Dominion Law Reports

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ANNOTATED

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CASES REPORTED
IN THIS VOLUME

TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 25 INCLUSIVE
OF THE DOMINION LAW REPORTS.

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CASES REPORTED, VOL. XXV., PART 1.

REX v. SNYDER.

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Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A., and Kelly, J. June 7, 1915.

1. TREASONABLE OFFENCE (§ I—10)—ASSISTING THE ENEMY DURING WAR —CR. CODE SECS. 72, 570.

Assisting an enemy alien to leave Canada to join the enemy's forces is treason under Cr. Code sec. 74, sub-sec. (*i*); a mere attempt so to assist is not treason but is indictable under Cr. Code secs. 72 and 570, where an intention to assist the enemy is manifested by any overt act.

[By the Code Amendment, 1915, assisting alien enemies "to leave Canada" is made an offence if the circumstances do not exclude the possibility that assistance to the enemy is an intended object and if the assisting does not amount to treason. This is new, sec. 75A of the Code.]

2. TREASONABLE OFFENCE (§ I—10)—ASSISTING PUBLIC ENEMY—TRAP EVIDENCE—CR. CODE SECS. 72, 74.

A conviction for an attempt to assist a public enemy with which His Majesty is at war by agreeing to ferry four enemy aliens over the Niagara River to the United States whence they might proceed to join the enemy's forces, is not sustainable where there was no incitement by the accused and the enemy aliens had no intention of leaving Canada and no knowledge that the purpose of their being brought to the accused was that they should be ferried across the river, the fact being that they were being used in the make-up of a police trap to get evidence against the accused because of a suspicion that he had committed similar offences; the aliens could not be said to have been "assisted" without a desire or willingness on their part to be assisted, and the sham plot having been terminated by the arrest of the accused after he took the consideration money paid in advance by another person who had solicited the accused in furtherance of the plot arranged by the authorities and the transportation not having begun, there was no evidence of an attempt.

[*R.* v. *Linnecker*, [1906] 2 K.B. 99, applied; *R.* v. *Taylor*, 1 F. & F. 511, referred to.]

3. CRIMINAL LAW (§ I C—10)—ATTEMPTS—DEFINITION.

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.

[See Annotation on Criminal Attempts at end of this case.]

CASE stated by BOYD, C.

The following is a statement of the facts.

Statement

"From information received by them, the military authorities at Welland suspected the defendant of assisting the enemy by conveying Austrian subjects across the Niagara river to the United States after the war broke out, and about the 14th November, 1914, they sent one Jack Bugarski, who was in their employment, to the defendant. The said Bugarski represented to the defendant that he was a foreman on the Welland canal, and that sixty or seventy Austrian reservists under him, who were under

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suspicion in the country, were anxious to get to Buffalo for the purpose of reporting to the Austrian consul there, and of saving their property in Austria from confiscation. The defendant, after several interviews, finally agreed with Bugarski that he would take these men across for $10 each, and arranged with Bugarski that he would bring some of the men to his house on the Niagara river on an appointed night, when he, the defendant, would row them across to the United States.

"Bugarski, at the appointed time, appeared at the defendant's house with four Austrian reservists, and met the defendant as arranged. The defendant stated that the weather was too bad, and that he would have to defer taking the men across the river until the wind abated, and he conducted the men to an old house on the property, where he agreed to keep them until that time.

"The defendant provided the men with a light to be used in the house, and cautioned them to make no noise and to place the light so that it would not be observed from without. He was paid $10 by Bugarski for each of the men in payment of his charge for taking them across the river. This payment was made in the house, in the presence of the men, by Bugarski. After the payment, Bugarski and the defendant left the house, locking the men in.

"After he left the building, he concealed the $40 received by him from Bugarski in an old cutter, and after he had concealed it he was arrested by the military authorities, who had men posted in the vicinity for the purpose of intercepting him on his way across the river. When he was arrested, he admitted that he had received the money, and told the authorities where he had concealed it.

"No evidence was called for the accused excepting two witnesses as to character.

"The jury returned a verdict as follows: 'Guilty of attempting to commit treason, but did not realise the seriousness of his act.'"

The following questions were submitted for the opinion of this Honourable Court:—

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"1. By common law or the Criminal Code is it an offence to attempt to commit treason?

"2. Was there sufficient evidence to justify me in submitting this case to the jury?

"3. Does the language used by the jury in their verdict, that the accused 'did not realise the seriousness of his acts,' amount to a verdict of 'not guilty?'"

A. C. Kingstone, for prisoner.

J. R. Cartwright, K.C., and *Edward Bayly*, K.C., for Crown.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is a case stated by the Chancellor after the conclusion of the trial of the prisoner at the sittings at Welland on the 7th April, 1915.

The prisoner was indicted for treason, the indictment charging him with the offence mentioned in clause (*i*) of sec. 74 of the Criminal Code, and the means by which he is alleged to have assisted the public enemy were, "by inciting and assisting Charles Karoly, Steve Padunadic, Mick Markic, and Peter Yuvatovich, Austrian subjects of the Emperor of Austria, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the said enemy, and by trading with the said enemy, contrary to the Criminal Code."

Counsel for the Crown did not ask for a conviction for treason, but that the prisoner should be convicted of "an attempt to commit the treason with which he was charged."

The jury found the prisoner "guilty of attempting to commit treason, but did not realise the seriousness of his act."

It was argued that this was in effect a verdict of "not guilty," but that is clearly not so. All that the rider to the verdict of "guilty" expresses and means is, that the prisoner attempted to do the act with which he is charged, without realising that the offence he was committing was as serious as it in fact is.

It was also argued that an attempt to commit treason is treason; but, if that were the case, the jury have found the prisoner guilty of treason. No doubt, in the case of certain kinds of treason, the attempt, or even less than the attempt, is treason:

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e.g., "the forming and manifesting by any overt act an intention to kill His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or to imprison or to restrain him," is treason: sec. 74 (*b*). So also "the forming and manifesting, by an overt act, an intention to kill the eldest son and heir apparent of His Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland," is treason: sec. 74 (*d*).

But in the case of the kind of treason with which the prisoner was charged, which is the statutory offence defined by clause (*i*) of sec. 74, the treason consists in "assisting," and the forming and manifesting by any overt act an intention to assist is, under the Code, not treason, but is an indictable offence under sec. 72, which provides that "every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not;" and by sub-sec. 2 of that section it is provided that "the question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

Contrary to my first impression, I have come to the conclusion that the acts done by the prisoner amounted to an attempt to commit the offence charged in the indictment.

It is often very difficult to draw the line between what is only preparation to commit an offence, and an attempt to commit it; but, accepting the definition of an "attempt" given in Stephen's Digest of the Criminal Law, 1st ed., art. 49, which was approved by the Court in *Rex* v. *Linneker*, [1906] 2 K.B. 99, I am of opinion, subject to what I shall say upon the last branch of the case, that what was done by the prisoner had passed the stage of mere preparation and constituted an attempt to commit the offence.

That definition is, that "an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

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In the case of *Rex* v. *Linneker* the prisoner was indicted for having attempted to discharge a loaded revolver at the prosecutor with intent to do him grievous bodily harm. It was proved that, being asked by the prosecutor why the prisoner asked a question that he put to the prosecutor, the prisoner said, "I am going to tell you why," and at once put his hand in his pocket and commenced to pull something out. This proved to have been a loaded revolver. Before the prisoner got the revolver out of his pocket, the prosecutor laid hold of his arm. The prisoner got the revolver out of his pocket. While they were struggling, the prisoner said several times, "You've got to die." Eventually the prosecutor wrested the revolver from the prisoner, and with assistance took him to the police station. The prisoner was convicted. It was held by the Court that there was evidence for the jury.

In delivering his judgment Kennedy, J., said: "It is always necessary that the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence" (p. 103). And, referring to what it was necessary to prove, Darling, J., said that two matters had to be present to constitute the crime: "First, there must be evidence of the physical act, the attempt to discharge the firearm. That can be proved by evidence of what the man was doing with his hands, holding a pistol and so on; and if he did these acts which, if not prevented, he would do in order to discharge a pistol, then there is evidence of an attempt" (pp. 103-4.)

In *Regina* v. *Taylor* (1859), 1 F. & F. 511, the prisoner was indicted for that he "by a certain overt act, to wit, by then and there lighting a certain match . . . near to a certain stack of corn . . . unlawfully . . . did attempt to set fire" to the stack of corn. It was proved that the prisoner called at the prosecutor's house and applied for work; upon refusal he asked for a shilling, and, being again refused, became very abusive, and threatened "to burn up" the prosecutor. He was then watched by the prosecutor and his servant, and seen to go to a neighbouring stack, and, kneeling down close to it, to strike a lucifer match; but, discovering that he was watched, he blew

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out the match, and went away, and no part of the stack was burnt. Chief Baron Pollock in charging the jury told them that if they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion that was in law a sufficient attempt to set fire to the stack, within the meaning of the statute, to render the prisoner liable to be found guilty. That it was clear that every act committed by a person with the view of committing the felonies mentioned in the statute was not within it; as, for instance, buying a box of lucifer matches with intent to set fire to a house; that the act must be one immediately and directly tending to the execution of the principal crime; and that, if two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment such as that against the prisoner.

The facts in the case at bar are thus stated in the case:—

"From information received by them, the military authorities at Welland suspected the defendant of assisting the enemy by conveying Austrian subjects across the Niagara river to the United States after the war broke out, and about the 14th November, 1914, they sent one Jack Bugarski, who was in their employment, to the defendant. The said Bugarski represented to the defendant that he was a foreman on the Welland canal, and that sixty or seventy Austrian reservists under him, who were under suspicion in the country, were anxious to get to Buffalo for the purpose of reporting to the Austrian consul there, and of saving their property in Austria from confiscation. The defendant, after several interviews, finally agreed with Bugarski that he would take these men across for $10 each, and arranged with Bugarski that he would bring some of the men to his house on the Niagara river on an appointed night, when he, the defendant, would row them across to the United States.

"Bugarski, at the appointed time, appeared at the defendant's house with four Austrian reservists, and met the defendant as arranged. The defendant stated that the weather was too bad, and that he would have to defer taking the men across the

river until the wind abated, and he conducted the men to an old house on the property, where he agreed to keep them until that time.

"The defendant provided the men with a light to be used in the house, and cautioned them to make no noise and to place the light so that it would not be observed from without. He was paid $10 by Bugarski for each of the men in payment of his charge for taking them across the river. This payment was made in the house, in the presence of the men, by Bugarski. After the payment, Bugarski and the defendant left the house, locking the men in.

"After he left the building, he concealed the $40 received by him from Bugarski in an old cutter, and after he had concealed it he was arrested by the military authorities, who had men posted in the vicinity for the purpose of intercepting him on his way across the river. When he was arrested, he admitted that he had received the money, and told the authorities where he had concealed it."

There was evidence that the prisoner intended to take the Austrians across the river to the United States for the purpose mentioned in the indictment, and evidence from which the jury might properly conclude that, if the prisoner had not been arrested, he would have carried out that intention.

The bargain he made with Bugarski, and his acts with reference to the four men who were brought to the farm for the ostensible purpose of being taken over to the United States, were overt acts forming part of a series of acts which, if not interrupted, would have ended in the commission of the actual offence. As in the case of *Rex* v. *Linnecker* the fact that the prisoner had not drawn the trigger did not prevent what he did from constituting an attempt, so in this case the fact that the prisoner had not begun the transportation of the men did not prevent what he had done with a view to carrying out his intention from constituting an attempt to commit the offence with which he was charged.

Since the argument, the stated case has been amended by making the evidence part of it, and we are now in a position to

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deal with a further contention on the part of the appellant, which was not open on the case as at first stated.

It appears from the evidence that the men whom the prisoner is charged with having incited and assisted had no intention of leaving Canada for the purposes mentioned in the indictment or for any other purpose, and that they had no knowledge that the purpose of their being brought to the prisoner's premises was that he might take them across the river for any such purpose or at all. The whole affair was a sham, arranged by the military authorities for the purpose of confirming the suspicions they had that the prisoner was engaged in the work of assisting Austrians to cross the river with the view of their going to Europe to assist the enemy, and, as they thought, enabling them to arrest him *flagrante delicto*. The prisoner, no doubt, thought that the thing was real, especially when he received $10 in cash for each of the men that were brought to him.

There was no evidence that the prisoner incited the men or any of them to leave Canada, and I am unable to understand how it can be said that the prisoner assisted them to leave or attempted to do so. Surely to assist another involves the idea of a desire, or at least a willingness, to be assisted on the part of the person who is said to have been assisted; and there was neither, according to the uncontradicted testimony, and that, too, elicited from the witnesses called on the part of the prosecution.

I am, for this reason, of opinion that there was no evidence proper to be submitted to the jury of the offence charged in the indictment, or of an attempt to commit it.

Conviction quashed.

Annotation

Annotation—Criminal law—What are criminal attempts.

Throughout the Criminal Code there are to be found special enactments as to the punishment of attempts to commit particular offences, *ex. gr.*, attempts to murder (sec. 264), attempting corruptly to dissuade a witness (sec. 180).

Punishment of criminal attempts.—The general provisions applicable are as follows: —

"570. Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for

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which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years."

"571. Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced."

"572. Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or incites or attempts to incite any person to commit any such offence, and for the punishment of which no express provision is made by such statute."

These raise the questions—What is an attempt to commit a crime? To what extent must the intention and the effort to commit a crime have progressed before its frustration or abandonment of effort in order to constitute an "attempt" in contemplation of law and indictable as such?

Definition of "attempt."—The definition of an "attempt" given by Stephen in his Digest of Criminal Law, 6th edition, p. 41, was that an attempt to commit a crime is an act done with intent to commit the crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. This definition was accepted in *R.* v. *Laitwood*, 4 Cr. App. R. 248, and later in *R.* v. *Linnecker*, [1906] 2 K.B. 99, 21 Cox C.C. 196. Some difficulty may arise in determining whether the preliminary acts were in fact part of the series of acts which would constitute the completed crime if it were not interrupted or whether on the other hand such preliminary acts were more properly to be classed as acts of preparation having too remote a relation to the intended crime to be termed an attempt.

Sec. 72 of the Criminal Code may here be referred to. It declares that:—

"Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not."

The same section provides that:—

"The question whether an act done or omitted with intent

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to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

In *R.* v. *Ring*, 61 L.J.M.C. 116, 17 Cox C.C. 491, the prisoners were held to have been rightly convicted of an attempt to steal from unknown women at a railway station, although there was no evidence that there was anything in the woman's pocket.

Where the purchase is made and the money parted with from a desire to secure the conviction of the seller, there is no obtaining by false pretences, but the seller may yet be liable for the attempt. *R.* v. *Lyons* (No. 1), 16 Can. Cr. Cas. 152.

The physical impossibility of completing the crime is now no defence to an indictment charging the attempt to commit the crime. *R.* v. *Brown*, 24 Q.B.D. 357; *R.* v. *Duckworth*, [1892] 2 Q.B. 83, 17 Cox 495; *R.* v. *Williams* [1893] 1 Q.B. 320.

In the Draft English Criminal Code, prepared in 1879 by Lord Blackburn, and Barry, Lush, and Stephen, JJ., the following definition appears (art. 74): "(1) An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause. (2) Every one who, believing that a certain state of facts exists, does or omits an act the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible. (3) The question whether an act done or omitted with intent to commit an offence is or is not only prepartion for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

The definition of an attempt given above in the first part of article 74, of the Draft English Code of 1879, has not been embodied in the Canadian Criminal Code, but the second and third paragraphs in explanation of the definition correspond with sec. 72 of the Criminal Code, 1906. The first part seems, however, to be an accurate statement of the common law.

As to what is "too remote" it is material to consider whether there is any further act on the defendant's part remaining to be done before the completion of the crime. See *R.* v. *Eagleton*, Dears. p. 538; *R.* v. *Cheeseman*, L. & C. at p. 145; and the ob-

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servations of Alderson, B., in *R.* v. *Roebuck*, Dears. & B. 24, 7 Cox at p. 127, and *R.* v. *Hensler*, 11 Cox 570.

At common law every attempt to commit a crime was a misdemeanour. *R.* v. *Hensler*, 11 Cox C.C. 570.

An assault with intent to commit an offence involving force is an attempt to commit such offence. *R.* v. *John*, 15 Can. S.C.R. 385. The procuring of dies for coining bad money has been treated as an attempt to coin bad money. 2 Stephen's History Criminal Law, 224; *R.* v. *Roberts*, Dears. C.C. 64, 25 L.J.M.C. 17. And the procuring of indecent prints with intent to sell them has been held an attempt to circulate them in contravention of the statute. *Dugdale* v. *The Queen*, Dears. C.C. 64, 1 E. & B. 435, 22 L.J.M.C. 50.

In an Ontario case A. was charged with attempting to set fire to a building, a dwelling house, and B. with inciting and hiring him to commit the offence. Under B.'s directions, A. had arranged and placed pieces of blanket saturated with coal oil against the doors and sides of the house, had lighted a match, which he held in his fingers till it was burning well, and had them put the light down close to the saturated blanket with the intention of setting the house on fire; but just before the flame touched the blanket the light went out, and he threw the match away without making any further attempt. It was held that the attempt was complete.

Hagarty, C.J., said: "The fact of A.'s going away, or ceasing further action after the match went out (not by any act or will of his) seems to put the matter just as if he had been interrupted, or was seized by a peace officer at the moment. It seems to me the attempt was complete, as an attempt, at that moment, and no change of mind or intention on prisoner's part, can alter its character. It would be a reproach to the law if such acts as were here proved do not constitute an overt act towards the commission of arson. *R.* v. *Goodman*, 22 U.C.C.P. 338; and see Dr. Hoyles' able article on the Essentials of Crime, 46 C.L.J. 393, 405.

In *Commonwealth* v. *Jacobs*, 9 Allen (Mass.) 274, it is said that an accused "*himself capable* of doing every act on his part to accomplish that object cannot protect himself from responsibility by shewing that by reason of some fact unknown to him at the time of his criminal attempt, it could not be carried fully into effect in the particular instance."

But it is not essential that the accused shall have done every act left for him to do in committing the offence intended. He may be convicted of an attempt to murder although further acts

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had to be done by him before the person could have been killed. *R.* v. *White*, [1910] 2 K.B. 124, 79 L.J.K.B. 854, 4 Cr. App. R. 257.

The intent.—The essence of a criminal offence is the evil or wrongful intent with which the act is done. This is the "mens rea" doctrine under the legal maxim—*Actus non facit reum nisi mens sit rea.* The mere intention to do or to omit an act is not generally punishable as a crime; there must be some overt act. *R.* v. *Thistlewood*, 33 St. Tr. 682. Where the charge is conspiracy the agreement by the two conspirators is in itself an overt act. *Mulcahy* v. *The Queen*, 3 H.L. 306; *R.* v. *Aspinall*, 2 Q.B.D. 48.

An intent does not necessarily imply an attempt. *R.* v. *Linneker*, [1906] 2 K.B. 99 at 103, 21 Cox C.C. 196.

Upon an indictment for an attempt to defraud by setting fire with intent to defraud the fire insurance company, evidence may be admitted on the question of intent of a fire on defendant's premises, although nine years previous, upon which his insurance claim had been disputed and compromised for a lesser amount. It is for the jury to say what weight should be attached to such evidence of intent in view of the lapse of time and other circumstances. *The King* v. *Beardsley*, 18 Can. Cr. Cas. 389.

A person who fires a loaded pistol into a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and who hits one of them, may be convicted on an indictment charging him with shooting at the person he has hit with intent to do grievous bodily harm to that person. *R.* v. *Fretwell* (1864), L. & C. 443, 9 Cox C.C. 471.

Mens rea, in the legal sense of the expression, should not be confounded with a guilty conscience or evil intention. A statute which prohibits an act, would be violated though the act was done without evil intention or even under the influence of a good motive. *R.* v. *Hicklin*, L.R. 3 Q.B. 360; *Stacey* v. *Chilworth Gunpowder Co.*, 24 Q.B.D. 90; *Bank of N.S.W.* v. *Piper* (1897), 66 L.J.P.C. 76; *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, 64 L.J. M.C. 218; *R.* v. *Tolson*, 23 Q.B.D. 168; *R.* v. *Prince*, L.R. 2 C.C.R. 154; and see article in Can. Law Jour. (1903), p. 691.

But, as stated by Baron Parke in *R.* v. *Eagleton*, Dearsley's C.C. 515, 6 Cox C.C. 559, "acts remotely leading to the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." Mens rea is a necessary ingredient in a criminal offence unless the statute either expressly or by necessary implication from its language

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dispenses with it. *Strutt* v. *Clift*, [1911] 1 K.B. 1; *R.* v. *Russill*, 2 Can. Cr. Cas. 131, at 139; *Coppen* v. *Moore*, [1898] 2 Q.B. 306. To constitute a criminal attempt there must have been an overt act directly connected with the intended crime. The intent may be inferred from the overt act which be the only evidence of the intended crime. Where the act is equivocal in its nature it may in some cases be possible to shew with what intent it was done by the statements made by the accused at or prior to the overt act, or by his subsequent admissions of his purpose.

Upon the trial of an indictment for wounding with intent to disable, a verdict of "guilty without malicious intent" is equivalent to a verdict of acquittal, although the jury were instructed that if intent to disable were negatived they might still convict of the simple offence of wounding. Such verdict is to be construed as a finding that the act of the accused which resulted in wounding the complainant was done without malice. (*The King* v. *Slaughenwhite* (No. 1), 9 Can. Cr. Cas. 53, reversed.) *Slaughenwhite* v. *The King; The King* v. *Slaughenwhite* (No. 2), 9 Can. Cr. Cas. 173, 35 Can. S.C.R. 607.

On an indictment charging an attempt to commit a crime it may be a misdirection not to distinguish an attempt in law from an intention or a threat. *R.* v. *Landow* (1913), 8 Cr. App. R. 218.

Motive and intent distinguished.—Intent should not be confounded with motive. The terms "intention" and "motive" are often used indiscriminately to denote the same thing, but motive and intention are really two different things, and a distinction ought to be made in the use of the terms. Motive is the moving cause or that which induces an act, while intent is the purpose or design with which it is done. Motive has to do with desire, and intent with will. Burrill's Circ. Evid., 283, 284.

Motive generally precedes intent, for a man usually has some inducement or cause for doing a thing before he makes up his mind to do it. There are some cases in which no more need be done to the criminal intent than to prove the mere doing of the act; as where the act is such as to shew within itself the guilty intent, so that there can be but one reasonable inference, which of necessity arises from the facts proved. Every sane man is presumed to contemplate the ordinary natural and probable consequences of his acts. *Townsend* v. *Wathen*, 9 East 277; *R.* v. *Dixon*, 3 M. & S. 15.

When any act done by any person is either a fact in issue, or is relevant to the issue, any fact which supplies a motive for

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Annotation

Annotation *(continued)*—Criminal law—What are criminal attempts.

such act is relevant, and proof of it is admissible even if such fact should tend to affect and damage such person's good character. Stephen's Digest of the Law of Evidence, article 7. While the law does not allow evidence of general bad character to be adduced in the first instance as a criminative circumstance, whenever it is necessary to prove a motive on the part of the defendant to commit the offence charged, it is competent to prove particular facts which are of a nature to shew a motive, even when they may injuriously affect his reputation, and the reason is that proof of the existence of a motive is not in itself a criminative circumstance, but is only a circumstance which tends to remove the improbability of the act which has been proved to have been done having been done without criminal intent. *R.* v. *Barsalow* (No. 2) (1901), 4 Can. Cr. Cas. 347. A motive may, under peculiar circumstances, become an exceedingly important element in a chain of presumptive proof, as where a man, accused of the murder of his wife, has previously formed an adulterous connection with another female. On the other hand, the absence of any apparent motive is always a fact in favour of the accused. Best on Presumptions, p. 310.

"Preparation" and "attempt" distinguished.—Lord Blackburn said in *Reg.* v. *Cheeseman*, Leigh and Cave 140, 31 L.J.M.C. 89, "There is, no doubt, a difference between the preparation antecedent to the offence and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the offence."

The facts in *Reg.* v. *Taylor*, 1 F. & F. 511, were that the prisoner was refused work, became very abusive, and threatened to "burn up" prosecutor. He was watched by prosecutor and his servant, was seen to go to a neighbouring stack and kneeling down close to it, to strike a lucifer match; but discovering that he was watched, he blew out the match, and went away. No part of the stack was burnt. The Chief Baron told the jury that if they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion this was in law a sufficient attempt to set fire to the stack.

If, with an intent to steal, the accused puts his hand into an empty pocket, he may be convicted of an attempt to steal, although he could not have committed the complete offence of theft. *R.* v. *Ring* (1892), 17 Cox C.C. 491, 61 L.J.M.C. 116; *R.* v. *Brown* (1890), 24 Q.B.D. 357; over-ruling *R.* v. *Collins* (1864), L. & C. 471, contra.

Annotation *(continued)*—Criminal law—What are criminal attempts. ONT.

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It was held in *Rex* v. *Linneker*, [1906] 2 K.B. 99, 22 Times L.R. 495, that the accused was rightly convicted of "feloniously attempting to discharge a revolver with intent to do grievous bodily harm, when he had drawn a loaded revolver from his pocket, with an expression of intention to use it, but was seized before he could take any further step towards discharging it."

In *Commonwealth* v. *Peaslee*, 177 Mass. 267, Holmes, C.J., said: "That an overt act, though coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation becomes very near to the accomplishment of the act the intent to complete it renders the crime so probable that the act will be a misdemeanour, although there is still a locus pœnitentiæ, in the need of a further exertion of the will to complete the crime."

"Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made." Field, C.J. *People* v. *Murray*, 14 Cal. 159.

"As the aim of the law is not to punish sins, but to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. But it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural force, but for some casual and unexpected interference. It is none the less an attempt to shoot a man that the pistol which is fired at his head, was not aimed straight, and, therefore, in the course of nature, could not hit him. Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd. Every question of proximity must be determined by its own circumstances and analogy is too imperfect to give much help." Holmes, J., in *Commonwealth* v. *Kennedy*, 170 Mass. 18, 20.

Where the act done by the accused could have been for no other object than to commit the offence, *i.e.*, where it bears the criminal intent upon its face, that circumstance will assist in classifying it as a proximate act evidencing an "attempt" if the act may be said to be the commencement of the intended crime, one of the series of acts which, if not interrupted, would end in the commission of the actual offence. *R.* v. *Roberts*, Dears. C.C.

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539; *R.* v. *Jackson*, 17 Cox C.C. 104; *R.* v. *Linnecker*, [1906] 2 K.B. 99, 21 Cox C.C. 196.

In *R.* v. *Button*, [1900] 2 Q.B. 597, 69 L.J.Q.B. 901, the prisoner by false pretenses and personating another was given a more favourable handicap in a race at an athletic meet than he would have received otherwise, and it was argued that there could be no conviction for attempt to obtain money under false pretenses as he had not claimed the prize, although he won the race. The Court for Crown cases reserved held that the attempt to obtain the prizes were not too remote from the pretence, and the prisoner was rightly convicted. Mathew, J., followed the decision of Lord Lindley in *R.* v. *Dickenson* (1879), Roscoe's Cr. Evid., 12th ed., 432, 433, and disapproved (Lawrance, J., concurring) the contrary view expressed in *R.* v. *Larner*, 14 Cox C.C. 497. Mathew and Lawrance, JJ., thought the pretense which the prisoner made was not too remote. The prisoner was "found out before he had the opportunity of applying for the prizes as no doubt he otherwise would have done." Wright, J., said that "in effect the prisoner did claim the prize. If nothing more had been shewn than that the defendant had entered for the race in a false name, the case would have been different."

An interesting case is that of *R.* v. *Robinson* (1915), 11 Cr. App. R. 124, where it was held that an attempt had not been proved because of remoteness of the act. The accused had a jewelry store and placed a burglary insurance on same. Some weeks later he bound himself in the store and called for help, pretending that the store had been robbed and that he had been tied by the robbers. The police found the goods he had secreted and he admitted to them that he had planned the scheme to get money from the underwriters. The Lord Chief Justice said there was no doubt that if a claim had been made, or if any step had been taken towards communicating the news of the burglary to the underwriters with a view to making a claim on them, the appellant could have been convicted of the offence. The Court affirmed the rule laid down by Parke, B., in *R.* v. *Eagleton*, Dears. C.C. 515, 24 L.J.M.C. 158, that "the mere intention to commit a misdemeanour is not criminal; some act is required and we do not think all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." In *Robinson's case*, there was preparation of evidence for the commission of the crime "but not a step taken with a view to the commission of the crime." "Appellant was preparing the evidence that would

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be required to give colour to the story which he intended falsely to pretend. If the police had reported the burglary it might well have been that the underwriters would have been satisfied without making further enquiries, but there must have been first some act on the part of the appellant in making a claim upon them."

Attempt charged.—When an attempt to commit an offence is charged, but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt, unless the Court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence. Code sec. 950.

After a conviction of such attempt the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit. Code sec. 950(2).

Where a prisoner is indicted for an attempt to steal, and the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the Court discharges the jury and directs that the prisoner be indicted for the complete offence. *R.* v. *Taylor* (1895), 5 Can. Cr. Cas. 89, 4 Que. Q.B. 226. This is a departure from the rule which prevailed before the Code, as to which see *Leblanc* v. *R.*, 16 Montreal Legal News 187.

Full offence charged.—When the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. Code secs. 949 and 951. *R.* v. *Hamilton*, 4 Can. Cr. Cas. 251; *R.* v. *Morgan* (No. 2), 5 Can. Cr. Cas. 272.

Full offence and attempt both charged.—Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only, will not be set aside, although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence. *R.* v. *Hamilton* (1897), 4 Can. Cr. Cas. 251 (Ont.). It is within the province of the jury, to believe, if it sees fit to do so, a part only of a witness's testimony, and to disbelieve the remainder of the same witness's testimony, and it may, therefore, credit the testimony in respect of a greater offence only in so far as it shews a lesser offence. Ibid.

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ROY v. FORTIN.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. November 2, 1915.

1. EXEMPTIONS (§ II A—5)—EXERCISE OF RIGHT—WHEN—ASSIGNMENT FOR CREDITORS.

The right to claim an exemption as against an assignee for creditors is founded on the restrictive words used in sec. 17 of the Homestead Act, R.S.B.C., 1911, ch. 100, and in the instrument of assignment which adopts the words of the Act; and in order to be entitled to such right it must be claimed at the time of the delivery of possession to the assignee or within a reasonable time thereafter, else it will be presumed to have been waived.

[*Sehl* v. *Humphreys*, 1 B.C.R., pt. 2, 257; *Pilling* v. *Stewart*, 4 B.C.R. 94; *Re Ley*, 7 B.C.R. 94; *Yorkshire* v. *Cooper*, 10 B.C.R. 65, applied.]

2. ASSIGNMENTS FOR CREDITORS (§ III B 3—25)—ACTIONS BY ASSIGNEE—REPLEVIN—MODE OF PROCEEDING.

An assignee for the benefit of creditors need not rely upon the special statutory remedies given him under secs. 48 and 50 of the Creditors Trust Deeds Act, R.S.B.C. 1911, ch. 13, to enable him to proceed in replevin to recover the possession of goods assigned to him.

Statement

APPEAL by defendant from judgment of Grant, Co. J.

Steers, for appellant, defendant.

Brown, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Defendant made an assignment to the plaintiff pursuant to the Creditors Trust Deeds Act of all her property and effects "which may be seized and sold or attached under execution or the Execution Act or attachments." She delivered possession thereof to the assignee without making any claim to exemptions under the provisions of the Homestead Act. The plaintiff subsequently loaned the defendant certain of the goods and defendant signed a receipt therefor in a form which clearly acknowledges the loan. Several months thereafter she refused to return the goods, claiming them as an exemption which but for her ignorance of the law, it is contended, she would have made at the time of the assignment. The plaintiff obtained an order of replevin and from that order defendant appeals.

By amendment (1873) of the Homestead Ordinance 1867, it was declared that:—

> The following personal property shall be exempt from forced seizure or sale by any process of law or in equity or from any process in bankruptcy, that is to say, the goods and chattels of any debtor or bankrupt at the option of such debtor or bankrupt or if dead of her personal representative to the value of $500, the same not being homestead property under the provisions of the said Homestead Ordinance 1867.

This section with certain modifications is now sec. 17 of R.S.B.C. 1911, ch. 100. Standing alone it was construed to mean that if the debtor wished to take advantage of the option

there given him of claiming an exemption he must make his demand upon the sheriff. In other words, his right to an exemption was declared to be a special privilege which he might insist upon or not at his option. If he insisted upon it then the sheriff must release the goods selected to the value of $500. *Sehl* v. *Humphreys*, 1 B.C.R., pt. 2, 257. The statute was again amended in 1890 by the addition of several sections which are now secs. 18 to 23, both inclusive, of the revised Act. These sections provide the procedure to be followed in the selection of the goods and in my opinion if anything were wanting to make the intention of the legislature clear as to the meaning of the original section, these new sections supply it. It is plainly contemplated that the sheriff may seize all the debtor's goods without setting aside anything by way of exemption, and that if the debtor desires to take advantage of the provision in his favour he must do so within two days after the seizure or after notice thereof, whichever shall be the longest time. It is further provided that in case there should be no dispute as to the value of the goods selected the sheriff shall release the same to the debtor, but that if there shall be a dispute the value shall be appraised as pointed out in the Act, and when the dispute is adjusted the sheriff shall hand over to the debtor the goods awarded to him. The intention is clear that the debtor is to make his claim at once, and any dispute is to be summarily decided, so that the sheriff may proceed to execute his writ without uncertainty.

The suggestion that it is made the duty of the sheriff in default of a claim by the debtor to set aside $500 worth of goods as an exemption in favour of the debtor finds no sanction in any part of the Act and is against the whole tenor of it.

The right to claim an exemption as against an assignee for creditors is founded on the restrictive words used in the Act and in the instrument of assignment which adopts the words of the Act. What are assigned are the assignor's goods which may be seized and sold under execution. Now, all her goods might be seized and sold under execution unless the exemption were claimed in the manner set out in the Homestead Act. Hence, if the assignor wished to resort to that right, she should have done so at the time of delivery of possession to the assignee, or at all events within a reasonable time thereafter. It being her

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option to claim an exemption or not, her election not to do so would bind her. I think she elected not to claim the goods in question when she borrowed them, and thus recognized the assignee's final ownership of them. She must be presumed to have known the law, and therefore it is no excuse to say that at that time she was not aware of her rights.

The construction I have placed upon the sections of the Homestead Act in question is consistent with the authorities from *Sehl* v. *Humphreys*, *supra*, down to the present time. It was the opinion of Drake, J., in *Pilling* v. *Stewart*, 4 B.C.R. 94, and of McCall, C.J., in *Re Ley*, 7 B.C.R. 94, and inferentially of the Full Court in *Yorkshire Guarantee* v. *Cooper*, 10 B.C.R. 65.

I would therefore dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—It was first objected that the plaintiff, being an assignee, cannot resort to these proceedings in replevin to recover the goods assigned to him but must rely upon the special statutory remedies given him under secs. 48 and 50 of the Creditors Trust Deeds Act, ch. 13, R.S.B.C. 1911, and we are asked to restrain him under sec. 64 from "continuing proceedings which are not in the interests of the estate," etc. I am unable to take this view, and can only regard said sections as providing special and summary methods before certain nominated persons (*Re Vancouver Corpn. Act*, 9 B.C.R. 373) of recovering property and obtaining information, and subjecting the assignor and others to special penalties. These sections are of much value in certain circumstances, but there is nothing in the present case (which is one where the assignee is trying to get back from the assignor, property which he loaned to her, as appears by her written acknowledgment and receipt) that would justify our ordering a discontinuance of this action, even if this Court of Appeal could in any event entertain such an application at this stage and in this manner, which I am of the opinion it could not.

Nor can I take the view that the assignee cannot commence an action of this description without obtaining the consent of the creditors; I find nothing in the sections to which we were referred which prevents him from doing so.

Then it was urged that the goods in question are "personal property . . . exempt from forced seizure or sale by any process at law or in equity" under sec. 17 of the Homestead Act, which provides that "the goods and chattels of any debtor at the

option of such debtor . . . to the value of $500" shall be exempt as aforesaid. But in my opinion that Act has no application to such a state of affairs as we have here because in any event the debtor must be deemed to have exercised her "option" and elected not to claim an exemption by conveying the goods to the plaintiff for certain specified purposes, under the Creditors Trust Deeds Act, ch. 13, R.S.B.C. 1911. The exact point was decided by McColl, C.J., *Re Ley*, 7 B.C.R. 94, where he held that:—

> The exemption is not an absolute right but a privilege and therefore may be waived, as well as lost by laches and that by the form of assignment the claimants in this case are precluded, even if otherwise entitled.

The "form of assignment" is essentially the same in the case at bar, viz.:—

> All her real and personal property credits and effects which may be seized or sold or attached under execution or the Execution Act, or attachment.

That the goods herein could be seized and sold under sec. 10 of the Execution Act, ch. 79, R.S.B.C., 1911, is clear, and therefore there is no distinction between the two cases, and I think the decision of McColl, C.J., should be followed. This view of the Act, that this dormant right of exemption is not an absolute exemption which prevents seizure and sale, but a matter of privilege dependable upon and exercisable "at the option of such debtor" (to quote the statute) and therefore the goods are liable to seizure and sale before the claim for exemption is made, is an old and long established one in this province, beginning with the decisions of Gray, J., in *Johnson* v. *Harris*, 1 B.C.R., pt. 1, 93; and *Sehl* v. *Humphreys*, 1 B.C.R., pt. 2, 257, and continued by Drake, J., in *Pilling* v. *Stewart*, 4 B.C.R. 94, where the exact point before us was raised by the debtor's counsel. Since the decision of Gray, J., the Act has been twice specially considered by the legislature and amended before the general revisions of 1897 and 1911, viz., in 1890, ch. 20, and in 1896, ch. 23 (this being also later than the judgment in *Pilling's Case*, *supra*), and so his view must be regarded as having received legislative sanction and exposition according to the authorities cited by me in *Jardine* v. *Bullen*, 7 B.C.R. 471, at 477; and *Sheppard* v. *Sheppard* 13 B.C.R. 486 at 517–8, approved of by their Lordships of the Privy Council in *Watt* v. *Watt*, [1908] A.C. 573 at 579. Therefore the later inconclusive expressions in *Dickinson* v.

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Robertson, 11 B.C.R. 155, should be disregarded. I note that *Pillings Case* escaped observation.

I have not overlooked the fact that in *Pillings Case*, Drake, J., said that the debtor "cannot after conversion make any claim," which observation was directed to the facts of that case where the claim was not made till after the assignee had sold the debtor's (assignor's) goods under the assignment. It was not necessary for the judge to express his opinion upon the effect of the failure to make any claim at the time of the assignment whereby under sec. 4 of the Creditors Trust Deeds Act all his property became "vested" in his assignee, excepting such as was exempt, and it has been seen that no personal property is exempt before claim made. But as hereinbefore stated that is the exact point decided, and I think rightly so, by McColl, C.J. Moreover, such a conveyance and transfer of the debtor's property would be a "conversion" of it to carry out the main specified object of the deed of assignment, viz., "upon trust, to sell and convey all the real and personal property of the assignor and with the proceeds to pay off all her debts, and the costs of the trust, and then to hand over the surplus to her." It is indeed unfortunate that the consequences of this decision should be those sad ones depicted by Drake, J., in *Pillings Case*, at p. 99, but the appellant here has the poor consolation of knowing that in the following year my equally unfortunate client in *H.B. Co.* v. *Hazlett*, 4 B.C.R. 450, met the same unavoidable but none the less unhappy fate at the hands of the same Judge and McCreight, J.

It follows that the appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—Though personally inclined to the view that the $500 exemption is not merely a privilege, the Courts of this province and other provinces have taken the latter view.

In view of this and that the legislature of this province by subsequently legislating a fixed period within which the judgment debtor may make his selection may be taken to have adopted those decisions as the proper interpretation of the exemption clause, I am with reluctance forced to the conclusion that this appeal must be dismissed.

McPhillips, J.A. (dissenting)

McPHILLIPS, J.A., dissented. *Appeal dismissed.*

LALEUNE v. FAIRWEATHER.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November, 29, 1915.

1. SALE (§ II C—37a)—WARRANTY—HIGH GRADE SEAL COAT—BREACH.
Representing a coat to be a "high grade Alaska seal coat" constitutes a warranty as to the quality of the fur and not of the makeup of the coat, which will entitle the buyer to recover the difference in value if the coat turns out to be of a medium grade only.

2. SALE (§ III C—70)—BREACH OF WARRANTY—REMEDIES—RESCISSION—WHAT CONSTITUTES.
A breach of warranty as to the quality of goods sold entitles the buyer to damages for the difference in value but not to the right of rescission; nor will the seller's dealings with the returned article in an attempt to remedy its defects amount to acts of ownership so as to operate as a rescission.

Statement

APPEAL from judgment of Dawson, Co. Ct. J., dismissing action for breach of warranty of sale.

C. Isbister, for appellant, plaintiff.

E. J. Bingham, for respondent, defendant.

The judgment of the Court allowing the appeal was delivered by

Richards, J.A.

RICHARDS, J.A.:—The defendants, on January 4, 1915, published an advertisement of goods which, it said, they were offering for sale at from "33 1-3% to 75% discounts off the regular marked prices." A number of articles were specified, amongst which was the following: "Real seal coat. High grade Alaska seal coat, ¾ length, with raglan sleeves, shawl collar and cuffs, handsome brocade lining, $750 value for $375."

It was the only sealskin coat referred to in the whole advertisement.

The plaintiff saw the advertisement and because of so seeing it went to defendant's shop and asked Mr. Beer, manager of the defendant's fur department, to show her the coat. When so doing she referred to it as the one named in the advertisement. He then brought the coat and shewed it to her. She says he then told her it was of a very high grade Alaska seal, and that she told him she knew nothing about furs and would take his word for it.

Mr. Beer says, in his evidence, that there was no question asked him regarding the quality of the seal. That is quite consistent with his having made the statement without being asked. He says nothing else that can be interpreted as a denial.

The plaintiff looked at the coat and on the next day, relying

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on Mr. Beer's representation, she bought it and a seal muff to match it, paying $375 for the coat and $50 for the muff. Later she exchanged the muff for another priced at $70, and agreed to pay, but has not yet paid, the $20 difference in price.

After wearing the coat once or twice the plaintiff found that dye from the fur came off and discoloured her neck. She then took it and the muff back to defendant's shop, saying she refused to keep them, and demanded a return of the $425.

Mr. Beer refused to return the purchase money, but told her that defendants would rectify the trouble as to the dye. She did not assent to their doing so. They did, in fact, have the coat treated by a process that is said to have remedied the dye trouble.

