justices of the peace, to have his license forfeited and voided, and for a second or any subsequent offence to imprisonment for not less than six nor more than twelve months, and if the offence be committed by a licensee or any person acting under his instructions or with his privity or consent the license of such licensee shall thereupon become forfeited and void and he shall be incapable of becoming a licensee under this Act for a period of three years thereafter.

By the amending Act of 1920, 10 & 11 Geo. V. ch. 78, sec. 11, sub-sec. 2 was added, "with the object of the better regulation of the penalties now authorised by the Ontario Temperance Act." The added sub-section does not affect the question discussed in this case.

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are, I think, "for the first offence," and "for a second or any subsequent offence." In each case there is an added provision and added punishment if the offence was committed by a licensee; read thus, the section provides for a fine, and in default imprisonment for a first offence, and if the offence was committed by a licensee he is liable to have his license forfeited in the discretion of the magistrate. Where the offence is a second or subsequent offence, the accused is liable to imprisonment, and if the offence is committed by a licensee his license shall be forfeited. Thus read, effect is given to all the provisions of the section. If it is read as contended by Mr. Counsell, and the words "if the offence was committed by a licensee" dominate all that follows, so that a licensee is alone liable to imprisonment for a second or subsequent offence, the last portion of the clause commencing with the words "and if the offence be committed by a licensee," where they occur the second time, is rendered meaningless.

I am aware that in giving this construction to the section I am permitting the Legislature to violate a rule of grammar and sound syntax; but this is nothing new, and it seems to be preferable to admit that in this matter the Legislature may be fallible rather than to suppose that an important part of the section is to be altogether devoid of any meaning, and the other portion is to have a forced and very unnatural construction.

This application fails and must be dismissed with costs.

Application dismissed.

REX v. POWELL.

Ontario Supreme Court, Hodgins, J.A. December 23, 1920.

CRIMINAL LAW (§ IV B—111)—*Summary conviction—Ontario Temperance Act, secs. 40-58—Penalties—Fine—Hard labour—Interpretation Act, R.S.O. 1914, ch. 1, sec. 95.*]—Motion to quash the conviction of the defendant, by a magistrate, for selling intoxicating liquor contrary to the Ontario Temperance Act, on the ground that the penalties imposed were beyond what the law allowed. Affirmed.

G. Lynch-Staunton, K.C., for defendant.

F. P. Brennan, for magistrate.

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HODGINS, J.A.:—The prisoner was sentenced to (1) three months at hard labour, (2) to pay a fine of $1,000, and, in default of payment, to three months' imprisonment at hard labour.

Mr. Lynch-Staunton argued that, as the Ontario Temperance Act forbids a sale of liquor, there could be no such thing as a sale, and so no conviction therefor. If this was seriously meant, it ignores the fact that a sale of liquor is an offence only if not authorised by license.

By sec. 58 of the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, every person who sells, etc., shall be liable, on summary conviction, to a penalty for the first offence of not less than $200 nor more than $1,000, and, in default of immediate payment, to imprisonment for not less than three nor more than six months.

By 10-11 Geo. V. (1920) ch. 78, sec. 11, sec. 58 was added to, by providing that, notwithstanding anything contained in it, the maximum penalty for any other offence (*i.e.*, other than one under clause (*a*) of sub-sec. 1 of sec. 41) under secs. 40 and 41, shall be $2,000 and costs, and in addition thereto imprisonment for a term not exceeding three months for a first offence; the imprisonment in both cases being in the discretion of the convicting magistrate; and, subject thereto, the provisions of sec. 58 are confirmed.

Clause (*a*) was added to sub-sec. 1 of sec. 41 by 7 Geo. V. (1917) ch. 50, sec. 10, and dealt with drinking liquor in a place where liquor cannot lawfully be kept.

Apart from the imposition of hard labour, the conviction follows the law as laid down in these sections.

By sec. 25 of the Interpretation Act, R.S.O. 1914, ch. 1, where power to impose imprisonment is conferred by any Act, it shall authorise the imposing of imprisonment with hard labour.