The plaintiff sued in the County Court for a return of the $425, or, in the alternative, for damages for breach of warranty. The defendants disputed their liability and counterclaimed for the $20, balance of price of the muff.

At the trial it was shewn by Mr. Beer's evidence, he being a witness called by the defendants, that the fur in the coat was only medium Alaska seal and not high grade, and that a similar coat of high grade seal would be worth $200 to $300 more than the one in question.

The defendants took the stand that there had been no warranty, or representation, that the fur in the coat was of high grade Alaska seal. They claimed that in the advertisement the words "high grade" referred, not to the quality of the fur, but to the quality of the makeup, lining, etc., of the coat.

The fact that the words "real seal coat" preceded "high grade Alaska seal coat" was relied on as shewing that the only warranty intended, as to the fur, was that it was really seal fur. It was argued that those words were such that any fur, really seal, would come within them, and it was claimed that, if "high grade" denoted the quality of the skins used, there would have been no object in using the preceding words, which would be fulfilled by furnishing seal fur of any grade.

The trial Judge held that the plaintiff had no right to rescind the contract and return the goods. He further held, as I understand his reasons for judgment, that the warranty of "high grade" referred only to the way in which the coat had been made up,

irrespective of the fur, and that, in that respect, the coat was of high grade. He dismissed the plaintiff's action and gave judgment in the defendant's favour for $20 on their counterclaim. From that decision the plaintiff has appealed.

If the case depended on conflicting evidence I should hesitate before disagreeing with the trial Judge. But, as I see it, the question turns on points not disputed, that is to say, the printed advertisement and the uncontradicted evidence by the plaintiff as to warranty by Mr. Beer.

I do not think the plaintiff had power to rescind the purchase. The defendant's dealings with the coat, after it was returned to them, were not acts of ownership, but rather were had in order to placate the plaintiff by removing her grievance as to the dye.

The question of warranty, however, stands on a different footing in my opinion. With the utmost deference I think that "high grade," in the advertisement, referred to the quality of the fur, and not to the makeup of the coat. There was some evidence that as a trade term it would be held to refer to the "make." The advertisement was not directed to members of the fur trade, but to the general public, and it should be construed, therefore, according to the meaning as the public would ordinarily give it.

As already stated, the fur is shewn by the defendants' own witness, who sold the coat to the plaintiff, to be of medium quality only, and the same witness says the difference in value, between such a coat and a similar one of high grade Alaska seal fur, would be $200 to $300.

I see no reason to doubt the plaintiff's story that she relied, in buying, on the representation that the coat was of high grade Alaska seal.

I would allow the appeal with costs, reverse the finding in the County Court, and enter a verdict there for the plaintiff for $180 (being $200 damages less the $20 balance unpaid on the muff) with costs.

This decision would not, of course, give the defendants a title to the coat and muff, or to either of them. They would still be the plaintiff's property.

Howell, C.J.M.
Cameron, J.A.

HOWELL, C.J.M., and CAMERON, J.A., concurred.

Perdue, J.A.
Haggart, J.A.
(dissenting)

PERDUE and HAGGART, JJ.A., dissented.

Appeal allowed.

ALTA.

S. C.

FLEMING v. DUPLESSIS.

Alberta Supreme Court, Harvey, C.J., Scott and Stuart, JJ. October 29, 1915.

1. ARBITRATION (§ III—16)—VALUATION OF FIXTURES BETWEEN LANDLORD AND TENANT—VALIDITY OF AWARD—INTERVIEW WITH ONE DURING THE ABSENCE OF OTHER.

An interview with the landlord while procuring invoices of stock to be used in making the award, in the absence of the tenant or his counsel, does not constitute misconduct on the part of an arbitrator appointed in pursuance of the terms of a lease to determine the value of fixtures to be taken over by the landlord at the end of the term, where the invoices were so obtained at the suggestion of the tenant's counsel.

Statement

APPEAL from an order of Beck, J., dismissing an application of a tenant to set aside an award.

J. C. Landry, for defendant.

E. B. Edwards, for plaintiff.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The tenant was tenant to the landlord of a hotel premises in Holden under a lease wherein it was provided that, upon the termination of the term created by the lease, the landlord should take over all the furnishings, fixtures, bar fixtures, stock-in-trade, furniture and other chattels belonging to or pertaining to the hotel business at a value to be agreed upon between the parties and in the event of their being unable to agree, then at the value to be determined by a sole arbitrator if one may be agreed upon and, in the event of the parties being unable to agree upon a sole arbitrator, then the value and terms to be determined by three arbitrators, each party appointing one and those two (and, in the event of their disagreement, the Court) appointing the third arbitrator.

The term created by the lease having been determined, the landlord took possession of the hotel premises and took over the personal property referred to and, upon the application of the landlord, Beck, J., after hearing the parties, appointed Allen sole arbitrator "to determine the value of the goods mentioned in the lease."

After his appointment as arbitrator Allen, at the request of the solicitors for the parties and before taking any evidence, went down to Holden to inspect the goods in question. On March 1, 1915, he proceeded to hear the evidence adduced by the parties. On March 29 he heard the argument of counsel for the parties and on April 3, 1915, he made his award or valuation in writing fixing the value of the goods at $1,608.42.

The grounds of the application to set aside the award are that the arbitrator misconducted himself "in receiving from the landlord or his son invoices of the goods in question, using the same as a basis for making his award, same having been received in the absence of the tenant or his solicitor and after the taking of evidence was concluded, also in having interviews with the landlord or his son in the absence of the tenant or his representatives and also in obtaining information from other sources after the conclusion of the hearing of evidence.

In his reasons for judgment dismissing the appeal, Beck, J., expresses the doubt whether Allen was an arbitrator within the meaning of the Arbitration Ordinance or was anything more than a mere valuator. He also expresses the view that there was no intentional irregularity in his conduct.

The only acts of the arbitrator which were shewn on the application were that he obtained invoices from the landlord and his son during his visit to Holden to inspect the premises, that he made use of them in making out his award, and that he had interviews with them in the absence of the tenant or his representatives.

In my view it is unnecessary to consider the question whether Allen was an arbitrator within the meaning of the Ordinance as his uncontradicted evidence on the hearing of the application shews conclusively that it was at the suggestion of the tenant's solicitor that he procured the invoices during that visit and made use of them. In answer to questions put to him by the solicitor he makes the following statements: "I got some invoices according to your instructions. . . . When I was asked to go to Holden, I mentioned the fact that I supposed the 'invoices would be there.' . . . You advised me to take the invoices and make use of them. . . . I understood from you that I was to use the invoices obtained at Holden and make my valuation accordingly. That is my recollection."

As to the interviews had by the arbitrator with the landlord and his son. The latter were then occupying the hotel premises and communication with them could not reasonably be avoided. It was also necessary to interview them in order to procure the invoices in their possession. It does not appear that there was any discussion during those interviews of the matters involved in the arbitration.

ALTA.

S. C.

FLEMING v. DUPLESSIS.

Scott, J.

Notwithstanding the fact that there was a formal hearing before the arbitrator at which evidence was adduced and a further meeting for the purpose of hearing the argument of counsel the conduct of the tenant's solicitor was such as to reasonably lead the arbitrator to the conclusion that the award was not to be based entirely upon the evidence adduced at the hearing and that the proceedings were not to be entirely of a formal character. His statements which I have quoted support this view.

I would dismiss the appeal with costs. *Appeal dismissed.*

B. C.

C. A.

Re **CANADIAN NORTHERN PACIFIC R. CO. & NEW WESTMINSTER.**

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. November 2, 1915.

1. TAXES (§ I F 2—80)—EXEMPTION—RAILWAY PROPERTIES—WHAT ARE. Lands acquired by a railway company for railway purposes, but contingent upon the sanction of the Minister of Railways whether or not they shall become part of the railway, are not within the meaning of clause 13 (*e*), ch. 3, of the Statutes of B.C. (1910), exempting from taxation all properties and assets of a railway company "which form part or are used in connection with the operation of its railway."

Statement

APPEAL by railway company from the judgment of Clement, J., confirming decision of Court of Revision that the lands were not exempt from taxation.

E. P. Davis, for appellant railway company.

Joseph Martin, K.C., for respondent municipality.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—There is evidence that the lands against the assessment of which the railway company appeals were purchased by or on behalf of the company for railway purposes.

The appellants, the railway company, rely upon ch. 3 of the Statutes of B.C. 1910, cl. 13 of the schedule thereof, sub-cl. (*e*), which reads as follows:—

> The Pacific Company (the appellants) and its capital stock, franchises, income tolls, and all properties and assets which form part of or are used in connection with the operation of its railway shall until 1st July, 1924, be exempt from all taxation whatsoever.

It is not denied by the respondent that if these lands fall within the above description the municipality is bound to exempt them from taxation. Their contention is that these lands do not form part of the railway. That they have not yet been used in connection with the operation of the railway is either conceded by appellants or is so plain upon the evidence and admissions of counsel as to make it unnecessary to discuss that part of the clause. The neat question therefore is, "Do these lands form part of the railway?"

The appellants admitted that no map pursuant to sec. 16 of the Railway Act, being ch. 194 of R.S.B.C. 1911, or pursuant to similar provisions in the Acts of which this is a consolidation, had been submitted to or approved by the Minister of Railways, or deposited with him or with the Registrar of Titles pursuant to the succeeding sections, so that the appellants could not, without contravening sec. 27 of the said Act, build its railway on the lands in question. The most that appellants have endeavoured to say is: "We bought these lands for the purpose of rights of way and other requirements of our railway, and although we are not yet in a position to use them for those purposes we *bonâ fide* intend so to do at a future time and as such these lands are within the true intent and meaning of said exempting clause part of our railway."

I think the clause must be strictly construed, and so construing it, I agree with the Judge below that in the circumstances of this case the municipality was within its rights in assessing these lands. Whether or not they shall become part of the railway is contingent upon the sanction of the Minister of Railways. It is to my mind manifestly impossible for the appellants to say that these lands are definitely part of their railway so long as it is open to the Minister to say, "Your railway shall not be constructed on these lands, or if on any of them, then only upon such as I designate."

It was not an unreasonable but a manifestly reasonable construction to place upon the Act, and it is in my opinion in accord with its language to hold that until lands have been definitely applied to the use of the railway they cannot be held to be within the language of the said clause and exempt from taxation. That construction is in accordance with manifest convenience. This railway company is authorized to acquire other lands not to form part of its railway nor to be used in connection with the operation of it. There is no presumption that because the lands have been acquired by the railway they are to become part of the railway. Proof of that is upon the railway company, and until the company can show these lands are definitely and unconditionally made portion of the railway, or are used in connection with the operation of the railway, they fail to bring them within the purview of the exempting clause. I would dismiss the appeal with costs.

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RE C.N.P.R. & NEW WESTMINSTER.
Galliher, J.A.

MARTIN, J.A.:—I am of the opinion that the Judge below took the correct view of this matter, that, in a nutshell, the lands in question cannot "form part of" this railway, in the true sense, until the location map thereof has been approved by certificate under sec. 17 and the plan, profile, and book of reference, required by sec. 19, duly deposited in the proper Land Registry Office.

It follows that the appeal should be dismissed.

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

McPhillips, J.A. (dissenting)

McPHILLIPS, J.A., dissented. *Appeal dismissed.*

MAN.
C. A.

MOLISON v. WOODLANDS.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 12, 1915.

1. SCHOOLS (§ IV—72)—CONSOLIDATION OF SCHOOL DISTRICTS—CONCLUSIVENESS AS TO FORMATION—ISSUE OF DEBENTURES—VALIDITY.

Section 219 (*g*) of the Public School Act providing that the signature of the Provincial Secretary and the Seal of the Province affixed to school debentures shall be "conclusive evidence that such corporation has been legally formed," precludes an attack as to the validity of the various proceedings leading up to the consolidation of a school district, and constitutes the debentures thereof indefeasible securities in the hands of their holders.

[*Molison* v. *Woodlands*, 21 D.L.R. 19, affirmed.]

Statement

APPEAL from judgment of Mathers, C.J.K.B., 21 D.L.R. 19, in favour of defendant in action by ratepayers to set aside award for consolidation of school district.

W. H. Trueman, for appellant, plaintiff.

W. B. Towers, for Woodlands municipality.

A. C. Campbell, for Rockwood municipality.

Howell, C.J.M.

HOWELL, C.J.M.:—The Chief Justice of the King's Bench has in his judgment, 21 D.L.R. 19, fully set out the facts in this case.

Par. 9 of the statement of claim is as follows:—

9. Subsequently to the making of said award the said school districts o McLeod, Brant and Bruce have by means or proceedings which are without legal warrant and which are contrary to law, been formed or organized into a consolidated school district known as Brant Consolidated School District No. 1703, administered by a board of trustees, and the said trustees have by means and proceedings without warrant in law and contrary to law enacted a by-law known as by-law No. 1 of the Brant Consolidated School District No. 1703, for the purpose of enabling the trustees of said school district to raise the the sum of $9,000 for erecting and equipping a new schoolhouse and purchasing site therefor.

Pursuant to the by-law referred to above the Department of Education assented to the loan and the Provincial Secretary shortly thereafter signed debentures to secure the loan and

affixed the Great Seal of the Province thereto as empowered to do by sub-sec. (*g*) of sec. 219 of the Public Schools Act.

The plaintiff alleges that the defendants went through certain forms with the intention of forming a union school district and through forms to obtain a loan on the credit of the district, but all were irregular and void. The defendants shew that the Department of Education assented to the loan and a Minister of the Crown signed the debentures and affixed the Great Seal of the Province thereto. I shall assume that the Minister of Education and the Provincial Secretary in doing these ministerial acts each believed that the law had been complied with and that the union school district had been legally formed.

I think the defendants thereby have given incontrovertible evidence under sub-sec. (*g*) above referred to, that the school district "has been legally formed," or, in other words, lawfully incorporated.

The appeal must be dismissed with costs.

RICHARDS, J.A.:—It seems to me that this matter is settled by sec. 159, sub-sec. (*g*) of ch. 143 of the R.S.M. 1902, which was in force when the debentures referred to were issued. That sub-section is re-enacted, in the same words, in sub-sec. (*g*) of sec. 219 of the present Public Schools Act. It says that, upon compliance with certain preliminaries (which it names, and which it is admitted have here been complied with)—

Richards, J.A.

> the Provincial Secretary . . . shall sign such debenture or debentures . . . and shall affix the Great Seal of the Province thereto: and such signature and seal shall be conclusive evidence that such corporation has been legally formed . . ."

Because of further provisions in the sub-section, that the validity of the issue of the debentures shall not thereafter be questioned, it is argued that the above quoted provision, as to the signature and seal being conclusive evidence of the corporation having been legally formed, is one that can only be invoked by *bona fide* holders of the debentures.

There is nothing in the language used that necessarily so limits the effect. On the contrary the wording is very broad. It would have extraordinary, and worse than useless, results as to the very school district in question, if we were to hold that while the debentures were a lien on the district, yet in fact no such district exists. It would also very materially injure the financial credit of the school districts of the province.

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I cannot see how evidence, however strong, of previous defects in the creation of the corporation can be admitted as against proof of the signature and seal which are to be "conclusive evidence" of that which such first-mentioned evidence is produced to impeach. I would dismiss the appeal with costs.

PERDUE, J.A.:—From the proceedings taken for the consolidation of the school districts and the facts in the case, all of which are fully set out by Mathers, C.J.K.B., in the judgment appealed from, it is clear that there were grave defects and irregularities in the procedure leading up to the award made under sec. 123 of the Public Schools Act, and in the award itself. If proper legal action had been promptly taken by persons entitled to maintain such an action, it appears to me that the award could not have been upheld. But the parties who are now moving took no action until more than 8 months had elapsed. In the meantime the Department of Education had approved the award, and had assented to the consolidation of the old school districts into a new corporation to be known as "The Consolidated School District of Brant No. 1703." A meeting for the election of trustees for the new school district was held and trustees elected. A public meeting was held and a site for a new school selected, and later another meeting was held to decide upon the kind of school to be erected. Two of the present plaintiffs were present at all these meetings and raised no objection to what was being done. Then the trustees by a by-law, which was approved by a vote of the ratepayers, authorized the borrowing of $9,000 to purchase a site and erect and equip a school. The Department of Education assented to the loan, the debentures were issued, and the endorsement provided for by sec. 219, sub-sec. (*g*), was placed on each debenture and signed by the Provincial Secretary and the Great Seal of the Province attached. The debentures were then sold, the erection of a schoolhouse commenced, and some $6,000 spent before this action was brought. The school was shortly afterwards completed and occupied.

The plaintiffs were fully aware of what was being done and allowed all the above steps to be taken without questioning their validity. In a case like the present prompt action is necessary upon the part of those who object to the legality of the proceedings and especially so where a new school district has been

established, pre-existing districts abolished, and a heavy expenditure made with borrowed money to provide a new school: See *Hill* v. *Tecumseth*, 6 U.C.C.P. 297; *Cotter* v. *Darlington*, 11 C.P. 265.

But the main obstacle in the plaintiffs' way is sec. 219, sub-sec. (*g*), of the Public Schools Act. By that sub-section the signature of the Provincial Secretary and the seal of the province affixed to the certificate endorsed on the debentures shall be "conclusive evidence that such corporation has been legally formed." This, to my mind, precludes the plaintiffs from taking any objection to the validity of the various proceedings leading up to the formation of the corporation. The plaintiffs desire that the award of the arbitrators made under sec. 123, sub-sec. (*d*), be referred back to the arbitrators for correction. I am not aware of any authority for doing so. If the award were now opened up the corporation upon which it is based would fall. It is idle to say that, even if the corporation is no longer in being, the debentures would remain good by virtue of the certificate. Against whom, in that event, could they be enforced? Upon what school district could the rate wherewith to pay them be levied if the school district mentioned in the debentures had ceased to exist? The debentures have been purchased by *bona fide* holders upon the protection afforded by the certificates. To attempt to open up the incorporation now on the ground of illegality in the proceedings relating to it would be to question a validity which the statute declares has been conclusively established.

I might point out that a needless mistake was made in the rearrangement of sec. 219 in the last revision of the statutes. In the previous revision, R.S.M. 1902, ch. 143, sec. 159, the sub-section providing for the placing of the endorsement or statement on the back of the debenture was sub-sec. (*f*) which came before sub-sec. (*g*), and the latter sub-section properly referred to the "statement of endorsement *hereinbefore* mentioned." In the last revision the old sub-sec. (*f*) is placed after sub-sec. (*g*) but the word "hereinbefore" is still used. A reference to former statutes shows that the word should be read as "hereinafter."

In my view the appeal should be dismissed with costs.

CAMERON, J.A.:—In this case the Chief Justice of the King's Bench dismissed the plaintiff's action on the ground that the

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wording of sec. 219, sub-sec. (*g*) of the Public Schools Act was sufficiently comprehensive to place beyond question the legal existence of the school district in question. It may be that a union school district intended to be formed under secs. 122 and 123 of the Act does not become a corporation until it borrows money under sec. 203 and following sections. It is the fact that sec. 219 occurs as one of a series of clauses under the heading of "Borrowing Money and Issuing Debentures," and that as a consequence sub-sec. (*g*) will be read as having primarily to do with the borrowing of money by a district, the issue of debentures thereof, the legality of the issue, the status of *bona fide* holders of such debentures, and other matters relevant to these subjects. But all these facts and considerations do not prohibit us from giving the full force to words in the sub-section the meaning of which, to me at least, is clear and indisputable. When sub-sec. (*g*) says that the signature of the Provincial Secretary and the affixing of the Great Seal of the Province "shall be conclusive evidence that such corporation has been legally formed." Those words convey to my mind a definite meaning. There is nothing to restrict the word "conclusive" to questions that may arise between the debenture holders and the district. The word is used generally, absolutely, without qualification. In my judgment it means "conclusive as against the world." Then such signature and affixing of the seal is evidence as against the world that such a corporation as that purporting to issue the debentures "has been formed." It is not necessary that a corporation should be declared a corporation in express terms. Cyc. X. 203. And defects in the orgainzation of corporations under a general law may be cured by subsequent recognition of the existence of the corporation. *Ib.* 241. There can be entertained, no doubt, I think, of the power of the legislature to pass such legislation and thus create a corporation, either directly, by express enactment, or indirectly, whether by recognition in an enactment, or by authorizing such recognition through some defined instrumentality, such as the executive government of the province or a member thereof. This last method, it is true, may seem to be an awkward way of attaining the result aimed at, but there can be no doubt that it can be done adequately and conclusively, and it seems to me that that is the effect of the words of the sub-section now under consideration.

I have read and considered the cases to which plaintiffs' counsel referred us upon his contention that the action of the Minister in signing, and affixing the seal of the province to, the debentures could not create a corporation that had no pre-existence. The Ontario decisions cited mainly proceeded upon the ground that there was to be found in the proceedings "a fundamental error which vitiates all proceedings based on the assumption that a valid corporation had been called into existence," per Boyd, C., in *Trustees, etc.*, v. *Arthur*, 21 O.R. 60 at 71. But the Ontario cases refer to statutory provisions curing defects in a by-law by virtue of registration after the lapse of a certain period without proceedings being taken to quash and other provisions of a similar character. The English case of *Wenlock* v. *Dee*, 38 Ch. D. 534, refers to the effect of the certificate of certain government officials which it was held did validate a mortgage upon a company for a greater amount that it had statutory power to borrow, which certificate was made "conclusive evidence," but only as to the specific matters set out in the Act, p. 540. But here the authority given by the statute before us is exercised by the Crown through the action of a Minister of the Executive Council in placing his signature upon the debentures and affixing thereto the Great Seal of the Province. This is an act of the executive government of the province, which has been appointed an instrument to recognize and thus call into existence a school district proposed to be formed, but not formed, in accordance with the Act. There is no question of the authority of the legislature to delegate such power. And I think there can be no doubt that such power has been in this case validly executed. I adopt the view expressed by Haultain, C.J., in *Canadian Agency* v. *Tanner*, 11 D.L.R. 472 at 479, 6 S.L.R. 152 at 161, in dealing with similar legislation in that province:—

> The whole object of the sections providing for that certificate (of the Minister of Municipal Affairs) would be lost if, in spite of the clearest and widest language to the contrary, the validity of the by-laws we are discussing could be open to question in this or any other Court.

In my opinion, therefore, the wording of sub-sec. (*g*) referred to is sufficient to constitute this union district a corporation for all the purposes of the Act relating to union school districts. The district has been legally formed, because the statute says so.

As to referring the matter back to the arbitrators for further consideration and report on the matters on which they are stated

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to have failed to report, in my judgment it is now too late to do so. The arbitrators have discharged their duties and are *functi officio*. Their report, such as it was, was made and acted upon by the ratepayers, the trustees, and the department, money was advanced, and the debentures, duly signed by the Provincial Secretary and sealed, of the district, were issued therefor. In the Arbitration Act definite provision is made giving power to the Court to refer matters back for re-consideration, but in the absence of such a provision in the Public Schools Act it cannot be deemed possible that the arbitrators have, or could be given by the Court, any power or authority to re-consider in a matter which has long since finally passed out of their hands.

I would affirm the judgment of the Chief Justice.

Haggart, J.A.

HAGGART, J.A.:—The Chief Justice of the King's Bench in his judgment has set out fully the facts. I agree with the conclusion at which he has arrived.

In addition to the reasons given by him I would observe that the plaintiffs in their statement of claim ask that it be declared that the award is illegal and void, but on the hearing of the appeal they reduced their claim to that for an order to remit or refer back the award to the arbitrators with instructions to have them report as to all the matters specifically set out in ch. 145, sec. 123, sub-sec. (*d*), R.S.M. By asking such relief the plaintiffs practically admit that there was a *de facto* award which could be cured or amended by further findings of the arbitrators.

The award is set out in the statement of claim and there is a finding that the territory therein described by sections, townships, and ranges "be formed into a Consolidated Union School District." This is a report or award though there are several defects in other respects.

Now sec. 3 of the statute effects the incorporation which section enacts that "the trustees of every consolidated school district shall be a corporation under the name of, etc." The word "union" is left out of the statute, but a "Consolidated Union School District" is a "Consolidated School District," and I think this section should be so read.

If then we have a corporation with all its defects to which the curative enactment in sec. 219, sub-sec. (*g*), can apply, it is made

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a corporation legally formed with all the statutory formalities complied with and its debentures an indefeasible security.

I cannot give this section the narrow meaning contended for by the plaintiff, which simply gives the bondholders a claim or demand to which no defence could be offered. The sub-sec. (*g*) enacts that the debentures signed by the Provincial Secretary and sealed with the Great Seal of the Province are conclusive evidence that a corporation has been legally formed, all the formalities complied with, and that the same shall to the extent of the revenues of the school district be an indefeasible security in the hands of the holders. The statute creates the relation of debtor and creditor. That debtor can only be a corporation and if it is a corporation it is a Consolidated Union School district. If it is bound to pay that debt it must necessarily have the powers to procure or collect the moneys for this purpose from "the revenues of the school district."

The plaintiffs might have raised all the questions set out in the pleadings in this suit when the application was made to the department for its assent to the proposed loan, or to the Provincial Secretary when asked to endorse the bonds with his signature and the provincial seal. On these occasions the proceedings could have been validated without trouble but by their laches they have allowed the serious conditions to arise referred to by the trial Judge.

I would dismiss the appeal. *Appeal dismissed.*

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N. S.

S. C.

Nova Scotia Supreme Court, Graham, C.J., Drysdale and Longley, JJ., Ritchie, E.J., and Harris, J. November 23, 1915.

1. LEVY AND SEIZURE (§ III A—40)—LIABILITY OF CONSTABLE—UNLAWFUL SEIZURE—JUSTIFICATION.

Where an execution is issued by a stipendiary magistrate after the lapse of one year without the affidavit required by sec. 32, ch. 160, R.S.N.S. 1900, but is otherwise within the jurisdiction of the magistrate and in regular form, a seizure by a constable under such warrant is a mere ministerial act and will afford absolute justification to the officer executing it.

[*Sleeth* v. *Hurlbert*, 25 Can. S.C.R. 620, 628; *Morse* v. *James*, Willes 122, 128, followed.]

Statement

APPEAL from judgment of Finlayson, Co. Ct. J., in favour of plaintiff in an action of replevin against a constable.

W. F. O'Connor, K.C., for appellant.

H. Mellish, K.C., for respondent.

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LAW v. LOVELL.

Harris, J.

The judgment of the Court was delivered by

HARRIS, J.:—This action is replevin against a constable who seized a piano under an execution issued by a stipendiary magistrate on a judgment recovered for a debt. The judgment was more than one year old and sec. 32 of ch. 160, R.S.N.S. 1900, which applies to the case provides that:—

No execution shall issue after the lapse of one year from the time of giving judgment unless it is made to appear by affidavit that a balance is still due on such judgment and that due diligence has been used to collect the same.

The execution was issued without this affidavit having first been made.

It was in the form M prescribed by ch. 160. This form recites the judgment but does not give the date of its recovery.

After this action was brought the execution was set aside by the stipendiary for want of the affidavit. The question is whether the constable can justify under this execution. I think he can.

In *Morse* v. *James*, Willes 122, at 128, Willes, C.J., said:—

I am of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject matter of which he had jurisdiction, and the execution not shewing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him by virtue of that process.

In *Hurlbert* v. *Sleeth*, 25 Can. S.C.R. 620 at 628, Sedgewick, J., in delivering the judgment of the Court, said:—

If the subject matter of a suit is within the jurisdiction of a Court, but there is a want of jurisdiction as to the person or place the officer who executes process in such case is no trespasser unless the want of jurisdiction appears by such process.

And at p. 629, after reviewing the authorities, he says:—

The general principle running through all these cases and authorities is that even though a warrant may in fact be bad, though it may be or has been set aside by reason of failure to comply with legal requirements, if it has been issued by competent authority by a functionary duly authorized by statute or otherwise and is valid on its face it will afford absolute justification to the officer executing it and not only where he is proceeded against criminally but by civil action as well.

The execution in this case is, I think, within this authority and a good justification for the defendant.

I think the appeal should be allowed with costs.

Appeal allowed.

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S. C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Elwood and McKay, JJ. November 20, 1915.

1. BILLS AND NOTES (§ I D 1—31)—NEGOTIABILITY—BLANKS—FILLING UP —AUTHORITY.

Filling up a blank in a promissory note at the time of its delivery to the payee completes the negotiability thereof, and where such fact is established by the evidence, the question whether it was filled up strictly in accordance with the authority given, as mentioned in secs. 31 and 32 of the Bills of Exchange Act, R.S.C., 1906, ch. 119, has no application, and the note will be enforceable in the hands of an indorsee who had obtained it in due course without knowledge of any defects.

[*Ray* v. *Willson*, 45 Can. S.C.R. 401; *Smith* v. *Prosser*, [1907] 2 K.B. 735, distinguished.]

Statement

APPEAL from judgment for plaintiff in action on promissory note.

G. E. Taylor K.C., for appellants.

W. F. Dunn, for respondent.

The judgment of the Court dismissing the appeal was delivered by

McKay, J.

McKAY, J.:—This is an action on a promissory note by an indorsee who claims to be the holder thereof in due course, having obtained it from Waterworth, the payee. The defendants deny the allegations in the plaintiff's claim, and say that if the defendants signed the note, which they deny, the same was not signed as a promissory note, but that the said Waterworth after obtaining their signatures to a blank document by fraud, without their consent or authority, filled in the body of the said document as and for a promissory note, but the same was not intended to be and never has been made or delivered as a promissory note, and the defendants received no consideration therefor whatsoever. That the said Waterworth represented that he would hold the same conditionally until he had delivered to the defendants a certain stallion satisfactory to them, and would deliver the said stallion, but the stallion delivered was of no use or value and not satisfactory to the defendants. The original plaintiff was McBride, but he having died while the action was pending, his executrix was substituted as plaintiff.

It appears from the evidence that the note sued on was one of two notes given by the defendants to one Waterworth for a stallion, and the trial Judge found "that the promissory notes

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McKay, J.

in question were signed as promissory notes; that the deceased plaintiff took them in due course for valuable consideration, and that, therefore, the defendants are liable to pay," and directed judgment for the plaintiff for the amount of the note and costs. From this judgment the appellants appeal.

Whether the note sued on was signed in blank or not, and whether the respondent was a holder in due course or not, are questions of fact, and if there is evidence to warrant these findings of the trial Judge, in my opinion the findings should not be disturbed, unless the evidence shews that he was clearly wrong in the conclusions he arrived at. But after having carefully gone over the evidence, I have come to the conclusion that there is ample evidence to support the findings of the trial Judge.

It appears that G. Waterworth and J. Porter, early in July, 1910, came to Moose Jaw from Ontario with some stallions which they were syndicating among the farmers in the neighbourhood, and Waterworth placed one named McAllister with the defendants, receiving from them a subscription agreement dated February 5, 1910, put in at the trial as ex. C, and two promissory notes, both dated February 5, 1910, each for $1,100, payable one 12 and the other 24 months after date to himself at the Molsons Bank, Simcoe, Ontario. These notes were put in at the trial as exs. A and B respectively.

All the defendants admit signing the promissory notes, and all but H. Lebuhn admit signing ex. C. Ex. C is as follows:—

For the purchase of a stallion horse to be held in Belle Plaine and surrounding towns and their vicinity I hereby agree to pay the amount subscribed opposite my name for the Clyde stallion McAllister No. (8153) Canadian bred, to be purchased from Geo. Waterworth, Simcoe, Ont., provided the two thousand two hundred dollars, $2,200, is subscribed for, or otherwise this agreement shall be null and void, said amount of two thousand two hundred dollars, $2,200, to be paid in two joint notes, payable in one and two years from the first of February, 1910, with interest at the rate of seven per cent. per annum, or to be paid in cash at the option of the subscribers on completion of this subscription list.

Dated at Belle Plaine this 5th day of Feb., 1910.

Names: Thomas Rusk, Jr., $400; John A. Watson, $400; John Randall, $400; John Rusk, $400; H. Lebuhn, $200; Phin J. A. Lowe, $400.

All the defendants are farmers living in the Belle Plaine district, and the original plaintiff, who gave evidence at the trial,

lived in Tillsonburg, Ontario. The only parties who gave evidence at the trial as to the signing and giving of the notes and agreement to Waterworth were the appellants, and the examination for discovery of Watson was also put in. The evidence of these appellants is not at all clear or satisfactory. The substance of their evidence is that Waterworth came out to their respective places, and told them he wished to syndicate a stallion, and wanted them to take a share in him, and to everyone taking a share he would later sell him a team of brood mares. That the stallion would pay for himself out of his earnings, and the mares would pay for themselves with their colts which he would purchase from them later. And they try to establish that they signed these two blank promissory notes, one as a subscription list for the stallion, the other for the mares. They, however, admit they knew they were blank promissory notes when they signed, but that they were not to be filled in until they accepted the stallion, which they were to inspect at the farm of Thomas Rusk, Jr., or some say other notes were to be filled up and completed when the stallion was accepted. But they do not give a satisfactory explanation why the third document, ex. C, was signed. Nearly all the appellants say they thought they signed only two documents, but when confronted with the two notes and ex. C all but one, H. Lebuhn, admit their signatures to the three documents. Appellant T. Rusk, Jr., who was the first to sign all three documents, met Waterworth and Porter in Moose Jaw on February 4, 1910, in presence of the defendant Watson, and he there saw the horse McAllister. He signed the documents on the next day, February 5, 1910, and admittedly knew when he signed ex. C it named the stallion McAllister, that the price was $2,200, and that the terms of payment were to be two joint notes in one and two years. He did not read the agreement ex. C, but he says Waterworth told him the contents as above. If, then, ex. C was filled in when signed by this appellant, it must have been filled in when the others signed it. If ex. C was filled up at the time it was signed, then why not the notes, as they practically correspond with what the agreement calls for?

And defendant Watson swears he thinks the two notes were

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filled up when he signed, and he was present when T. Rusk signed, and he signed immediately after. If Watson is right then the notes were filled up and complete when all the appellants signed.

T. Rusk refused later to have the horse delivered at his place because he found out that the notes rendered each one liable for the whole, and not for their respective shares only. So the horse was delivered at Watson's, and Waterworth appears to have given Watson copies of the notes which were filled up. All the appellants except one of the Rusks saw the horse at Watson's, but refused to accept him, and on February 15, 1910, despatched the following telegram:—

Belle Plaine, Sask., Feb. 15, 1910.

Manager of The Molsons Bank, Simcoe, Ont.

Refuse notes from Mr. Geo. Waterworth, signed by Thomas Rusk, Jr., John Randall, H. Lebuhn, P. J. A. Lowe, John Rusk.

Appellant John Randall, in reply to a letter received from the plaintiff's solicitors demanding payment of the note sued on, wrote a letter dated May 29, 1911. In this letter he says nothing about the notes being signed in blank, but his sole complaint is that the horse was misrepresented, and that he gave the note with the understanding that if the horse did not suit Waterworth would take his name off the note and get someone else to take his share.

None of the defendants complained to the plaintiff at any time before action brought that the notes were signed in blank.

Watson also testified to the effect that he was present when all the appellants signed, and at no time did Waterworth represent to any of them that any of the documents were for mares, but that the two notes were for the price of the stallion, and that they were not to be used unless the syndicate was filled, that is, that Waterworth got enough subscribers to make up $2,200, and he filled his syndicate. And there is evidence that the horse was delivered and never returned.

The trial Judge who heard the appellants testify evidently disbelieved their testimony and preferred to take that of Watson, which was to the effect that the notes were filled in when signed. He having so found, I am not sufficiently satisfied that he was wrong to warrant me in disturbing that finding.

The notes, then, being filled up when delivered to the payee Waterworth in consideration for the stallion, secs. 31 and 32 of the Bills of Exchange Act, and *Smith* v. *Prosser*, [1907] 2 K.B. 735, and *Ray* v. *Willson*, 45 Can. S.C.R. 401, and the other authorities cited by counsel for the appellants, do not apply, as a completed negotiable note was delivered by the makers to the payee.

It was also contended that Waterworth obtained these signatures fraudulently, and that plaintiff must have been aware of this, or had sufficient knowledge to put him on inquiry. But to my mind there is no evidence to support the contention that the plaintiff knew of any fraud or had sufficient knowledge thereof to put him on inquiry, and the evidence clearly establishes that the plaintiff obtained the note from the payee before maturity and for value.

I would, therefore, not disturb the findings of the learned trial Judge, and would dismiss the appeal with costs.

Appeal dismissed.

BLOMFIELD v. RURAL MUN. OF STARLAND.

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Alberta Supreme Court, Harvey, C.J., Scott and Walsh, JJ.
November 22, 1915.

1. MUNICIPAL CORPORATIONS (§ II C 3—70) — OPENING OF HIGHWAY — "TRAIL"—VALIDITY OF PROCEDURE—BY-LAW OR RESOLUTION—DEFINITENESS.

Sec. 196(5) of the Rural Municipalities Act, (Alta.), empowering the council of every municipality to pass by-laws for the opening and maintaining of temporary roads is permissive and not imperative, and permits the exercise of such powers, under sec. 185 of the Act, under the power of resolution; nor will such resolution be deemed bad for want of certainty by a mere reference to the opening of an existing "trail" without a more definite description.

[*Bernardin* v. *North Dufferin*, 19 Can. S.C.R. 581, followed; *Young* v. *Leamington*, 8 A.C. 517; *Waterous* v. *Palmerston*, 21 Can. S.C.R. 556, distinguished.]

2. EMINENT DOMAIN (§ III C I—146)—LAND TAKEN FOR HIGHWAYS—COMPENSATION—WHEN FIXED.

The Rural Municipalities Act, ch. 3, sec. 196, sub-sec. 5, 1911-12, does not contemplate the fixing of compensation and damage for lands taken for highways, before the actual taking of such lands by the municipality.

[*Blomfield* v. *Mun. of Starland*, 21 D.L.R. 859, affirmed.]

APPEAL from judgment of Stuart, J., 21 D.L.R. 859. Statement

A. A. McGillivray, for appellant.

W. S. Morris, for respondent.

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Walsh, J.

The judgment of the Court was delivered by

WALSH, J.:—This is an appeal from the order of Stuart, J., appointing an arbitrator under sec. 196, sub-sec. 5 of the Rural Municipalities Act (ch. 3, 1911-12), to fix the compensation to be paid to the applicants for the use of a temporary road or right of way opened and maintained by the municipality across their land for public purposes and for the damages occasioned thereby. Sec. 196, sub-sec. 5 reads as follows:—

196. In addition to all other duties and powers conferred on councils by this Act the council of every municipality shall have power to pass by-laws . . . (5) to open and maintain a temporary road or right of way for public purposes for a term not exceeding two years across any private property or properties when in the opinion of the council the condition of the public roads in the neighbourhood make such action necessary or expedient; and the council shall in every such instance pay to the owners or occupants of any land so opened as a temporary road such compensation for the use thereof and for any and all damages occasioned thereby as may be mutually agreed upon between the council and the persons interested or in the event of a disagreement such compensation as may be determined by arbitration under the provisions of the Arbitration Act.

No by-law was ever passed by the council dealing with the matter, but it was dealt with under a resolution of the council passed on October 11, 1913, in the following terms:—

Moved by Mr. Bussard, that as complaint has been made to him that Mr. Blomfield has fenced in whole of section 29-33-20, rendering it impossible for people to get into Rumsey from the east, the council resolved that said trail be left open, and had instructions to that effect sent Mr. Blomfield in the shape of a letter signed by reeve and secretary, the trail be left open till such time as road fixed.

The following letter was sent to the applicants pursuant to this resolution:—

Complaint having been made to the council regarding closing of trail across section 29-30-20 w4, after considering said complaint we beg to advise you that it will be necessary to leave said trail open till such time as road around is made passable for heavy traffic.

In October, 1913, the municipality by its agent and servants cut the applicants' fence across this trail and opened the trail across this land, dug post holes, put in posts and hung iron gates across the trail and have ever since maintained the said road. No compensation has been made to the applicants and the municipality has failed or refused to appoint an arbitrator to fix the amount of the same.

The main ground of appeal is that the council can only

exercise by by-laws the powers conferred upon it by the above sub-section, and as it did not so act in this matter, the applicants' right to have their compensation and damages awarded and fixed by arbitration under the sub-section does not arise. The authorities relied upon by Mr. McGillivray in support of his contention that the municipality could not act in such a matter under a by-law of the council are *Young* v. *Leamington*, 8 App. Cas. 517, *Waterous* v. *Palmerston*, 21 Can. S.C.R. 556, and *Manning* v. *Winnipeg*, 17 W.L.R. 329. If the sections of the statutes under which these cases were decided were in the same terms as or similar terms to those employed in our sub-section they would be conclusive of the matter in favour of the contention of the municipality for two of these judgments are binding upon this Court. But such is not the case. In the first mentioned case the defendants were under a statute which provided that every contract made by it for an amount exceeding £50 shall be in writing and sealed with its common seal. In each of the other cases the defendants' powers were governed by a section of the statute which provided that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for." And in each case it was held that this section was obligatory and not merely directory and that the defendant, therefore, could only contract in the manner provided for by it and judgment went against the plaintiff because the contract upon which he sued was not entered into by the defendant in the manner so provided.

Bernardin v. *North Dufferin*, 19 Can. S.C.R. 581, was decided under section of a statute which enacted that "in every city, town or local municipality the city *may* pass by-laws" for certain enumerated things of which that constituting the plaintiff's cause of action was one. The Court held that the plaintiff could recover even though the contract was neither under the defendant's corporate seal nor authorized by any by-law passed by the council. This decision was put partly, at least, on the ground that the language of the section was permissive and did not prohibit the corporation from exercising its jurisdiction otherwise than by law. Gwynne, J., at p. 618, says:—

> Now, it has been argued that as these sections authorized the municipal councils to exercise their jurisdiction over roads and bridges by by-

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laws, they are precluded from exercising their jurisdiction otherwise than by a by-law, and so that no road or bridge could be repaired or made fit to be travelled on unless a by-law should be first passed for the purpose. The answer to this contention is to be found in the language of Lord Justice Turner in *Wilson* v. *West, Hartlepool*, 11 Jur. N.S. 126. Affirmative words in a statute saying that a thing may be done in one way do not constitute a prohibition to its being done in any other way.

Howell, J., in *Manning* v. *Winnipeg, supra,* emphasizes the distinction between the permissive character of the language of the section discussed in the *Bernardin case* and the imperative character of that used in the section he was dealing with and expresses the opinion that "if the statute in the *Bernardin case* had been as in this case, the result would have been different." I can see no distinction between the language of the section under discussion in the *Bernardin case* and that of the section with which we have to deal. The former says *may* pass by-laws and the latter *shall have power to* pass by-laws. Both expressions are primarily permissive, I think, and I can see nothing in the circumstances to compel us to treat the words of our section as mandatory.

For the compulsory exercise of its powers under sub-section, a by-law would undoubtedly be necessary for the land owner would be quite justified in refusing to allow the opening of the road across his land in the absence of one.

But if the land owner does not object, I do not see why a resolution should not be as effective as a by-law. Sec. 185 of the Act enacts that—

> Except as herein provided the council of every municipality may exercise the duties and powers conferred on it by this Act either by resolution or by by-law.

The exception from this choice of methods under the sub-section in question is in my opinion in the compulsory exercise of the powers thereby conferred and the council may in other cases proceed either by by-law or resolution. When the road is opened, whether it be by by-law or resolution, if the parties fail to agree as to the amount of damages and compensation to be paid by the municipality, the amount of the same must be determined by arbitration. The provision for the payment of compensation and damages to the owner or occupant of any land "so opened" might perhaps as a matter of strict grammatical

construction be limited to the case of a road opened under a by-law, but I think he must give it a broader meaning than that. This is the only provision for payment in the statute and I think it quite obvious that it is intended to cover every case in which the use of land is taken for the purpose specified when no agreement as to the amount of the compensation has been reached.

Mr. McGillivray contends on the authority of some Ontario cases that this resolution, if otherwise good, is bad for uncertainty inasmuch as the road to be taken is not defined with any degree of precision. I can see no uncertainty in it, however. It is obvious from the resolution that what was being taken for road purposes was an existing trail across the applicant's land by which people travelled to Rumsey from the east. The letter sent pursuant to the resolution also shews that it was an existing trail and there is nothing in the material suggestive of the existence of any other trail across this land. The resolution appears to have been certain enough in its description to enable the servants of the municipality to act upon, and I think it, sufficiently certain for all purposes.

Finally the argument is made that the statutes contemplate that the amount of compensation and damages to which the applicants are entitled should be ascertained and fixed before the municipality actually takes the land, and for this the authority of *Saunby* v. *London Water Commissioners*, [1906] A.C. 110, 114, is cited. That case, however, was decided under a statute essentially different from ours for it contemplated the purchase or acquisition outright of the property over which the defendants were given the right of expropriation while ours simply gives the power to acquire the temporary use of the land. The municipality is to pay "compensation for the use thereof and for any and all damages sustained thereby." While it might be very easy to fix beforehand a proper sum for the use of the land, I do not see how it could be possible to anticipate the damages which the applicants would sustain by such use and for this reason if for no other, I think this objection cannot be given effect to.

I would dismiss the appeal with costs. *Appeal dismissed.*

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ATKINSON v. C.P.R. CO.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and Elwood, JJ. November 20, 1915.

1. NEW TRIAL (§ III D—26) — GROUNDS FOR — MISCONDUCT OF JUROR — VISITING SCENE OF ACCIDENT.

Visiting the scene of the accident by a juror during the course of trial, which does not influence nor bias his verdict, is no ground for a new trial.

Statement

APPEAL from a motion for a new trial.

P. E. Mackenzie, K.C., for appellant.

A. E. Bence, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—In this matter the defendant (appellant) asks for a new trial on the ground that during the course of the trial one or more of the jurymen visited the scene of the accident and in so doing he may have been influenced in arriving at his decision.

The questions submitted to the jury and the answers thereto are as follows:—

(1) Was the plaintiff injured by the defendant company's train? A. Yes. (2) Was the plaintiff injured through the negligence of the defendant company? A. Yes. (3) Was the plaintiff knocked beneath the wheels of the train by being struck by the target of a switch stand in the yards of the defendant company? A. Yes. (4) Was the position of the switch stand contrary to order No. 12,225 of the Board of Railway Commissioners of Canada? A. (None). (5) If "yes,"—how? A. Yes; by the intermediate switch stand being nearer the rail than the distance authorized by the Board of Railway Commissioners for Canada by order 12,225. (6) Was the distance of the switch stand from the rail a reasonably safe distance for the plaintiff to pass between the target of the switch stand and cars upon the track? A. No. (7) Was the plaintiff acting in the course of his duty at the time he was injured? A. Yes. (8) Was the plaintiff guilty of contributory negligence? A. No.

Order No. 22,225 of the Board of Railway Commissioners for Canada, *inter alia*, directs as follows:—

(*b*) No semaphores, signals, poles, high or intermediate switch stands, or piles of material, erected or placed in future shall be nearer than six feet from the gauge side of the nearest rail.

(*c*) No structure over four feet high shall hereafter be placed within six feet from the gauge side of the nearest rail without first obtaining the approval of the Board.

(1) Semaphores, signals, poles, or high or intermediate switch stands shall, within two years from this date, be either removed or changes made so that the same shall not be nearer than the said six feet; or high and intermediate switch stands shall be changed to low or dwarf signals or switch stands.

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On the part of the respondent, it was objected that the evidence produced before us as to the fact of a juror visiting the scene of the accident was not sufficient to entitle the appellant to raise that question. In view of the conclusion I have come to, it is unnecessary that I should decide whether or not the material before us is sufficient.

In *Woodbury* v. *City of Anoka*, 52 Minn. R. 332, I find the following:—

> Misconduct of jurors as a reason for setting aside the verdict was fully considered in *Kochler* v. *Cleary*, 23 Minn. R. 325, and the rule stated that if it does not appear that the misconduct was occasioned by the prevailing party, or anyone in his behalf, and if it does not indicate any improper bias in the jurors' minds, the Court cannot see that it either had or might have had an effect unfavourable to the party moving for a new trial, the verdict ought not to be set aside, and that all the moving party can be called on to shew is that the misconduct might have had an effect unfavourable to him. The party need not shew that he was in fact prejudiced.

In *Rush* v. *City of St. Paul R. Co.*, 70 Minn. R. 8, I find the following:—

> Not every unauthorized view of the *locus in quo* will require the setting aside of a verdict. Considerations of practical justice forbid it. It would be an injustice to deprive an innocent party of his verdict simply because there was a casual inspection of the premises by some of the jurors or because they were familiar with them. If verdicts were set aside for such reasons there would be no reasonable limits to litigation, especially in cities where the opportunities are great for jurors personally to view the locality of an accident under consideration. . . . But where the gist of the action is the character or condition of the *locus in quo*, or where a view of it will enable the jurors the better to determine the credibility of the witnesses or any other disputed fact in the case, if in such a case jurors, without the permission of the Court or knowledge of the parties, visit the locality for the express purpose of acquiring such information, their verdict will be set aside unless it is clear that their misconduct could not and did not influence their verdict.

In *Pierce* v. *Brennan*, 83 Minn. R. at 425, what is above quoted from *Kochler* v. *Cleary* and *Rush* v. *St. Paul*, is quoted with approval.

Assuming the above, therefore, to be the law, and that is as far as the appellant's counsel goes, it seems to be that the point to consider is, did the conduct of the jurors influence, or could it have influenced, their verdict? During the course of the trial, counsel for the respondent on several occasions asked whether or

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not the switch in question had been moved since the accident, and these questions were ruled out. The reasons given at the trial for asking the question was that the counsel wished to shew that measurements of the switch made now would not avail him because the switch was not in the position that it was in at the time of the accident. To my mind, three questions, and three questions only, could be affected by a view: (1) the height of the switch, and (2) the distance from the rail, and (3) was it an intermediate switch? I think possibly we might altogether eliminate (3), because, from the evidence given, the question of whether or not it was an intermediate switch might or might not depend upon the height. The evidence of Holding was that there were only three kinds of switches—high, intermediate, and low or dwarf, and he stated that "low" and "dwarf" were the same. Duval, on the other hand, said that there were four kinds—high, intermediate, low, and dwarf. He said "high" was 20 ft.; intermediate, anything over 8 ft. 6 in. and up to 20 ft. The jury, as will be noticed, in the answers they gave said that this was an intermediate switch, and they must have accepted the evidence of Holding that there were only three classes of switches—high, intermediate, and low. Then there would only remain to be decided the other two questions—was the switch over 4 feet high, and was it within 6 feet of the rail? On the question of distance from the rail the following evidence was given at the trial: Totland (at pp. 34 and 35 of the Appeal-Book), stated that there was no change in distance between the time of the accident and the time of certain measurements which were made after the accident happened. The evidence of Duval (at p. 96 of the Appeal-Book) was that at the time of the measurements it was four feet seven and one-eighth inches from the rail. So that the uncontradicted evidence given at the trial was that at the time that certain measurements were taken after the accident the switch was four feet and seven and one-eighth inches from the rail. If, on a view, the juror found the switches to be farther away than that, it could not prejudice the railway company, and, in my opinion, could not possibly affect his answers to the questions. Duval (at p. 98 of the Appeal-Book) also stated that the switch at the time of the measurements was

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closer than 6 feet to the track, and was slightly higher than 4 feet, and that it was contrary to Order No. 12,225 of the Board of Railway Commissioners; and this is the uncontradicted evidence. So that it seems to me in this respect also that an inspection by the jurors could not possibly affect their answers to the questions relating to these points. It would seem to me, therefore, that a view by the jurors could not possibly influence their verdict, and that therefore there should not be a new trial on that ground. It seems to me that whether or not this was an intermediate switch does not affect the question, because there is the evidence of Holding (at p. 15) that it was a structure, and the evidence of Duval (above quoted) that it was within 6 feet of the rail and over 4 feet high, and that being so, it did not comply with sub-sec. (*c*) of the order above referred to, because it was a structure over 4 feet high and was within 6 feet of the rail.

It was further urged that the damages were excessive. This, however, was not urged very strongly on the hearing of the appeal; and in view of the many decisions in this Court and elsewhere, I cannot see how the appellant could succeed in having the verdict set aside or a new trial granted on this ground.

It seems to me, therefore, that the appeal should be dismissed with costs. *Appeal dismissed.*

STRONG v. CANADIAN PACIFIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. November 2, 1915.

B. C.

C. A.

1. ADMIRALTY (§ II—6)—INJURIES TO SHIP—PARTIES—ASSIGNEE—NON-REGISTRATION OF ASSIGNMENT UNTIL AFTER ACCIDENT—MORTGAGEE—ADDING TRUE OWNER.

The assignee of a ship, to whom a ship is assigned for the purpose of enabling him to execute a valid mortgage thereon on behalf of a foreign subject, cannot maintain an action for injuries to the ship, where his certificate of British registry, to establish his ownership, had not been obtained until after the occurrence of the accident; and such mortgagee cannot, by virtue of sec. 45 of the Canada Shipping Act, be deemed the owner, nor may the foreign assignor be added as a party to such action without his written consent.

Statement

APPEAL from judgment of Hunter, C.J.B.C.

The R. A. Williams Machinery Co. agreed with one Lindsay, the then owner of the steam tug Lady Lake, to instal a new boiler in her and to remove an old one. Lindsay, being a foreign

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subject, could not own a ship registered in Canada. It was arranged that he should transfer the ship to Strong, the plaintiff, who should give a mortgage on the ship to the vendors to secure the contract price. That company, the mortgagee, hired the defendant's crate and operators to lift out the old and put in the new boiler. The action is brought by Strong, the assignee, against the railway company to recover damages for injuries to the tug during the operation resulting from the defective nature of the defendant's appliances.

E. V. Bodwell, K.C., for appellant, defendant.

M. A. Macdonald, for respondent, plaintiff.

Martin, J.A.

MARTIN, J.A.:—After a careful perusal of the evidence, I have reached the conclusion that it justifies the judgment.

But a legal difficulty arises respecting the allowance of damages to the ship because at the time of the accident, October 27 1911, it is conceded that it was not the property of either of the plaintiffs, but of one George W. Lindsay, who, on September 13, 1911, gave an order for the boiler in question, reserving to the vendors a lien thereon, and an agreement to give a first mortgage on the ship to secure the lien. Lindsay, being a foreign subject, could not own a ship registered in Canada, so it was arranged that he would transfer the ship to the plaintiff Strong, who was to give a mortgage on her to the plaintiff Williams Co. to secure repayment of the machinery and for certain advances, including the customs duty, paid on bringing the ship to Canada from the United States, which mortgage was not given till September 3, 1912. The bill of sale from Lindsay to Strong is not in evidence, nor its date, but from Strong's evidence, on pp. 12 and 19, it appears that he did not get his certificate of British registry or become owner till January 11, 1912, nearly 3 months after the accident. The statement of claim sets up, par. 3, that the plaintiff Strong was the owner of the ship at the time of the accident, but this is denied in the defence, par. 3, and in par. 8 thereof it is alleged that Lindsay was the owner at that time.

Thus the question of ownership was clearly raised, and, though it was admitted by the plaintiff, in his evidence, that Lindsay was the owner, yet no assignment of Lindsay's claim has been put in evidence. In such circumstances it is submitted that the plaintiffs cannot recover for any damage done to Lind-

say's ship, and the objection is well taken. It was urged that, since Lindsay had agreed to transfer the vessel to Strong, and that Strong was to give a mortgage to the plaintiff company, it was really in the position of a mortgagee, and, therefore, could maintain this action. But, whatever else may be said of this shuffle, Strong did not even become the owner till January, and sec. 45 of the Canada Shipping Act provides that:—

> Except in so far as is necessary for making such ship available as security for the mortgage debt, a mortgagee shall not, by reason of his mortgage, be deemed to be the owner of a ship, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship.

I think that this contention is too far fetched and cannot be given effect to.

I am unable, in view of the pleadings and evidence, to take the view that the course of the trial was such that it can be said that the case was so conducted that the defendants' counsel led the "Court and opposing counsel to believe, and to act upon the belief, that the issue" so pleaded was abandoned, within the meaning of *Scott* v. *Fernie*, 11 B.C.R. 91, and *cf. Tanghe* v. *Morgan*, 11 B.C.R. 76; and in 2 M.M.C. 178 (where a fuller report is given); *King* v. *Wilson*, 11 B.C.R. 109; and *Haddington Island Q. Co.* v. *Huson*, [1911] A.C. 722 at 729, wherein their Lordships of the Privy Council held the defendants to the pleadings, though another issue had been argued before us in this Court.

And I also find myself unable to regard or deal with the case as though it were one of indemnity and third party and thereby dispense with the necessity of the owner Lindsay being upon the record—that would be a fundamental alteration which I think we would not be justified in countenancing.

But we were asked to amend and add Lindsay as a party plaintiff. I was at first of the opinion that this ought not to be done, as it was not asked for at the trial, and in *Durham* v. *Robertson*, [1898] 1 Q.B. 765; 67 L.J.Q.B. 484, the Court of Appeal refused to add an assignor as a party to cure an objection to an invalid conditional assignment, Chitty, L.J., saying, p. 744: "The trial has taken place, and it is not possible now to make any amendment by adding parties or otherwise." But in *Howden* v. *Yorkshire Miners' Association*, 72 L.J.Q.B. 176, an action respecting the funds of a miners' association, wherein

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the trustees of the association were not originally parties, it is said, p. 178:—

> In the course of the argument in the Court of Appeal the Court ordered that the trustees should be made defendants in order to give them an opportunity of appearing and being heard.

Stirling, L.J., at p. 187, explaining the situation, said:—

> The persons in whom the funds were legally vested were not parties, and I have never known such an action as this where the trustees were not parties to it. I think it is clear that under O. 16, r. 11, we have power to add parties at any time. That applies, of course, to the Court of first instance; but by O. 18, r. 4, the Court of Appeal has all the powers and duties as to amendment and otherwise as the High Court. It seems to me, therefore, that the trustees have not been properly made parties. It was objected that there is no evidence of any application to the trustees here; and it was stated on their behalf that they were bound to act on the directions of the council.

The prior decision of the same Court in the *Durham* case was not referred to, and it is strange and embarrassing that there should be such a direct conflict of opinion, and the uncertainty is increased by another earlier decision of the same Court in *Edison* v. *Holland* (1889), 41 Ch. D. 28, wherein Cotton and Lindley, L.JJ., differed as to their power to add third parties as defendants, but agreed in declining to do so in the circumstances, if they had power, Cotton, L.J., laying stress on the fact that the relief had not been applied for below. In the case at bar I am of the opinion that justice does not require us to exercise the power, if we have it, by adding the party, and also I point out that a proper foundation for the application was not laid because the necessary "consent in writing thereto" of the proposed plaintiffs, which must be under his own hand—*Fricker* v. *Van Grutten*, [1896] 2 Ch. 649, has not been obtained. I note that we have exercised the power to amend pleadings, though no amendment was asked for below—see *King* v. *Wilson*, *supra*, and terms there imposed.

The result is that the appeal should be allowed by reducing the judgment by the amount awarded for damage to the ship, $674.40, with costs: *Dallin* v. *Weaver* (1901), 8 B.C.R. 241.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I concur in the judgment of my brother Martin.

Macdonald, C.J.A. (dissenting)

MACDONALD, C.J.A., dissented. *Appeal allowed.*

IMPERIAL ELEVATOR & LUMBER CO. v. KUSS.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, Brown and McKay, JJ. November 20, 1915.

1. GOVERNOR (§ I—1)—POWERS OF LIEUTENANT-GOVERNOR—SUSPENSION OF ACTIONS BECAUSE OF WAR — CLASS PROCLAMATIONS — LIQUOR LICENSEES.

Chapter 2 of statutes 1914 (Sask.), authorizing the Lieutenant-Governor in Council to prohibit the issue of processes in all or any classes of civil actions, for the protection of persons whose interests may be jeopardized during a state of war, a proclamation prohibiting the taking of actions by creditors against liquor licensees as a class, whose interests are affected by the closing of bars for the proclaimed period, is not *ultra vires* and in conformity to the spirit of the statute. [*Bywater* v. *Brandling*, 7 B. & C. 643, applied.]

2. WRIT AND PROCESS (§ II D 2—49)—ACTIONS AGAINST LIQUOR LICENSEES —SUSPENSION BECAUSE OF WAR—SETTING ASIDE SERVICE.

A proclamation during a state of war, prohibiting the taking of any action against liquor licensees during the proclaimed period, does not deprive creditors from issuing the writ, but service of the writ, if arising out of an action in connection with the business as liquor licensees, will be set aside and the action continued to all other claims.

3. INTOXICATING LIQUORS (§ IV A—95) — ACTIONS AGAINST LIQUOR LICENSEES—NATURE OF—SUSPENSION BECAUSE OF WAR.

Only actions arising out of the business as liquor licensee are within a proclamation prohibiting actions against such licensees whose interests are affected by war, and there is no prohibition against creditors whose debts have accrued in another capacity, such as merchant or farmer; nor is any protection given to property other than the licensed premises or that used in connection therewith.

[*Norello* v. *Toogood*, 1 B. & C. 554, applied.]

Statement

APPEAL from judgment of Elwood, J., granting motion to set aside service of process.

F. L. Bastedo, for appellant.

J. A. Allan, K.C., for respondent.

A. L. Geddes, for Attorney-General.

Newlands, J.

NEWLANDS, J.:—This is an action against the appellant Kuss, for: 1st. The sum of $753.20 with interest in respect of an agreement. 2nd. An account of $749.35, with interest. 3rd. For a declaration that said plaintiffs are mortgagees of lots 5, 6 and 7, block 2, Neudorf, and for an order for the sale or foreclosure of the sale, and 4th. To set aside a transfer of land and an assignment of goods, stock-in-trade, etc., from said appellant to his wife, the other defendant Lydia Kuss, as a fraud upon the creditors of said appellant.

The appellant, after service of the writ of summons upon him, made a motion in Chambers to set aside the writ and the service thereof upon him and for the striking out of his name from said writ and the other proceedings thereon, on the

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ground that, at the time of the issue of the writ, he was a licensee and entitled to the benefit of the proclamation of March 27, 1915.

In support of this application, said appellant filed an affidavit stating that he was a licensee within the meaning of such proclamation, having a hotel license for a hotel at Neudorf; and in reply thereto the plaintiff filed an affidavit stating that said Daniel Kuss was a storekeeper and farmer in addition to being a licensee, that he had transferred to his wife, the defendant Lydia Kuss, his store and farm property, and, further, that $750 of the amount sued for is for material and goods supplied to said Daniel Kuss for use in his farm and store and not as licensee.

Upon this motion Elwood, J., held that the Order-in-Council in question merely prohibited the taking of a step in an action, but did not forbid the issue of a writ of summons, and he set aside the service of the writ of summons upon him—but not the writ itself. From this order the said defendant Daniel Kuss appealed.

This Order-in-Council was passed under an Act to confer certain powers upon the Lieutenant-Governor in Council, ch. 2 of the Acts of 1914. The Act recited the present war and the necessity for protecting the property of volunteers in the Canadian forces and volunteers and reservists in the armies of Great Britain, and her allies, and by sub-sec. (*b*) of sec. 1 authorized the Lieutenant-Governor in Council to—

> (*b*) Prohibit in any judicial district the issue of any process out of any one or more of the Courts of the province in all or any classes of civil actions, or the execution of process already issued in such actions, or stay proceedings in civil actions and matters of any description pending in such Courts, or extend or otherwise vary the exemption privileges which execution debtors now enjoy;

and by sub-sec. (*c*) authorized them to close public bars and places where intoxicating liquors were sold.

The first question to be considered is: whether the Order-in-Council was within the powers conferred upon the Lieutenant-Governor in Council by that Act.

A perusal of the preamble of the Act would lead one to believe that the Act was passed for the benefit of soldiers in the

armies of Great Britain and her allies, but when the enacting clauses are looked at it is seen that the powers conferred by the Act are not confined to such persons, but are general in their application. I take it, therefore, that the intention of the preamble is to point out the reasons that moved the legislature to pass the Act.

[Reference to Maxwell on Interpretation of Statutes, pp. 62 and 66.]

In *Bywater* v. *Brandling*, 7 B. & C. 643, at 660, Lord Tenterden, C.J., said:—

In construing Acts of Parliament we are to look not only at the language of the preamble, or of any particular clause, but at the language of the whole Act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect, from the more large and extensive expressions used in other parts, the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause.

The construction, therefore, which we must give to this Act is, that the powers conferred upon the Lieutenant-Governor in Council are general in their character, and are not confined to soldiers taking part in the war. What then are these powers? Sub-sec. (*b*) allows the Lieutenant-Governor in Council to "prohibit the issue of any process out of the Courts of the province in all or any classes of civil actions."

Since the Judicature Act, actions are not divided into classes. Before that Act they were divided into real and personal actions, actions *ex contractu*, *ex delicto*, etc., so that the use of the word "classes" in that section can have no meaning unless it was intended to mean actions against classes of persons. The preamble lends itself to this interpretation, but I am of the opinion that any such interpretation would restrict the intention of the legislature, and I have come to the conclusion that the word "classes" has no meaning and that the meaning of this section is to authorize the Lieutenant-Governor in Council to prohibit the issue of process in all actions in the Courts of the province.

The Order-in-Council would, therefore, be within the powers of the Lieutenant-Governor in Council.

The next question is: What have they prohibited by the

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Order-in-Council? The language used is "No action shall be taken." To "take action" means to commence action: Stroud's Jud. Dic., p. 2007; *Re Martin*, 35 Sol. J. 88.

By the Rules of Court (r. 1), every action shall be commenced by writ of summons, except where otherwise specified. The Order-in-Council, therefore, prohibits the issue of a writ of summons.

This prohibition is of a writ of summons by the creditors mentioned against a licensee. The premises in which he carries on business are protected, and, as licensee of such premises, he is protected against creditors; these creditors are again protected by the fact that the licensee cannot sell or mortgage the licensed premises, nor any of his stock-in-trade, fixtures or furniture on such licensed premises. There is no prohibition in the Order-in-Council against his selling, mortgaging, or otherwise disposing of any other property he may own which is neither part of the licensed premises, nor stock-in-trade, fixtures or furniture therein. He may, therefore, dispose of all his other property. Was it, therefore, the intention of the Order-in-Council to prohibit all his creditors from commencing action against him, or only his creditors in his capacity of licensee? I think the intention is clear that it is only as licensee that he is protected. If he is engaged in any other business and has incurred debts in connection with such other business he has no protection from this Order-in-Council, any more than he is restricted by it from disposing of such other property.

This case is analogous to an action against the servant of an ambassador who does not reside in his master's house and conducts a business on his own account outside: *Novello* v. *Toogood*, 1 B. & C. 554.

I am, therefore, of the opinion that it is only actions arising out of his business as licensee that are prohibited, and that there is no prohibition against creditors whose debts have accrued in the defendant's capacity of a merchant and farmer, nor is any protection given to his property other than the licensed premises and such property as is used in connection therewith.

The defendant in this case moved to set aside the writ and all proceedings thereunder.

In *Musurus Bey* v. *Gadban*, [1894] 2 Q.B. 352, the Court held that this procedure was proper where the issue of the writ was prohibited.

The defendant is, therefore, entitled to have such parts of the statement of claim struck out as claim against him as licensee, but the action should be continued as to all other claims. There should be a reference if necessary to carry out this judgment. The appeal should be dismissed with costs.

Newlands, J.

BROWN, J.:—I concur in the judgment of my brother Newlands except wherein he dismisses the appeal with costs. There was a cross-appeal in this case by the plaintiffs against that portion of the judgment which set aside the service of the writ. This service being good, the judgment appealed from should be varied accordingly. It can scarcely be said in this case that the defendant's appeal has been wholly unsuccessful. He has, it is true, mistaken his remedy in that he applied to have the writ of summons set aside instead of applying to strike out that part of the claim which is objectionable. The legislation in question is new, and its meaning is not obvious. Although the defendant has mistaken his remedy, he had a real grievance, and as a result of his proceedings he succeeds in getting relief. Under all the circumstances I am of opinion that each party should bear his own costs both on appeal and on the application made in Chambers. The plaintiff should bear the costs of any reference that may be necessary under the judgment of Newlands, J., and the defendant should have six days within which to file his defence after the plaintiffs' claim has been amended as directed.

Brown, J.

HAULTAIN, C.J., concurred with NEWLANDS, J.

Haultain, C.J.

LAMONT and MCKAY, JJ., concurred with BROWN, J.

Lamont, J.
McKay, J.

Judgment varied.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. November 6, 1915.

1. CORPORATIONS AND COMPANIES (§ IV D1—65)—POWERS OF DEVELOPMENT COMPANY—COVENANT—ESTABLISHMENT OF RAILWAY STATION.

A covenant to establish and maintain a railway station is within the corporate powers of a development company "to do any act to increase the value of the property . . . or to enter in any arrangement capable of being conducted so as directly or indirectly to benefit the company," and within the requisite or incidental powers under

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sec. 29 (3) of the Companies Act (Alta.), particularly where the establishment of such station may be procured from a railway company owing to an identity of management.

[*Union Bank* v. *McKillop*, 16 D.L.R. 701; 30 O.L.R. 87, referred to.]

NORQUAY v. G.T.P. TOWN & DEV. CO.

2. DAMAGES (§ III A3—63)—BREACH OF COVENANT FOR RAILWAY STATION—MEASURE OF DAMAGES—COSTS OF SURVEY—INCREASE IN TAXATION—LOSS OF PROFITS.

In an action for breach of covenant to establish a railway station in furtherance of an arrangement to subdivide lands as a townsite, a claim for half the costs of the survey and the increased amount of taxes paid as a result of the subdivision, also the loss of profit on a sale of lots therein as ascertained from the evidence, may be properly allowed in the assessment of damages.

Statement

APPEAL from judgment of Simmons, J., dismissing plaintiff's action.

H. R. Milner, for plaintiffs.

N. D. McLean, for defendants.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The action is for damages for breach of contract. The contract was as follows:—

Whereas the grantor is the owner, in fee simple, of all of the fractional west half of section thirty-six (36), township fifty-two (52), range twenty-eight (28), west of the fourth meridian in Alberta, excepting the C.N.R. right of way as shewn on attached plan;

And whereas it is the intention of the company to establish a townsite on the said property in consideration of a half interest in the said property;

Now this agreement witnesseth that in consideration of the premises and of the covenants hereinafter contained the parties thereto mutually agree and covenant one with the other;

1. The grantor covenant with the company that the grantor will, within a reasonable time and as soon as practicable, cause a survey of the whole of the said fractional west half section to be made in accordance with the scheme of subdivision as shewn on the blue print hereunto annexed at a cost not to exceed one dollar ($1.00) per lot.

2. The grantor covenants with the company to have a plan of the said property prepared in accordance with the above-mentioned scheme of subdivision and registered as soon as practicable;

3. The company hereby covenants to pay the grantor one-half of the cost of survey of the said subdivision as soon as the plan of the townsite has been registered.

4. The grantor covenants with the company to deliver to the company free of cost, and in its name, a certificate of title in fee simple, free of all encumbrances (here follows a list of lots and blocks shewing the company's share).

5. The company hereby covenants to establish and maintain a station at the foot of Main Street at the point indicated in red on the attached blue print.

6. The grantor shall pay all taxes on the said fractional half section till such time as he places the company in possession of their interest in the ownsi te.

7. The grantor and the company covenant the one with the other not

to sell or dispose of any lots or blocks herein until after the registration of said plan of subdivision.

In dismissing the action, the trial Judge said in part:—

Letters patent incorporating the defendant company were put in, and they clearly shewed that they had no authority to establish a railway station. There was no breach of the agreement shewn other than the failure to establish the railway station, and it was admitted by counsel that that was the real cause of the failure in the promotion of a certain parcel of land as a townsite speculation. The establishment of a station being *ultra vires* of the powers of the company, I hold that the action cannot be maintained.

It is contended by the appellants that par. 5 of the contract was not *ultra vires* of the company and that in holding that it was, the trial Judge was wrong.

There is no doubt that in its direct and primary meaning the covenant was *ultra vires*. It is obvious from an examination of the plan referred to in the covenant that the word "station" must be interpreted as meaning a railway station on the G.T.P. R. Co., and it is also, I think, clear that the covenant would not have been fulfilled by the mere erection and maintenance of a building suitable to be used by the railway as a station. There could be no real railway station there unless there was a railway upon which were operated the usual trains passing by the building and stopping at it regularly as is the practice at any railway station. Inasmuch as by the letters patent incorporating the company the power to construct and work a railway was expressly withheld from the company, it follows that it was beyond the power of the company directly to establish and maintain a station.

But it is also clear that the company was by its letters patent given power to do certain things which for the purposes of the plaintiff and of the contract entered into by them with the defendant would have been just as satisfactory as the direct fulfilment of the covenant. The company, by its letters patent, was given very extensive powers, all of which it is not necessary to enumerate, but among them will be found the following:—

To acquire in any manner lands and any estate or interest therein in any part of the Dominion of Canada, and to improve such lands and use or deal with the same in any manner required to serve the purposes and objects of the company . . . to assist, promote or engage in any industry that the company may think will enhance the value of land or tend to develop the neighbourhood or enure to the interests of the company or render profitable any of its property rights . . . to do any and all acts or things

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tending to increase the value of the property at any time held or controlled by the company . . . to enter into . . . any arrangement for . . . co-operation with any . . . company carrying on any business . . . capable of being conducted so as directly or indirectly to benefit the company.

There would appear, in my opinion, to be no doubt that under these latter clauses the defendant company had power to procure or induce by contract or otherwise the G.T.P. R. Co. to establish and maintain a railway station at the point in question. And, if the covenant contained in clause 5 of the contract can be construed as a covenant, not directly to establish and maintain a railway station, but to procure the railway company, which possessed the necessary powers, to do so, it will follow that the defendant company is liable for a breach of that covenant.

In my opinion, the construction I suggest is the proper one to be given. All the circumstances surrounding the making of the contract, as well as the actual position of the parties, suggest the most intimate relationship between the defendant company and the Grand Trunk Pacific Railway Company. The evidence shews that the first step in the negotiations was taken by the right-of-way agent of the railway company, a Mr. Farley, coming to the office of the plaintiff Norquay, and securing, so Norquay said, an option in favour of the railway company upon the property. On May 22, 1907, some days before the date of the contract, Mr. Ryley, who is described as land commissioner of the railway company, wrote a letter upon the letterhead of the railway company's land department, referring to a blue print of the subdivision which had been sent him, and criticising the manner of the subdividing. He spoke of "the company's" desires upon several points and of the intention to plant trees and shrubs on two blocks immediately opposite the spot where the station was to be placed. Everyone knows that railway companies are in the habit of beautifying their station grounds in this way. On the face of it, one would naturally suppose that he was referring to the "company," of which he described himself as an officer, *i.e.*, the railway company. The fact may have been otherwise, but there is nothing in the letter to suggest it. Then the agreement above recited was drawn up. In its original form the second recital contained a statement that it was the intention of "the company" (*i.e.*, the defendant com-

pany) "to construct its line of railway through . . . the said property." After the contract was executed, it was apparently submitted to Mr. Ryley, and he wrote to Norquay a letter, again upon the letterhead of the railway company, "land department," in which he pointed out that "the company," by which, of course, in this instance he necessarily could not have meant the railway company, had "no authority to construct," and said that the words quoted above from the recital had been struck out, and asked that the change be initialled and the contract returned. He then, signing himself again as land commissioner of the railway company, asks to be advised what progress was being made in the survey of the townsite, and to be given some idea as to the probable price at which the lots would be sold.

Ryley was examined for discovery as an officer, which he apparently was, of the defendant company. He said that the offices of the two companies, both in Montreal and in Winnipeg, were in the same building, that the same officers conducted the affairs of the two companies, that where the Development Co. bought lands for a station, the railway company, generally speaking, located their station on those lands.

Taking all these circumstances into consideration, it would appear to be quite beyond doubt that the defendant company, when entering into a covenant to establish and maintain a station at the point in question, was relying entirely upon its intimate connection with the railway company, and its ability, owing to the identity of management, to procure the latter company to locate its station there.

It is quite open to the Court, in construing the meaning of a contract, to look at all the surrounding circumstances in order to ascertain the sense in which certain words were used as applied to those circumstances. The defendant company clearly intended to contract that it would procure the establishment and maintenance of a station, and it is in that sense that the words were undoubtedly used and should be interpreted. I can see no reason why the defendant can in this case object to its covenant being construed in the sense in which it quite obviously intended to fulfil it. To procure the maintenance of a station and to contract to so procure it are clearly within the objects and powers of the defendant company as set forth in the letters patent, if not specifically, at any rate incidentally, and as necessary to the

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complete fulfilment of its objects and purposes. Sec. 29 (3) of the Companies' Act clearly gives to a company incorporated under it, all the powers requisite or incidental to the carrying on of its undertaking, and this, of itself, would, in my opinion, confer upon the defendant company the power to procure the railway company by any means to establish the station, and to contract with the plaintiffs that it would do so. See *Union Bank* v. *McKillop*, 16 D.L.R. 701. But I also think that the specific powers given in the letters patent are in themselves wide enough to authorise such a contract without the necessity of resort to sec. 29 (3).

It was contended by the respondent that the covenant was inserted by mistake, but there is no evidence to suggest this at all, and there is no plea on the record to that effect. Indeed, I would make a directly contrary inference from the fact that the clause in the recital to which I have referred was struck out. The striking out of that clause shews that attention was specifically directed to the subject of railway construction, and, nevertheless, the covenant in paragraph 5 was allowed to stand. This is an additional circumstance in favour of the particular interpretation of that paragraph which I think should be given to it.

I think, therefore, that the plaintiffs are entitled to damages for the failure of the defendant company, which is admitted, to establish and maintain a railway station at the point agreed upon, as they had covenanted to do.

It is, however, a rather difficult matter to work out an assessment of the damages upon any satisfactory basis. The counsel for the appellant put forward as two items of damage, first, one-half the cost of survey, and, second, the increased amount of taxes paid by the plaintiffs over what they would have had to pay if the land had been left unsubdivided. The difficulty about these items is this, that the rule as to damages for a breach of a contract is not that you should endeavour to put the plaintiff back into the position in which he stood before the contract was entered into, but to ascertain what the plaintiff has lost by its not being carried out; that is, you endeavour to see what benefit would have accrued to him if it had been fulfilled. If the contract had been fulfilled, he would have had to make these

payments all the same. But I think this difficulty may be overcome by the application of what must be undeniably a fair principle. Strictly speaking, it may be, on the evidence, impossible to infer that, if the contract had been fulfilled, there would have been profit enough on the sale of lots at least to cover the items of survey and extra taxes. But it seems to me that the defendants ought not to be allowed to make such a contention. By their breach of contract they deprived the plaintiffs of any opportunity of endeavouring to recoup themselves for these payments, and it seems to me quite unfair and unjust that the defendants should thus take advantage of their own breach of contract, and then raise a question as to the uncertainty of the possible profits. The plaintiffs were led into the contract and to the expenditures in question by the defendants' offer to covenant as they did, and I, therefore, think that these two items should be allowed. The first amounts to $417 and the second to $1,268.72—not $1,468.72, as stated by counsel.

A far greater difficulty arises in respect of any further possible damages. It is clear, however, that a very different result would be arrived at if it is impossible to cancel the plan and the streets and lots must still continue to exist, from that which would be reached if it were found possible to cancel the plan, remove the streets and lanes and revest them in the plaintiffs. It is admitted by everyone that the land in its present position is practically worthless, and that value can only be given to it by returning it to the position of farm lands. It seems to me, therefore, better to give the defendants an opportunity to secure the cancellation of the plan and a revesting of the streets and lanes and also to reconvey the lots they now hold to the plaintiff. They should, I think, be given two months in which to do this, which must be done at their expense. The matter of further damages can then be better dealt with by a single Judge, when he will know whether the cancellation and reconveyance have been made or not, and can assess the damages according to the position of affairs at that time. The evidence as to loss of profit is so meagre that it seems impossible to make upon it any assessment. It might be that we could allow some small sum, say $1,000 or so, as damage for the loss of profit on the sale of the plaintiff's share of the lots, but it would appear to me that it would be more

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likely to lead to a satisfactory result if an assessment were made by a single Judge, with liberty to hear more evidence, if the parties so desire, considering also the evidence already in. In considering this damage, the Judge will not overlook the fact that if the defendants do re-convey the lots now standing in their own name, this will be giving back to the plaintiffs land which they would not have owned had the contract been carried out. Of course, the plaintiffs may say that they do not want the defendants' lots back, but judgment for their damages. But if they were to stand on this strict right and the scanty evidence adduced, it would seem clear that they could get very little, if anything, and the course I suggest is, after all, the fairest one to both parties.

Finally, there is the question of the land which cannot be re-conveyed to the plaintiffs on account of its having been taken by the railway for its purposes. This was evidently conveyed by the defendants to the railway company, whether for a consideration or not does not appear, and is in any case immaterial. I think the Judge to whom the reference is made should deal with this as if the defendants were the railway company and were expropriating the land in 1908. He should ascertain the then value of the land and the damages caused to the adjoining land through its expropriation as if in an arbitration under the Railway Act. The Judge may then direct judgment for the plaintiffs for the amount of damages as he assesses them, plus the two items already dealt with, and the costs of the action.

The appeal will be allowed with costs, the judgment below set aside, and judgment entered as above directed.

Appeal allowed.

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CARLETON v. RURAL MUN. OF SHERWOOD.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and McKay, JJ. November 20, 1915.

1. HIGHWAYS (§ IV A 5—154*a*)—LACK OF REPAIR—FILLING UP HOLE WITH MANURE—LIABILITY OF MUNICIPALITY—NOTICE.

Filling up a hole in a highway with manure in an attempt by a municipality to remedy its dangerous condition, is actionable negligence which will render the municipality liable for injuries to a traveler resulting therefrom, unless by a failure to comply with the notice requirements under sec. 21 of the Rural Municipalities Act, ch. 87, R.S.S. 1909, the right to such recovery is defeated.

Statement

APPEAL by municipality from judgment for plaintiff in action for personal injuries.

Johnson, for plaintiff, respondent.

Thomson, for defendant, appellant.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action for injuries sustained by falling into a hole in a road in the defendant municipality.

The statement of claim alleges that the defendants allowed the road in question to fall into disrepair, so that holes were formed dangerous to persons using the road, that the portion of the road in question led up to a small bridge and that the plaintiffs, while lawfully driving on the road, turned out to avoid an unfilled hole and ran the motor car in which they were driving into a hole in the said road which had been filled with manure, straw and similar light material which would not bear the weight of the motor car, and caused the car to skid and fall over the embankment; by reason of which—*and* the non-repair of the road—they sustained injuries.

Amongst other things defendants pleaded want of notice as required by sec. 221 of the Rural Municipalities Act, ch. 87, R.S.S. 1909. The trial Judge held that the defendants were not liable for want of repair to the road, but that they were liable for misfeasance on the part of the defendants in putting the manure on the road.

Sec. 220 of the Rural Municipalities Act provides that the council shall keep in repair all bridges, culverts and ferries and the approaches thereto. . . . And in default so to keep the same in repair shall be civilly liable for all damages sustained by any person by reason of such default.

Sec. 221 provides that no such action shall be brought except within 6 months and after 1 month's notice in writing given to the secretary-treasurer of the municipality.

In *Pearson* v. *York*, 41 U.C.Q.B. 378, an action brought under a similar statute, the defendants' workmen made a hole in the highway for the purpose of ascertaining whether the road at that part of it required repairing; the workmen did not replace the materials or repair the opening so made; and there being no light or means taken to warn persons using the road, the plaintiff while crossing it struck his foot against some of the materials taken out of the road bed, and fell on his knee

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into the hole. Morrison, J., in delivering the judgment of the Court, held that it was not a case like *Rowe* v. *Leeds and Grenville*, 13 U.C.C.P. 515, which was a decision arising out of the pleadings, and he said:

> The learned Judge found that the hole was not filled in again or the road repaired. The question arises whether the highway, at the time of the accident to the plaintiff, was out of repair. This subject is discussed at length by the learned Chief Justice of this Court in *Castor* v. *Township of Uxbridge*, 39 U.C.Q.B. 113, and also in *Toms* v. *Corporation of Whitby*, 37 U.C.Q.B. 100, in appeal, affirming the judgment of this Court, 35 U.C.Q.B. 195. I take it from the principles laid down, and the grounds upon which the decisions in these cases rested, that the road now in question being in a defective state was out of repair, and that the defendants were consequently liable, under sec. 409 of the Municipal Act, for the injury resulting to the plaintiffs for their default in not repairing the road-bed, and their negligence in not placing a light or other signal to warn persons using the road of the defect in question.
>
> That being the case, the question remains, whether the plaintiff can recover, as he did not bring this action within three months. The same sec. 409, which gives the right of action, enacts that the action must be brought within three months, which the plaintiff has not done. The rule must, therefore, be discharged.

In this case, the evidence given on the part of the plaintiffs shewed that the manure was put in the hole in question for the purpose of repairing the road. John Ritchie, a witness called by plaintiffs, stated that he was employed by Mr. Birnie, a councillor, to fill this hole up. He said: "I had been over that road and coming from the east I seen this hole, and Mr. Birnie and I was talking one day about this. I told him this was a kind of a dangerous place here, this hole, and he said: 'Some time you go down there, take a load of manure down and fill the hole up.' I threw the manure in the hole and got off and tramped it in, and then filled it about a foot, say, over the hole to allow it to settle."