This power clearly applies to the penalty for non-payment of the fine. This is also the view of Elwood, J., in *Rex* v. *Nelson* (1914), 17 D.L.R. 305, 22 Can. Crim. Cas. 301, 7 S.L.R. 92, and of the Chief Justice of Saskatchewan in *Rex* v. *Morton*, unreported, referred to therein (at p. 307)—as well as of the Court of Appeal in Alberta: see *Rex* v. *Davidson* (1917), 35 D.L.R. 82, 28 Can. Crim. Cas. 44.

The motion will be dismissed with costs.

Motion dismissed.

BRENNER v. AMERICAN METAL Co.

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Ontario Supreme Court, Middleton, J. December 27, 1920.

WRIT AND PROCESS (§ II B—26a)—*Service out of Ontario—Foreign company—Assets in Ontario—Rule 25 (h) discretion.*]—Appeal by the defendants from an order of the Master in Chambers dismissing a motion by the defendants to set aside a previous order allowing service of the writ of summons out of Ontario, upon the defendants, a company doing business in a foreign country.

G. R. Munnoch, for defendants; *H. H. Shaver*, for plaintiff.

MIDDLETON, J.:—A motion had already been made attacking this order, and an appeal had before the Chief Justice of the Common Pleas. He regarded the order as indefensible without the material being supplemented, and gave leave to file an affidavit supplying the deficiency, whereupon the order was to be allowed to stand; but he further provided that, notwithstanding this order, leave be reserved to the defendants to apply—if so advised—to set aside the order allowing such service, upon the ground that the affidavit filed does not disclose sufficient ground for allowing service out of the jurisdiction or for any other cause. Pursuant to this leave this motion is now made.

In my view, the motion should succeed. I have little to add to what I said in *J. J. Gibbons Limited* v. *Berliner Gramophone Co. Limited* (1912), 27 O.L.R. 402, 8 D.L.R. 471. It is true that my decision in that case was reversed upon appeal (1913), 28 O.L.R. 620, 13 D.L.R. 376; but, as I understand the judgment of the Appellate Division, that Court had no quarrel with the law as I laid it down, but thought that upon the particular facts of the case then in hand, in the exercise of the discretion which I think undoubtedly exists, the action should be allowed to proceed in Ontario. It is not necessary for me to repeat what I there said; I will only refer to the decision in *The Hagen*, [1908] P. 189, 201, where Lord Justice Farwell, after quoting from the judgment of Pearson, J., in *Société Générale de Paris* v. *Dreyfus Brothers* (1887), 37 Ch. D. 215 (relied upon in my former judgment), adds (p. 201) that, if there is any doubt, "it ought to be resolved in favour of the foreigner."

Where our Court assumes to exercise an extra-territorial jurisdiction, and the foreigner has not in any way attorned to our

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jurisdiction, and the only excuse or justification for the assertion of jurisdiction over him is the existence within the Province of assets which may be reached by execution (Rule 25 (*h*)), manifestly the situation is one of delicacy and one calling for the exercise of the most careful judicial discretion. It is not seemly that a command should issue from our Sovereign to the subject of another State calling upon him to submit himself to the jurisdiction of our Courts, save in the clearest possible cases.

The main assets of these defendants are in New York, and it is a mere accident that there is some transient property in this country; and convenience, as well as the exercise of due respect for the right and preference of foreigners to litigate in the Courts of their domicile, points out the Courts of New York as the proper place for this litigation.

I think that proceedings in this action should be forever stayed.

The question of the liability for the costs of the action may well be left to be dealt with after any litigation abroad may have been determined. *Judgment accordingly.*

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MERCHANTS BANK OF CANADA v. SHELDON AND KIBBE.

Saskatchewan King's Bench, Bigelow, J. February, 28, 1921.

MONEY IN COURT (§ I—1)—*Charging order nisi—Paid in under garnishee summons—Summons set aside—Equitable assignment—Consideration.*]—Motion to make absolute a charging order *nisi* on certain money in Court.