As this manure was put in the hole for the purpose of repairing the road where it approached a culvert, it is a similar case to *Pearson* v. *York*, *supra*, and comes under sec. 220 of the Act, and defendants would, therefore, be liable only if the provisions of sec. 221 were complied with, and as the trial Judge held that the notice required by that section was not given, the plaintiffs cannot recover.

The appeal should, therefore, be allowed with costs.

LAMONT, J.:—I concur in the judgment of my brother Newlands, and would only add, that an attempt at repair which does not repair, is not alone sufficient to change the character of the defendants' liability from nonfeasance to malfeasance. The accident was not caused by the manure, but by the hole, which had never been properly filled up. Nowhere does the plaintiff allege that he was allured into the hole by reason of the manure being there. *Appeal allowed.*

MISSISQUOI LAUTZ v. NORTH.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 1, 1915.

1. BILLS OF SALE (§ III B—20)—NON-REGISTRATION—IMMEDIATE DELIVERY—WHAT IS — CHANGE OF POSSESSION — GOODS IN CUSTODY OF BAILEE.

An unregistered bill of sale of a concrete mixer, with the name of the bargainee left blank, in the possession of a bailee who had been notified by the bargainee, after a month's delay, of the change of ownership thereof, does not constitute "an immediate delivery followed by an actual and continued change of possession" within the meaning of sec. 3 of the Bills of Sale and Chattel Mortgage Act (Man.), and therefore void against an execution creditor.

[*Jones* v. *Henderson*, 3 Man. L.R. 433; *Jackson* v. *Bank*, 9 Man. L.R. 75; *Richardson* v. *Gray*, 29 U.C.Q.B. 360; *Ex p. Close*, 14 Q.B.D. 386, applied.]

APPEAL from judgment of Dawson, Co. Ct. J., in favour of plaintiff in an interpleader issue. Statement

C. G. Barnardo, for appellant, claimant.

A. B. McAllister, for respondent, plaintiff.

HOWELL, C.J.M., concurred with PERDUE, J.A. Howell, C.J.M.

RICHARDS, J.A.:—A concrete mixer, owned by the judgment debtors, was housed in a garage owned by Tessler Bros., who had complete possession of it, and were holding it for the judgment debtors. On November 20, 1914, Mr. Reynolds, who claimed $200 against the judgment debtors for services as a solicitor, procured one of them to execute a bill of sale of the mixer, leaving the name of the bargainee blank. There is some discrepancy in the evidence as to what happened thereafter. But that, I think, need not be considered if, as appears to me, the claimant cannot succeed on the evidence given on his behalf. Richards, J.A.

Taking that evidence as correct for the purpose of this decision, the material facts are: Mr. Reynolds never registered the bill of sale. His first dealing under it was about the end of

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December, when he told Mr. Tessler, one of the garage owners, that he was the owner or was acting for the owner. At that time the name of the grantee had not yet been inserted.

It is not contended that any further transfer than the bill of sale was ever got from the judgment debtors, and it is not suggested that before Mr. Tessler was spoken to by Mr. Reynolds in December there was any agreement by the garage owners, or any of them, to hold the mixer for Reynolds or for Lay, whose name was subsequently put into the bill of sale as that of the bargainee.

The sheriff seized the mixer under a writ of *fieri facias* on a judgment recovered by the plaintiffs against the judgment debtors, and Lay claimed to be its owner.

This action is an interpleader issue to try the rights of the plaintiffs and Lay. The trial Judge found the issue in the plaintiff's favour, and the claimant appealed.

The claimant admits that the bill of sale was not registered. The third section of the Bills of Sale and Chattel Mortgage Act makes any unregistered sale of goods void as against the creditors of the bargainor where the sale is "not accompanied by an immediate delivery followed by an actual and continued change of possession."

Assuming, for present purposes only, that the bill of sale was sufficient as between the judgment debtors and Mr. Reynolds or the unknown person whose name might later on be inserted as that of bargainee, there is at once the question whether there was an immediate delivery, as contemplated by the statute.

The vendee of a chattel, in the possession of a bailee, may acquire delivery by procuring the owner to notify the bailee of the sale to him, the vendee, and by then getting the bailee to hold it for him, the vendee. It is claimed that such a state of fact arose here.

But no reason is given for the delay of a month or more in notifying the bailees. The mixer and the parties were all in Winnipeg. Whether there was or was not a delivery, there certainly was not an "immediate" one as contemplated by the statute. See *Jackson* v. *Bank of Nova Scotia*, 9 Man. L.R. 75, where, because of an unexplained delay of 3 days in notifying

the party in possession, it was held that the delivery was not an immediate one within the Act.

I express no opinion as to any of the other grounds relied on by the respondent to uphold the trial judgment.

I would dismiss the appeal with costs.

PERDUE, J.A.:—This is an interpleader issue to try the question of the ownership of a concrete mixer seized by the sheriff under a writ of *fieri facias* in this suit and claimed by H. W. Lay.

The facts are briefly as follows: The defendants North and Small were trading together as the V. C. North Construction Co. There was a dissolution of the firm in August, 1914, and North was left to wind up its business which was then believed to be solvent. Mr. Reynolds, a solicitor, performed some legal services for the firm and claimed that about $200 was due to him in respect of these. North could not pay the claim and Reynolds proposed that it should be paid by North transferring the concrete mixer to him. A bill of sale of the machine dated November 20, 1914, was prepared by Reynolds, the bargainor being North, and a blank space being left for the name of the bargainee. This document was sealed and executed by North, the space for the bargainee's name being left blank, Reynolds intending to fill it in afterwards with the name of some other person. The concrete mixer was not in the actual possession of North, but was stored with one Tessler. Some considerable time after the bill of sale had been executed by North, Reynolds arranged with the claimant Lay that Lay's name should be entered in the blank space in the bill of sale as the bargainee, and that Lay should hold the mixer in trust for him. This was done and the affidavit of *bona fides* was filled up and signed, but not certified as sworn. The date in the jurat of the affidavit is December 30, 1914, and this is in all probability the date of the arrangement made between Reynolds and Lay. No attempt was made to effect an actual delivery and change of possession of the article. Tessler, the bailee of the machine, received no notice of the sale of the machine by North until about the end of December, when Reynolds telephoned that he was acting for a purchaser from North. Lay, the claimant and alleged bar-

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gainee, says he never saw North and had no communication with Tessler. Tessler does not appear to have agreed to recognize any change in the ownership of the chattel.

On January 11, 1915, a writ of *fieri facias* was placed in the hands of the sheriff in the suit of the Missisquoi Lautz Con. Co. against the defendants North and Small. On the following day, January 12, 1915, the affidavit of execution of the bill of sale was sworn by the witness, and on the same day a declaration of trust was executed by Lay stating that he held the mixer in trust for Reynolds. The machine was seized by the sheriff under the writ, and it was then claimed by Lay.

The bill of sale was never fully completed or registered and no valid claim can be made under it. It is, however, urged that because the article was in the hands of a warehouseman or bailee and not in the actual possession of the bargainor, sufficient was done in the circumstances to operate as a change of ownership. In January, 1915, there was a conversation by telephone between Tessler and Reynolds concerning Tessler's charges for keeping the machine which were much in arrear. On January 20, 1915, Reynolds wrote to Tessler enclosing $10 on account and informing him that Lay was the owner. Tessler gave Reynolds a receipt for the money, but gave no acknowledgment that he held the machine for Lay.

The Bills of Sale and Chattel Mortgage Act requires that every sale of goods and chattels in this province not accompanied with an immediate delivery, followed by an actual and continued change of possession, shall be in writing and shall comply with the requirements set out in sec. 3. As there was no bill of sale in compliance with the Act, the plaintiff must prove, in order to succeed, that there was an immediate delivery followed by actual and continued change of possession. Even if we were to construe the so-called bill of sale in this case as a direction from North to Tessler to hold the chattel for Reynolds or his nominee, it is clear that the document was not shewn to Tessler, and that Tessler was not informed that North had sold to anyone until more than a month had elapsed since the signing of the instrument by North. Where a sale is made of goods in the hands of a warehouseman, and the owner cannot,

or does not, make a physical delivery of them to the purchaser, if the *indicia* of ownership are made over to the purchaser and, at the time of the transaction, or as promptly as may be, the warehouseman agrees to hold, and forthwith continues to hold, the goods for the purchaser, the transaction may come within the exception mentioned in the section. In such case there has been the only delivery and change of ownership the nature of the case permitted, without actually removing the goods from the custody of the warehouseman and making manual delivery of them, a thing which might be impossible in some instances. This principle is discussed in *Jones* v. *Henderson*, 3 Man. L.R. 433; *Richardson* v. *Gray*, 29 U.C.Q.B. 360; *Ex parte Close*, 14 Q.B.D. 386; *Commercial National Bank* v. *Corcoran*, 6 O.R. 527; *Jackson* v. *Bank of Nova Scotia*, 9 Man. L.R. 75, and other cases.

In the present case Reynolds retained the incomplete instrument in his hands for more than a month after North had signed it. He appears to have taken no step until the execution against North was placed in the sheriff's hands. There was no attempt to make or obtain delivery of the article sold and to secure an actual change of possession, or to do what might be the equivalent of such acts where the article was in the hands of a warehouseman. The necessity for acting with the greatest promptness in such a case is discussed and exemplified by Killam, J., in *Jackson* v. *Bank of Nova Scotia*, *supra*. I think the claimant, down to the time the execution came into the sheriff's hands and bound the chattel, had obtained nothing, and that nothing had been done, which could be regarded as, or take the place of, a delivery and a change of possession.

It is argued that the Act does not apply to goods which are in the hands of a third party, and that therefore no immediate delivery and change of possession are necessary in such a case. In support of this contention, reference was made to certain expressions used in *Jones* v. *Henderson*, 3 Man. L.R. 433, 435; *Commercial National Bank* v. *Corcoran*, 6 O.R. 527, 531; *Scharf* v. *Dillabough*, 22 D.L.R. 569.

The third section of the Act declares that:—

Every sale made of goods and chattels, situated in the province of

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Manitoba, *not accompanied by an immediate delivery, followed by an actual and continued change of possession, of the goods and chattels sold*, shall be in writing, and such writing shall be a conveyance under the provisions of this Act;

then follow the provisions providing the requirements as to the execution, completion and registering of the instrument and declaring the consequences of non-compliance. Now, it is clear that there is an exception provided in the section, and that sales of goods, which fall within that exception need not be evidenced by a writing made in pursuance of the Act. Sales that are accompanied by an immediate delivery followed by an actual and continued change of possession, or the equivalent of this where the goods are in a third party's hands, remain valid without the necessity of a bill of sale under the Act. But in order to avoid the necessity of a bill of sale, the purchaser must shew that he comes within the exception and establishes the immediate delivery and the actual and continued change of possession which alone will excuse the making and registering of a bill of sale. Where goods are in the hands of a third party the delivery of them and the acts which evidence a change of possession of them may be effected in a manner differing from manual delivery and physical possession and still be sufficient to bring the case within the exception. This, I take it, is the meaning of the cases relied on by the claimant. But the Act applies to every sale to this extent, that there must be a bill of sale or else the purchaser must shew that he has sufficiently brought himself within the exception. If he fails to put himself within one or the other of these positions, the Act makes void the sale as against creditors or subsequent purchasers for value.

In the present case the transaction that took place between the parties cannot be construed as a sale accompanied by an immediate delivery followed by an actual and continued change of possession. The sale should therefore have been by bill of sale made and registered under the Act, and non-compliance with these requirements makes the sale void as against the execution creditors. I do not think it necessary to discuss the validity of the document relied upon by the claimant in this case, or the circumstances under which his name found its way

into that document. I think the claimant failed to prove a sale accompanied by immediate delivery and actual change of possession. I would therefore dismiss the appeal with costs.

HAGGART, J.A.:—On March 11, 1915, the Referee in Chambers ordered that the parties proceed to the trial of an issue wherein the above-named plaintiffs, the Missisquoi Lautz Co. Ltd. should be plaintiffs and the claimant, H. W. Lay, should be defendant, and the question to be tried should be whether, on January 27, 1915, being the date of the seizure of the concrete mixer seized by the sheriff under the writ of *fieri facias*, the said mixer was liable to the execution in a suit of the *Missisquoi Lautz Co.* v. *North and Small*, carrying on business in co-partnership as The V. C. North Contracting and Supply Co., wherein judgment was recovered by the said Missisquoi Lautz Co. against the said V. C. North and R. H. Small.

The issue was tried by Dawson, J., of the County Court of Winnipeg, who found in favour of the plaintiffs and that the mixer was subject to the seizure under the plaintiff's execution.

The claimant appeals from that decision on the grounds that the bailee of the mixer, in whose custody it was, had acknowledged that the mixer was held by him for one C. E. Reynolds, for whom the claimant Lay was acting, as trustee, prior to the issue of the plaintiff's execution, and that the claimant was a *bonâ fide* purchaser for value prior to the said execution.

The facts are briefly as follows. Judgment was recovered in the Court of King's Bench by the plaintiffs, the Missisquoi Lautz Co. Ltd., against V. C. North and R. H. Small, trading as The V. C. North Contracting and Supply Co., on January 11, 1915, for $4,163.45. An execution was issued thereon on the same day and placed in the hands of the sheriff of the eastern judicial district, under which execution the mixer was seized.

The claimant tries to make title by producing a document purporting to be a bill of sale, bearing date November 20, 1914, from Vivian C. North to Henry William Lay. The name of the bargainee is not mentioned in the document and was not in the document when signed by North. There is no affidavit of *bonâ fides* annexed or endorsed, and the affidavit of execution

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purports to be sworn on January 12, 1915. The document, of course, was never registered.

Bearing the same date, January 12, 1915, there is produced a declaration of trust by Henry William Lay in favour of Charles E. Reynolds, the real claimant.

The mixer had been stored with one Tessler by one Davis, a former owner, on April 4, 1914, and after it had been in storage for about a month, Davis notified Tessler that he, Davis, had sold it to a man named North, who would pay the storage, and North did subsequently pay the charges for three months, after which he apparently left the city. Tessler received no more money from him, and, in his evidence Tessler swears that he had never received any notice that North had sold the machine.

On January 20, 1915, Reynolds writes a letter to Tessler saying that he had seen his client, H. W. Lay, who was the owner of the concrete mixer, and that he had received $10 from him on account, and he enclosed a cheque to Tessler for the $10. At the foot of this letter is a receipt, dated January 21, 1915, acknowledging the $10 on account. Previous to that letter it appears there had been a telephone communication from Reynolds saying that he was acting for a client to whom North had sold the mixer, and that they would pay the rent; but it does not appear clearly how long this was before the date of the letter enclosing the cheque. Tessler thinks it was more than two or three weeks.

Reynolds swears that in the month of December, 1914, he gave Tessler notice that he, Reynolds, was the owner of the mixer, and in due course the account for rent was rendered, that Tessler called at his office and he shewed Tessler the bill of sale and told him that he, Reynolds, was the owner of it, and that he intended to dispose of it, and put it in the name of someone else, and that he would send him a cheque in a day or so.

The claimant urges that by reason of this interview, the sending by Tessler to Reynolds of the account for the rent, and Tessler's receipt of the cheque for $10 on account of the rent, that there was a new contract of bailment and that Tessler thereby acknowledged that he was the bailee for Reynolds, and

consequently came within the decision in *Jones* v. *Henderson*, 3 Man. L.R. 433, and *Scharf* v. *Dillabough*, 22 D.L.R. 569.

In *Jones* v. *Henderson*, a manufacturing company in Brantford, Ontario, consigned certain goods to a warehouseman in Winnipeg, and the plaintiff having advanced some money to the manufacturing company, obtained from them an order on the warehouseman to deliver the goods, and the warehouseman made in his books a transfer of the goods from the manufacturing company to the plaintiff Jones. The trial Judge held that there was evidence to shew that the company had assigned the goods to Jones, and that the warehouseman was notified of it, and his decision was that when goods were held by a warehouseman, an assignment or order for delivery does not pass the property until the warehouseman has made an entry of the transfer in his books and has thereby assented to hold the goods as the agent of the vendee, and that when a transfer order has been lodged with the warehouseman and accepted by him he then holds them in future for the buyer. This case went to appeal, but the Full Court disposed of it on grounds other than these mentioned in this dictum of the trial Judge.

Scharf v. *Dillabough*, *supra*, was a case in the Supreme Court of Saskatchewan, where Lamont, J., decided that where there was a sale of goods which at the time of the sale are not in the possession of the vendor, but in the possession of a third party, and that party is made aware of the sale and consents to the goods remaining in his possession as the goods of the vendee, then that is a sufficient actual change of possession to support the sale, and prevents the sale being avoided owing to non-registration under the Bills of Sale Act, and *Jones* v. *Henderson* was cited as one of the authorities for this decision. The bailee Tessler, it appears to me, was only interested in getting his charges. He had no instructions, either written or verbal, from North. He had mailed bills of his charges to North and they came back, returned by the Post Office.

A sale of goods, while good between the parties, when "not accompanied by an immediate delivery followed by an actual and continued change of possession . . . shall be absolutely

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null and void as against the creditors of the bargainor. . . ." I do not think that here there was a sale accompanied by an immediate delivery and followed by an actual and continued change of possession. The words of sec. 3 of our statute, ch. 17, R.S.M., are to me conclusive, and the transaction is null and void as against these plaintiffs.

Jones v. *Henderson*, *supra*, was decided under sec. 3, ch. 49, Con. Stat. of Man. 1880, which is in substance the same as our present Act. But our present statute has an interpretation clause, namely, sec. 3, which enacts that "the expression 'actual and continued change of possession' shall be taken to be such change of possession as is open and reasonably sufficient to afford public notice thereof." Here, the transaction relied upon to change the property in the mixer was not such a change of possession as to be notice to the public.

It is to be observed that this mixer was the property of the partnership, consisting of North and Small, and that Small never executed the document nor authorized any other person to dispose of his interest in the mixer. It appears that it was left with North with the view of his collecting the debts and assets of the firm and paying the liabilities.

Barron & O'Brien Chattel Mortgages and Bills of Sale, 2nd rev. ed., p. 393, says:—

> In cases where the vendor has not the property in his possession, nor yet the right to its possession until the happening of a subsequent event or something on his part to be performed, the Act will now apply.

And again,

> Strict compliance with the Act is necessary, notwithstanding that there may have been as much a change of possession as the position of the parties admits of.

See also *Snarr* v. *Smith*, 45 U.C.Q.B. 156; *Doyle* v. *Lasher*, 16 U.C.C.P. 263; *Ranny* v. *Moody*, 6 U.C.C.P. 471.

I would affirm the judgment of the trial Judge and dismiss the appeal.

Cameron, J.A. (dissenting)

CAMERON, J.A., dissented. *Appeal dismissed.*

KELLY v. CANADIAN PACIFIC R. CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. November 3, 1915.

1. BILLS AND NOTES (§ V A 2—121)—CHEQUE FOR WAGES—LOST INSTRUMENT—FORGED INDORSEMENT—LIABILITY FOR AMOUNT.

There can be no recovery for the amount of wages represented by a cheque which was lost by the payee and later came into the possession of a bank upon a forged indorsement, where for the protection of the maker the payee is unable to deliver possession of the cheque.

Statement

APPEAL from judgment for plaintiff in action on lost cheque.

Mayers, for appellant, defendant.

R. M. Macdonald, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The respondent (plaintiff in the action) sues for 3 months wages for which he had been given by his employer (the appellant) three cheques drawn on the Bank of Montreal, Vancouver branch. When the action was commenced these cheques were outstanding in either the hands of the said Vancouver branch or of the Spokane branch or agency of the Bank of Montreal. The business relationship of these two branches does not clearly appear. Evidence was admitted to shew that the Spokane branch or agency cashed the cheques on forged endorsements and then forwarded them to the Vancouver branch, which branch appears to have claimed the right to charge these cheques against the appellant's account. At the trial a clerk from the bank was called to produce the cheques in Court. The right of the bank, therefore, to the cheques pending the settlement of any contest with the appellants in respect of the endorsement, is not in dispute. The result is that the respondent was not in position to deliver up the cheques upon judgment being given in his favour.

At common law it is well settled that the respondent could not succeed unless he could deliver up the cheques. Formerly in equity relief in case of a lost negotiable instrument could be obtained upon a sufficient indemnity being given, and by our Bills of Exchange Act a like relief is provided for. The situation then is that judgment has been given against the appellants in respect of the cheques or the wages which they represent, although the cheques are outstanding in the hands of third parties, whose right to insist upon payment of them from the appellants may in the future be established, and who are at all

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events not estopped by the judgment in this action from insisting that the endorsements are genuine and that they are entitled to insist upon payment by the appellants.

In these circumstances I think the appeal must succeed. The respondent should either have recovered possession of the cheques if they rightly belonged to him before commencing this action, or should have joined the third parties in this action and thereby enabled the Court to dispose of the whole matter in such a way as to protect the interests of all concerned. The appeal should be allowed.

Martin, J.A.

MARTIN, J.A.:—This is an action to recover the sum of $176 for wages as a carpenter, or alternatively, for payment of three cheques for the same amount given for said wages for March, April and May, 1914, and payable to the order of the plaintiff. He lost said cheques on July 8, last, after carrying them about with him, and the Bank of Montreal paid them and still holds them, though they were produced in Court by the bank when the plaintiff swore that the endorsement thereon was not his, but a forgery. The position, therefore, is peculiar in that though the notes had been lost yet at the time of bringing the action they were not lost but found, and were held by the bank which refused to give them up. Secs. 156 and 7 of the Bills of Exchange Act (ch. 119, R.S.C.), containing certain remedial provisions as to lost instruments (considered in *e.g.*, Byles on Bills, 17th ed., 344; Falconbridge on Banking, 2nd ed., 742-3; Maclaren on Bills, 4th ed., 378-81; *Orton* v. *Brett*, 12 Man. L.R. 448, and *Palmer* v. *Reilly*, 2 E.L.R. 308, have, therefore, no direct application to the case. The plaintiff has taken no steps under sec. 49, or otherwise, to assert his title or rights under the originally lost and forged bills, as against the Bank of Montreal, so the position simply is that he comes into Court asking for the payment of a bill which is held by another person. In such circumstances the case is to be decided by the "general rule of law" laid down in *Ramuz* v. *Crowe*, 1 Ex. 167, 172; *Crowe* v. *Clay*, 9 Ex. 604; *Davis* v. *Reilly*, [1898] 1 Q.B. 1; and *Re, a Debtor*, [1908] 1 K.B. 344; that the plaintiff must in order to succeed be the holder at the date of the beginning of the action. And *Crowe* v. *Clay*, *supra*, shews that the demand for

which the bill was given cannot be sued upon where the creditor is not the holder of the bill, the Court saying:—

It appears, therefore, that the loss of a negotiable bill given on account of a debt is an answer to an action for the debt as well as one to the bill. (And again.) To entitle the plaintiff to sue, he ought to be the holder of the bill, and the bill ought to be due; and there seems no reason why the defendant may not rely on a defect of the plaintiff's title in either of these respects, leaving the others unnoticed.

And in *Davis* v. *Reilly*, [1898] 1 Q.B. 1, it was said, p. 3:—

It seems to be clearly settled at common law that an action will not lie for the price of goods, for which a bill of exchange has been given, while the bill is outstanding in the hands of a third party. At the date of the commencement of this action he was not entitled to sue, and we have no power to amend so as to give him a new cause of action which he had not got when the action was begun.

As to the countermanding of the cheque, I am unable to accept the submission that the bare fact that it was countermanded by the defendant at the requesting of the plaintiff entitles the latter to sue on the original contract, on the theory that a cheque that has been countermanded must always be regarded as one that has never been given. That this may be so in certain circumstances appears from *Cohen* v. *Hale*, 3 Q.B.D. 371, but that it would be so in the peculiar circumstances of the case at bar does not at all follow. The attempt of the plaintiff to stop payment of the cheque by a vague telegram from Seattle on the 8th was clearly insufficient—*Curtice* v. *London City, etc., Bank*, [1908] 1 K.B. 293—but he went to Vancouver and next day got the defendant paymaster to go with him to the bank and stop payment which was done verbally, and by the following letter:—

To the manager of Bank of Montreal, Vancouver. Claim is made that the following three cheques have been lost and I should feel much obliged if you would, in the event of any of them being presented for payment, hold same, advising me. March cheque 1353, Roll 34, $54.90, favour of F. Kelly; April cheque F. 65, Roll 34, $59.35, favour of F. Kelly; May cheque 1130, Roll 34, $63.55, favour of F. Kelly.

After this was done the plaintiff asked the paymaster when he would get his money and was told "in about 6 months, not before." The plaintiff later went back to work for the defendant and shortly after the 6 months had expired he began this action, on February 5 last, after the paymaster had informed him that he had no orders to pay him. It could not seriously be con-

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tended in these circumstances that the plaintiff could, immediately after the countermand, have turned round and sued the defendant for the original debt, and yet that is the result of what we are asked to hold if a general rule is to be laid down. The fact of the still outstanding originally lost cheque held by the bank which cashed it, and which in effect denies that the endorsement is a forgery, places the defendant company in such a peculiar and dangerous position that it is entitled as a matter of law for its business protection to require the plaintiff to get possession of the cheque before recovering the amount for which it was given.

It is unfortunate that the bank was not added as a party, or other proper steps taken before action brought, and that the plaintiff thus finds himself in this unenviable position, but in view of *Davis* v. *Reilly, supra*, I can, I confess, with reluctance, come to no other conclusion than that the only Order we can legally make is that the appeal should be allowed.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A., dissented. *Appeal allowed.*

SASK.
S. C.

RUSSELL v. QUAKER OATS CO.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. November 20, 1915.

1. CHATTEL MORTGAGE (§ II A—7)—TRUE CONSIDERATION—BALANCE OF PURCHASE PRICE—VERBAL AGREEMENT.

The sale of a business by verbal agreement creates a valid existing debt for the purchase price which may form the *bona fides* of a chattel mortgage, though such agreement is formally reduced to writing subsequent to the execution of the mortgage; and a recital in the mortgage that it was given as security for the balance of such purchase price truly sets forth the consideration thereof.

Statement

APPEAL from judgment in interpleader issue declaring chattel mortgage invalid.

G. A. Cruise, for appellant.

J. Cowan, for respondents.

The judgment of the Court allowing the appeal was delivered by

Elwood, J.

ELWOOD, J.:—This is an interpleader. Respondents are execution creditors of the defendant Martin hereinafter referred to.

The only evidence given in this matter, besides some documentary evidence, was the evidence of one James Russell. He swore that on July 13, 1914, he, through his solicitor, entered into a verbal arrangement with the defendant Martin whereby

Russell sold to said Martin his business for the sum of $875 cash, and on the evening of that day handed over the entire charge of the business in pursuance of said sale to Martin. On the following day, Russell's solicitor 'phoned him that Martin could not pay the cash and that he wanted the business on terms. In consequence of this, certain terms were arranged and a chattel mortgage drawn for securing the payment of the balance, namely, $575. This chattel mortgage contained the following recital:—

Whereas the mortgagor is indebted to the mortgagee in the sum of $575, and whereas the mortgagor is unable to duly meet the said indebtedness and the mortgagee has insisted upon receiving security and has agreed thereupon to extend the time for the payment of the said debt to August 1, 1915, and the mortgagor has agreed to give this chattel mortgage as collateral security for the payment of the said sum above-mentioned and for the due payment of all and every note or notes hereinafter taken in renewal or substitution thereof or part thereof and of all interest, costs and charges incurred in respect thereof.

On July 15, an agreement was executed by Russell and Martin providing for a sale of the business to Martin, setting forth the terms, and *inter alia* providing that Martin would execute a chattel mortgage in favour of Russell for the unpaid balance. This agreement is dated July 14, the same date as the mortgage, but the uncontradicted evidence is that it was executed on July 15, and the affidavit of execution to the mortgage appears to have been executed July 14. The agreement above referred to was apparently executed at the request of Martin.

The District Court Judge held that the chattel mortgage did not set forth the true consideration, and was, therefore, void.

The evidence given for the plaintiff was uncontradicted, and under that evidence it seems to me that there should be no doubt that the true consideration was set forth in the chattel mortgage in the above recital. As soon as the verbal agreement was entered into on July 13 there was a debt due. Afterwards Martin stated his inability to pay that debt, and, in consequence, he was given time and as set forth in the recital. The agreement executed on July 15 cannot, in my opinion, affect the question. I am, therefore, of opinion that the appeal should be allowed, with costs.

Appeal allowed.

ALTA.

S. C.

Re JASPER LIQUOR CO. and WINDING-UP ACT.

Alberta Supreme Court, Harvey, C.J., Scott and Stuart, JJ. November 6, 1915.

1. CORPORATIONS AND COMPANIES (§ VI FI—345)—DISSOLUTION AND WIND-UP —DISTRESS FOR RENT—LEAVE OF COURT.

Under sub-sec. 7 of sec. 18 of the Companies' Winding-up Ordinance, 1903 (Alta.), a distress for rent, after the commencement of the winding-up proceedings, cannot be had without leave of the Court.

[*Re Jasper Liquor Co.*, 23 D.L.R. 41, affirmed.]

Statement

APPEAL from judgment of Beck, J., 23 D.L.R. 41.

J. R. Scrimgeour, for plaintiff.

H. R. Milner, for defendants.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—This is an appeal from the judgment of Beck, J., 23 D.L.R. 41, in favour of the respondent upon the following facts agreed upon between the parties.

A certain lease, dated November 22, 1913, was made between Scott and the Jasper Liquor Co., per Elzear Boivin, which lease is produced herewith and made a part of this case. On December 29, 1913, the lessee took possession of the store, the building then being ready for occupation. The Jasper Liquor Co., Ltd., which was incorporated on February 5, 1914, entered into possession of the premises and obtained a wholesale and retail license under the provisions of the Liquor License Ordinance on March 18, 1914, and the leased premises were then first thrown open for business. After the incorporation of the company the rent was always paid by it, and Scott was aware that the company was in occupation of the premises and that the rent was being paid by it.

It is agreed that the lease was never assigned to the company nor was there any sub-lease, written or verbal.

In August, 1914, the company requested a reduction in the rent, which Scott refused to give, the correspondence in connection therewith being herewith produced and made part of this case.

On April 23, 1915, the company went into voluntary liquidation under the provisions of the Companies' Winding-up Ordinance, 1903. On May 4, 1915, a petition for the purpose of bringing the winding-up under the Dominion Act was served and subsequently on the same day Scott distrained on the premises for arrears of rent. A formal winding-up order was finally made on May 17, 1915. The distress was abandoned on the under-

standing that the abandonment was to be without prejudice to any rights which Scott had acquired thereby.

The question for determination by the Court is whether or not Scott by distraining under the foregoing circumstances acquired a charge or lien and is now entitled to rank as a preferred creditor.

The following provisions of the Companies' Winding-up Ordinance (ch. 13), 1903, bear upon the question submitted:—

Sec. 6. A winding-up shall be deemed to commence at the time of the passing of the resolution authorising the winding-up, or the making of the order directing the winding-up, as the case may be.

Sec. 7. The following consequences shall ensue upon the commencement of the winding-up of a company under the authority of this Ordinance.

Sub-sec. 2. Subject to the provisions of sec. 10 hereof the property of the company shall be applied in satisfaction of its liabilities, *pari passu;* and, subject thereto and to the charges incurred in the winding-up its affairs shall, unless it is otherwise provided by the ordinance, charter, or instrument of incorporation, be distributed amongst the members according to their rights and interests in the company.

Sec. 10 has no bearing as it merely provides for the payment in priority to the claims of ordinary creditors certain wages due to the employees of the company.

Sec. 18, sub-sec. 7. Every liquidator or inspector shall be subject to the summary jurisdiction of the Court in the same manner and to the same extent as the ordinary officers of the Court are subject to its jurisdiction; and the performance of his duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in, or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the Court on summary application, and not by any action, attachment, seizure, or other proceeding of any kind whatever; and obedience by a liquidator to such order may be enforced by the court under the penalty of imprisonment as for contempt of court or disobedience thereto; or he may be removed in the discretion of the court."

The judgment of Beck, J., is based upon the ground that the appellant, by reason of his not having distrained for his rent until after the commencement of the winding-up proceedings had not established a lien upon the goods before their commencement, and that the provisions of sub-sec. 2 of sec. 7, which provides for the distribution of its assets *pari passu* among its creditors, preclude the obtaining of such a lien after that date.

In my view, it is unnecessary to consider whether the effect of the last-mentioned provision is such as to deprive the landlord of his right to distrain after the commencement of the winding-up proceedings, as I am of opinion that sub-sec. 7 of sec. 18

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deprives him of that right except by leave of the Court. It is clearly a remedy for enforcing a claim for a debt. It is in effect a seizure of tenants' goods to satisfy a claim for rent, but, even if it cannot be held to be such, the words "action, attachment, seizure or other proceedings of any kind whatever" are wide enough to include a distress for rent. I cannot find in any of the cases relating to the doctrine of *ejusdem generis* any principle laid down which would authorise such a restrictive construction of these words as would exclude such a remedy.

In *In re the Calgary Furniture Company*, my brother Stuart expressed the view that a landlord was not deprived of his right to distrain for rent by reason of the tenant company having gone into voluntary liquidation under the Ordinance. He appears to have there taken the opposite view to my brother Beck respecting the effect of sub-sec. 2 of sec. 7, and his judgment is based solely upon the effect of that provision. He now informs me, however, that his attention was not directed to the effect of sub-sec. 7 of sec. 18.

Upon the facts submitted it must be assumed by this Court that the voluntary winding-up proceedings under the Ordinance as well as the subsequent proceedings under the Dominion Act were duly authorised. Their legality is not questioned.

The proceedings for the voluntary winding-up of the company under the ordinance continued in force until the making of the order for its winding-up under the Dominion Act. After the making of that order, it was too late for the appellant to apply to the Court under sub-sec. 7 of sec. 18 of the ordinance for leave to distrain. By sec. 23 of the Dominion Act a distress made after the making of the winding-up order is void. I would dismiss the appeal with costs.

My brother Beck, in his reasons for judgment, expressed the view that the appellant was entitled to rank as an ordinary creditor in respect of his claim for rent. As that question was not submitted to this Court, I express no opinion upon it.

Appeal dismissed.

BOWERS v. BOWLEN.

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S. C.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 20, 1915.

1. MORTGAGE (VI A—70)—ENFORCEMENT—DISTRESS—RIGHTS OF ASSIGNS. Sec. 5 of the Distress Act, R.S.S. ch. 51, which entitles a mortgagee to distrain upon "the goods and chattels of the mortgagor or his assigns," is confined to an assignee of the land whose assignment is subsequent to the mortgage, but does not give a mortgagee the right to distrain on the goods of someone whose interest was prior to the mortgage. [*Vousden* v. *Hopper*, 4 S.L.R. 1, applied.]

Statement

APPEAL by plaintiff from judgment in an action for the wrongful seizure of a crop.

J. F. Hare, for appellant.

G. E. Taylor, K.C., for respondent.

The judgment of the Court dismissing the appeal was delivered by

Elwood, J.

ELWOOD, J.:—One Thomas Oliver entered into an agreement to sell to Robert Martin several parcels of land, including the land on which the grain, the subject-matter of the present action, was grown. Part of the purchase-price was to be paid from the proceeds from year to year of the sale of one-third of the crop grown on the land in question. Oliver assigned his vendor's contract to the respondent to the extent of and until the sum of $2,221 was paid to the respondent, and delivered to him the agreement of sale between Oliver and Martin. Martin was duly notified, and inspected the assignment and agreement and delivered the vendor's share of the 1913 crop to the respondent. Oliver, being indebted to the appellant, agreed to secure his indebtedness by a mortgage to the appellant of the land in question; and also by assigning to him, subject to the prior assignment to the respondent, his agreement with Martin. This mortgage was given, but not the assignment of the contract. The mortgage was duly registered, and up to that date neither Martin nor the respondent filed a caveat. In September, 1914, the appellant by a warrant authorized one Vickers to distrain the goods and chattels of Thomas Oliver on the lands in question. This warrant purports to be for principal and interest due under the mortgage, and was given by virtue of authority given by the mortgagee to distrain for interest and principal. At the time of the seizure the grain had been cut and threshed, but there had been no division. Some question arose as to whether or not a valid seizure had been made, but, in view of the con-

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clusion I have come to, it is unnecessary that I should express any opinion on that question. The respondent seized and took away one-third of the crop, and sold it, and credited Martin with the proceeds. This action is brought to recover from the respondent the value of the crop so taken away, and for general damages. It was contended on behalf of the appellant, that, by virtue of sec. 5 of ch. 51 R.S.S., he had the right to distrain the crop on the land in question. That section is as follows:—

> The right of a mortgagee of land or his assigns to distrain for interest in arrear or principal due upon a mortgage shall, notwithstanding anything contained to the contrary in the mortgage or in any agreement relating to the same, be limited to the goods and chattels of the mortgagor or his assigns, and as to such goods and chattels, to such only as are not exempt from seizure under execution.

It was contended that Martin, in whose possession the wheat was at the time of the seizure by the appellant, was an assign of the mortgagor, and also that the respondent was an assign of the mortgagor. I am of the opinion that the word "assign" in the above section is confined to an assignee of the land whose assignment is subsequent to the mortgage, and therefore one whose interest would be subject to the mortgage, and that it was never intended by that section to give a mortgagee the right to distrain on the goods of someone whose interest was prior to the mortgage. In *Vousden* v. *Hopper*, 4 S.L.R. 1, Johnstone, J., at pp. 9-10, says as follows:—

> Prior to the introduction of sec. 5 of the Distress for Rent Ordinance, the mortgagee under a license clause could not have distrained the goods of the sub-tenant, nor could he have distrained the goods of a stranger. There was a difference to be noted in the relations of mortgagee and tenant in the case of a lease made before the mortgage and in the case of a lease made after it. In the former case the mortgagee took subject to the lease, as assignee of the reversion, and was bound to respect the tenant's right, but might on default become entitled to the rent and assume the position of landlord without the tenant's consent.

Having, therefore, reached the conclusion that neither Martin nor the respondent was an assign within the meaning of the above section, it follows that the appellant had no right to distrain, and, therefore, no cause of action against the respondent.

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

WYTON v. HILLE.

MAN.
C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 29, 1915.

1. ALTERATION OF INSTRUMENTS (§ II B—12)—CHANGING RATE OF INTEREST—RIGHT TO SUE UPON ORIGINAL CONSIDERATION.

Where a promissory note is taken in satisfaction of payment of a car, the amount of the purchase price represented by it cannot be sued upon after an avoidance of the note by a fraudulent alteration by the holder, of the rate of interest therein.

2. ACCORD AND SATISFACTION (§ I—3)—WHAT CONSTITUTES—TAKING NOTE OF THIRD PERSON.

A promissory note signed by a third party as a joint maker and which is taken by the seller of a car as payment of the balance of purchase price due thereon operates as an accord and satisfaction.

Statement

APPEAL from judgment of Ryan, Co.Ct.J., dismissing action on promissory note.

J. P. Foley, K.C., for appellant, plaintiff.

J. W. E. Armstrong, for respondent, defendant.

Perdue, J.A.

PERDUE, J.A.:—The facts in this case are briefly as follows. In June, 1913, the plaintiff sold to the defendant Fred Hille, a Kennedy automobile or "auto-buggy" for $450, at the same time giving, as the purchaser alleges, a warranty that it was in proper working order and first class condition. It is also claimed by defendants that certain material representations were made by the plaintiff at the time of the sale, and that these were untrue. The car was settled for in the first place by the purchaser paying $100, and giving his own note for $350, payable in 5 months, and bearing interest at 6 per cent. per annum. The plaintiff tried to discount the note but could not do so. He then demanded that Fred Hille should pay him $50 more in cash. This was done, and a new note for $300 was drawn up. This note was signed by Fred Hille. The plaintiff requested the other defendant, Walter Hille, who is a son of Fred Hille, to "back" the note. In consequence of this request Walter added his signature under his father's on the face of the note. The note was given to the plaintiff and accepted by him in settlement for the car. Afterwards, the plaintiff, without the consent of either of the defendants made a material alteration in it by changing the rate of interest mentioned in it from six to eight per cent. Neither of the defendants consented to this. Walter Hille, who was present when the alteration was made, protested against it.

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The note was dishonoured at maturity and an action was commenced upon it against both defendants. The County Court Judge before whom the first action was tried held that the plaintiff had avoided the note "by a fraudulent alteration of the rate of interest." Judgment was therefore entered for the defendants. No appeal has been entered against this judgment and it remains in force. The plaintiff then brought the present action against both Fred and Walter Hille upon the consideration for which the note was given, namely, the purchase price of the car, after giving credit for the cash received. The trial Judge entered judgment for both the defendants and from this the present appeal is brought.

The plaintiff claims that the automobile was purchased by both defendants, that after the note made by them became due and remained unpaid he was, notwithstanding the fact that it had been rendered void by the alteration, entitled to sue upon the consideration. Reference was made to the following authorities: *Atkinson* v. *Hawdon*, 2 Ad. & E. 628, 4 L.J.K.B. 85; *Sutton* v. *Toomer*, 7 B. & C. 416; Leake on Contracts, 6th ed., 593; Byles on Bills, 17th ed., 154; Chalmers on Bills, 7th ed., 240. It was claimed that Walter Hille had, by his statement of defence, admitted that he was a purchaser of the automobile. It is clear to me that this was an error caused by the fact that in putting in his statement of defence the defence of his co-defendant had been copied word for word. The evidence shews, and the trial Judge has found, that Fred Hille was the purchaser and that Walter Hille was not a party to the contract of purchase. If necessary, the statement of defence put in by Walter should be amended in that respect. . . .

In so far as Walter Hille is concerned, he was not a party to the purchase of the automobile, and the action against him on the consideration must fail. There remains the question of the liability of Fred Hille upon the consideration.

The first bargain was that Fred Hille should give the plaintiff his note for $350 and a cheque for $100. The note and cheque were given to the plaintiff as agreed. The plaintiff tells what occurred. He says:—

At Hille's I got the note of Fred Hille for $350, and I had the note and

cheque. When we saw the banker he would not cash the note and I said I would have to have more cash. Finally, defendant gave me $150 cash and a note for $300 signed by both defendants. I accepted the note *in settlement for the car*. I subsequently altered the note and sued on it after maturity.

This shews that the true bargain between the parties was that the promissory note of the two defendants (together with $150 cash) was accepted by the plaintiff in settlement for the car. If the note given had been that of Fred Hille alone there might have been much in the contention that the note only postponed the time for payment, and that the altering of the note did not destroy the remedy against the purchaser upon the consideration. But here the note of a third party has been given in payment, because the fact that Fred Hille is a maker of the note along with the third party makes it none the less the note of the latter. The plaintiff says that he accepted this note in settlement. When it fell due he sued upon it and a verdict was given in favour of the defendants. The reason for that verdict was that he had fraudulently altered the note, thereby rendering it void. In *Alderson* v. *Langdale*, 3 B. & Ad. 660, Lord Tenterden said:—

> It is perfectly clear that a bill of exchange will operate as a satisfaction of a preceding debt, if the holder make it his own by laches—as by not presenting it for payment when due. Here, we think that the plaintiff, by altering the bill in a material part, made it his own as against the defendant and caused it to operate as a satisfaction of the debt for which it was originally given.

In that case the bill was drawn on and accepted by a third party.

It appears to me that the question involved in the present case, in so far as Fred Hille is concerned is, was the note, signed as it was by himself and a third party, received by the plaintiff in payment for the car?

A promissory note may be received in satisfaction of a claim and then a suit cannot be sustained on the original debt: *Sard* v. *Rhodes*, 1 M. & W. 153; *Sibree* v. *Tripp*, 15 M. & W. 23. A negotiable security may be given and accepted in satisfaction, and this although it is the security of the debtor only and is for a less amount than the debt: *Sibree* v. *Tripp, supra; Curlewis* v. *Clark*, 3 Ex. 375; *Bidder* v. *Bridges*, 37 Ch.D. 406;

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Goddard v. *O'Brien*, 9 Q.B.D. 37. In Leake on Contracts, 6th ed., at p. 653, the following proposition is stated:—

> But if the creditor take bank notes or a bill or note or other form of credit of a third party, instead of cash, it is an absolute payment in satisfaction of the debt; and he cannot, upon dishonour of the security, have recourse to his remedy for the debt.

In addition to the cases cited in support of that proposition, I would refer to the recent decision of the Court of Appeal in *Hirachand Punamchand* v. *Temple*, [1911] 2 K.B. 330.

I think the evidence establishes that the plaintiff took the note of the two Hilles in satisfaction of the purchase price of the car, after giving credit for the cash paid at the time. By his own deliberate and, as the trial Judge found, fraudulent act he rendered the note null and void. His action on the consideration must therefore fail. It is unnecessary to go into the question on the warranty raised in the counterclaim.

The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—This action is brought in the County Court of MacGregor to recover the sum of $300, being the balance due on the purchase price of one Kennedy automobile. The circumstances of the case are fully set out in the judgment of His Honour Judge Ryan, who held that the plaintiff having failed in his action on the promissory note for the reason that he had materially altered the same, could not succeed in an action on the consideration for which the note was given.

Whether a bill or note is given and taken in satisfaction or as conditional payment is a question of fact as to the intention shewn by the parties; the presumption being that it is a conditional payment with a recourse to the original debt. Leake on Contracts, p. 153.

After consideration it seems to me that the evidence here points to the conclusion that the intention of the parties was that the note in question was to be taken in satisfaction. In the first place $150, one-third of the whole consideration of $450, was paid in cash. This, I take it, is some indication that the parties considered the giving of the cash and the notes a satisfaction of the debt. In such cases the larger the proportion of the amount of cash to that of the note the stronger I would say would be the presumption. Here we have the sub-

stantial sum of $150 paid in cash on a total consideration of $450, the balance $300 being represented by the note of the defendants Fred Hille, the purchaser of the car, and his son. In his evidence the plaintiff says [see judgment of Perdue, J.A.].

It is important to observe that the defendant Walter Hille, the son, was not a party to the first note. It was the other defendant, the father, who was the purchaser. The son signed the second note as maker at the request of the plaintiff after the banker had refused to discount the first. The cancellation of the first note, with its single name, and the substitution therefor of another note for a less amount with the additional name of the son as maker, go to shew an intention to give and receive this second note in satisfaction. Indeed the plaintiff says: "I accepted the note in settlement for the car."

We have the further fact of the material alteration of the note by the plaintiff when in his possession. This goes distinctly to strengthen the conclusion that the plaintiff considered and intended the debt to be satisfied by, and merged in the negotiable instrument. Indeed that intention is shewn, to some extent, by the fact that he brought action upon it against both defendants, seeking to hold them liable on the note as altered.

The subject of conditional or absolute payment by bill or note is dealt with by Daniel in par. 1259 *et seq.* The ordinary presumptions can be rebutted by shewing an express agreement that the bill or note was received in absolute payment or the contrary, "or that there were facts and circumstances attendant upon the transaction from which an understanding and agreement might be inferred," par. 1267. I think the inference can be readily drawn here that the note sued on in the first action was taken in absolute payment of the debt. The action upon the note having been duly disposed of in favour of the defendants and against the plaintiff, a cause of action upon the original consideration no longer remains. In this view there is no object in expressing an opinion on the question as to the effect of an alteration in a negotiable instrument upon the original consideration or on any other question raised on the argument.

I would dismiss the appeal with costs.

MAN.

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WYTON v. HILLE.

Haggart, J.A.

HAGGART, J.A.:—Was the $300 note accord and satisfaction for the balance of the purchase money?

Fred Hille was the purchaser of the auto-buggy for $450. He gave $100 cash and his note for $350. This completed the sale. The consideration agreed upon was given to the plaintiff, and the property in the chattel passed to the defendant Fred Hille.

"After the bargain was concluded," as the trial Judge puts it, the plaintiff failed to discount the note. At the plaintiff's request Fred Hille gave $50 more in cash and a new note for $50 less, namely $300, with interest at 6 per cent. was substituted. This new note, at the request of the plaintiff, was signed by Walter Hille, who became a joint maker, though he was really only a surety.

I think this last transaction was accord and satisfaction both of the liability on the first note and of the liability on the original debt.

We have been referred to the following authorities in which the giving of a negotiable security has been urged as a defence to an action on the original indebtedness: Falconbridge on Banking and Bills of Exchange, 2nd ed., at 722, says: A bill taken for and on account of a debt suspends the remedy by action to recover the amount of the debt—for which he cites *Walton* v. *Maskell*, 13 M. & W. 452, as an authority. And on the same page he says, a creditor who takes a bill for a pre-existing debt presumably takes it as conditional payment of the debt: *Currie* v. *Misa*, L.R. 10 Ex. 163; Am. & Eng. Encyc., vol. 1, p. 416; "Accord and satisfaction founded upon the receipt by the creditor of a negotiable note of the debtor, although for a less amount than the debt, has been held valid." *Goddard* v. *O'Brien*, 9 Q.B.D. 37, holds that A. being indebted to B. in £125 for goods sold and delivered, having given B. a cheque for £100 payable on demand, which B. accepted in satisfaction was accord and satisfaction.

Cumber v. *Wane*, 1 Stra. 426, decided that security for an equal degree of a smaller sum if it provided no easier or better remedy, cannot be pleaded in an action for the larger one. In *Sibree* v. *Tripp*, 15 M. & W. 23, it was held that a negotiable

security may operate, if so given and taken, in satisfaction of a debt of a greater amount, the circumstance of negotiability making it in fact a different thing, and more advantageous than the original debt, which was not negotiable. In *Goddard* v. *O'Brien*, 9 Q.B.D. 37, a cheque given by the debtor himself, and in *Bidder* v. *Bridges*, 37 Ch.D. 406, a cheque given by the debtor's solicitor, were held to be a good accord and satisfaction.

The negotiable instrument must, however, have been given and taken as an accord and satisfaction. It is a question of fact to be determined in each case whether the negotiable instrument has been so given and taken.

The authors in Smith's Leading Cases, in commenting upon the various decisions that have been given, lay down the following rule (11th ed., p. 348):—

> The general doctrine in *Cumber* v. *Wane*, *supra*, and the reason for all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows, viz., that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such agreement being *nudum pactum*. But if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.

There seems to be a want of harmony in the various decisions in question before us. It is to be observed here that this is not a pre-existing debt. The sale of the chattel, the payment of the $150 and the giving of the note for $300 were one transaction.

I think the same principle should apply to the case before us. Here there was a very substantial advantage to the plaintiff by the last transaction. He gets $50 more in cash, the personal obligation of Walter Hille on the note and he has a negotiable instrument instead of an ordinary debt.

The plaintiff's subsequent conduct in suing upon the note at its maturity supports the foregoing view. He looked to the note and not to the original debt.

Whether the taking of a negotiable security is an extinguishment of the debt for which it is taken is a question of fact. The trial Judge on coming to his conclusion must have found that it did, and there is evidence to support the finding. I would

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hestitate to reverse that finding of fact. Walter Hille was only liable on the note, and by the material alteration he is released.

Mr. Foley contends that it requires a fraudulent alteration of the note to extinguish the debt for which it is given, and that as the alteration was made in the presence of Walter Hille there could be no fraudulent intent. I do not agree with this contention. Walter Hille objected to it, and referred to what might be the consequences and Fred Hille did not know that it was altered. It was an attempt to impose on Fred Hille a liability he never agreed to. . . . I would dismiss the appeal.

Howell, C.J.M. Richards, J.A.

HOWELL, C.J.M., concurred with the judgment of the Court; RICHARDS, J.A., concurring with CAMERON, J.A.

ALTA.

S. C.

Re DAVIES.

Alberta Supreme Court, Harvey, C.J., Scott, and Stuart, JJ. November 6, 1915.

1. HABEAS CORPUS (§ I C—14)—PROCEEDINGS FOR CUSTODY OF CHILD—RENEWAL OF APPLICATION BEFORE ANOTHER JUDGE—WHEN ALLOWED.

An application for a writ of *habeas corpus* to obtain the custody of an infant cannot be renewed before any judge while there is an order pending of another judge that no application shall be made by the petitioner until the infant attains the age of 7 years unless, if under the practice rules 9 and 10 adopted by sec. 34 of the Infants Act (Alta.) 1913, ch. 13, such judge is unavailable, another judge may exercise his jurisdiction.

[*Re Holt*, 16 Ch. D. 115, followed.]

Statement

APPEAL from an order of Beck, J., made upon an application by the infant's father for a writ of *habeas corpus* directed to Emily and William Parcells.

J. F. Lymburn, for appellants.

A. Grant, for respondents.

Harvey, C.J.

HARVEY, C.J.:—Under the order it was directed that the custody of the infant should be given to the father without conditions. The mother of the infant died July 29, 1913, leaving this child then about a year and a half old and a new-born baby, and in December the appellant, Emily Parcells, who is a sister of the mother, hearing from the respondent of the trouble he was having, went to his place and found the children not properly cared for, and, she says, in a filthy condition. The custody of the baby was given to some people, the father receiving some money in connection therewith, and the custody of the infant was given by the father to its aunt by a formal document attested by a notary in these words:—

Los Angeles, February 23, 1914.

I, Chadwick L. Davies, father of Florence Edna Davies, a female child, about two years old, the legitimate daughter of Florence Davies and myself, do hereby consent to the adoption by Mrs. Emily Parcells, the sister of said Florence Davies, my deceased wife, and do hereby consent to the taking by said Emily Parcells out of the State of California of said child, and to the taking by said Emily Parcells or her husband of any legal steps that they or either of them may desire to take for the legal adoption by them or either of them of said child.

The appellants came to Alberta with the infant and some months later the father followed, and in August, 1914, he made an application for a writ of *habeas corpus*, which application was heard by Ives, J., who ordered that the application be dismissed, and

that the said Edna Davies remain in the custody of the said Emily and William Parcells until she shall have attained the age of seven (7) years, when the said Chadwick L. Davies shall have liberty to apply again for the custody of the said Edna Davies.

The order also provided that the father should have access to the child at all convenient times, and that it should not be taken out of the jurisdiction for longer than 6 months at a time.

In December following an application was made to Beck, J., for the custody of the child. Beck, J., heard evidence, and on the evidence refused to give the custody of the child to the father.

Six months later the father applied again to Beck, J., who again heard further evidence, after hearing which he made the Order now appealed against. The reasons given for making the Order are as follows:—

On the former application I was not satisfied that the father was in a position to provide properly for the child, or that in the interval between his getting the custody of the child and his proceeding to his former home in California there was any one in whose care he could place her. I am satisfied now on these two points and feel that there is now no good reason why the custody of the child should not now be given to the father and I accordingly make an order to that effect. There will be no condition attached. There will be no costs.

The first ground of appeal is that by reason of the Order of Ives, J., Beck, J., had no jurisdiction to make the Order.

It is answered that this objection has been waived by reason of the proceedings that have been taken. Assuming that it would be a case in which jurisdiction could be given by con-

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sent, it does not appear from the record that the appellants acquiesced in the hearing of either application by Beck, J., on the merits. The Judge expresses the opinion in giving judgment on the first application that he had the right to hear it, notwithstanding the terms of the Order of Ives, J., which would suggest that the point had been raised, and, moreover, he tells us that he is now of the impression that it was in fact raised. As the record contains no argument or other statements of counsel except questions to witnesses, I think we must assume that the objection was taken, and that therefore there was no waiver by consenting to the first application being disposed of on the evidence. The failure to appeal from that order, which was in their favour, certainly cannot be deemed a waiver. I am of opinion, therefore, that it is quite competent to the appellants to raise this objection on this appeal, and it is necessary to consider it.

It is contended on behalf of respondent that an application for *habeas corpus* or in the nature of *habeas corpus* may be made as often as one pleases, and to as many Judges as one pleases. That, however, is not the case under our practice. The disadvantage of one Judge being required to sit practically in appeal from a brother Judge, and the consequent loss of dignity and respect to judicial decisions in case of a difference of opinion, caused our practice to be changed, and now, by rule 20 of the Crown Practice Rules, the decision of a Judge on an application for *habeas corpus* is final, subject only to an appeal to the Appellate Division. It does not, of course, follow that another Judge has no jurisdiction in case of a change of circumstances, but the old practice as to *habeas corpus* when the facts are the same has changed, and, moreover, on an application for *habeas corpus* the appellants would have a perfectly good answer in the order of Ives, J., giving them the custody of the child till it is seven.

It does not appear to be the general practice to fix any definite period during which any one shall have the custody of an infant, and the interest of the infant would seem to make it desirable that there should be no time fixed absolutely. In *Re Holt*, 16 Ch.D. 115, the Order made by the Vice-Chancellor

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was that the infant should remain in the petitioner's custody until she should attain sixteen or further order. There was an appeal from the Order and the Court of Appeal refused to deal with it, as it was only until further order, and it was sent back to the Vice-Chancellor.

The present order quite clearly contemplates that no application shall be made by the father until the infant becomes 7 years of age, and he has not appealed from the Order. It is at once apparent that a change of circumstances might make it desirable, if not necessary, to take the custody of the child from the present custodian, and it is made clear by the Infants' Act (ch. 13, 1913, 2nd sess.), that the welfare of the infant is the primary consideration, but that Act also by sec. 34 makes the general practice and procedure apply to applications under it, and by rule 9 of the Rules of Court it is provided that an order made by a Judge may be varied or set aside by the same Judge, and rule 10 provides that when that Judge is unavailable, another Judge may exercise his jurisdiction. There is nothing to suggest that Ives, J., was unavailable, and in those circumstances, owing to the clear intention of the Order, I am of opinion that no other Judge had any jurisdiction to make any Order for the custody of the child before it reached the age of 7 years, because it could not be done without varying or setting aside the order of Ives, J.

I would allow the appeal with costs and dismiss the application with costs.

Scott, J.

Stuart, J.

SCOTT and STUART, JJ., concurred. *Appeal allowed.*

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C. A.

PAGE v. PAGE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, and McPhillips, JJ.A. November 2, 1915.

1. PLEADING (§ III A—303)—GENERAL DENIAL—FAILURE TO SPECIFY—EFFECT.

A general denial in one paragraph of all the allegations in a statement of claim, without specifically denying each allegation of fact as required by r. 213 (B.C.), is bad and must be disregarded.

[*Hogg* v. *Farrell*, 6 B.C.R. 387, followed.]

2. PLEADING (§ I G—58)—INDORSEMENT OF WRIT—EXTENSION OF—TIME OF OBJECTION.

A writ cannot be deemed to be specially indorsed and need not be amended, because it is not intituled "statement of claim," nor signed by counsel, and omitting the words "delivered, etc.;" and an objection to an undue extension of an indorsement upon the writ should be raised by motion before the delivery of the defence.

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Statement

APPEAL by defendant from judgment of Gregory, J., in an action founded on a decree to recover 4 monthly instalments of alimony alleged to be in arrears under the decree. There were at the time of the trial two instalments sued for in arrear; the other two had been recovered by the plaintiff in receivership proceedings in New York. The only answer made to the reduction of the judgment, by the amounts so recovered, was that the statement of defence did not specifically deny their non-payment.

Maclean, K.C., for appellant, defendant.

Mayers, for respondent, plaintiff.

Martin, J.A.

MARTIN, J.A.:—I can find no valid reason on the merits for setting aside the judgment arrived at by the trial Judge, and I shall only make some observations upon two questions of pleading that were raised before us.

The first is one not only of present but general importance, and it is that the first paragraph of the statement of defence infringes r. 213 and should be disregarded, with the result that by operation of r. 209 the allegations in the statement of claim must be taken to be admitted, excepting those that are specifically or necessarily impliedly denied or stated to be not admitted. The paragraph in question is:—

1. The defendant denies the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 in the plaintiff's statement of claim.

At the time this defence was delivered on January 13, 1914, the statement of claim as it then stood (before amendment) contained only these 9 paragraphs so this is nothing more than a general denial in one paragraph of the whole alleged cause of action. Now, it is true that there has been some relaxation of r. 213 in England, as is best set out in the note thereon in the Yearly Practice for 1915, pp. 271-2, and as exemplified in particular by the cases of *British Land Assn.* v. *Foster* (1888), 4 T.L.R. 574; *Adkins* v. *North Metropolitan Tramways Co.*, 63 L.J.Q.B. 361; and *Thornhill* v. *Weeks*, 109 L.T. 146, at 148, per Kennedy, L.J., but in none of these cases was the denial so general and sweeping as this one. While it is said in the Yearly Practice, *supra*, that:—

In the King's Bench Division it has become a common practice for the defendant to plead in his defence that he "denies specifically all the alle-

gations in paragraph of the statement of claim," etc., or that "save as above admitted he denies," etc."

(and *cf.* 22 Hals. 430) yet it is obvious that in many cases such a course could not be permitted, in regard to which the same authority says: "It should not, however, generally be adopted in dealing with the essential allegations," and some apt illustrations of this are given in Odgers on Pleading (12th ed.) 155.

If the matter were to rest solely on the English cases I should have much doubt about the sufficiency of the present denial, but there is a long-standing decision of our former Full Court in *Hogg* v. *Farrell*, 6 B.C.R. 387, 1 M.M.C. 79, which was pressed upon us as binding, and settling the practice in this province. The Court there (McCreight, Walkem & Drake, JJ.), held that the objectionable paragraph of the defence infringed the old r. 171 (now 213), saying: "The general denial in par. 3 of the statement of defence is bad (see r. 171), and must be disregarded."

The paragraph, coming after two others containing admissions, was as follows:—

3. The defendants deny all the other allegations contained in the said statement of claim, and put the plaintiffs to the proof thereof.

No essential distinction can be drawn between that paragraph and the one in question here, so I think there is no other course open to us than to follow the decision of our predecessors in the matter of practice under the same rules and likewise disregard this general denial. There is no hardship in so doing for the decision of the Full Court settled the practice in this province 20 years ago, and the appellant was entitled to rely on it as she has done. The object of the present rule in requiring parties to "deal specifically with each allegation of fact" was to abolish abuses which had grown up under the old practice, and it is particularly desirable that in such cases as the present, where the issues arose in a foreign jurisdiction, and the evidence is chiefly on commission, there should be no uncertainty as to what is in dispute.

Our attention was drawn to the fact that the amendment of the defence which was offered to the defendant's counsel on terms which were within the trial Judge's discretion were refused (A.B. p. 27).

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The second question as to pleading was that the statement of claim has been unduly extended or enlarged beyond the scope of the writ in a manner not authorized by r. 228—as to which *cf.* Odgers on Pleading, 7th ed., 38, 193-4; Bullen & Leake's Precedents (1915), 34, (1915) Y.P., 289-90; (1915), A.P. 366; and Holmested Ont. Jud. Act (1915), 506-7. The point is taken that as the writ was specially indorsed it thereby contained a statement of claim, and therefore a new statement of claim could not be delivered without leave—rules 16, 225 and 310. But the answer to this is, apart from other objections, that the writ cannot be deemed to have been specially indorsed because it is not intituled, "Statement of Claim" or signed by the solicitor in default of signature by counsel (which is not necessary, R. 200)—see *Vancouver Agency* v. *Quigley*, 8 B.C.R. 142; and *Oppenheimer* v. *Oppenheimer*, 8 B.C.R. 145; Y.P. (1915) 249. Furthermore, the prescribed words, "Delivered, etc." App. C. sec. 1, are omitted. I can only regard the indorsement as general, and there has been no undue extension thereof, and consequently the writ need not have been amended —*cf. Oppenheimer* v. *Sperling*, 10 B.C.R. 162; *Bugbee* v. *Clergue*, 27 A.R. (Ont.) 96, 99-100; *Snider* v. *Snider*, 16 D.L.R. 720.

But in any event this is an objection which should have been raised by motion before the delivery of the defence—*Bugbee* v. *Clergue, supra*, affirmed by the Supreme Court of Canada, 31 Can. S.C.R. 66, and I see that course was taken in *Snider* v. *Snider, supra*.

McPhillips, J.A.

McPHILLIPS, J.A.:—I would dismiss this appeal. In my opinion the trial Judge, Gregory, J., arrived at the right conclusion, and I concur in the reasons for judgment of my brother Martin.

Macdonald, C.J.A. (dissenting)

MACDONALD, C.J.A., dissented. *Appeal dismissed.*

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HERSCHORN v. ST. MARY'S YOUNG MEN'S SOCIETY.

Nova Scotia Supreme Court, Graham, C.J., Ritchie and Harris, JJ. August 23, 1915.

1. LANDLORD AND TENANT (§ II E—36)—LEASE—COVENANT AGAINST ASSIGNMENT—MAKING LEASE PARTNERSHIP PROPERTY—FORFEITURE.

A provision in a partnership agreement whereby one partner agrees to assign to the other partner an interest in a lease to be used for the business of the partnership, in consideration of his share of contribution, operates as a mere equitable assignment and does not constitute a breach of a covenant in the lease against assignment as a ground of forfeiture of the lease.

APPEAL from judgment of Drysdale, J., in favour of plaintiff in an action for an injunction to restrain the cancellation of a lease.

T. S. Rogers, K.C., and *F. H. Bell*, K.C., for defendant society, appellant.

H. Mellish, K.C., for plaintiff, respondent.

GRAHAM, C.J.:—This is an injunction to restrain the defendant society from forfeiting a lease.

By indenture of lease under seal, dated August 19, 1914, the society let to the co-defendant Franklin, St. Mary's Hall, at a rental of $5,000 per year for 10 years for theatrical purposes.

There are a number of covenants in the lease, and, among them, a covenant on the part of the lessee that:—

he shall not or will not assign or sublet the whole or any part of the tenancy hereby created . . . without the written consent of the lessor to such assignment, subletting, etc.

There is later a provision that

upon breach by the lessee of any covenant the lessor may at its option re-enter into possession of said premises and on such re-entry the tenancy theretofore existing between the parties hereto shall without further action become forfeited and at an end.

The alleged breach is contained in a partnership agreement between Franklin and the plaintiff, his brother-in-law, dated August 19, 1914, which co-partnership was in contemplation when the lease was made.

The plaintiff paid the sum of $3,000, of which $1,000 was to be paid to the society as security and $2,000 to be used in fittings. The co-partnership agreement was entered into in Montreal, and is as follows:—

Before M. Henry Fry, the undersigned, notary public for the Province of Quebec, practising in the city of Montreal. Appeared Joseph M. Franklin, of the city of Montreal, theatrical manager, first party, and Myer Herschorn, of the city of Montreal, theatrical manager, second party; Who declared: That the first party has acquired by indenture, dated August 19, instant, a lease for 10 years from December 20 next certain premises in the city of Halifax, Nova Scotia, consisting of the main hall on the ground floor of the building known as St. Mary's Hall, Nos. 26, 28 and 30 Barrington St., including the stage in connection therewith, also the office adjoining the said main hall and gallery, etc., the whole as therein described, and intends to operate the same as a theatre, etc.

The second party acknowledges to have taken communication of the said indenture of lease and to be therewith content and satisfied and ratifies and confirms the same.

The first party has agreed to assign to the second party in considera-

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tion of the sum of $3,000 an interest in the said lease, and in the said venture or business, namely, 49% thereof, retaining 51% for himself.

This assignment is made in consideration of the sum of $3,000 of which the first party acknowledges to have received $1,000 at the execution hereof, the remainder, namely, $2,000, the second party binds himself to deposit in a bank to the credit of the parties hereto or under such name as they may agree upon within ten days from this date, which sum shall be used for the undertaking, namely, for the necessary fitting up and improvements to the said building and otherwise for the benefit of the business.

The parties left Montreal on December 6, took possession on the 20th, got the chairs in and opened up on the 23rd. By May the plaintiff and Franklin had quarrelled, and on June 5 the society gave the plaintiff notice that the lease stands forfeited for breach of the covenant, and that he might remain in possession until June 20, the rent having been advanced up to that date.

The trial Judge, in granting the injunction, has held that the co-partnership agreement was not a breach of the covenant; that it did not constitute a legal assignment of the lease.

A covenant, in some such form is very old, as old as the case of *Dumpor* in Smith's Leading Cases, and the principle is almost as old, that any other than a legal assignment of a lease with such a covenant where reliance is placed upon the word "assign" does not constitute a breach of the covenant. Where the instrument is only one that can be enforced in equity, that will not constitute a breach of the covenant. An agreement to assign is, of course, the most obvious instance of that. Of course, the reason is highly technical. Such a covenant was regarded as an attempt to restrain the transfer of property and was looked on with jealousy. Again, a forfeiture was a thing to be leaned against. In *Church* v. *Brown*, 15 Ves. 264 at 265, Lord Eldon said:—

> Further, if the landlord has a covenant against both assigning and underletting the tenant might by an agreement neither assigning nor underletting put another person in possession of the premises and parting with the possession in that manner would not be a breach of those covenants. Is a further covenant therefore not to part with the possession of the premises to be given as a usual covenant? That would not have restrained the tenant from parting with a part of the premises, these covenants having been always construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The Court will have to consider whether all these covenants are also included under the terms "usual and proper covenants" in the construction of an equitable agreement where the law would regard the instrument with that jealousy.

Notwithstanding the Judicature Act, the law is still the same.

In *Gentle* v. *Faulkner*, [1900] 2 Q.B. 267, 274, A. L. Smith, L.J., said:—

What, then, is the meaning of a covenant not to assign the demised premises? In my judgment, the meaning is not to execute a legal assignment. An equitable assignment is not sufficient to operate as a breach of the covenant. There must be an assignment at law.

And Romer, L.J., p. 276, said:—

Upon the first point it seems to be clear that a covenant in a lease against assigning the demised premises, in the absence of any context shewing that the covenant is to have an extended meaning covers only a legal assignment. The covenant against assignment is, therefore, not broken by anything short of a legal assignment.

There the words were:—

That he will stand possessed of all leasehold property of or to which he is now possessed or entitled upon trust for the said trustee and to assign and dispose of the same in such manner as the said trustee should from time to time direct for the purposes of these presents.

In this province we only have the Statute of Frauds, R.S. 1900, ch. 141, secs. 3 and 4, requiring a lease not under these paragraphs in effect or an assignment of a lease to be by "deed or note in writing."

And the Registry Act, R.S. 1900, ch. 137, sec. 20, requiring a lease for a term exceeding 3 years to be registered.

We have not the statute of England, the Real Property Act, 1845, requiring either to be by deed.

But, although the English decisions allowed a lease under seal with covenants to be assigned by an instrument not under seal, a "note in writing," so interpreting the Statute of Frauds, the law still required an actual assignment by operative words in order to vest the property in the assignee.

Looking at the instrument in this case, I think there are no operative words of assignment to pass the term and vest it in plaintiff. Of course, I consider that it would be enforced in equity as between the parties. I do not mean by specific performance, *Weatherall* v. *Geering*, 12 Ves. 504, 512, for the reason given there by Grant, M.R.: "A Court of Equity cannot consider that as done which, if done, would extinguish the very subject of the contract," but by regarding one partner as trustee for the others: 3 Pomeroy on Equity, 1050.

If the clause beginning "The first party has agreed, etc.," is treated as a recital, which might be the notion of one of our con-

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veyances, there are subsequently no active words of assignment. Calling it an assignment afterwards is not effective in law. Later it is called "this agreement," coupled with "venture." But if it is not recital, but a registration before the notary of what is orally taking place between the parties, then it is but an agreement to assign the lease, not an assignment. In this clause it is associated with "venture" or "business" as things to be assigned, and those things were never the subject of a legal assignment.

In a partnership agreement one expects to find as part of it an agreement as to the premises in which the business is to be carried on. But one does not expect to find there an assignment at law of, say, a lease. It becomes partnership property in equity without that. And if the party wishes an assignment in law, one would expect a further instrument of that character fit to be registered without registering the whole partnership agreement.

In Lindley on Partnership, p. 399, it is said:—

> So, again, when a partnership is first formed or when a new partner is taken into an existing firm or where two firms amalgamate into one, some agreement is generally come to by which what was before the property of some one or more only of the members of the firm becomes the joint property of all such members. All such agreements, if *bonâ fide* and not fraudulent against creditors, are valid and have the effect of altering the equitable ownership in the property affected by them.

Story's Equity, s. 674; Story on Partnership, 2nd ed., s. 94, note p. 139.

If, then, an equitable or non-legal assignment does not constitute a breach of a covenant not to assign and the interest in this case was but an equitable interest, it does not require any authority to support the conclusion.

The defendant's counsel cited several partnership cases: *Loveless* v. *Fitzgerald*, 42 Can. S.C.R. 254; *Langton* v. *Henson*, 92 L.T.R. 805; *Varley* v. *Coppard*, L.R. 7 C.P. 505; *Dingley* v. *Sales*, 1 M. & S. 297.

These were all cases of an assignment at law and also were cases of a partner going out, except the last. In *Varley* v. *Coppard*, Willes, J., said: "It is unnecessary to consider whether the merely taking a partner would be a breach of the covenant."

I refer also to vol. 18 of the 2nd edition of the American and English Encyc. 657.

Roe d. Dingley v. *Sales*, *supra*, proceeded on the ground that there was a parting with the exclusive possession of a part of the demised premises. But, as I have said, that was an assignment at law. In my opinion, the appeal should be dismissed.

HARRIS, J.:—As a preliminary to the consideration of the questions argued in support of the appeal, it is important to ascertain what has been held to constitute a breach of a covenant not to assign a lease. The authorities are, I think, clear, and I understand this to be conceded on the argument, that an actual assignment of the legal title is, but an agreement to assign the lease or the term is not, a breach of the covenant. There must be an alienation of the legal interest, and, if there is less than this, there is no breach. The covenant is against assigning and nothing but an assignment comes within its terms.

Foa on Landlord and Tenant, p. 277; Lindley on Partnership, p. 399; *Horsey Estate* v. *Steiger*, [1899] 2 Q.B. 79; *Gentle* v. *Faulkner*, [1900] 2 Q.B. 267.

The sole question in this case, in my opinion, is, whether the provisions of the agreement for partnership between the plaintiff and the defendant Franklin are to be regarded as an actual assignment of the lease or as a mere agreement to assign it.

The agreement was drawn up in the province of Quebec, and it may be that under the law of that province it is well settled as to how such a document should be regarded. This, however, it is conceded, is of no importance, because it must be interpreted according to the law of this province.

After giving the document the most careful consideration, I fail to find any words of conveyance or assignment, and without such words it is impossible to construe the document as an assignment of the legal interest.

The agreement states that the parties had taken communication of the lease and, therefore, they must have known that it contained the provision making the lease void if any assignment was made without obtaining the written consent of the lessor.

In 18 Hals.' Laws of England, pp. 368 and 369, in discussing the question as to the distinction between a lease and an agreement for a lease, it is said:—

> It is construed as an executory agreement, notwithstanding that it contains words of present demise, if the provisions to be inserted in the lease are not finally ascertained or if from other indications it appears

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that it was not intended to take effect as a lease; where, for example, it is expressly provided that it shall not operate as a lease . . . or where the lessor is not yet in a position to demise, or where certain things have to be done by the lessor before the lease is granted . . . such as the obtaining of sureties . . . (and in a note it is added) or *where a necessary license or consent has not been obtained*. (*Doe d. Bailey* v. *Foster*, 3 C.B. 215; *Rollason* v. *Leon*, 7 H. & N. 73). But in all cases the question whether an agreement operates as a demise or as an agreement only depends on the intention of the parties. . . . (*Sidebotham* v. *Holland*, [1895] 1 Q.B. 378, 385.)

In the case of *Bailey* v. *Foster*, 3 C.B. 215, Coltman, J., said:—

The instrument in question was clearly an agreement and no lease. If a lease, it must have been a lease for twenty-one years, which would have created a forfeiture of the estate. The parties evidently did not mean that.

See also Bramwell, B., in *Rollason* v. *Leon*, 7 H. & N. 73, at 78.

In *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378 at 385, Lindley, L.J., said:—

But it is familiar law that whether an agreement operates as a demise or as an agreement only *depends on the intention of the parties*.

In the case of *Re Beachey, Heaton* v. *Beachey*, [1904] 1 Ch. 67, 75, Lord Alverstone, C.J., said:—

But I cannot come to the conclusion that the legal estate was intended to pass by this deed and it contains no words which would in ordinary conveyancing language be sufficient to pass the legal estate. Not finding either any such intention as I have indicated, or any technical or necessary words capable of passing the legal estate, I am of opinion that we ought not to hold that the words "convey and transfer the benefit of the said mortgage" are sufficient to pass the legal estate.

I am unable to impute to the parties an intention, on August 27, 1914, when they entered into the partnership agreement, to destroy the only asset of the proposed partnership months before they were to commence the very business for which the partnership was being formed. They had met before the notary to make an agreement to carry on business in the premises leased from the defendant company, and it is, in my opinion, illogical to assume that they intended by their agreement to do anything which would have, or might have, the effect of preventing the partnership agreement from ever having any force or effect. That result would follow from finding that the agreement executed at Montreal was a legal assignment of the lease.

For the reasons mentioned, I feel myself obliged to construe the document executed at Montreal as a mere agreement to

assign, and not a legal assignment of the lease; and, therefore, not a breach of the covenant referred to.

It was, however, urged on behalf of the defendant company that, if the partnership did not constitute an assignment at common law, but was a mere agreement to assign, there was, nevertheless, a breach of covenant when the assignor put the assignee into possession, recognized him and joined with him in the payment of rent to the lessor, and that this result ensues from the operation of the fusion sections of the Judicature Act. This is the way the contention was put.

This contention, in my opinion, is not borne out by the authorities.

In the first place, the Judicature Act does not provide that legal and equitable rights shall be treated as identical, and the same distinction exists between legal and equitable estates and interests as before the Act. For example, an assignment of after-acquired chattels still gives only an equitable interest: *Joseph* v. *Lyons*, 15 Q.B.D. 280, 286; *Ballas* v. *Robinson*, 15 Q.B.D. 288. So, also, the owner of an equity of redemption has, apart from statute, only equitable rights and cannot enforce his rights against a tenant as though he were legal owner: *Matthews* v. *Usher*, [1900] 2 Q.B. 535; and an equitable assignment of leaseholds does not operate as a legal assignment: *Gentle* v. *Faulkner*, [1900] 2 Q.B. 267, 275, and 277.

Again, relief on equitable grounds is only obtainable in cases where it would have been granted by a Court of Equity before the Act.

It was argued that equity looks upon that as done which ought to be done. But this maxim does not extend to things which might have been done, nor will equity apply it in favour of everybody, but only of those who had a right to pray that the thing should be done. Thus, where the obligation arises from contract that which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it: 13 Hals.' Laws of England, p. 73; Story's Equity Jurisprudence, sec. 64 (*g*) and note; *Re Anstis, Chetwynd* v. *Morgan*, 31 Ch.D. 596, *per* Lindley, J., at p. 605; *Re Plumptre, Underhill* v. *Plumptre*, [1910] 1 Ch. 609, *per* Eve, J., at 619.

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The rule as I have stated it has been the law at least since 1759. (See *Burgess* v. *Wheate*, 1 Eden. 177, *per* Clarke, M.R., p. 186.)

The contract with regard to the assignment of the lease is between the plaintiff and Franklin, and, in my opinion, the equitable rule referred to cannot be invoked in favour of the defendant company, which is not a party to it and cannot enforce specific performance of it.

So far as the defendant company and its rights in this action are concerned, the document is to be treated as an agreement to assign, *i.e.*, as an equitable assignment and not as a legal assignment. The defendant company not being in the position to enforce specific performance, the equitable maxim does not apply, and the Judicature Act cannot affect the case.

In *Gentle* v. *Faulkner*, [1900] 2 Q.B. 267, there was an assignment of all the assignor's real and personal property and a declaration that he would stand possessed of all leasehold property in trust for the assignee and to assign and dispose of the same in such manner as the assignee should direct. The assignee had taken possession of the leased premises. Held that, as there was no legal assignment, there had been no breach of the covenant against assignment, and that the Judicature Act had no application. See *per* Romer, L.J., at p. 277, and *per* A. L. Smith, L.J., at p. 274.

The case of *Walsh* v. *Lonsdale*, 52 L.J. Ch. 2, and many other cases cited by counsel for the appellant, in my opinion, have no application, because in all those cases the parties, plaintiff and defendant, were either the actual parties to the agreement in question or their privies. There was, therefore, no question as to the right to specific performance. That being so, the Court properly treated that as done which the parties had a right to have done.

In a note to p. 367 of Hals.' Laws of England, vol. 18, in discussing *Walsh* v. *Lonsdale*, 21 Ch. D. 9, and that line of cases, it is said:—

> The doctrine does not apply where the question arises in a Court not having jurisdiction to order specific performance of the agreement . . . nor does it apply where the circumstances are such that specific performance would not be ordered.

See also Farwell, L.J., [1901] 2 Ch. 608, at p. 617, and Lord Esher, M.R., 21 Q.B.D. 289, at 293.

I do not understand that it was contended that the entry by the plaintiff and the payment of rent by the partnership alone had the effect of compelling the Court to hold that an agreement to assign was in effect an assignment. The argument always coupled the possession and payment of rent with the equitable doctrine and the sections of the Judicature Act. The equitable maxim and the Judicature Act are not, in my opinion, available, and I do not suppose that it would be seriously argued that possession and payment of rent alone are sufficient. But it may be well to consider what effect they have.

Perhaps it is only right, in approaching the consideration of this question, to bear in mind the following facts:—

(1) The possession of the plaintiff was not an exclusive possession of any part of the premises. They were occupied by the firm. The plaintiff was known to the defendant company as being interested in the lease at the time it was executed, and he and the lessee Franklin, as partners, carried on the partnership business together. I think it is a fair inference that the defendant company knew he was there as Franklin's partner and that they acquiesced in it.

(2) The covenant in the lease is not a covenant against parting with the possession of the premises. It is a covenant against assigning or subletting only.

The defendant company, in order to forfeit the lease, must shew a breach of the covenant against assigning or subletting.

Neither the presence of the plaintiff on the premises and assisting in the business of the partnership nor anything in the partnership agreement created the relationship between the plaintiff and Franklin of landlord and tenant, and, so far as I am able to see, there is nothing which by any possibility can be construed into a subletting. The defendant company, to succeed, must, therefore, shew a breach of the covenant not to assign.

It is difficult to understand how such possession as the plaintiff had in this case can give to this equitable assignment the effect of a legal assignment or how the payment of rent by the partnership can have any such effect; nor, in my opinion, can the union of the two produce such a result.

In the case of *Cox* v. *Bishop*, 8 De G. M. & G. 815, it was expressly held that an agreement to take an assignment of a

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lease followed by possession on the part of the equitable assignee was not sufficient to give the lessor any right to sue the equitable assignee in equity for rent on the covenants of the lease. Knight Bruce, L.J., at p. 822, said:—

It was properly conceded on the part of the respondents that the liability would not have existed but for the possession or enjoyment of the property under the equitable assignment. It appears, however, to me, I acknowledge, that the possession and enjoyment make no difference. They do not, in my opinion, create a contract between the lessor and the equitable assignee which can give the former a title to the relief prayed against the latter. The possession by itself would not, nor would the equitable assignment by itself, have given the respondents the equitable right which they are here asserting against the appellants. Neither, I think, can the union of the two.

In *Horsey Estate Ltd.* v. *Steiger*, [1899] 2 Q.B. 79, there was an agreement for an assignment of a lease and the purchasers had possession. It was held there was not a breach of the covenant against assigning or subletting without the consent of the lessors.

In this case Lord Russell of Killowen, C.J., at p. 93, points out the distinction between a covenant against parting with the possession of the premises and a covenant against underletting. And in 18 Hals.' Laws of England, at p. 577, the difference between a covenant against parting with the possession of the premises and one against assigning is discussed. The former goes much further than the latter and is broken if the lessee makes an equitable assignment of the lease and places the assignee in possession, but the law is different in the case of a covenant against assigning.

Cox v. *Bishop, supra*, has been followed in *Bagot* v. *Clifford*, [1902] 1 Ch. 146, and in other cases.

In Bell on Landlord and Tenant, p. 473, it is stated:—

In order to create the relationship of landlord and tenant there must be an actual assignment; a mere agreement to assign or an equitable assignment will not operate to vest the term in the assignee or to create a privity of estate between him and the lessor which is necessary in order to render the assignee liable on the covenants, even if he has entered into possession and paid rent.

See also *Friary Holroyd* v. *Singleton*, [1899] 1 Ch. 86 (overruled as to the facts only in [1899] 2 Ch. 261).

It was also urged that the plaintiff, unless he was an assignee or under tenant, had no *locus standi*. I do not agree with this contention. He had an equitable interest in the lease. And if I am right in holding that there was no forfeiture the defendant company and Franklin could not by agreeing that there was a

forfeiture deprive the plaintiff of this interest. He is entitled to have his equitable interest protected.

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

RUSSELL and RITCHIE, JJ., concurred with HARRIS, J.

Appeal dismissed.

The KING v. CITY OF HALIFAX. Re STEVENS.

Nova Scotia Supreme Court, Graham, C.J., Russell, Longley, Ritchie, and Harris, JJ. November 16, 1915.