D. Maclean, K.C., for plaintiff.

A. E. Bence, for Union Bank of Canada.

BIGELOW, J.:—On January 28, 1921, plaintiff obtained a charging order *nisi* on a certain sum in Court—$314—which was paid in by Alexander E. Sigorenko under a garnishee summons issued in this action, which garnishee summons was afterwards set aside.

This is a motion to make the order absolute.

The Union Bank of Canada claim the money: 1. Because of an equitable assignment on or about October 1st, 1920; 2. Because of a written assignment, January 13, 1921.

As regards the claim under the equitable assignment on October 1, all that was done was that Sheldon handed to the bank manager a statement of account for threshing signed by

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Sigorenko which shewed Sigorenko owed Sheldon and Kibbe a balance of $574.94. There was no assignment of this account to the Union Bank. On November 4, 1920, Sheldon signed a document to the Union Bank which shews:—

In consideration of financial accommodation received by the undersigned from the Union Bank of Canada, it is agreed by the undersigned with the bank as follows:

All bills, notes, lien notes, stocks, bonds, debentures and other securities heretofore or hereafter lodged with the Union Bank of Canada by or on behalf of the undersigned, have been and shall be so lodged and held by the Bank upon the terms and for the purposes following, etc.

This does not apply to an open account, and further it is only signed by Sheldon. Kibbe's interest is not mentioned.

The document, dated September 18, 1917:—

To the Manager,
Union Bank of Canada.

Sir:

We, the undersigned L. C. Kibbe and A. M. Sheldon, composing the firm of Kibbe & Sheldon, do hereby acknowledge and agree, that we are and will be jointly and severally liable and responsible to the Union Bank of Canada for all transactions entered into, or to be entered into, with the said Bank in the name of our said firm, by any individual member of the same, and that the signature of the name of our firm by any member of the same, to any Note, Bill, Draft, Cheque, Receipt, or other document, shall be as binding on us as if such signature had been affixed by each of us respectively under our hands.

(Sgd.): A. M. Sheldon.
(Sgd.): L. C. Kibbe.

does not help. It says that the signature of the name *of our firm* by any member of the same, shall be as binding, etc. There is no signature of the firm to the document of November 4, 1920. It has only the signature of Sheldon.

(2). The Union Bank of Canada claim under an assignment dated January 13, 1921, which reads as follows:—

In consideration of the Union Bank of Canada extending time to A. M. Sheldon on his indebtedness to said Bank which said time has been extended from October 15, 1920, to February 1, 1921, the firm of A. M. Sheldon and L. C. Kibbe and the said Sheldon and the said Kibbe hereby assign, transfer and set over to the Union Bank of Canada the debt due from Alex. E. Sigorenko otherwise Alex. Egeroff to the said firm of Sheldon & Kibbe and the said A. M. Sheldon and L. C. Kibbe for threshing done by the said parties in the fall of 1920 and all their right, title and interest therein and the Union Bank of Canada is hereby given the right to receive the proceeds of the said debt and to give an effectual discharge therefor.

Dated at Perdue, this 13th day of January, 1921.

(Sgd.): Sheldon and Kibbe.
(Sgd.): A. M. Sheldon.
(Sgd.): L. C. Kibbe.

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It is contended by the plaintiff that this assignment is not good because there is no consideration. On that date Sheldon and Kibbe were indebted to the Union Bank in the sum of $928.25. I am of the opinion that an existing debt is sufficient consideration. Whether an existing debt is good consideration has been the subject of decisions under the Statutes of Elizabeth. That statute provides for setting aside fraudulent transfers to creditors, and provides that the Act shall not extend to amounts, etc., upon good consideration and *bonâ fide* made. It has been held under that statute that an existing debt is a good consideration. Parker on Frauds on Creditors and Assignments, 1903, p. 60; *Belcher* v. *Prittie* (1834), 10 Bing. 403, 131 E.R. 962; *Holbird* v. *Anderson* (1793), 5 Term. Rep. 235, 101 E.R. 132.