1. TAXES (§ III C—134a)—BOARD OF ASSESSORS—MODE OF ASSESSMENT.
It is not necessary that the entire board of assessors unite in an inspection of property for the purpose of assessing it for taxation; it is sufficient if each member ascertains the values as he thinks them to be and reports the facts and his views to the other members of the board for final determination, and no member of such board is justified in refusing to act in a separate capacity for the purpose of inspecting the property when required to do so by the municipal authorities.

2. OFFICERS (§ I E 3—58)—DISMISSAL OF TAX OFFICER — SUFFICIENCY OF NOTICE OF HEARING.
Notice of a council meeting to consider a recommendation for the dismissal of one from the office of assistant assessor must be served personally and not by merely leaving a copy of the notice with someone at the place of residence of the person to be served.

3. MANDAMUS (§ I D 2—35)—TO MUNICIPALITY—ILLEGAL DISMISSAL OF TAX OFFICER.
A municipality may be compelled by mandamus to restore one to the office of assistant assessor who has been dismissed without personal notice of the council meeting called to consider his dismissal.

Statement

APPLICATION for writ of mandamus to restore applicant to office of assistant city assessor from which he was removed by resolution of the city council.

E. P. Allison, K.C., in support of application.

F. H. Bell, K.C., *contra.*

Graham, C.J.

GRAHAM, C.J. (dissenting in part):—In 2 Dillon on Municipal Corporations, sec. 487, it is said:—

> Subject to the qualifications hereinafter mentioned, if an officer or employee of a city has been summarily removed in violation of the civil service law or other statute, giving him the right to retain his position until removed for cause, and after notice and a hearing, he is entitled to mandamus to compel the appointing officer to restore him to his office or position. Where the specific charge stated is insufficient to justify the removal or where the removal is erroneous and no good and sufficient ground therefor appears, the officer is entitled to a mandamus to restore him.

That extract covers the two branches of this case, first, re-

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moval for cause, which requires notice or a hearing, and, second, a good and sufficient ground for a removal.

The applicant is one of three assessors constituting a board of assessors for the city of Halifax, nominated by the Board of Control and appointed by the city council. And by the city charter, sec. 134, sub-sec. (3), it is provided that:—

Every such officer (including assessors) shall hold office until his death or resignation, but he may be dismissed from his office for good cause by a two-thirds vote of the whole council at a meeting of the council called to consider the question.

But even then it is not to take effect for 3 months or, in lieu thereof, payment of 3 months' salary.

The provisions of the city charter prescribing the duties of the Board of Assessors are numerous, and some of those are judicial rather than ministerial. I refer to those requiring them to value or assess the properties to be taxed. And they are to exercise discrimination and the duties thus have to be performed personally. I refer to the city charter, secs. 369, 374, 380 to 387 inclusive, 391, 392, 413, 416. Speaking generally, joint action is contemplated. Take the form of notice to the ratepayer, sec. 391:—

I hereby give you notice that the Board of City Assessors have assessed the property herein specified to you and at the valuation herein mentioned on which rates for the year 19— are to be levied.

Take the oath of office of the assessors, also a special oath after the books are made up each year:—

We do hereby solemnly swear that the books marked A. B. C. D. identified, contain a full and true list of the names of all persons, firms, estates or companies known to us or liable to rates and taxes in the city of Halifax for the year commencing the first day of May next. And that the real and personal property contained in the said list is a full and accurate assessment of all the property of each person, firm, estate or company liable to taxation at its full assessable value according to our best knowledge and belief.

Sec. 380. All real property . . . shall be valued by the assessors at the cash value at the time of the valuation so far as the same can be ascertained, due allowance being made by the assessors in the case of a property receiving only a limited advantage from street expenditure, water supply, sewerage, street lighting and police supervision.

Sec. 383, sub-sec. (4). All stocks of merchandise held for sale shall, for the purpose of assessment, be valued at three-fourths of their cash value.

This year, for the first time, there is in force in Halifax a special provision requiring separate valuations of the land

and of the buildings on the land, and there is no record which would help in coming to a conclusion in that matter. I refer to the provincial Acts 1915, ch. 46, sec. 10:—

In valuing real property for the purpose of assessment the assessors shall make separate valuations of the land alone and of any buildings or other improvements on such land and such separate valuations shall be set out in the notices of assessment.

The provisions for assessing banks, sec. 393, and for specified companies and businesses, sec. 394, and stock brokers, sec. 396, all require personal attention.

Then there are elaborate provisions for an appeal from the valuations of the assessors, sec. 392, to the Court of tax appeals, secs. 401, 402, and following. That is a Court of three to be specially appointed, and in case of illness or absence of one, the mayor is temporarily to be substituted.

I am of opinion that the valuations of this Board of Assessors for the purposes of taxation are clearly of a judicial nature rather than ministerial. One hardly requires authority for that. When I was at the bar *certiorari* was a favourite remedy to remove into Court an assessment of the assessors that was complained of. It is said in 1 Cooley on Taxation, p. 751:—

It is elsewhere shewn that valuation is in its nature a judicial act and that the assessors in making it are entitled to the customary protection which the law affords to officers exercising corresponding judicial functions.

I refer also to 2 Cooley, p. 1473, and to *Dillingham* v. *Snow*, 5 Mass. 547, where Parsons, C.J., says: "But the same law must apply to them . . . as to inferior judicial officers."

If this valuation is a judicial act it cannot be delegated, and it requires the exercise of all three minds in forming a judgment. I refer to 23 Am. & Eng. Ency. 593, and 365, 366, 368. I quote from page 368:—

But if the act is one that requires the exercise of discretion and judgment, in which case it is usually termed a judicial act unless special provision is otherwise made the persons to whom the authority is given, must meet and confer together and be present when the act is performed.

It appears that the mayor, for one, this year conceived the idea of a division of labour, namely, sending out two assessors, of whom the applicant was one, to do the work, and to have the third remain in the office sending out bills for the old taxes and doing clerical work. And this idea appears to have been

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founded on the opinion of the city solicitor, which is in the following terms:—

I do not think there is anything in the charter requiring all the assessors to personally visit every property valued. If that were so the work of assessment would require to be suspended in the event of one of the Board being ill for any length of time, and I see nothing to prevent either the assessment being made by the assessors separately and simultaneously in different sections of the city, or by two of the assessors while one remains to attend to the duties of the office. At the utmost all that would be required would be that the final determination should represent the judgment of the Board, and this could easily be accomplished by submitting the valuation made by the assessor or assessors who personally inspected the property to any member of the board who did not, so as to enable him to concur if he thought fit or make a separate inspection for himself in case he refused to accept the valuation of the other members of the Board. In this matter, as in all others, I see no reason why ordinary business methods should not be adopted.

The applicant demurred to that direction to proceed without all three joining in the work, and he was first suspended by the mayor. This the mayor had no power to do, but, inasmuch as it was afterwards rescinded, it is not very material. But it was a commencement.

The Board of Control took the matter up and reported in favour of his dismissal and the city council confirmed the report. The city council professed to give the applicant notice of the hearing, and there is in this connection, a slip which I shall deal with presently.

It is sought now, on the part of the city, to minimize the departure from the usual mode by the excuse that the reduction of the number of assessors was only to be a temporary matter, but the resolution of the Board is not so qualified. It was in words:—

That the city clerk notify chief assessor McManus, that he and assessor Stevens should at once commence the assessment for next year, Mr. McDonald, the third assessor, and the stenographer to remain in the office attending to the billing, etc., for the current year. Motion passed.

The city solicitor's opinion is not limited at all to this proposed expedient as if it was only a temporary one.

I shall not go into the question whether a rate from valuation, made by two instead of three assessors, or made by three assessors severally and apart from each other, each acting on different sources of information, would be valid or invalid as

against third persons, namely citizens raising the question. There is such a thing as a *de facto* tribunal whose work cannot be so questioned. But as between the immediate parties brought face to face, that principle cannot be invoked where one proposes to act illegally or irregularly, and I confine my observations to such a case. *Hannigan* v. *McLeod*, 21 D.L.R. 509, 48 N.S.R. 340. I think that is where statutes and legal traditions commonly called the common law have to be followed, "ordinary business methods" at variance with them should not be adopted. And I think an assessment is not to be made by the assessors separately and simultaneously in different sections of the city. The legislature each year passes Acts to amend the statutes respecting the city of Halifax, and any business methods, if they are business methods, may be duly obtained by amendment. It is no use putting extreme cases. One side will say: "Is each assessor to go to every lot of vacant land in a block?" and the other side will say: "Can each assessor alone ask the policeman on the beat, what is the cash value of that piece of land and of that house on that land, and what allowance ought to be made for the limited advantage from street expenditure, water supply, sewerage, street lighting or police supervision?" Then fasten the sheets together and have all three assessors sign at the end. For myself, I think it is difficult to carry all those properties and the circumstances in one's head and to describe them to others, so as to give the one who was never there, or only two or three times, an adequate notion of what the assessment should be. Anyone who has been in Halifax will be struck with the great variety of buildings we have. There is no uniformity. What is the use of having a Board of three assessors if the work may be done in that way? Take a simple common law award of arbitrators. I suppose "business methods" would not require all the arbitrators to hear the evidence but permit each one to obtain evidence from a different source, or would permit the arbitrators or some of them to delegate judicial functions to others, or to execute the award at the same time and in the presence of each other.

I think without specific legislation a Board of Assessors must do what is reasonable to ascertain the assessable value,

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always, of course, following the law. They are not required to take sworn testimony, but viewing a property was always a very reasonable common law way of obtaining evidence about it.

I am of the opinion that the proposed method is not as convenient a way as the method prevailing. Three persons can, on view, fix a valuation in a shorter period of time, and better than two who have to reserve judgment and afterwards describe the property to the third one remaining in, who might be a person who knew nothing about it. How can he check the others? It is proposed, if he dissents, that he is to go and view the property for himself. He will not dissent if he knows nothing about it. Then notice must be given to the ratepayer, sec. 391. How convenient the prevailing system has been to fix the valuation on the spot and at the same time leave the notice with entering a note of the service on the counterfoil. The present notice contemplates judgment being reserved for the consideration of the three members as it must be to get the judgment of the three. Notice cannot be given before. Then the notices will have to be sent out requiring a second visit to each proprietor or mailing which is not so sure and costs postage at least. Uniformity in assessment is the very essence of a just taxation. The changes in this legislation from ward assessors to this Board for the whole city shews a desire for uniformity. Formerly it was thought that one inspector for the whole city with the ward assessors would secure that. The city charter of 1876 had careful provision to enable the assessors for each ward to assess the property without the chief inspector being present. Thus, sec. 332, p. 55:—

> The three or more ward assessors annually elected by the city council (with the inspector, when the assessors may require his assistance) shall simultaneously attend at each ward of the city on the same day . . . to make a fair and impartial assessment, etc.

Sec. 334 provided for the appointment of another ward assessor if any ward assessor shall be absent or become, from illness, incapacitated for the performance of his duties. Then at p. 56, sec. 334:—

> The ward assessors associating themselves with the inspector of assessments when necessary shall . . . proceed forth to make an assessment upon the respective wards of the city, etc. . . . Such assessors shall

commence the business of assessment in each ward of the city on the same day at one and the same time.

By the Acts of 1883, ch. 28, sec. 5, these provisions were repealed and the present provision substituted, viz.:—

The city of Halifax shall have a permanent Board of city assessors consisting of the chief assessor and two assistant assessors who shall perform all the duties formerly performed by the inspector of assessments, ward assessors and assistant ward assessors.

An affidavit of Stephen R. Phalen was read, but I think it only shews that irregularities previously existed. That establishes nothing. I suppose that the old inspector of assessments, Mr. Barry, thought he was still acting as inspector under the former law which admitted of separate work and may have been irregular in that. But in respect to the board the habit of "going on with the work" whenever, through illness or other sufficient cause, it was requisite to do so, is not the case before us, and I shall not deal with that aspect. Indeed that affidavit as well as the affidavit of McManus shews that the work can properly be done by all three visiting the properties. If it cannot be done the legislature is open every year. But there is no necessity of commencing wrong and dividing the work up in the way proposed. Why was the old legislation amended if this board for the whole city may be distributed among the different wards and the work done as before? The repeal of a provision for the work being done by some without the presence of all is conspicuous. I think the oath is something. It is joint. A full and accurate assessment of the property of each person at its full assessable value "to our best knowledge and belief" is sworn to. If the assessor who takes it second-hand from the assessor who views the property can have better knowledge and belief by personally viewing it, is the oath complied with? I think it is the duty of the assessors to inform themselves as far as they can of the value of each property or stock of goods assessed, and this cannot be done by one taking from the others valuations at second hand.

In sec. 416, requiring the oath to be made, there is this provision:—

(2). In the case of absence or illness of any or any two of the assessors the others or other of them shall subscribe and take such oath.

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I think that "absence" in that context does not cover the case of an assessor who has been detailed to other duty in the office of the assessors. Therefore, that the expression of that provision would not enable the third assessor to take the oath.

It is no use citing authority that in an exceptional case when the final assessment was taken from personal knowledge as well as from information derived from a committee, the tax could not be questioned. That only shews that the second-hand information should not be allowed to defeat the tax as that probably did not prejudice the proper authority. I think one assessor cannot make an assessment. It is the joint act of all or of a majority in cases in which a majority may control, as where there is dissent after conference in judicial action. But this is not one of them. There is no illness or absence: *Metcalfe* v. *Messenger*, 46 Barb. 329.

For these reasons, I think that the applicant was not doing anything wrong for which he might be dismissed.

The second branch of this case is that the office of this applicant was taken away from him without notice and without his being heard. This is the affidavit of service of the notice:—

I, Leo Tough, of the city of Halifax, make oath and say as follows:—I am a member of the police force of the city of Halifax, and as such was directed to serve notices of the meeting of the city council for the 6th of July last, and did serve such notices. Among the said notices was one directed to Mr. F. C. Stevens, assistant city assessor, and I served the same, delivering it at his house, No. 14 South St., in the city of Halifax, about 4 o'clock p.m. on Friday, 2nd July last. I distinctly recollect a notice to Mr. Stevens for two reasons. First because he was not one of the persons usually served with notices and I had to ascertain his residence, and, secondly, because I was aware of the trouble between Mr. Stevens and the board of control, and that therefore it was of particular consequence that the notice should be delivered to him.

The receipt of the notice by the applicant is denied by him.

It appears that this special meeting of the city council was called by notice to the aldermen, and the same notice was also to be given to this applicant. There is a provision by which a notice of this kind may be served on an alderman by leaving it at his house, and no doubt the policeman followed that mode in serving the applicant. And now, not when the city council was charged with the duty of hearing the charge against the

applicant, there was no proper notice at all proved there, but now, long afterwards, in shewing cause against this application for a mandamus, this affidavit is the best the policeman can do. This is the minute of the council as to notice, in its book:—

Assistant assessor Frank C. Stevens. The council was summoned to attend a special meeting agreeably to notice left at the usual place of abode or of business of every member of the council and of Frank C. Stevens, assistant city assessor, as follows:—

Sir: You are requested to attend a special meeting of the city council, at the council chamber, city hall, on Tuesday the 6th day of July, 1915, at 8 o'clock p.m., to consider a recommendation by the board of control for the dismissal of assistant assessor F. C. Stevens for refusal to perform the duties of his office as set out in the accompanying statement of controller McKeen.

The mode of service of a notice sometimes depends on the kind of notice it is. This is not a notice of dishonour where the previous business expects the person to be on the look out for such a notice. Nor is it a notice as between landlord and tenant as before bringing ejectment where the person to be notified is supposed to be in that house. It is the case where a man is charged with something which may deprive him of his freehold. The girl on the step was not shewn to be a person charged with the duty of delivering such notices to her master. That was the case of *Tonham* v. *Nicholson*, L.R. 5 E. & I. App. 561, and it was a landlord's notice to a tenant.

This kind of notice must be shewn to have been personally served or that it certainly reached his knowledge. I am satisfied that this has not happened.

But it appears that the applicant had consulted counsel and when the city council was met that solicitor who had read in the newspapers of the meeting was present casually without the knowledge of the applicant. He was noticed in the audience and was addressed by the mayor when he informed the council that as Mr. Stevens had received no notice of the meeting he was not in a position to say anything regarding the matter of his dismissal. Also that he had advised the applicant not to attend any meeting of the city council unless he received a formal notice or request from the proper authority. Mr. Allison's affidavit appears on p. 18 of the case, and I unhesitatingly accept it. It is really not contradicted.

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Mr. Bell asks us to break down a law which has existed for centuries that you are not to be deprived of your freehold unless there is notice and an opportunity of being heard. And he cites a recent criticism of the expression, "natural justice." But it has no bearing on the necessity of notice before a man can be deprived of such an office as this. I can add nothing to what Thompson, J., said on this subject in the case of *Re Wilson*, 18 N.S.R. 189, 192, where he reviews the authorities.

This notice is not proved to have been delivered to anyone who was a servant of the applicant or to anyone whose duty it was to give it to the applicant, and therefore does not come up to the landlord and tenant cases of service of notice already mentioned.

As to catching the applicant's solicitor casually in the audience, I am quite at a loss to understand why that would amount to sufficient notice. He met the suggestion with the language of protest and expressly required formal notice. He had no authority under such circumstances to represent the applicant or waive his rights. Counsel are not, without special authority, to represent their clients upon any such buttonholing as that. He could not bind the applicant or waive notice. In the case of *Reg.* v. *Bailiffs of Ipswich*, 2 Ld. Raymond's Reports 124, it appeared that the sergeant appeared, was charged and answered and that this supplied the want of notice. But it appeared that although notice of the day was given, it charged him with not holding a Court of sessions of the peace, but a Court of Oyer and Terminer. "And the Chief Justice said that in justice, convenient notice ought to be given for the party to prepare his defence," and there was a mandamus.

In the case of *Labouchere* v. *Earl Wharncliffe*, 13 Ch.D. 346, 353, a club case, Sir George Jessel said:—

> On the one hand it has been said that Mr. Labouchere attended that meeting and entered into the discussion; that he did not protest against the meeting having been irregularly called, and that therefore he has no right now to complain. But on the other hand, Mr. Labouchere said he did protest though it does not appear what the protest was. Mr. Labouchere was not compelled to say what it was. A man might say, "I have a good defence on the merits. I contend that I ought not to be expelled. Therefore I am not going to run away by availing myself of a technical objection." He was entitled to say, "Though the meeting was irregularly

called I have such a good case on the merits that I should like to take your opinion." But he was not bound to tell the meeting that it was irregularly or improperly called.

In my opinion, the proceeding of the city council was wholly irregular, because there was no notice and the applicant was deprived of his office without being heard.

There should be an order for a prerogative writ of mandamus to restore the applicant to his office of assistant city assessor with costs.

Graham, C.J.

RUSSELL, J.:—I am of opinion that there must be a mandamus to restore the applicant to his office on the ground that he was not duly notified of the meeting at which the resolution was passed to dismiss him. It is not proved that the person to whom the notice was delivered was a member of the applicant's family or one whose duty it was to deliver the notice handed to her by the policeman. It is not shewn that Mr. Allison had any authority to represent the applicant or to speak for him at the meeting at which the resolution was passed, and if he was not so authorized it makes no difference what he said on the occasion of the meeting, as to which the affidavits are at variance and I do not feel called upon, because it is not necessary, to say whose recollection is most trustworthy.

Russell, J.

The case does not, I think, come within the class of cases in which a mandamus should be refused, because it would be futile. The applicant had and has the right not merely to justify his conduct if he can but to "palliate" it (I am using an expression in one of the decided cases), if he cannot justify it. I am not certain that he can altogether justify his refusal to act with the chief assessor, or that an assessment made in pursuance of an inspection by the chief assessor and himself would have been necessarily illegal. I agree that there must be an assessment by all the three assessors, but I do not consider it impossible that such an assessment could legally be made by the concurrence of the three in an assessment made by means of an inspection by two of them and the knowledge already possessed or to be acquired by the third. I do not think the applicant was justified in assuming that the third assessor would pass judgment on the valuations to which he would be obliged

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to make oath except on such evidence as would satisfy his conscience.

I agree that the mandamus must go and with costs.

RITCHIE, J.:—The applicant, Mr. Stevens, was one of the assistant assessors of the city of Halifax. The appointment is until death or resignation, subject only to dismissal for good cause by a two-thirds vote of the whole council at a meeting called to consider the question. There is a chief assessor and two assistant assessors. Mr. McManus is the chief assessor; the applicant, Mr. Stevens, and Mr. George McDonald, were the assistant assessors. It has been the custom for the three assessors to go through the city on tours of inspection for the purpose of making valuations. This, however, has not been the universal custom so far as all three being present is concerned. The affidavit of Mr. Stephen R. Phelan shews that he was formerly one of the assistant assessors, Mr. J. R. Graham being the other, and Mr. J. L. Barry the chief assessor. The practice, according to the affidavit, was for Mr. Phelan and Mr. Graham to go on these tours of inspection and submit their proposed valuations to Mr. Barry for his consideration, and thus the final determination was the act of the board. After the death of Mr. Barry this practice continued, when necessary, up to 1911. Mr. Phelan, in his affidavit, says on this point:—

3. After Mr. Barry's death the same reason for dispensing with the presence of one member of the board no longer existed, but the board never hesitated in going on with the work with two members whenever, through illness or other sufficient cause, it was requisite to do so. In particular, when it was found that the attendance of at least one member of the Board at the office for not less than one day in the week was necessary, in order to give persons assessed an opportunity to discuss various points with the assessors, a regular practice grew up by which one member of the board always remained in the office on Saturday while the other two members proceeded with the work of valuations. In this as in all other cases, however, opportunity was given the members of the Board who had not inspected any property to pass judgment upon the valuation made by the other members of the Board who had valued it. This practice continued until my retirement from the office in the year 1911.

In consequence of press of work in the office, the mayor directed that McManus and Stevens should do the work of inspection for the purpose of ascertaining values, and that McDonald should remain in the office and dispose of arrears

of clerical work. Mr. Stevens refused to comply with this direction, claiming that in order to make a legal assessment, all three assessors must unite in the work of inspection for the purpose of ascertaining values. He has been dismissed for his refusal to obey the direction before mentioned. The case was argued on the basis that if Stevens was right in his law, then there was not good cause for his dismissal, but that if he was wrong then there was good cause. The question is thus squarely raised as to the validity of an assessment based upon an inspection by two only of the assessors. It is, I think, important to note that the city charter does not require the three assessors to unite in making the inspection or to make it at all. It is contended by Mr. Allison, K.C., for the applicant that judicial functions are exercised by the board, and that therefore there must be united action by all the members of the board. I entirely agree with this proposition, but, in my opinion, it does not dispose of the question in favour of the applicant. The city solicitor does not dispute the proposition to which I have referred, but he says inspection of the various properties is one thing, and assessment which involves final determination, is another thing. It is, in my opinion, absolutely necessary that the final determination should represent the judgment of the Board. I think I am justified in presuming that, if the two assessors, McManus and Stevens, had completed the work of inspection and put down their ideas of values, the whole matter would have been submitted to McDonald for his consideration, and that the final determination would then have been made. This is the course which the city solicitor suggested in his opinion. I think, obviously, it would have been the right course for them to take, and it was the course which had been taken in the past. An assessment so made would, in my opinion, have been legal, because the Board would be acting as a Board in the final determination. It is not contemplated that witnesses are to be examined before the assessors. They are, I think, to get information in a reasonable way. If one assessor has possessed himself of information and submits it to the Board I think the Board can act upon that information when making the final determination, if it is thought right to do so.

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There is American authority for the proposition that one member of a Board of assessors can ascertain values as he thinks them to be and report the facts and his views to the other members of the Board for the consideration and final determination of the whole Board. No authority at variance with this proposition was cited.

In the judgment of the Court in *Porter* v. *R.R.I. & St. L. R.R. Co.*, 76 Ill. 561 at 597, it is said:—

> It is also objected that the valuations were first determined by a committee of the board and not by the board. The assessment as made is the act of the board and not of a committee.

And again:—

> The report of the committee was suggestive only and the members of the Board can not be presumed to have been affected by it any further than it met the approval of their judgments.

This case is cited in 1 Cooley on Taxation, pp. 774 and 775. That author says:—

> A Board cannot, however, delegate its authority to two of its members though it may make use of committees to hear complaints or to consider anything falling within its jurisdiction and to report to the Board for final action.

"Final action" is the judicial action; there is no judicial decision before that.

But there is another question to be considered and that is: Was the applicant dismissed without being heard and without notice? It is very clear that he was entitled to have notice of the meeting at which he was dismissed whether the cause for his dismissal was good or bad. On this point the strong opinion of Sir John Thompson, in *Re Wilson*, 18 N.S.R. 189, is conclusive. I agree with what is said in the opinion of the Chief Justice in regard to the service of the notice being bad. Mr. Allison was present at the meeting and the affidavits are contradictory as to what he said. But I cannot see that it makes any difference what he said. The real question is, did he have authority from Stevens to represent him at the meeting. It is uncontradicted on the affidavits that he had no such authority.

It is contended by the city solicitor that "Even if there had been no notice at all the Court would not, when a good cause for dismissal is shewn on the papers, order a reinstatement."

This contention is based on the ground that the council

would at once give due notice, and after a hearing, dismiss Stevens again, and that the Court will not in its discretion grant a mandamus where the result would be nugatory.

I think it does not follow that this would be the result. Who can say what action the council would take if Mr. Stevens, in response to the notice, appeared and said: "I conscientiously did what I thought was right, but now that the law has been made clear I am willing to obey the order."

On this point Mr. Bell cited the following cases: *R.* v. *Gaskin*, 8 Term Rep. 209; *R.* v. *London*, 2 Term Rep. 177; *R.* v. *Griffiths*, 5 B. & Ald. 731, 735; *R.* v. *Uxbridge*, 2 Cooper, 523.

I think that none of these cases apply, under the circumstances of this case. In *R.* v. *Uxbridge*, Lord Mansfield refused the writ on the ground that the applicant "would undoubtedly" be removed again.

In *R.* v. *London*, it is stated in the judgment that the conduct of the applicant was "extremely reprehensible." It is also said:—

> What operates very strongly with us is that this is not a total dismission but only a suspension from the office which may be rescinded by Roberts making a proper submission.

In *R.* v. *Griffiths*, the judgments go upon the ground that if restored it would be the duty of the council to again dismiss the applicant. *R.* v. *Gaskin* is simply an authority for the proposition that a party must have notice before he can be removed from office.

In 10 Hals. at p. 120, after laying down the principle that mandamus will not go if it could only result in another dismissal, the writer of the article goes on to say:—

> A return to a mandamus to restore to a freehold office, however, will not be good unless it shews that the removal was preceded by an inquiry in which the person removed had an opportunity of being heard.

The result is that, in my opinion, the mandamus must go, and with costs.

HARRIS, J., concurred with RITCHIE, J.

Harris, J.

LONGLEY, J.:—I concur in the judgment of Ritchie, J. The mayor of the city was quite right in ordering two of the Board of Assessors to go out, and Stevens, in my judgment, was not justified in disregarding the order. The Board of Assessors

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must all concur in making up their award, but they can obtain information from themselves or from other sources to enable them to make it up. If any doubt existed in regard to the matter that doubt ought to be settled by the opinion of the recorder. It is on the advice of the recorder that matters in the city council are regulated, and it ought to be sufficient for any official belonging to it. He refused, however, on his own motion and became liable to dismissal.

The city of Halifax took the natural course to secure his dismissal from office and served him with the regular notice of the meeting at which his case was to be considered. This was sent by a policeman who, instead of giving it to him in person, gave it to a young woman on the door step of his house. Whether he got it or not is a question that need not be determined. He swears that he did not get it and as it was not served upon him personally this renders necessary a judgment that he was not served at all.

The action of Mr. Allison at the meeting of the city council and what he said will not suffice to justify us in holding that it was a good service. He had no authority on that occasion to act for him. I am therefore compelled to come to the conclusion that there was no notice of the meeting served upon Stevens and that the vote of the city council was given without notice for hearing, and for this reason I have to give judgment in favour of the plaintiff. *Application allowed with costs.*

MAN.

C. A.

PESZENICZNY v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron, and Haggart, JJ.A. October 12, 1915.

1. LIMITATION OF ACTIONS (§ III F—131)—WORKMEN'S COMPENSATION—RAILWAY ACCIDENTS—PROVINCIAL AND DOMINION LEGISLATION.

The period of limitations of actions under a Provincial Workmen's Compensation Act is unaffected by the lesser period provided by sec. 306 of the Dominion Railway Act, even though the injuries arose while employed in the construction or operation of the railway. [*Sutherland* v. *C.N.R. Co.*, 21 Man. L.R. 27, considered.]

Statement

APPEAL by defendant from a judgment in an action under the Workmen's Compensation Act.

O. H. Clark, K.C., for appellant.

T. J. Murray, and *W. M. Noble*, for respondent.

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Howell, C.J.M.

HOWELL, C.J.M.:—The sole question involved in this matter is, whether sec. 306 of the Canada Railway Act limits the time within which an action is to be brought, under the Manitoba Workmen's Compensation Act, by an employee of a railway company governed by the first-mentioned Act.

The plaintiff was, to my mind, clearly employed in the construction or operation of the railway, and because of negligence for which the defendants are answerable, he was injured. The local Act fixes the period of limitation of action at 2 years and the above-mentioned section makes the period 1 year. More than 1 but less than 2 years elapsed between the accident and the commencement of this action.

This question came up for discussion in *Sutherland* v. *C.N.R.*, 21 Man. L.R. 27. In that case Mr. Justice Perdue and I held that the Dominion Act as to limitation did not apply, but it is open to doubt whether the whole Court agreed on this point, and it might be argued that the case was really decided on another ground. Under the circumstances it is well to reconsider the law on this subject.

By 4 Edw. VII. ch 31, the Parliament of Canada passed a statute which prohibits railway companies within the jurisdiction of the Dominion Parliament from entering into contracts with their employees which deprive the latter of a right of action against the railway company for damages for personal injury incurred while servants of the company.

This Act came up for consideration in *Grand Trunk R. Co.* v. *A.-G. of Canada*, [1907] A.C. 65. In that case it is pointed out that there may be a domain where the powers of legislation of the Dominion and the Provinces overlap, and in such cases where there is no Canadian legislation, the provinces have legislative power. This is followed by the statement:—

> It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where

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the civil rights of outsiders may be affected. As examples may be cited, provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers.

That case decides that the legislation above referred to is *intra vires*.

With this decision before me I would think that the Parliament of Canada had power to pass a Workmen's Compensation Act declaring rights and regulating and giving procedure in actions by employees of railway companies for damages sustained by them while operating or constructing the road and also limiting the time for the commencement of actions.

Manitoba has fully legislated on this field and has fixed the period of 2 years for limitation of the action, and it seems to me the sole question is, did the Parliament of Canada intend to invade this field and to legislate on this subject, but only to the extent of limiting the time within which actions may be begun against them by their workmen? Sub-sec. 4 of sec. 306, is to me confusing, surely it was not intended to say that where rights of action are given by Provincial legislation which is contrary to rights and remedies given by the Railway Act, the former shall prevail. If that is the proper construction, then the matter is not open to doubt.

With some hesitation, I reiterate the views held by me on this subject in the case above mentioned.

Considering that for many years elaborate legislation on the subject of workmen's rights against masters, with distinct enactments as to limitations, has been in force in Manitoba, and applying the rule that to deprive the plaintiff of his right of action, the words of the limitation clause should be plain and unambiguous, I do not think that Parliament intended to legislate on this branch of the law so fully covered by the local Act, and to change only one of its provisions. In my view of the law sec. 306 above mentioned, does not apply to this case. The appeal is dismissed with costs.

Richards, J.A.

RICHARDS, J.A.:—I agree with the last paragraph of the judgment of the Chief Justice, so confining my concurrence because in the preceding part, opinions are stated on matters which, with deference, I do not find it necessary to now decide.

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PESZENICZNY v. CANADIAN NORTHERN R. CO.

Perdue, J.A.

PERDUE, J.A.:—The question whether the limitation of time for bringing suit referred to in sec. 306 of the Railway Act applies to an action like the present was discussed by this Court in *Sutherland* v. *C.N.R.*, 21 Man. L.R. 27. No doubt that case might have been decided upon another point, but I still think the opinions on this question there set out by the members of the Court who discussed it, are correct. I have little to add to what was said in the *Sutherland* case, and to the reasons expressed by the Chief Justice, in the present case.

A provision relating to limitation of actions has been contained in the Railway Acts in force from time to time since Confederation. The interpretation of the clause in the old Act (see 51 Viet. ch. 29, sec. 287), gave rise to great diversity of opinion. In 1903, the railway law was amended and codified, the Act being intituled, "An Act to amend and consolidate the law respecting Railways." In sec. 242 of that Act, the words, "sustained by reason of the construction or operation of the railway," are found for the first time, the previous expression being, "sustained by reason of the railway." In interpreting the Act as it stands at present, we should, I think, adopt the rule laid down by Lord Herschell in *Bank of England* v. *Vagliano*, [1891] A.C. 107, at 144 and 145—that in a codification of the law we should examine the language of the statute and ask what is its natural meaning, instead of first inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered. I think the words in sec. 306 clearly shew that the intention is to confine the limitation to actions for indemnity for damages or injury caused by the railway company in carrying out works or operations authorized by the Act in its corporate capacity. Parliament conferred upon the railway company power to do certain things, and as long as these are done *bonâ fide* in accordance with that power, the statute affords a protection. But if in doing these things the company exceeds its powers, or is guilty of negligence resulting in injury to some person, it is not protected from liability for such a wrong. See *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, 438; *C.P.R.* v. *Roy*, [1902] A.C. 220, 229; *McArthur* v. *Nor. Pac. Junct. R. Co.*, 17 A.R. (Ont.)

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86 at 122. A company incorporated by Dominion statute and subject to the provisions of the Railway Act remains, apart from matters purely of railway legislation, subject to the jurisdiction of the provincial legislature: *C.P.R.* v. *Notre Dame de Beausecours*, [1899] A.C. 367, 372. It cannot now be questioned that the Employers' Liability Act of this province applies to a railway company operating a railway in the province. If parliament had intended to pass an enactment limiting the time for bringing any suit for damages against a railway company (assuming that it has the power to pass such a law), one would think that in so seriously invading the field of property and civil rights, it would have made its intention clear and unmistakable. I think that the several clauses of sec. 306, grouped together as they now are in the same sec. shew that there was no intention to amend or limit the provisions of the provincial Act. Cl. 4 of sec. 306 declares that

> . . . nothing in this Act contained, and nothing done or ordered or omitted to be done or ordered, under or by virtue of the provisions of this Act, shall relieve, or be construed to relieve, any company of or from or in any wise diminish or affect, any liability or responsibility resting upon it, under the laws in force in the province in which liability or responsibility arises, either towards His Majesty or towards any person, or the wife or husband, parent or child, executor or administrator, tutor or curator, heir or personal representative, of any person, for anything done or omitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance, or nonfeasance, of such company.

If the time for bringing an action under the Employers' Liability Act were limited by the Railway Act to one year, whereas the provincial Act prescribes a period of 2 years for bringing an action, the section would affect the liability created by the provincial Act. At the end of a year after the injury, the Railway Act would apply a bar to the commencement of an action, while, under the Employers' Liability Act, the plaintiff would have a year further in which to sue.

I think the appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—I concur in dismissing the appeal, and agree with the Chief Justice on the grounds taken in his judgment; but I wish to add a brief statement as to the meaning and bearing of sub-sec. 4, of sec. 306 of the Railway Act, as that

sub-section appeals to my understanding. It is true that the wording of that sub-section is not as clear as it might be. But, taking its words in the sense they convey to my mind I think they must be held to mean that nothing in the Act (including, of course, sub-sec. 1 of sec. 306), shall relieve any railway company from, or shall diminish or affect, any liability existing under the laws in force in the province where the liability arises whether such laws are in force by virtue of a statute or otherwise. Statutes of limitation undoubtedly affect the legal liabilities to which they are by law applicable. This interpretation has the effect of restricting the sub-sec. 1 of sec. 306 within narrow limits not as yet clearly or authoritatively defined, but it does seem to me that it is the reasonable and proper conclusion to be drawn from the language of the fourth sub-section. In this case I cannot avoid the conclusion that the terms of the limitation clause in the Employers' Liability Act in force in this province are unaffected by sub-sec. 1 of sec. 306 of the Dominion Railway Act.

Cameron, J.A.

HAGGART, J.A., concurred. *Appeal dismissed.*

Haggart, J.A.

THE CANADIAN BANK OF COMMERCE v. BELLAMY.

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S. C.

Saskatchewan Supreme Court, Lamont, Brown, Elwood, and McKay, JJ. November 20, 1915.

1. CORPORATIONS AND COMPANIES (§ IV G 2—110)—POWER OF OFFICER TO INDORSE NOTE—DISPUTE OF AUTHORITY—ADVANCES ON STRENGTH OF INDORSEMENT.

The authority of an officer of a corporation to indorse a note for the corporation cannot be disputed after the corporation has obtained advances from a bank on the strength of such indorsement.

2. BILLS AND NOTES (§ IV A—85)—PRESENTMENT FOR PAYMENT—STIPULATION AS TO PLACE—EFFECT OF NON-COMPLIANCE.

Under sec. 183 of the Bills of Exchange Act (Can.), a failure to make presentment of payment of a note at the place specified therein does not necessarily discharge the maker from liability on the note; but if upon an action on the note before presentation it appears that there were sufficient funds available at the place of payment to satisfy the note if it had been presented, the court may award the costs of the action against the plaintiff.

[*Union Bank* v. *MacCullough*, 7 D.L.R. 694, followed; see Annotation, 15 D.L.R. 41.]

3. BILLS AND NOTES (§ VI B—155)—MATURITY—PREMATURE ACTION.

There can be no recovery on a note in an action commenced before its maturity, even though forming part of an action on other notes that had matured.

Statement

APPEAL from judgment for plaintiff in action on promissory notes.

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Lamont, J.

J. F. Frame, K.C., and *G. H. Yule*, for appellants.

H. Y. MacDonald, K.C., for respondent.

The judgment of the Court was delivered by

LAMONT, J.:—The plaintiff bank brought this action on 4 promissory notes made by the defendants in favour of the Pioneer Tractor Co., and endorsed over to the bank. The indorsation of the notes reads: "Pay Canadian Bank of Commerce or order," and signed "Pioneer Tractor Co., H. E. Blair, Treas." Blair was called as a witness at the trial and testified that he was secretary-treasurer of the company, that he had indorsed the notes as above, that he had authority to do so, and that he had taken them along with other notes to the plaintiff bank from which he obtained for the company an advance of $24,500, pledging these notes as collateral security therefor. Along with the notes sued on was another note signed by the defendant Bellamy alone. This note was afterwards satisfied out of a payment of $2,000 forwarded to the company by Bellamy. Two of the notes sued on were payable at the Union Bank of Canada at Saskatoon, and the other two at the office of the Pioneer Tractor Co. in Regina. There was no evidence that any of them had been presented at the place specified for payment before action was brought. Judgment was given for the plaintiffs, and the defendants now appeal to this Court, and claim that the judgment should be reversed, because (1) There was no proper evidence that H. E. Blair had authority to endorse the notes to the plaintiff bank; (2) The notes had not been presented for payment at the places specified therefor, and that there had been no waiver of presentment; (3) That as to one of the notes, for $1,160, it had not become due at the date action was brought, and the action was therefore premature.

As to the authority of Blair to indorse: Blair testified that his authority was set out in the articles of association of the company. These articles would have been the best evidence of what his powers were, but they were not produced. He, however, testified he had authority to indorse, and this evidence was admitted without objection. Where secondary evidence is admitted without objection, it may be acted upon: *Gilbert* v. *En-*

dean, L.R. 9 Ch.D. 259. Further, the Tractor Co., having obtained an advance from the bank on the strength of Blair's indorsation of these notes, it could not question the authority of its treasurer to indorse the company's name thereon, and if the company cannot question it the makers of the notes are not in a position to do so.

The 2nd point presents greater difficulty. It involves a determination of the question whether as against a maker of a promissory note presentment at the place specified for payment in the body of the note is necessary before action can be brought. On this point there is in Canada a conflict of judicial decision. Sec. 183 of the Bills of Exchange Act (ch. 119 R.S.C.) reads as follows:—

183. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.

2. In such case the maker is not discharged by the omission to present the note for payment on the day that it matures; but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court.

3. If no place of payment is specified in the body of the note, presentment for payment is not necessary to render the maker liable.

Sec. 1 is merely declaratory of the common law, and is the same as the English Act except that the words "in order to render "the maker liable" at the end of sub-sec. (1) in the English Act have been left out of our Act. Sub-sec. (2) is not in the English Act in the form in which it is in the Canadian Act, and there is nothing at all in the English Act corresponding to the latter part of this sub-section, which reads: (2) "but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court." These words were added to the bill as it was going through the Canadian parliament, and it is as to their correct interpretation that there has been a divergence of judicial opinion. Two views have been taken—one that the addition of the clause does not make any change in the law, and that presentation before action is still necessary in order to hold the maker liable; the other, that the clause does make a change in the law to this extent, that presentation is no longer necessary before action can be brought, but that if the holder does bring an action on the note before presenting it at the place specified for payment

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and the defendant has funds there to meet it, the party suing may have to pay the costs of the action. The former view was held by the Court *en banc* of British Columbia in *Croft* v. *Hamlin*, 2 B.C.R. 333, also by the Court *en banc* of Nova Scotia in *Warner* v. *Symon-Kaye Syndicate*, 27 N.S.R. 340, which case was followed by my brother Newlands in *Jones* v. *England*, 7 Terr. L.R. 440. The same view was taken by Richards, J.A., in *Robertson* v. *North-Western Register Co.*, 19 Man. L.R. 402. These authorities hold that a note payable at a particular place must be there presented before action brought. As against the endorser it must be presented on the day it falls due. As against the maker it may be presented at any time before action; but presentment at some time must be proved or the action fails. The provision as to costs in sub-sec. (2) is explained by saying that if the maker succeeds on the ground that no presentation is proved, the Court may deprive him of the costs usually given to a successful suitor. In favour of the other view we have the *dictum* of Armour, C.J., in *Merchants Bank* v. *Henderson*, 28 O.R. 360. This was followed by Riddell, J., in *Freeman* v. *Canadian Guardian Life Ins. Co.*, 17 O.L.R. 296. Then we have the Supreme Court of Prince Edward Island in *Sinclair* v. *Deacon*, 7 E.L.R. 222, where Fitzgerald, J., in delivering the judgment of the Court, at p. 224, said:—

> The better and fuller interpretation of this section appears to me to be, "you must present the note at the particular place it is made payable, not necessarily—as against the maker—on the day of its maturity, nor indeed, before suit; but if presentment is not made before suit, the costs being in the discretion of the Court, the maker will be protected from costs should—for instance—the funds to meet the note have been duly placed by him at the place named.

This interpretation was adopted by Cameron, J.A., in *Robertson* v. *North-Western Register Co.* (*supra*). In *Union Bank* v. *MacCullough*, 7 D.L.R. 694, 4 A.L.R. 371, Walsh, J., took the same view. In *Albert* v. *Marshall*, 15 D.L.R. 40, the Full Court of Nova Scotia, while following the case of *Warner* v. *Symon-Kaye Syndicate*, *supra*, on the ground that they were bound by that case, cast doubt on its correctness. Russell, J., in giving the judgment of the Court, said (15 D.L.R. p. 40):—

> The only question raised in this appeal was the question which has already been settled by the judgment of this Court in *Warner* v. *Symon-*

Kaye Syndicate, 27 N.S.R. 340. . . . If the matter were *res integra*, and authorities, like witnesses, were to be weighed and not numbered, it might be necessary to consider whether we should not follow the dictum of Armour, J., to the contrary in *Merchants Bank* v. *Henderson*, 28 O.R. 360 at 365. But we are bound by the decision of our own Court to hold that the plaintiff cannot succeed on the note for want of presentation.

The interpretation given by these latter cases is, in my opinion, the correct one. The latter part of sub-sec. (2) clearly contemplates the bringing of an action before presentment. If parliament intended to maintain the law that presentment was still to be a condition precedent to the bringing of an action against the maker, I cannot think that it would have added a provision simply to enable the Court to deprive a successful maker of his costs. This interpretation is characterized by Russell, J., in his book on Bills as "ingenious but far-fetched." It makes parliament say to the makers of promissory notes, "non-presentment at the place specified for payment is a good defence to an action against you on the note, but if you raise this defence and succeed on it you may be deprived of your costs." To my mind the more reasonable interpretation is that parliament did not intend to alter the law by making presentation unnecessary as against the maker, but that if the maker were sued before presentation, and it appeared that he had funds available at the place of payment sufficient to satisfy the note if it had been presented, the Court might and doubtless would award the costs of the action against the plaintiff. The defence of want of presentation therefore fails.

On the third point raised in the appeal, the defendants are entitled to succeed. The bank admits that so far as the last note is concerned, it was not due at the time action was brought, and that the defendants are entitled to have the judgment against them reduced by the amount of that note and interest thereon. The bank, however, will be at liberty to bring another action on this note.

The defendants also contended that a payment of $2,000 made by Bellamy to Blair should be credited on these notes. This sum was appropriated to retiring a note of Bellamy's own for $1,500 and the defendants were credited with the balance on the notes sued on. I cannot see on what ground this con-

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Lamont, J.

tention could succeed. When Bellamy gave the $2,000 to Blair —I assume the money belonged to the defendants—Blair was not acting in any way for the plaintiff bank, but was merely the agent of the defendant to forward the money. He as the defendants' agent appropriated the money to the Bellamy note. This must be held to be an appropriation by the defendants in the same way.

The appeal will therefore be allowed and the judgment reduced by deducting therefrom the amount of the note not due at the time the action was commenced. The defendants are entitled to the costs of the appeal. *Appeal allowed.*

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REX v. NERLICH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. July 12, 1915.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II E—44)—CONSPIRACY TO COMMIT INDICTABLE OFFENCE—ASSISTING ALIEN ENEMY—CR. CODE SECS. 74, 573.

A conviction against the husband only upon an indictment of husband and wife, upon which the wife was acquitted, for conspiracy to aid and comfort a public enemy at war with the King by inciting and assisting a subject of the enemy country to leave Canada and join the enemy's forces, is not sustainable where there was no evidence of the husband conspiring with any person other than the person named in the indictment as the person incited and assisted, although the indictment charged that the two defendants did maliciously and traitorously conspire, confederate and agree with each other "and with others," for if it had been intended to cover a charge of a conspiracy with the assisted alien he should have been specifically named; the words "with others" must, in that connection, be construed as excluding the person specifically named as the alien who was assisted to leave Canada and as referring to persons unknown.

[*R.* v. *Johnston* (1902), 6 Can. Cr. Cas. 232; *R.* v. *Ahlers*, [1915] 1 K.B. 616, referred to.]

Statement

CASE stated by MULOCK, C.J.EX., as follows:—

"The accused, Emil Nerlich and his wife H. Nerlich, were tried before me on the 22nd, 23rd, and 24th days of February, 1915, on the following indictment:—

" 'The jurors for our Lord the King present that Emil Nerlich and H. Nerlich, in the months of September, October, November, and December, in the year of our Lord one thousand nine hundred and fourteen, and in the month of January, in the year of our Lord one thousand nine hundred and fifteen, at the city of Toronto, in the county of York, and Province of Ontario, within His Majesty's dominions, did maliciously and traitorously conspire, confederate, and agree with each other, and with

others, to aid and comfort the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the said enemy and by trading with the said enemy, contrary to the Criminal Code.'

"There was no evidence to sustain the charge against H. Nerlich, and under my direction the jury returned a verdict of 'not guilty.' A verdict as set out in the notes was found by the jury against the accused Emil Nerlich.

"At the request of counsel for the accused Emil Nerlich, I have reserved the following questions for the opinion of this Honourable Court:—

"1. Were the objections taken at the trial to admission of evidence well-founded and should I have given effect to the same?

"2. Was there evidence (admissible and sufficient) against the accused Emil Nerlich on which he could properly be convicted on the said indictment?

"3. Does the indictment disclose any offence to which any of the evidence properly admissible was applicable?

"4. Was the witness Zirzow capable of being a co-conspirator; and, if so, should I have charged the jury, as requested by counsel for the accused Emil Nerlich, that Zirzow's evidence was the evidence of an accomplice, and should be corroborated or at least viewed with suspicion?

"5. The original indictment preferred against the accused Emil Nerlich was on the charge of treason, and was as follows:—

" 'The jurors for our Lord the King present that Emil Nerlich, in the months of September, October, November, and December, in the year of our Lord one thousand nine hundred and fourteen, and in the month of January in the year of our Lord one thousand nine hundred and fifteen, at the city of Toronto, in the county of York, and Province of Ontario, within His Majesty's dominions, maliciously and traitorously assisted, aided, and comforted the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Em-

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peror of Germany, a public enemy now at war with His Majesty, the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the said enemy and by trading with the said enemy, contrary to the Criminal Code.'

"Subsequently, and after the commencement of the assizes, the grand jury, on presentment, found the indictment first above set out against the accused Emil Nerlich and his wife H. Nerlich. Counsel for the accused Emil Nerlich contended that the accused Emil Nerlich should be tried on the indictment charging treason before being tried on the indictment with H. Nerlich charging conspiracy, and contended that the evidence to be called by the Crown on the charge of treason must of necessity be practically the same evidence as on the charge of conspiracy. Should I have sustained the objection of counsel for the accused Emil Nerlich?

"6. Might the references made by Crown counsel to certain letters, which were not in evidence against the accused Emil Nerlich, have prejudiced the fair trial of the accused Emil Nerlich?

"7. Did the language of Crown counsel amount to a comment by him on the failure of the accused Emil Nerlich to testify?

"8. Should I have given effect to the objection of counsel for the accused Emil Nerlich, that the accused Emil Nerlich could not under the indictment be guilty of conspiring with Arthur Zirzow 'by aiding and assisting the said Arthur Zirzow to leave Canada to rejoin the German army?'

"9. Was I right in directing the jury to render their verdict either 'guilty' or 'not guilty' as charged in the indictment, after the foreman of the jury had stated that the jury found the accused Emil Nerlich guilty of conspiring with one Arthur Zirzow by aiding and assisting the said Arthur Zirzow to leave Canada to rejoin the German army?

"10. Might the statements of Crown counsel, by way of opening or otherwise, have prejudiced the fair trial of the accused Emil Nerlich,

"11. Might the nature of the closing address of Crown counsel to the jury have prejudiced the fair trial of the accused Emil Nerlich?

"The evidence taken at the trial, the particulars given by the Crown under my direction, the addresses of counsel, and my charge, are made a part of this case."

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G. F. Shepley, K.C., *I. F. Hellmuth*, K.C., and *G. W. Mason*, for Emil Nerlich.

J. R. Cartwright, K.C., *E. E. A. DuVernet*, K.C., and *Edward Bayly*, K.C., for Crown.

MACLAREN, J.A.:—Emil Nerlich and his wife, H. Nerlich, were indicted for that they did "maliciously and traitorously conspire, confederate, and agree with each other, and with others, to aid and comfort the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces," etc.

At the close of the case for the Crown, the trial Judge directed the jury that there was no evidence on which Mrs. Nerlich could be convicted of conspiracy, and the jury accordingly rendered a verdict of "not guilty" as to her.

A number of objections were then raised on behalf of Emil Nerlich, which were overruled by the trial Judge, and the case went to the jury. The jury first brought in a special verdict, saying: "We find the accused Emil Nerlich guilty of conspiring with one Arthur Zirzow by aiding and assisting the said Arthur Zirzow to leave Canada to rejoin the German army." This verdict was not accepted by the trial Judge, and the jury were directed to render a verdict of either "guilty" or "not guilty" as charged in the indictment. They returned with the verdict, "We find the accused Emil Nerlich guilty."

At the request of counsel for the accused, eleven questions of law were reserved for this Court. As the 8th question appears to me to be fundamental and to go to the root of the matter, I shall consider it first. It reads as follows: "8. Should I have given effect to the objection of counsel for the accused Emil Nerlich, that the accused Emil Nerlich could not under the indictment be guilty of conspiring with Arthur Zirzow 'by aiding and assisting the said Arthur Zirzow to leave Canada to rejoin the German army?'"

If only Mr. and Mrs. Nerlich had been indicted for conspiracy, her discharge would necessarily have been followed by his. "Where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both con-

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victed:" *Regina* v. *Manning* (1883), 12 Q.B.D. 241; *Rex* v. *Plummer*, [1902] 2 K.B. 339. Archbold's Criminal Pleading and Evidence, 24th ed., p. 1420, after citing the foregoing rule, states the exception to it as follows: "unless they are also charged with conspiring with persons unknown, in which case the conspiracy must be alleged to be with a certain person (or persons) to the jurors unknown;" and then refers to 3 Chitty's Criminal Law, p. 1141, where it is stated in substantially the same terms, and several high authorities are cited in support of the proposition.

To put it at the highest for the prosecution, the word "others" in the indictment cannot be construed to mean more than the expression above quoted from Archbold. Good faith on the part of the Crown requires that the names of all the persons known and respecting whose part in the conspiracy evidence is to be tendered, should be given in the indictment, or in the particulars, as the case may be. If it had been intended to include Zirzow as one of the conspirators, his name should have been given in the indictment, as the Crown was well aware of the part he had taken in the matters that formed the basis of the prosecution, and his name appears as the first witness on the back of the indictment, and it has been initialled by the foreman of the grand jury as evidence of Zirzow's having been sworn before them. The name of Zirzow appears in the indictment only as a person to be incited and assisted to leave Canada and join the enemy's force, but not as a party to the conspiracy.

In the trial of a case of conspiracy in the Court of King's Bench at Montreal, *Rex* v. *Johnston* (1902), 6 Can. Crim. Cas. 232, it came out in evidence that a person not named as a conspirator in the indictment or particulars was a party to the conspiracy, and the trial Judge ordered his name to be added to the particulars. On a motion for a reserved case, Hall, J., said that where the co-conspirator was known in advance it was the duty of the prosecution to furnish the name in the indictment. He added (p. 236): "On a charge of conspiracy, more than any other, an accused person is entitled to know the names of those with whom he is alleged to have conspired, inasmuch as the act or statement of such co-conspirator, even done or

made out of the presence of the accused, may be used as evidence against him, as soon as the offence is proved and the connection of the several parties with it. But, in the case under consideration, there was no proof, in advance, to establish the name of any person with whom the accused was conniving."

Maclaren, J.A.

In that case the amendment was allowed because the application was made as soon as the Crown became aware of the fact, and because the accused was not prejudiced thereby.

But there is more in this case. The Nerlichs and the "others" referred to in the indictment are charged with conspiring to aid the enemy by inciting and assisting Zirzow to leave Canada and join the enemy's forces. The same persons are accused of "inciting" and "assisting" him. The idea of a man conspiring with others to incite himself seems to be an absurdity. To attempt to put such a meaning upon the language of this indictment is surely something entirely at variance with the plain language of the instrument, and could not possibly have been in the mind of the draftsman. In imputing or charging a crime, the language of the indictment should be clear and unmistakable; and I do not think it should be necessary to resort to an interpretation that may not inaptly be described as fanciful and far-fetched.

In my opinion, the 8th question should be answered in the affirmative.

In the argument before us it was not claimed by the counsel for the Crown that there was any evidence of Emil Nerlich having conspired with any other person than Zirzow, and I am unable to discover any such evidence in the stated case. It consequently follows that the second question reserved by the trial Judge—which reads as follows, "Was there evidence (admissible and sufficient) against the accused Emil Nerlich on which he could properly be convicted on the said indictment?"—should be answered in the negative.

In my opinion, it becomes unnecessary to answer any of the other questions reserved.

Meredith, C.J.O.
Garrow, J.A.

MEREDITH, C.J.O., and GARROW, J.A., concurred.

Magee, J.A.

MAGEE, J.A.:—The question turns upon the meaning to be attached to the word "others" in the only count in the indict-

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ment. By alleging that those others conspired with Emil Nerlich to aid the King's enemies by inciting Zirzow to join their forces, the draftsman excluded Zirzow, of necessity, from the conspirators, as he could not by any reasonable construction be supposed to be charged with conspiring to incite himself.

As the "others," whoever they were, are alleged to be parties to the whole conspiracy, the word "others" must mean the same persons throughout the indictment, though not necessarily throughout the evidence. Being exclusive of Zirzow as regards inciting Zirzow, the word "others" must therefore also be exclusive of him as regards the other means of aiding the enemy.

The result, in my opinion, is that there was no charge that Nerlich conspired with Zirzow; and, as the evidence failed to establish conspiracy by Nerlich with any one else, it would follow that he should have been acquitted.

Hodgins, J.A. (dissenting)

HODGINS, J.A., dissented. *Conviction quashed.*

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ST. DENIS v. QUEVILLON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. May 18, 1915.

1. LANDLORD AND TENANT (§ II B 1—10)—CONDITIONS OF LEASE—OPTION TO PURCHASE—NOTICE OF SALE TO OTHERS—SUFFICIENCY—RIGHTS OF LESSEE.

Mere written notice to the lessee to exercise his option without particularizing the terms and conditions of the sale is not a sufficient compliance with a provision in a lease whereby the lessee is given an option to purchase the property during the term of the lease and that in the event of a proposed sale to any other person at whatsoever price, the lessor should notify the lessee to enable him, by preference, to exercise his option to purchase; and the rights of such lessee, where the lease is registered, will continue to subsist, even after a subsequent sale of the premises, during the currency of the lease.

[*Payette and Quevillon v. St. Denis*, 23 Que. K.B. 436, reversed.]

Statement

APPEAL from the judgment of the Court of King's Bench, 23 Que. K.B. 436, reversing the judgment of Lafontaine, J., in the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

Lafleur, K.C., and *Perron*, K.C., for appellant.

Mignealt, K.C., and *Robillard*, K.C., for respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This is an action "en passation de titre" and in the alternative damages are claimed on the ground that the defendants, now respondents, conspired together to prevent the plaintiff, now appellant, from getting his deed. The trial Judge maintained the action, but his judgment

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was reversed on appeal to the Court of King's Bench on these two grounds:—

(1) That respondent Payette was a "*bonâ fide*" purchaser for value and that his knowledge of the option given by his co-respondent Quevillon to the appellant St. Denis in the lease of the latter did not constitute him a fraudulent purchaser or chargeable with illegal collusion;

(2) That Quevillon complied with the stipulation in said deed of lease in favour of the said St. Denis respecting said option and that the said St. Denis did not exercise his rights of purchasing the property in question in this cause, although duly notified and put in default to do so by the said Quevillon.

It appears by the record that in July, 1908, Quevillon leased to St. Denis for a period of 5 years a store and dwelling; the lease was duly registered in the month of September following, and in the interval St. Denis entered into possession of the premises which were subsequently purchased (June 8, 1910) by the respondent Payette.

The lease contains this clause:—

Le locataire aura droit de prendre possession des dits magasin et logement au vingt de juillet courant, 1908. Et le dit locataire aura en outre le droit d'acheter l'immeuble ci-dessus loué, comprenant les dits magasin, logement, étal de boucher et dépendances, en aucun temps pendant la durée du présent bail, moyennant le prix de sept mille cinq cent piastres, dont trois mille piastres seront payables comptant et la balance par versements annuels de mille piastres, avec intérêt au taux de six pour cent. par an; et dans le cas où le dit bailleur désirerait vendre à quelque autre pour un prix quelconque, il devra en signifier l'avais par écrit ou dit locataire et donner la préférence à ce dernier.

The questions to be decided in this appeal are: (1) What are the rights of the landlord and tenant respectively under this clause during the term of the lease; (2) what is the legal recourse of St. Denis in view of the sale to Payette?

The trial Judge came to the conclusion that the intention of the parties was (1) to give the tenant St. Denis the right, at any time during the whole period of the lease, to purchase the property at $7,500; (2) to reserve to the landlord Quevillon the right to dispose of the property during the same period to any one and at any price, provided, however, notice in writing of the landlord's intention to avail himself of that right was given to the tenant, who was in that case entitled to take the property at the new price offered by any serious intending purchaser. The trial Judge held also that the sale to Payette, hav-

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ing been deliberately entered into by both the parties to it, for the purpose of defeating the plaintiff's rights, should be set aside. I agree entirely with the trial Judge in his appreciation of the evidence and his statement of the law.

Having carefully read the notes of Cross, J., in the Court of Appeal, I come to the conclusion that the main ground upon which the judgment of the Superior Court is reversed is that St. Denis, when notified of Quevillon's intention to sell, did not object more definitely and explicitly. The Judge says, speaking of the time when Quevillon served notice of his intention to sell to Payette:—

> I think that the plaintiff St. Denis should have objected more definitely and should have pressed his request for particulars then and there more explicitly. Instead of doing so, he remained inactive for over two years.

With all respect, it is impossible for me to agree that the appellant was under any obligation to take action upon the notice served upon him by Quevillon, or that his rights under the promise of sale were in any wise affected by that notice. By virtue of the promise of sale the appellant was entitled to buy the property at any time during the currency of the lease for the stipulated price of $7,500. (S.V., 60.1.849.) On the other hand, the respondent Quevillon reserved to himself the right to sell the same property at any time and for any price obtainable, but that right so reserved could only be exercised subject to notice to the appellant, who then was entitled to the preference, that is to say, to the right to purchase the property by preference on the same terms as the intending purchaser offered. To exercise this right it was, of course, necessary for the appellant to be informed not only of the price offered, but also of the name of the purchaser, that he might be in a position to judge of the *bona fides* of the offer (see Beaudant, p. 224), otherwise the tenant could not intelligently exercise his right to purchase subject to which the landlord retained the right to sell notwithstanding the option contained in the first part of the clause. I gather from the notes of judgment that Cross, J., is also of opinion that a notice such as was required was not given. He says:—

> If Quevillon desired to sell to somebody else pending the option the covenant was that "il devra en signifier un avis par écrit au dit locataire et donner la préférence à ce dernier."

The notice served called upon the plaintiff to sign a draft deed and intimated that if he did not comply, Quevillon would hold himself free to sell to another person, *but it did not give the plaintiff* a notice of the purport or terms of the sale desired to be made to another, as I think should have been done.

The plaintiff's testimony is to the effect that he asked who the intending offerer was.

The defendant Quevillon admits that his intention was not to disclose the term or terms of the contemplated sale to the plaintiff, and he did not do so.

If, as found by Cross, J., the required notice was not given, I am with all respect, unable to understand how it can be said that Quevillon complied with the express condition subject to which he retained his right to sell and what steps St. Denis was obliged to take in order to protect his option, which had still about 3 years to run.

Coming now to the sale to Payette. Assuming in favour of the respondents that the clause in the lease is analogous to a "*pacte de préférence.*" In ordinary circumstances the recourse of the appellant Payette would be limited to damages (Beaudant, Vente et Louage, p. 224). But the trial Judge finds that Payette bound himself "*de maintenir les baux existants,* en percevant les loyers, à compter du premier juin aussi courant." When examined as a witness, he says that he was careful to take legal advice as to the meaning of the clause above quoted. Payette also knew, before he bought, of the difficulty which had arisen between Quevillon and St. Denis about the sale and that the latter was insisting upon his right to have the terms and conditions under which the sale was to be made before exercising his right under his deed. And finally Payette served a protest on the appellant from which I quote the three following clauses:

(*a*) Qu'en vertue d'un bail par le dit F. X. Quevillon à Paul Saint-Denis, devant Mtre J. H. A. Bohémier, N.P. le 3 juillet, 1908; ce dernier Paul Saint-Denis est locataire et occupant de partie des lieux sus-mentionnés, magasin No. 1580 et logement 1582 de la dite rue Saint-Hubert, et ce, pour le loyer et aux charges, clauses et considération spécifiées au dit bail;

(*b*) En conséquence les requérants, notifient et signifient au dit Paul Saint-Denis de se conformer au dit bail et *à tout ce qui y est mentionné*, tel que loyer, etc., en faveur des dits H. et D. Payette, en leur payant tous les loyers échus et à échoir pour la durée d'icelui.

Qu'à défaut par le dit Paul Saint-Denis d'exécuter ce que mentionné aux dits actes en leur faveur, les requérants prendront contre lui tous procédés légaux et de droit pour l'y contraindre et le tiennent responsable

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immédiatement de tous frais, perte, dépens, dommages et intérêts soufferts et à souffrir et du coût des présentes, copie et signification. Pour que le dit Paul Saint-Denis ne puisse plaider ignorance, je, dit notaire, lui ai signifié une copie de l'acte de vente susdit et des présentes en parlant comme susdit.

What could be the object or the meaning of this protest if not to notify the tenant that he was thereafter to deal with his new landlord on the same footing as with the old and to warn him that the "charges, clauses et considérations spécifiées" in his lease were to be considered as still binding upon both parties?

I was much impressed by the argument that the provision in the deed by Quevillon to Payette above referred to was merely to give effect to art. 1663, C.C., but after much consideration I cannot escape from the conviction that in the protest served by Payette on St. Denis the former construed his deed of sale to mean that he, Payette, acquired all the rights and assumed all the obligations of his vendor Quevillon towards St. Denis, not only as landlord, but also as owner of the property.

The authorities referred to by the learned trial Judge are conclusive in support of his judgment granting rescission on the ground of collusion: *Alambert* v. *Reynal*, D. 85.2.259; Dal. 1903, 2, 41 (*vide* note); Dal. 1903, 1, 38. The appeal should be allowed with costs.

Idington, J.

IDINGTON, J.:—The appellant was lessee of certain property owned by the respondent Quevillon. By the terms of the lease appellant was given an option of purchase at a price named, during the entire term of the lease and a further option, as some put it, but as others contend in modification of said option, that in case the lessor should desire to sell to someone else for any price whatever that he must notify in writing the appellant lessee, and give the preference to the latter.

We have heard many diverse attempts in argument to put a construction upon the terms of this clause. Some of these attempts seemed to me to begin with adopting that which might best fit the legal consequences sought to be reached by him arguing.

I think we should, rather than beginning thus, begin by attempting to realize what the parties, in a business-like common-sense way, probably desired to accomplish and let the legal

consequences be ascertained after so determining the realization of the actual purpose in hand when framing a somewhat ambiguously worded contract. If there were surrounding circumstances which might have helped they have not been brought much in evidence by those concerned.

I think in default thereof we are safe in assuming that the parties were rational business people who were fair-minded enough at that stage, whatever they may have become since, to try to arrange to give such advantages to the lessee as would be likely to induce him to give the best renting terms he could, in light of such advantages, afford to the advantage of the lessor. And on the other hand the lessor would desire whilst giving the option not to be tied down thereto for five years if during that term he should find a purchaser. It was agreed accordingly in such case that the lessee should be notified of any such proposal and given his alternative option. That no doubt was fair and a very common way, and common-sense way, of dealing with such a problem and I think the document should be construed accordingly.

If the respondent had acted thereupon in the way I have no doubt intended originally, he would have informed the appellant of the offer he had got and its terms and possibly as evidence of, or means of shewing, good faith the name of the purchaser also.

The latter, however, need not have to be pressed for, unless the terms are such as to arouse some suspicion, and it was not.

A full knowledge of the terms, however, was pressed for and refused. That part of the contract having been so broken could not affect the first option and hence that stood. Had it been honestly observed and the terms of the alleged purchase disclosed and the chance given appellant to accept them or reject them then the lessee would have been driven to act. If he accepted in such case the matter of purchase was closed. If he in such event had rejected such terms then I think the respondent, Quevillon, would have been quite within his rights in making the sale and the first option might have ended.

I have no hesitation in accepting the version of appellant as to what transpired when he sought to learn the terms. The

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sort of contradiction given thereto is quite as emphatic as a straightforward assent thereto. So far I have little trouble in dealing with this case.

Before coming to what arises out of mere local practice and mode of thought, in regard to which I speak with diffidence, there are to be considered one or two interesting questions. Is this contract a subject of registration? It has, as embodied in the lease which was duly registered, but by some error so as to omit an unimportant part of the land, been in fact registered. Could it if embodied in a separate instrument have been registered?

It seems to me that art. 2085 of the C.C. was only designed to force any one having a registrable deed to register it under pain of losing his priority even over another who has notice of the right conferred thereby unless he is claiming through an insolvent.

As it was in fact registered the operation of this article seems automatically eliminated from any possible bearing upon the question of what effect notice or knowledge on the part of Payette might otherwise have had on his good faith. Hence it seems to me Payette whether acting in face of a contract affecting real property, or in face of a mere personal right such as his counsel contends this alleged unilateral contract to have been, must be held to have acted in bad faith. In the latter point of view I agree with the trial Judge that Payette has as a result of his bad faith become bound to observe the obligation thus resting upon Quevillon.

It is to be observed that the art. 2085, C.C., does not in terms protect such a purchaser except as against "an unregistered right belonging to a third party and subject to registration."

If as contended (of which I say nothing) this option was not the subject of registration then no protection exists for him acting in face of positive knowledge and he must abide by the general consequences attaching by law to such a course of conduct.

If on the other hand the unilateral contract is to be treated according to the authorities referred to in Cross, J.'s, judgment,

at lower part of p. 438 of the official report of this case, 23 Que. K.B., then there can be no doubt of the matter.

And I most respectfully submit that in view of what I have above set forth relative to the question of registration the Judge's view of the effect of the registry system upon said opinions, which he cites, is not well founded.

There is another view occurs to me, not in conflict with what the same Judge has later on presented, and that is that an option such as this in question in a lease and forming part of the bargain between the parties might well be considered accessory thereto and part of the leasing contract and consideration for the terms in way of rental and, hence, cannot be dissociated from the lease in the way sought to be done by counsel for respondent. It is quite clear to my mind that many a man would for the sake of obtaining such an option in his lease be willing to increase the rent beyond what he would otherwise give and may have done so in this very case. The case where a tenant, as often happens, desires to make improvements (which the lessor cannot afford) in the property, and does so relying upon his option in the lease, is one where pushing too far the doctrine of the option being merely unilateral and hence merely a personal obligation dissociated from the lease proper might in the consequences work much injustice. As this suggestion only occurs to myself and was not dealt with in argument by the able counsel representing the parties herein, I put it forward with much hesitation.

Yet I must say that when I come to consider the question of what meaning is to be attached to the language of the deed from Quevillon to Payette and the obligation therein to maintain the lease and of the protest following it relative thereto, I think such considerations are entitled to some weight. When people speak of a lease they usually mean all that exists therein and hardly ever think of severing all that is therein from that which in a narrow sense alone constitutes the lease.

Looking to the matter in that way makes me the more inclined to adopt the view pressed by Mr. Lafleur that the vendee of Quevillon assumed as part of his obligation to maintain the lease, to observe the option therein as well as all else and thereby

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preserve his vendor from damages for breach of anything arising from the failure of said vendor to maintain his tenant in possession. It may be answered the law in such case does so in case of registration. Granted so; what then is the use of any covenant unless to cover any risk beyond the mere tenant's possession? However all this may be I think the construction I put upon the much discussed clause giving appellant the option renders it unnecessary to rely upon this part of appellant's contentions.

It is the different construction which the Court of Appeal has put upon the said clause that gives rise to any trouble. The other way of construing it which I adopt leads on the reasoning of Cross, J., to the same conclusion as the trial Judge.

If anything in the objections of forms of pleading and difficulty arising therefrom and practice I think they can be all overcome if necessary by amendment this Court has the power and must observe the duty to make to render them conformable with the facts in order that justice be done. I should, therefore, allow the appeal and restore the judgment of the trial Judge with costs here and below.

Duff, J.

DUFF, J.:—First as to the construction of the *pacte de préférence*. I think the lessor's right to sell was conditional upon his giving notice in writing to the lessee of the price at which he proposed to sell; and giving the lessee an opportunity to buy. Whether the lessee would be entitled to buy at the price mentioned in his option or at the price named by the lessor, or at the more favourable of the two is a question which I need not discuss. The answer to it is by no means obvious and I express no opinion on it. No notice was given and the sale was, therefore, a violation of the lessor's obligation; and admittedly on this construction the lessee is entitled to damages; but in the view taken by the majority of the Court it is unnecessary to consider how much.

Is the appellant entitled to enforce his option against Payette, the purchaser? He is not entitled to do so in my opinion. The lessee's right under the promise of sale is not a *jus in re*. It is a *jus in personam ad jus in rem acquirendum*. The lessor's obligation, therefore, does not (in the absence of special circumstances giving a right against the purchaser) bind the purchaser from him or the land in the hands of the purchaser.

Then, is there just reason for enforcing the obligation against the respondent on the ground of bad faith? Of *bad faith* there is really no evidence, in the sense that the transaction was colourable. Bad faith in the sense of the English equity there was, the transfer, that is to say, was taken with full notice of the appellant's rights; but I have not found any authority for the proposition that, in the law of Quebec, to purchase property with the knowledge of the owner's obligation *in personam* to sell it to another—there being no *jus in re* vested in the person in whom the obligation inheres—subjects the purchaser to a like obligation.

A more important question is as to the effect of the registration of the lease. Has the registration the effect of making the obligation binding on the lands in the hands of a purchaser? Does it transform a *jus in personam* into a *jus in re?* The point to be determined is a question of strict law and that is whether or not the promisee's right is a *droit réel* within the meaning of art. 2082, C.C. It is not a *droit réel* within the strict meaning of that term, that is to say, it is not a right in the thing or a right assertable generally against the world. I have examined the context fully (see arts. 2089, 2098, 1601, 1663, 2128, 2102, 2106, 2016, 2168, C.C.) and I can see nothing justifying an interpretation inconsistent with this.

Anglin, J.

ANGLIN, J.:—There is no evidence in the record to sustain the defendant's contention that the plaintiff parted with his interest in the lease in question and, therefore, has no status to maintain this action.

In the view I take it is not necessary to determine whether the option of purchase, which the lease gave to the lessee, was entirely independent of and unaffected by the *pacte de préférence* which follows it. There is a great deal to be said in support of the position taken by Lafontaine, J., that it was and that no action by the lessor under the latter clause could affect his obligations of the lessee's rights under the earlier provision; and I am far from being convinced that his view is not correct. On the other hand, with great respect, I can find nothing to warrant the construction which its formal judgment shews was placed by the Court of Appeal on the *pacte de préférence* itself, namely,

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that by it the lessor, on receipt of any offer of purchase which he was willing to accept, was empowered to call upon his lessee to exercise at once his option to buy under the former clause, with the consequence that, if he should decline or neglect to do so and the lessor should accept the offer and carry out the sale, all the lessee's rights under the option would be extinguished. As I read the clause creating the *pacte de préférence* whatever may have been its effect (if any) upon the rights of the lessee under his option, it entitled him to a preferential right during the term of the lease to purchase the property at whatever price and upon whatever terms the lessor might desire to sell it to any other person.

It is obvious that it was essential to the lessee's enjoyment of this right of preference that he should have been told the price and the terms which the lessor was prepared to accept from the other proposing purchaser. This information was refused him and he was notified that, although his lease had still more than three years to run, he must at once agree to buy the property under his option (which by its terms was to hold good until the termination of the lease), or forego all rights under it. Assuming, therefore, in favour of the lessor, that if proper notice had been given to enable the lessee to exercise his rights under the *pacte de préférence* his refusal to purchase under it would have extinguished his option to buy at $7,500, such notice was not given, the lessee never had an opportunity to buy at the price and on the terms which the lessor accepted from the Payettes, and it follows that not only was the *pacte de préférence* itself broken, but the lessee's rights under his option remained intact.

I am, however, unable to agree with the trial Judge that, notwithstanding the sale by the lessor to the Payettes and the subsequent transfer from Didyme Payette to the defendant Henri Payette, the plaintiff is entitled to specific performance of his lessor's promise to sell and transfer the property in question to him. Until he signified acceptance of his lessors' offer to sell under the option, as Lafontaine, J., states, it gave him no interest in the land, but merely a personal right against the lessor. I have not found in the Quebec registry law any pro-

vision for the registration of an unaccepted unilateral promise of sale or anything which would render a subsequent purchaser from the promisor liable to implement such a promise merely because it was included in a registered document, such as a lease, which contained other provisions susceptible of registration. With deference, I am unable to accept the view expressed by Cross, J., on this point.

The trial Judge did not rest his judgment against the defendant Payette on this ground, but on his knowledge of the plaintiff's option and fraudulent conspiracy on his part with his co-defendant to defeat it.

By the sale to the Payettes the lessor put it out of his power to fulfil his personal obligation to the plaintiff, and, although the Payettes took subject to the lease, I cannot find that they assumed Quevillon's obligation to sell to the plaintiff, which was not an ordinary covenant incident or accessory to a lease, but a substantive and independent contract. Fuzier-Hermann, Rep., *vo.*, "Bail en général," nos. 2354 and 2355; Guillouard, "Louage," no. 361. On the contrary, the clear purpose of Quevillon and the Payettes was that the latter should obtain a title free from any claim of the plaintiffs. Quevillon guaranteed the Payettes against disturbance by St. Denis. Nor does it appear, as was alleged, that the Payettes were parties to a fraudulent conspiracy to deprive the plaintiff of a right which they knew he had to obtain the property. They appear to have acted in the belief, and on the assurance of Quevillon based on opinions of counsel, that he was entitled to determine all the rights of St. Denis, except his interest as lessee, by calling on him, as he did, forthwith to exercise his option to purchase. Notice of the clause in the lease under which St. Denis claims did not, I think, under these circumstances (if, indeed, it ever would) suffice to establish bad faith on the part of the Payettes such as the trial Judge thinks would render them liable at the suit of St. Denis to carry out Quevillon's obligation to sell to him. Moreover, the deed to the Payettes was duly registered and the plaintiff has not asked to have it declared void or set aside.

Then it is urged that by delaying for over two years after the sale to the Payettes before bringing action and paying them

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meantime the rental for the property under his lease, the plaintiff acquiesced in the sale to them and abandoned all rights under his option to purchase. He had, no doubt, an immediate right of action against Quevillon for his breach of the pacte *de préférence* by the sale to the Payettes. It may be that he could have treated that sale as a repudiation by Quevillon of the option as well and sued him thereupon for breach of his promise to sell. But the lease gave the plaintiff the right to exercise his option at any time during the term, and I do not think he can be charged with default or laches in asserting that right during its currency. Notwithstanding what he had done the lessor might re-acquire the property or otherwise put himself in a position to meet the exigency of the plaintiff's option. I cannot think that the lessee was bound to treat the sale as a repudiation and breach of the option and elect promptly to bring action or to abandon his rights. He was entitled to wait until it suited him (of course, within the term of the lease) to make his demand upon the lessor to implement his promise to sell and on failure to meet that demand to bring action for the breach then committed. I cannot understand on what basis the position can be maintained that the lessor's own wrongful act in selling, without giving his lessee the benefit of his *pacte de préférence* and in violation of the option, imposed upon the lessee an obligation to assert his rights under that option at a period earlier than the option itself required. The plaintiff certainly did nothing which amounted to a positive or direct renunciation of his rights, and, under the circumstances, there was, in my opinion, no delay on his part which implied an abandonment, or barred his assertion of them.

I am, for these reasons, of the opinion that the appellant is entitled to succeed as against the defendant Quevillon for breach of his personal obligation, but that the recovery must be limited to damages. There is no material in the record, however, to enable us to determine the quantum of the damages which should be awarded. Unless the parties can agree upon the amount for which judgment should be entered for the plaintiff, the action must be remitted to the Superior Court for the assessment of his damages.

The appellant should have his costs throughout as against the defendant Quevillon. Under all the circumstances, while the appeal against the Payettes must be dismissed, I think it should be without costs.

BRODEUR, J.:—This is a case of an action for passing title which is maintained by the Superior Court and dismissed by the Court of Appeal. The plaintiff appeals from the latter judgment.

The circumstances which gave rise to the action are the following: On July 3, 1908, the respondent Quevillon, leased to the appellant, St. Denis, a certain property for 5 years. The lease contained the following clause which has given rise to the present litigation:—

> And the said lessee will besides have the right to purchase the above mentioned immovable leased, . . . at any time during the term of the present lease for the price of $7,500, of which $3,000 will be payable in cash and the balance by annual instalments of $1,000 with interest at the rate of 6% per annum, and in case the said lessor should wish to sell to any other person for any price whatever, he shall serve a notice in writing on the said lessee and give him the preference.

This lease was registered against the property.

On May 28, 1910, the lessor, Quevillon, caused a protest to be served on the appellant and put him *en demeure* to purchase the property pursuant to the agreement for sale contained in the lease for the sum of $7,500 and in default of his doing so, he declared that he would then sell upon any conditions that he considered proper. He did not state in this protest the conditions on which he would dispose of his property.

On June 8, 1910, Quevillon, the respondent, sold the property to Payette for the sum of $7,925, of which $500 was to be payable in cash and the balance by instalments of $400 a year. It was further declared in the deed of sale between Quevillon and Payette that the latter would maintain the existing leases.

The plaintiff, on November 22, 1912, brought his action for passing title against Quevillon and Payette, alleging that they had concerted together to deprive him of his rights. He claims that the agreement for sale always continued to exist in spite of the sale made to Payette and that the latter in undertaking to maintain the lease had assumed the agreement for sale therein stipulated.

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The defendant claims on the contrary that the failure of St. Denis to take advantage of the agreement for sale had put an end to his rights, that the plaintiff was free to sell the property to Payette and that he was not obliged to inform him of the conditions on which he would sell the property to Payette. The Superior Court maintained the action, but its judgment was reversed by the Court of Appeal. This clause of the contract containing the agreement for sale and reference is far from clear and is susceptible of different interpretations.

After having carefully considered the contract and the circumstances established by the evidence, I have come to the conclusion that the contract provides for an unilateral agreement for sale and an agreement of preference which, however, should be interpreted in connection with the other. We first have the lessor who agrees to sell to his lessee during the term of the lease the property leased for a sum of $7,500. But at the same time this obligation on his part seems to disappear in case he should find a purchaser for his property and then he could only dispose of it by giving the preference to his lessee. So much for the interpretation of the contract. Now, has Quevillon fulfilled his obligations?

I consider that the *mise en demeure* to St. Denis was insufficient. Quevillon should have announced to him the conditions on which he was about to sell to Payettee, the price, terms of payment, in short all the conditions of the sale. But Quevillon has not performed this obligation. As I have said before, he simply demanded by his protest to St. Denis that the latter should purchase the property on the conditions contained in the lease. Quevillon then has become responsible. It remains to inquire whether or not the plaintiff had a right to an action for passing title or to be put in possession of the property or if his right was only to damages.

The respondents claim that the property having passed into the possession of a third party, the plaintiff had no right of revendication.

The fraudulent concert between the prospective vendor and the third party acquiring the property and the obligation of the

third party to maintain the lease, causes me to consider the action in revendication to be well founded.

On the effect of the registration of an agreement for sale, Lafontaine, J., in the Superior Court formally declares in his judgment that a unilateral agreement for sale without reciprocal agreement to buy, like the agreement for a preference does not carry with it any real right and that when the intended vendor has ceased to be owner, the remedy that the promisor purchaser may have is for damages.

The Court of Appeal upon this point, on the contrary, has decided that:—

1. A registered deed which affects an immovable such as an agreement for sale or an action to buy can be opposed by a third party purchaser who has a title subsequently to this registration, our registry laws not being limited in their effect to the contract conveying the property or to rights susceptible of hypothec.

I am brought to believe with the Court of Appeal that every right in property resulting either from an agreement for sale or from any other form of contract is a real right and capable of being registered, and I would cite in support of this opinion, Dalloz, "Biens," No. 151.

The law does not say that it is only reciprocal or bilateral contracts which may be registered, but any act which is of a nature to affect a property and confer a real right in the immovable may be registered. (Aubry & Rau, vol. 2, sec. 209, n. 1; Mourlon, Revue Pratique, vol. 2, p. 193, n. 39.)

It seems to me that the agreement for sale and the right to redeem should be treated in the same way. In a right to redeem as in the agreement for sale, the creditor of the obligation is not obliged to demand its execution. There is no obligation on his part to buy. However, if the right of redemption has been registered the purchaser cannot dispose of the property: art. 2102, C.C.

But it is not necessary for me to dispose of this question of registration in view of the conclusion to which I have come upon the two other points in the case.

I consider that the fraudulent agreement made between Quevillon and Payette and the obligation assumed by Payette to

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maintain the lease, makes the latter responsible and forces him to give effect to the agreement for sale contained in the lease.

In a case analogous to this, the Court of Cassation in France decided (Dalloz, 1903-1-38) that a sale made in opposition to an agreement of preference may be set aside and the third party who has acquired the property condemned to its restitution if it is stated as a fact that the third party subrogated by his title to the rights and obligations arising out of a lease, was aware of the existence of this right of preference and the intention of the beneficiary to profit by it.

In the present case we have an agreement for sale in favour of the appellant by the respondent Quevillon, in the lease which was given to him on the property in question. This agreement for sale registered against the property was known to the defendant Payette.

The evidence shews, as the Judge decided, that Payette and Quevillon were acting in concert to prevent its being carried out. In this case it is not doubtful that the third party acquiring the property became under an obligation to the appellant.

Moreover, Payette in entering into an obligation to maintain the leases existing on the property became substituted to the rights and obligations of Quevillon himself. He contractually substituted himself to the obligations which rested on his vendor, and he is bound as the latter was.

The holder of the agreement for sale has then a right to bring against the third party acquiring the property a real action for reconveyance of the thing dealt with by the contract, which is binding upon them, and to bring about in consequence the annulment of sale which has caused him injury. Dalloz, 1885-2-259.