But even outside existing indebtedness we have here an extension of time until February 1, which would be a good consideration for a new promise. Leake on Contracts, 6th ed., p. 446.

In my opinion the order *nisi* dated January 28, must be discharged and the money in Court paid out to the Union Bank of Canada. *Judgment accordingly.*

KORULAK v. KORULAK.

Saskatchewan Court of King's Bench, MacDonald, J. March 3, 1921.

MARRIAGE (§ IV A—45)—*Annulment—Refusal of wife to cohabit with husband—Desertion of wife—No proof of lack of physical capacity to consummate the marriage—Separation agreement as affecting claim for restitution of conjugal rights.*]—Action by a husband for a declaration that his marriage was void; an order annulling the marriage; restitution of conjugal rights. Action dismissed.

Cumming, for plaintiff; *Waterman*, for defendant.

MACDONALD, J.:—In this action the plaintiff alleges that he and the defendant were married on February 13, 1919, and that after the marriage the defendant refused and still refuses to live and cohabit with the plaintiff, and the marriage has never been consummated by reason of such refusal.

The plaintiff claims: (a) Declaration that the marriage was null; (b) an order annulling the marriage; (c) restitution of conjugal rights.

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The evidence establishes that the parties were married as alleged. On the first night after the marriage plaintiff desired to consummate the marriage, but, to use his own words, "she would not agree and I would not fight for it." Defendant lived with the plaintiff for about a week and then left him. Her father brought her back, but she only remained a few hours. Later the plaintiff went to Canora and brought the defendant thence home with him. She remained not longer than two days when she went away again and thereupon the parties entered into a separation agreement, which, however, was not produced at trial. They have ever since lived separate and apart and the marriage has never been consummated.

There is neither an allegation nor proof that either party has not the physical capacity to consummate the marriage. The only reason given is that the defendant did not desire consummation and plaintiff acquiesced in her refusal.

On these facts I am clearly of opinion that the plaintiff is not entitled to a declaration of nullity, or an order annulling, the marriage. The plaintiff does not allege or shew any reason why the marriage should be held null and void *ab initio*. In fact, the only ground for any relief set up by the plaintiff is the fact of the defendant's refusal of marital intercourse. "Inability to consummate a marriage is now the only cause (except non-age) for which, though not void, it may be avoided." 16 Hals., p. 470 para. 970.

In *S.* v. *A.*, *otherwise S.* (1878), 3 P.D. 72, it was held that: "Wilful wrongful refusal of marital intercourse is not in itself sufficient to justify the Court in annulling a marriage by reason of impotence."

It is true that (see headnote, p. 72) when, after a reasonable time, it is shewn that there has been no sexual intercourse, and that the wife has resisted all attempts, the Court, if satisfied of the *bona fides* of the suit, will infer that the refusal arises from incapacity and will pronounce a decree of nullity of marriage," but (at p. 75) "the law has indicated what is a reasonable time, in requiring three years' cohabitation, by which is meant, that three years is a sufficient time to ascertain whether it is a mere coyness on the part of the woman, or whether there is any physical incapacity."

In this case there has been no such cohabitation and hence no inference of incapacity will be drawn.

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As to the claim for restitution of conjugal rights, I have only to say that, as already observed, there is evidence that the parties executed a separation agreement. This agreement is not produced but as they call it a "separation agreement" I must assume that the parties agreed therein to live separate and apart. As the parties have not seen fit to make complete disclosure I will act on such assumption, and the said relief is refused.

Defendant counter claims for a declaration of nullity, alleging that at the time of the marriage she was only 15 years of age, and that she was compelled by the plaintiff and her parents to go through the form of marriage against her wish. On this point she testifies that she had known the plaintiff, as a neighbour, for some years; that 2 or 3 weeks before the marriage, he for the first time mentioned marriage to her in the presence of her parents; that her parents said she should marry him and would have to marry him. In my opinion this does not shew that she was coerced or compelled to marry plaintiff; it may have only been what the parents considered good advice to their child.

The action and counterclaim shall both be dismissed. There shall be no costs to either party.

Judgment accordingly.

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