And even in the case where the third party acquiring the property had not agreed with his vendor to bring about a realization of the agreement of preference if he has concerted with the vendor to dispossess the *titulaire* of the agreement, the latter could all the same bring about the annulment of the sale as made in fraud of his right. Dalloz, 1849-2-46.

But it is said that in the actual case, Payette in agreeing to maintain the lease did not intend thereby to assume obligations

foreign to the obligation of lessor and lessee. Pothier, "Louage," no. 299, says:—

> When one to whom I have succeeded in a title peculiar to a heritage has charged me with the maintenance of the lease . . . he is deemed . . . to have also conveyed to me all the rights and obligations thereof.

And it was decided by the Court of Dijon that a person acquiring an immovable is obliged to respect not only the lease properly speaking but the agreements which are connected with it and form with it an indivisible whole. Sirey, 1875-2-33.

In this case decided by the Court of Dijon the lessor became under obligation to furnish the raw material for the working of a factory which the lessee was to install upon the property leased. Later he sold the property to another person with the obligation of maintaining the lease and the Court decided that the new owner was obliged to respect not only the lease itself, but the agreements which form part of it.

It is true that this decision has been criticized by Fuzier-Hermann. It seems to me, however, that the fact of a third party acquiring property assuming the obligations of a lease should cover all that is mentioned in it, since otherwise the stipulations in favour of the lessee for which he is deemed to have given consideration would be made a nullity.

In the case decided by the Court of Cassation and reported in Dalloz, 1903-1-38, the Courts have decided that the third party acquiring the property was supposed to assume all the obligations contracted for by his vendor in the lease. This decision of the Court of Cassation confirms, therefore, the position taken by the Court of Dijon in 1875.

I consider that in these circumstances the plaintiff had the right to institute his action for passing title, that the judgment which dismissed this action should be reversed and that the *dispositif* of the judgment of the Superior Court should be restored.

Appeal allowed.

MAN.

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U.S. CONSTRUCTION CO. v. RAT PORTAGE LUMBER CO.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. December 6, 1915.

1. MECHANICS' LIENS (§ II—7)—ERECTION OF FIRE SPRINKLER UNDER LEASE—RIGHT OF LESSOR.

One who erects a fire sprinkler system under an agreement whereby the equipment is merely leased to the owner of the premises with a right to purchase, reserving the title and ownership thereto until paid in the lessor, is not precluded from claiming the statutory mechanic's lien against the premises of which the erection has been made part of. [*Chicago & Alton R. Co.* v. *Union, etc., Co.*, 109 U.S. 702, followed.]

Statement

APPEAL from judgment of County Court in favour of plaintiff in a mechanic's lien action.

H. J. Symington, for appellant, defendant.

S. E. Richards, for respondent, plaintiff.

Perdue, J.A.

PERDUE, J.A.:—The plaintiffs agreed to equip the defendant's premises with a sprinkler plant as a protection against fire. It was agreed by the parties that the sprinkler equipment and everything connected therewith should remain the property of the plaintiffs and on default of payment by the defendants under the agreement the plaintiffs might "at their option" take out and remove the equipment. It was further agreed that the plaintiffs had leased to the defendants the equipment at an annual rental equivalent to the amount to be paid under the agreement for purchase money. The sprinkler equipment has been installed and the plaintiffs have registered and seek to enforce a mechanics' lien to obtain payment.

It seems at first sight an anomaly to say that a party who has merely leased, with a right to the lessee to purchase goods belonging to him to another party, and has attached them to the premises of that other party, but has carefully reserved the ownership, is entitled to claim a mechanics' lien against the premises. I can find no Canadian decision on the subject, but the American cases cited by Mr. Richards and referred to by my brother Cameron hold that the retention of the ownership of materials furnished for a building is not inconsistent with the right to a mechanic's lien given by statute. One of these cases, *Chicago & Alton R. Co.* v. *Union Rolling Mill Co.*, 109 U.S. 702, is a decision of the Supreme Court of the United States. In the absence of any decisions in the Canadian Courts, in so far as we are aware, I think we should follow such a high authority as that above referred to.

I would, however, add that, in my opinion, when the plaintiff once asserts and seeks to enforce by legal proceedings a mechanics' lien for the materials or machinery furnished for and erected in a building, he must be taken to have elected to make them a part of the building and realty against which he claims the lien. He acquires the lien by reason of having put such materials, etc., into and having made them part of the erection. Having on this ground asserted the statutory lien, I think he should be thereafter estopped from claiming that the materials, etc., are his property and that he has a right to remove them.

I agree that the appeal should be dismissed.

Cameron, J.A.

CAMERON, J.A.:—This is an action brought in the County Court of St. Boniface to enforce a lien under the Mechanics' Lien Act. The plaintiff company alleges, in its statement of claim, that it installed an automatic sprinkler system for the defendant on its premises under the terms of an agreement dated December 10, 1912. The work is stated to have been done between that date and February 18, 1915, and a balance due is claimed of $17,949.16, of which payment is asked, as is also a declaration that the plaintiff is entitled to a lien therefor. The statement of defence makes general and specific denials of the plaintiff's allegations and further states that the statement of claim is not sufficient in law.

The agreement in question is before the Court as an exhibit to an affidavit. An application was made to the County Court Judge to decide the point of law whether the plaintiff is entitled, on the allegations and the agreement, to claim a lien under the Act. The County Court Judge decided in favour of the plaintiff's contention, and from his Order this appeal is taken.

In the contract between the parties the following, amongst other provisions, are to be found:—

In order to reimburse the first party for making said improvement and equipment, second party agrees to pay to said first party a sum annually and in advance for the next five years, equal to the difference in the cost of the said insurance on the premises at the present rate of $5.09 per hundred on $268,700 of insurance, and the reduced cost after the sprinkler equipment shall have been installed and in good working order; it being understood that the rate of insurance after the sprinkler system is installed shall be taken at the cost thereof.

At the end of five years, upon full payment of all said annual instal-

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ments, said sprinkler system shall become the property of and belong to said second party, constituting a part of said plant, and upon payment of the last instalment this lease shall be cancelled and released of record, and the first party shall also cancel or assign said lease in the event of the second party purchasing the sprinkler equipment as later provided for.

It is further agreed that, until full payment, according to the above arrangement, said sprinkler equipment, and everything relating thereto, shall be and remain the property of the party of the first part and on failure of the second party to pay as above provided, the first party may at his option, take out and remove said equipment; it being understood that the first party may collect the annual instalments herein provided for, the same as any other mature obligation.

. . . . .

It is further understood and agreed that this contract shall be regarded and treated as a lease of said equipment from the first party to the second party for a period of five years dating from the date of the approval and acceptance of the sprinkler equipment by the insurance interests for the consideration of the above mentioned annual payments.

. . . . .

It is further understood and agreed that the party of the second part may take up this contract at the end of any one year upon the payment of the following options, dating from the date of the first payment: Option at end of 1st year, $22,800; option at end of 2nd year, $19,000; option at end of 3rd year, $14,500; option at end of 4th year, $7,500; option at end of 5th year, yours.

It was argued on the plaintiff's behalf that this agreement, notably the above provision reserving the property in the sprinkler equipment in the plaintiff, is antagonistic to and inconsistent with the right now claimed to register and enforce the statutory lien, and that, therefore, the right to a lien never existed, or, if it existed, has been waived.

It is provided by the Mechanics' and Wage Earners' Lien Act, ch. 125, R.S.M., sec. 4, that—

> Unless he signs an express agreement to the contrary, any person who performs any work or service upon, or in respect of, or places or furnishes any materials to be used in the making . . . of any erection . . . shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, . . . and the land occupied thereby . . . in amount to the sum justly due . . . by the owner.

The lien may be registered before or during the performance of the contract or within thirty days after the completion (sec. 20) and expires after the expiration of 90 days after the completion of the work or after the lapse of the term of credit (sec. 22).

What effect has the retention of title to materials furnished upon the right to a lien?

The fact that one who furnishes materials for improvements on land retains the title to the materials until they are paid for does not deprive him of the right of a mechanic's lien. Cyc. XXVII., 276.

In the cases arising in the United States where this subject has come up for consideration and adjudication, the tendency has been to regard a provision for the retention of property as manifesting an intention to hold the material furnished itself liable for the payment while, on the other hand, the statutory lien attaches to the land to improve which the material is furnished. The two matters, the retention of property in the material, and the lien upon the land improved thereby, are quite distinct and in no wise antagonistic. This is, in effect, stated in *Clark* v. *Moore*, 64 Ill. 279. This decision of the Supreme Court of Illinois was quoted and approved by the United States Supreme Court in *Chicago & Alton R. Co.* v. *Union Rolling Mill Co.*, 109 U.S. at p. 720, where it was held that the lien given by the Illinois statute, quoted at p. 719, was not affected by a special agreement (1) that the contractor should have a lien on the rails in question until payment, and (2) that the possession of the railroad should be the possession of the contractor.

In *Case Manufg. Co.* v. *Smith*, 40 Fed. 339, it was held that—

The retention of title till payment was made for the machinery was in no way inconsistent with the statutory lien given upon . . . the land. . . . The retention of title was in the nature of a specific lien upon the identical machinery furnished. It was not inconsistent with the lien given by the statute upon the premises on which the machinery was placed or erected. It shews no intention of waiving the lien, it imposed no obligation to resume possession, but left the complainant free to hold the defendants liable or invoke any other remedies open at law. Instead of being inconsistent with, it was merely security to, that provided by the statute. See Phillips on Mechanics' Liens, p. 479.

In *Hoover* v. *Featherstone*, 99 Fed. 180, a reservation by one furnishing an engine to be placed in a building, of title to the engine until payment is made, does not amount to a waiver of the right to a mechanic's lien therefor given by statute. This part of the judgment was affirmed on appeal, 111 Fed. p. 95:—

The former (the contract) retained a lien upon the engine as security for the purchase price: the latter created a lien not only upon the engine, but upon the real estate upon which it was placed. The former was a lien by contract, the latter by statute: and neither is destructive of the other. Citing the *Chicago & Alton Case* and others. To the same effect

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Cameron, J.A.

are the decisions in *Salt Lake Hardware Co.* v. *Chainmin Mining Co.*, 128 Fed. 509, and *Warner Elevator Co.* v. *Capital Assn.*, 86 N.W. 828.

I consider the reasoning in the above cases cogent and applicable to cases within the terms of our own statute.

It was urged by counsel for the defendant, however, that this agreement in question is a lease of the equipment in question and so declared to be by and between the parties, and, therefore, wholly outside the statutory provisions. But it is in substance an agreement for sale, and the provision that it shall be regarded as a lease is for the purpose of giving the vendor an additional remedy which it is not bound to exercise. The other remedies at law on the covenant or under the Act remain open to the vendor.

The expression found in sec. 4, "unless he signs an express agreement to the contrary," apparently is not to be found in the statutes in force in the States of the Union. But in my judgment they add nothing to the law as it would have been under the section without those words.

> The principle that a person of full age and acting *sui juris* can waive a statutory provision . . . in his own favour, affecting simply his property or alienable rights and not involving questions of public policy, is applicable to mechanics' liens. Cyc. XXVII., 262.

If the above expression in sec. 4 has any effect at all, it would possibly be rather to narrow the ordinary common law right of the individual and compel him, if he wishes to waive the statute, to do so by an "express agreement."

On consideration I am of opinion that the plaintiff would be entitled on the facts alleged, if established in evidence, and on the agreement referred to, to a declaration that it is entitled to a lien for whatever amount may be justly due it under the contract. I would, therefore, dismiss the appeal, with costs to the plaintiff in the cause.

Howell, C.J.M.

HOWELL, C.J.M., concurred.

Haggart, J.A. (dissenting)

HAGGART, J.A., dissented. *Appeal dismissed.*

MERIDEN BRITANNIA CO. v. WALTERS.

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Ontario Supreme Court, High Court Division, Boyd, C. October 14, 1915.

1. CONTEMPT (§ I B—5)—SUMMARY JURISDICTION—NEWSPAPER COMMENT.
To support a charge of contempt of Court against a newspaper editor for published comment about a pending case, the comment must be such as to manifest that the object is to taint the source of justice and to obtain a result of legal proceedings different from that which would follow in the ordinary course.

2. CONTEMPT (§ III B—35)—POWER OF COURT—INTERFERENCE WITH FAIR TRIAL.
The disciplinary power of the Court to punish for contempt the publisher of a newspaper making improper comment on a pending case is to be sparingly and carefully exercised, and it must be shewn that it was probable that the publication would substantially interfere with a fair trial.
[*Re Finance Union* (1895), 11 Times L.R. 167; *Skipworth's Case* (1873), L.R. 9 Q.B. 219, approved.]

Statement

MOTION on behalf of the plaintiff company for an order that Jones Lewis Lewis, editor of "The Hamilton Herald," be committed to the common gaol for the county of Wentworth for a contempt of Court in publishing or writing and procuring to be published, while the proceedings in the above action were still pending, in the said "The Hamilton Herald," a newspaper published in the city of Hamilton, on the 17th September, 1915, an editorial with the heading "An Action at Law," and also certain paragraphs containing comments upon the said action, and restraining the said Lewis and the Herald Printing Company of Canada Limited, the publisher of the said newspaper, from repeating their alleged offence.

The action was brought by the plaintiff company, suing on behalf of all ratepayers on Wellington street north, in the city of Hamilton, and also on behalf of all ratepayers in the city of Hamilton except the individual defendants, against Charles S. Walters, Mayor of the city, William Henry Cooper, a Controller, and the city corporation. The writ of summons was issued on the 16th September, 1915; the claim endorsed upon the writ was as follows: (1) for a declaration that the property-owners on Wellington street north, between King and Cannon streets, in the city of Hamilton, in front of whose property an asphalt pavement had been laid by the defendant corporation, were not liable for the amounts assessed against them for such pavement, by reason of the fact that such pavement was not constructed with proper materials, and was not of the value charged for the same by the defendant corporation; (2) for an order referring it to the Local Master at Hamilton to ascertain what, if anything, should be

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paid by the property-owners for such pavement, and what funds of the defendant corporation have been diverted and misappropriated in connection with the construction of such pavement, and to take an account thereof; (3) for an order that the defendant corporation recover from the original defendants damages for breach of trust in permitting the acquisition by the defendant corporation of improper materials for the said pavement, and in expending the defendant corporation's funds in purchasing such improper materials, and in constructing the said pavement therewith, such damages when recovered to be applied to the proper uses and purposes of the defendant corporation; (4) for a declaration defining the rights of the plaintiff company to obtain inspection of books and papers, the property of the defendant corporation, and information in the possession of the officers, employees, and servants of the defendant corporation, dealing with matters in respect of which the plaintiff company is called upon by the defendant corporation to pay rates and taxes; (5) for an injunction restraining the defendant corporation from levying on or seeking to collect from the plaintiff company local improvement rates charged against it in connection with the construction of the pavement.

In support of the motion was filed the affidavit of James W. Millard, the president and managing director of the plaintiff company, stating, among other things, that in the editorial article complained of there were misleading and incorrect statements as to facts involved in the action, and the writer had suppressed important and material facts; that since the 18th June, 1915, the affiant had endeavoured to obtain all the information that appeared on record in the offices of the city-hall, but had been unable to obtain necessary data which the company had a right to obtain; that the action was brought in good faith, and not for any improper purpose, but solely to obtain relief from what the affiant considered an unjust tax for a pavement constructed with stone that had been condemned by the city engineer; that the plaintiff company objected to the Herald Printing Company of Hamilton Limited and its editor, Jones Lewis Lewis, making misleading and incorrect statements as to the facts involved in the action, and suppressing important and material facts, and commenting upon the case adversely to the plaintiff company's claim and contention, until such time as the records shall have

been produced and the witnesses upon both sides subjected to examination and cross-examination in open court, and asked for the protection of the Court until the trial; and that the affiant was advised and believed that the plaintiff company had a good cause of action on the merits.

Affidavits in answer, made by the said Lewis, the editor, and by John M. Harris, the president of the Herald Printing Company of Hamilton Limited, were filed: in these affidavits the affiants denied any intention to offend or interfere with the course of justice and explained the situation and the meaning of the writings complained of.

E. F. B. Johnston, K.C., for the plaintiff company, the applicant.

C. J. Holman, K.C., and *J. A. Soule*, for the defendants and for Jones Lewis Lewis, the respondent.

Boyd, C.

October 14. BOYD, C.:—Lord Justice Bowen pithily expresses the modern view of the power exercisable by the Court by way of discipline in cases of alleged contempt of Court. It is not, he says, "to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice:" *Helmore* v. *Smith* (1886), 35 Ch.D. 449, 455. Many of the later cases were referred to in *Guest* v. *Knowles, Re Robertson* (1908), 17 O.L.R. 416. Sir George Jessel's judicial admonition was, that such arbitrary and unlimited jurisdiction should be jealously and carefully watched, and exercised with anxiety and reluctance: *In re Clements* (1877), 46 L.J.Ch. 375, 383.

The apprehension of detriment must be of a tangible character, plainly tending to obstruct or prejudice the due administration of justice in the particular case pending. Regard must be had to all the surrounding circumstances: the manner of trial, the time of publication, the causes leading to the publication, and the tenour of what is published.

This action was begun on the 16th September by writ against the Mayor of Hamilton and a City Controller in respect of the defective character of a pavement laid in front of the plaintiff's premises, claiming a declaration to that effect, and a reference to estimate damages and to ascertain what public funds have been wasted and misapplied in the undertaking, and an injunction against collection of taxes in respect of the said work. The fact

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of such an action having been started appeared in "The Hamilton Herald" newspaper of the 16th September. An article also on the same day appeared in "The Hamilton Spectator" intituled "The Mayor must Justify in Court." This article set forth that the plaintiff, after failing for weeks to get satisfaction from the city as to the defective pavement, had begun this action against the Mayor and the Board of Control representative on the Works Committee, and then added: "Interesting developments are promised when the case reaches the Courts." The conduct of the Mayor is commented on, and the article goes on to allege that persistent efforts had been made by the city to sidetrack an investigation. This article on the 16th September, contemporaneous with the issue of the writ, appears to have called forth a rejoinder in the "Herald" next morning, which is the article now complained of by the applicant—headed "An Action at Law." It sets out the nature of the action and says: "The facts upon which this action is based are well known, having been published and discussed some months ago." It is then set forth that while the pavement was being laid it was discovered that the stone was unsuitable. Work was stopped and proper stone procured and suitable stone substituted for what had been laid—the article goes over the various steps through which the matter had progressed in the council in order that satisfactory material should be obtained. Then it proceeds: "A reminder of these facts should not be necessary, and would not be but for the fact that a city newspaper, which nurses a private grudge against the Mayor, has essayed the difficult task of creating the impression that somehow or other the Mayor is personally to blame for getting the city mixed up in a law-suit over this pavement matter. 'Mayor must justify his Stand in Court' is the head-line it puts over the article describing the action taken by the Meriden company." Other unimportant comments follow on the Controller being made a defendant, and a wonder why the Chairman of the Board of Works was not made a co-defendant; and then it winds up: "Whatever may be thought of the merits of this action or the motive for instituting it, there is already evidence that attempts will be made to utilise it for the purpose of discrediting the Mayor. It is safe to predict that such attempts will be ludicrously unsuccessful."

Two isolated items in the same paper are set forth in the notice of motion as follows:—

"Mayor Walters, Controller Cooper, and the city are in the same boat, as defendants in a law-suit. Now let us hope that none of the occupants will try to rock the boat."

"And how, we wonder, has Alderman Roy managed to escape being made a defendant in that pavement law-suit? As Chairman of the Works Committee, he signed the order for the stone which, having been used in a patch of the pavement complained of and afterwards condemned, supplied an excuse for the plea that the pavement is not up to the mark. We don't say that Alderman Roy was to blame—we don't think he was. But, if he wasn't to blame, who else could have been?"

This publication, a day after the writ issued, had no reference to the outcome at the trial, which might not take place during that municipal year. The evident object was to commend the Mayor as a worthy officer of the city, and to deprecate any use being made of the charges to affect the mind and votes of the local electorate. The trial would be as of a Chancery case, and would be before a Supreme Court Judge not likely to have ever seen or heard of this by-play of the newspapers in regard to a matter of municipal administration. Long before the trial, even if the matter were to come before a jury, the article would have passed into oblivion. Nor can I read the whole of what is complained of as tending in any way to interfere with the due course of judicial determination of the controversy. I am not able to conjure up even a suspicion that either of the parties will be prejudiced or benefitted before the Court by what has appeared in the public prints.

The affidavit of Lewis, the editor, has not been answered, which states, as the article on the face of it declares, that the matters of fact or of detail referred to or commented on were already well-known to the public, and had been discussed this year and last in the Hamilton papers, and had been common talk of the citizens. The newspapers have the same right as the citizens to discuss these matters of municipal administration. It is within the purview of journalism to deal with such matters, to take sides thereon, to inform and direct the local electorate; and, so long as the articles do not unduly interfere with the action of the Courts, the members of the Press have a free hand. The ground of objection

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in the applicant's affidavit, para. 12, is, that the article makes misleading and incorrect statements as to the facts involved in the case and suppresses important and material facts, and comments on the case adversely to the plaintiff's claim. But it is impossible, upon a summary application, to go into the question of truth or falsehood of facts and unfair comment thereon. This method of inquiry is that invoked in matters of newspaper libel, and is not pertinent to the question of whether there has been a contempt of Court in disturbing and hampering the due course of trial and the due administration of justice. The statements and comments of the newspaper are directed to municipal electors, and will have and can have no influence upon the proper conduct of the litigation and the due attainment of an impartial trial.

The words of Cottenham, L.C., quoted by Blackburn, J., in *Skipworth's Case* (1873), L.R. 9 Q.B. 219, 230, 235, are apposite: Comments in a pending case must be such as to manifest that "the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course." If the tenour of the article is such as to be likely to prejudice the proper conduct of the case, to create a feeling against the litigant, and so to affect the minds of those who may be charged with the trial, then the disciplinary power of the Court should be exercised. This arbitrary jurisdiction, from which there is no appeal, should be sparingly and carefully exercised. The word of caution as expressed by Wright, J., in *In re "Finance Union"* (1895), 11 Times L.R. 167, 169, is to be emphasised: "The jurisdiction . . . is special, and ought . . . not to be exercised except when there is a case made out shewing that it is probable that the publication will substantially interfere with a fair trial. . . . It is no part of the functions of the Court to see that 'reprehensible' articles are not published in the Press."

I do not suggest that the article in hand is to be called "reprehensible," and I think the affidavit of the editor in which he justifies his action is sufficient as to that aspect of the case.

I see no reason to withhold costs—to be paid by the applicant to the opponents after taxation.

The affidavits on which the motion is based appear to be filed too late; I have not dwelt on this irregularity, but, over-passing it, dispose of the application on its merits. *Motion refused.*

[NOTE: Upon the trial of the action, the state of facts disclosed was such that the plaintiff's counsel admitted that the case could not be maintained, and it was dismissed.]

GUNN v. HUDSONS BAY CO.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 12, 1915.

1. PLEADING (§ I S—146)—STATEMENT OF CLAIM—STRIKING OUT—VEXATIOUS ACTION—BUILDING CONTRACT.

A statement of claim will be regarded as vexatious, and will be struck out, if its purpose is an attempt to obtain a further interpretation and reformation of a building agreement which was already dealt with in a previous action, and the action stayed upon a reference to arbitration under the terms of the agreement, to ascertain the amount recoverable thereunder.

[*Gunn v. Hudsons Bay Co.*, 18 D.L.R. 420, referred to.]

Statement

APPEAL from judgment of Curran, J., affirming Order of referee.

E. P. Garland, for appellant, plaintiff.

S. J. Rothwell, and *H. A. Bergman*, for respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—The details of the former suit and the complications arising therefrom are set forth in the judgment of Perdue, J., and need not be repeated by me.

The statement of claim in this suit is chiefly to ask for a judicial interpretation of the written agreement; incidentally and by way of alternative relief, the plaintiff asks for a reformation of that agreement, alleging in vague and inapt language that it does not contain all the terms of the contract. The chief part of the statement of claim was therefore vexatious. The Referee ordered the case to be struck out, from this the plaintiff appealed to Curran, J., who supported the Referee, but offered the plaintiff the alternative of striking out the vexatious portions of the statement of claim and leaving the action one for reformation only. This was refused by the plaintiff, and he appealed to this Court.

A large portion of the statement of claim was undoubtedly vexatious, and, without considering the question whether the existence of the former suit may be held to be a defence to an action for reformation of the written contract, I think it would be well to dismiss this appeal without prejudice to the plaintiff in commencing a new action for the reformation of the written agreement, or in applying to amend in the first action as he may be advised. Nothing herein shall prejudice the defendants in raising as a defence to any new action for reformation, the commencement or existence of the former suit in which the matter

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in dispute is stayed pending arbitration, or in opposing an amendment in the first action.

Subject to the above observations, the appeal must be dismissed with costs.

RICHARDS, J.A.:—I concur in the judgment of the Chief Justice.

PERDUE, J.A.:—In February, 1914, the plaintiffs commenced an action against the defendants to recover the balance due under a contract in writing for the erection of a building, the architect having issued his final certificate as to the completion of the building and the amount due to the plaintiffs. In that certificate the architect allowed a sum of $512 for the removal of 2 old buildings which stood on the premises. The defendants admitted the completion of the building and were willing to pay the sum found due by the certificate except the item of $512, which they claimed was included in the contract price. The defendants applied to the Referee in chambers under the Arbitration Act, sec. 6, to have the action stayed on the ground that the matters in dispute were by the agreement referred to arbitration. The Referee granted an Order staying proceedings on this ground and this Order was confirmed by Macdonald, J., and again by this Court on an appeal from him. The case is fully reported in 18 D.L.R. 420, 24 Man. L.R. 388. The arbitration has not been proceeded with.

In May, 1915, nearly a year after the above appeal was decided, the plaintiffs brought a second action against the defendants in which, after setting out the agreement set out in the statement of claim in the first action, they allege the completion of the building, the granting by the architect of a final certificate in which final certificate the architects certified that the plaintiffs were entitled to $512 as an extra in respect of the removal of the old building, the refusal by defendants to pay the above sum, the commencement of the first action and the stay granted. The principal paragraphs are 9, 10 and 11, which are as follows:—

9. Neither party has appointed an arbitration to act for them in the matters aforesaid but the defendant has signified to the plaintiffs that on the said arbitration it will contend that by the contract aforesaid, the said buildings were to be removed by the plaintiffs without any compen-

sation additional to the compensation provided for by the said contract for the other work therein referred to, and that it is not open to the plaintiffs to give extrinsic evidence upon such arbitration, that as the fact was, the agreement of the parties was that the plaintiffs were to remove the said buildings but that compensation therefor was to be additional to the compensation set by the said contract for the other works therein referred to be paid by the defendant to the plaintiffs.

10. The plaintiffs say (as the fact is) that the said contract is not open to the interpretation above mentioned put thereon by the defendant, and that under the contract aforesaid, no compensation was set for the removal of said buildings and the plaintiffs are entitled to be paid therefor the fair value of said work in addition to the compensation set by the contract, but, if however, the Court should be of the opinion that, under the said contract or agreement as written the defendant was not liable to pay to the plaintiffs for the removal of the said buildings, compensation additional to the compensation set by the said contract for the other works therein referred to, the said contract should be rectified, and says that the verbal agreement between the plaintiffs and the defendant was that the plaintiffs were to remove the said buildings and that compensation therefor additional to the compensation set by the said contract for the other works therein referred to should be paid by the defendant to the plaintiffs.

11. The written contract referred to above was prepared by the defendant's agent and was intended to embody the agreement made as stated in paragraph 10 hereof, which was the only agreement made by the plaintiffs and the defendant, and was signed by the plaintiffs and the defendant in the belief that it did embody the same, and it was by mutual error and mistake that same was omitted therefrom.

The relief claimed is, first, a declaration that, under the contract, no compensation was set for the removal of the buildings and that plaintiffs are entitled to be paid the fair value of that work; secondly, that in the alternative the written contract be rectified so as to embody the agreement actually made.

On the application of the defendants, an order was made by the Referee striking out the statement of claim in the second action, presumably on the ground that it was vexatious. An appeal from this Order to Curran, J., was dismissed. From the recital in the Order dismissing the appeal, it appears that counsel for the plaintiffs declined to accept leave to amend the statement of claim in the second action so as to confine it to one for the rectification of the contract in question. The plaintiffs bring the present appeal from this Order.

In the first suit the plaintiffs based their claim upon the written agreement and upon the architect's final certificate

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given thereunder. On the argument of the motion to stay proceedings in the first suit, it was shewn that the architect had treated the item of $512 as an extra that should be paid while the defendants, on the other hand, contended that it was covered by the contract. In par. 7 of the present statement of claim the plaintiffs allege that in the final certificate the architect certified that the plaintiffs were entitled to $512 as an extra in respect of the removal of the old building. The question as to whether this item was a proper extra or was included in the contract price was considered in the first suit to be a subject for arbitration under the terms of the contract. No question was raised or suggested in the first suit as to there being anything wrong with the written contract or anything omitted therefrom.

In the second suit the plaintiffs in effect state that they are apprehensive that the defendants will contend that the contract covered and included the removal of the building and that defendants will object that it is not open to the plaintiffs to give extrinsic evidence before the arbitrators of a verbal agreement between the parties that the plaintiffs were to be paid additional compensation for the removal of the buildings. But they still rely on their interpretation of the written agreement as it stands, and will only set up the alleged verbal agreement in the event of the written agreement being held to be insufficient to maintain their claim. It appears to me that the attempt made in the second suit to obtain a further interpretation of the written agreement which had already been dealt with and, to a certain extent, interpreted in the first suit is vexatious. It is a case of bringing a new suit to effect a purpose which might have been effected in a suit already brought: *Williams* v. *Hunt*, [1905] 1 K.B. 512.

The allegations in the second suit upon which the claim for rectification is founded, appear to be indefinite and vague. The alleged verbal agreement was that compensation for removing the buildings was to be paid. This alleged agreement might be something apart from the building contract altogether and not subject to the award of the architect. In that case there would be no necessity for a rectification of the written agreement providing for the erection of buildings merely. The difficulty of

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the plaintiffs appears to be that they do not seem to know whether they should rely on the written agreement or set up a verbal agreement. If the second action were allowed to proceed we should have an arbitration pending in the first suit respecting the plaintiffs' claim under a written agreement, and at the time another suit proceeding to interpret or to reform that same agreement.

The plaintiffs had, during the several arguments that took place in the first suit, ample opportunity of learning the position the defendants intended to take in respect of the written agreement. The plaintiffs must then have been aware of the alleged verbal agreement now set up by them and if they intended to rely upon it and believed they could establish it, they should have amended their statement of claim in the first suit and have made a case for rectification.

I think the appeal should be dismissed with costs, subject to the saving clause contained in the judgment of the Chief Justice.

CAMERON and HAGGART, JJ.A., concurred.

Cameron, J.A.
Haggart, J.A.

Appeal dismissed.

N. S.

S. C.

The KING v. ROACH; Re PAYZANT MEMORIAL HOSPITAL.

Nova Scotia Supreme Court, Graham, C.J., Russell, Longley, Drysdale, Ritchie and Harris, JJ. November 16, 1915.

1. MANDAMUS (§ I D 1—125)—TO MUNICIPAL CORPORATION — COMPELLING APPOINTMENT OF HOSPITAL BOARD.

An application to compel a municipal corporation by mandamus to appoint a minority representation in a board of trustees in the management of a hospital, in pursuance of a provincial statute divesting the municipality from the control of the management, the property and funds whereof vested in the municipality under the terms of a charitable bequest, and where the appointments sought by the mandamus would otherwise prove futile, was dismissed by an equally divided court.

Statement

APPLICATION for writ of mandamus directed to the mayor and town council of the town of Windsor to compel them to nominate and appoint from the members of the town council two members of the Board of Trustees of the Payzant Memorial Hospital.

V. J. Paton, K.C., and *L. H. Martell*, for the applicant.

H. Mellish, K.C., and *W. M. Christie*, K.C., for the mayor and town council.

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THE KING v. ROACH.

Graham, C.J.

S. Jenks, K.C., for the Attorney-General.

GRAHAM, C.J.:—Clause 39 of the will of the late Godfrey Payzant will be found in the Acts of 1903, ch. 128, as follows:—

I will and direct that my executors shall transfer and pay over to the corporation of the town of Windsor, the sum of $20,000 in cash, or in securities at their market value, or partly in cash and partly in securities, in the discretion of my executors to be received by the said corporation to assist in building, maintaining and supporting a hospital for the sick, diseased and suffering of all classes, so soon as a like sum of $20,000 shall be procured by the corporation by a tax on the citizens, or from private donations, or otherwise, to be added to this bequest; but should the corporation fail to raise the said additional sum of $20,000 within 7 years after my decease, then this bequest to said corporation shall lapse and be void and my executors shall pay over to and divide the said $20,000 share and share alike between the said G. P. Payzant and the said C. B. Paulin.

One thing is clear that this was a conditional gift to the corporation of the town of Windsor to be received by it on a trust therein mentioned with a provision for lapsing if the condition was not performed within seven years.

The town raised by private subscription $6,000 and applied to the government of the province for a gift of $14,000 to supplement the sum of $6,000. There has also been a specific gift of $1,500 to the town, made by W. H. Blanchard, deceased upon special terms for this hospital.

In 1902, ch. 40, will be found the conditions upon which it was proposed to make the gift of $14,000 to the town of Windsor by the government. Then doubts having arisen as to whether, as against the Payzant beneficiaries, the town was entitled to the gift from the Payzant estate in consequence of the conditions imposed, the town council and the government entered into a compact to rescind the resolutions of 1902, and what they then agreed to will be found in the Acts of 1903, ch. 128. Thereupon, 1902, ch. 40, was repealed. Upon this legislation an opinion of this Court, which previously had been taken adversely to the project, was again taken as to whether the Payzant trustees could lawfully pay over to the town of Windsor the gift, and in pursuance of that opinion the legacy was paid over. (See *Paulin* v. *Windsor*, 36 N.S.R. 441, 447.)

By the Act of 1903, ch. 128, it appears that resolutions previously passed by the town of Windsor were ratified and con-

firmed. And the compact of the government was that this gift of $14,000 was to be "applied and used in all respects in accordance with the said clause in the will, etc.," and without conditions. That it was a gift to enable the town to take advantage of the clause in the will and receive this legacy.

And by sec. 3 the government was authorized to grant the sum of $14,000 to assist in building, maintaining and supporting a hospital for the sick, diseased and suffering of all classes, and as a gift to said town for such purposes without conditions.

Afterward, on November 28, 1905, by-laws were made by the town council in reference to the Payzant Memorial Hospital and for its management. These by-laws were submitted to and approved by the Governor in Council, December 19, 1905. One of the by-laws which was passed was as follows:—

2. The said hospital shall be governed by a board of five persons to be known as the "Payzant Memorial Hospital Board," which shall be composed of three members of the town council, to be appointed annually by the council, immediately after the annual election, and who shall hold office until their successors are appointed, one person being a resident of the town, and who is not a member of the council to be appointed by the council, and to hold office during the pleasure of the council, and one member to be appointed by the governor in council.

There is no doubt that a municipal body or corporation like the town of Windsor may accept a gift in trust for purposes of a charitable or public nature, and having accepted it, is bound by the acceptance and the terms thereof: *Atty.-Gen'l.* v. *Shrewsbury*, 6 Beav. 220; *Atty.-Gen'l.* v. *Leicester*, 7 Beav. 176; *Higgins* v. *Turner*, 171 Mass. 591; *Atty.-Gen'l.* v. *Catherine Hall*, Jac. 381, 392; *Atty.-Gen'l.* v. *Caius College*, 2 Keene, 150.

Under the provisions in force, the town corporation acted as the trustees of this hospital, and the funds, until the year 1915, when someone promoted in the legislature, without notice, the Act of 1915, ch. 74. This appears in the first affidavit of Mr. Roach, mayor of the town:—

8. The town council of the said town since the erection of the said hospital has successfully operated the same with the aid of the trustees appointed under the said rules and regulations for the past nine years. No complaints were ever made to the town council as to the management of the said hospital, nor was any application made to the council to make any change in the said rules and regulations, or in the way and manner of appointing the trustees or board of management thereof.

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9. I am informed and believe that a bill was presented to the provincial legislature at the last session thereof and that an Act was passed —the same being ch. 74 of the Acts of 1915—by which the mode and manner of the appointment of the said board of trustees was changed, but the said bill was never read before the said town council, nor was any notice that the said legislation was to be applied for ever given or brought to the notice of the said council.

This Act of 1915, ch. 74, provides that all the affairs thereof (*i.e.*, of the hospital), shall be subject to the control and management of a Board of Trustees consisting of five members, of whom three shall be nominated and appointed by the Governor in Council and shall hold office during pleasure, one of whom shall act as chairman of said Board, and the remaining two members thereof shall be annually nominated and appointed by the town council of the town of Windsor, from the members of the town council. Then it constitutes the Board when so nominated and appointed a body corporate.

Purporting to act under this legislation the government has nominated three persons as members of such Board. The town council, by resolution passed by all its members excepting Charles D. Smith, one of the government nominees, has declined to designate any members to act on this Board. The said Charles D. Smith could not secure a seconder for his proposed motion to make such a nomination. Now Charles D. Smith, one of the government nominees, producing an affidavit of Thomas B. Smith as well as his own, is moving this Court for a prerogative writ of mandamus to compel the council to nominate two members to act on this Board.

If this legislation is construed as the applicant asks to have it construed, there will be a gross interference with vested rights. The property and funds vested in the corporation of the town, both by the will of Payzant and by the legislature by compact, as trustee, will be taken from it and given to another corporation as trustee. The management of the affairs of the hospital will be taken from the present managers and given to another body.

It would be a total disregard of the rights of the town corporation to take from it the majority representation which it had in the management of the hospital and give the majority

representation to the government. Anyone who knows about the effect of having a majority in a corporation or on a Board knows what that means in respect to the body. It means control.

I think it would be a violation of a compact. The time for lapsing of the Payzant legacy was running when the town council received this gift from the government, and it was in danger of lapsing, but it was secured, and it was secured so that the terms of the trust of the will were satisfied on the one hand and the government was satisfied to make the grant without conditions.

This very subject of the Board of Trustees and the right of the town council to have a majority representation on such Board had been provided for in the Act of 1902, ch. 40, which was scrapped in order to get the legacy, fast lapsing, from the Payzant trustees. And it does seem to me that it would be a little extraordinary that afterwards the government should not only now impose conditions but impose conditions which are prejudicial to the interests of the corporation of the town of Windsor, in taking away from the town council the controlling interest on the Board and give the controlling interest to the government. If the applicant's contention is correct, Payzant's gift to the town council would go to the new Board, a corporation in which the council has lost its controlling interest. The person who promotes legislation of that kind would have to complete the legislation he promotes with great care. There is nothing in this legislation which transfers the title and property of the hospital, the Payzant gift, the private subscriptions and the government gift, vested expressly by the terms of the trust and by the terms of the legislation in the corporation of the town of Windsor, to the new corporation, the Board of Trustees when it is nominated and appointed under this legislation, or enables it to be transferred when this happens.

Express legislation would be required to divest this property out of the corporation of the town and vest it in the other corporation, the proposed Board.

The enactment that all the affairs thereof (*i.e.*, of the hospital) shall be subject to the control and management of a Board

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of Trustees, etc., does not expressly or even by implication, effect that transfer. When would it vest? What provision is there for the vesting of the funds held by the town subject to the trusts or the legal title of the land on which the hospital is situated?

The legislature never could have contemplated anything but an enabling Act, no doubt, passed hurriedly, to be used if the town council consented to come into this new Board. If it did not consent then the statute cannot be used and no harm will be done. But it was not intended to be operative whether there was consent or not. It is like one of the many acts of incorporation passed by the legislature every session, with most drastic powers.

If there is organization under it and a company formed, well and good, but if not, the provisions are abandoned. Here, there can be no organization until the town council consents. It will have to have the five nominees accept office before it can organize, and except by consent of the council the Board cannot obtain possession of the property or the funds.

The legislature apparently intended that the title and funds should remain vested in the town corporation as they now are, although that is not the contention of the applicant. But as to the management of the affairs, subject of course to the consent of the council, that is to be done by this proposed Board.

When is the appointment of the trustees to take place under the statute? The present incumbents were presumably appointed after the election of the councillors in February, and they hold for a year not yet elapsed. They have vested rights not repealed by this statute.

In respect to the law, I quote a passage from Craies on Statutes, 2nd ed., p. 123:—

In re Cuno, 43 Ch.D. 12, 17, Bowen, L.J., said:: "In the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature." Therefore rights, whether public or private, are not to be taken away or even hampered by mere implication from the language used in a statute, unless, as Fry, J., said in *Corporation of Yarmouth* v. *Simmons*, 10 Ch.D. 518, 527, "the legislature clearly and distinctly authorize the doing of something which is physically inconsistent with the continuance of an existing right."

"in order to take away a right," said the Judicial Committee in *Western Counties Railway Co.* v. *Windsor*, 7 App. Cas. 178, 189, "it is not sufficient to shew that the thing sanctioned by the Act, if done, will, of sheer physical necessity put an end to the right; it must also be shewn that the legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights." (And p. 126): "This result," said Lord Westbury," follows of necessity consistently with every rule by which Acts of Parliament ought to be interpreted, especially the rule that they should be so interpreted as in no respect to interfere with or prejudice a clear private right or title, unless the private right or title is taken away *per directum*."

In addition to the case of the *Windsor, etc. R. Co.* v. *Western Counties R. Co., supra*, I wish to refer to the judgment in that case of Ritchie, E.J., when it was in this Court. It will be found in Russell's Equity Dec., p. 303. There it was proposed to give such a construction to legislation of the Dominion Parliament, 1874, ch. 16, that it would enable the government to take from the one company the Windsor Branch Railway and give it to the other company. He cites Maxwell on Statutes, 269: He continues:—

So the legislature in granting away in effect the ordinary rights of the subject should be understood as granting no more than passes by necessary and unavoidable construction. It is difficult to imagine a case where the very strictest construction would be more applicable than where, of the two parties to a contract, treating the Act as a contract, the one is to give and the other to take what belongs to a third party. It is impossible to believe that the legislature ever intended to do such an injustice. . . . To put any other construction on the Act, and to hold that there existed a deliberate intention of violating their contract with one party to enable them to enter into a contract with another, would be derogatory to the character of the government and of the legislature, and as I believe no such intention existed, so I believe that the words used do not necessarily indicate such an intention.

I may say as a fact that the government already had acted on the other construction and taken possession of the railway.

Then he quotes from cases: *Ward* v. *Scott*, 3 Camp. 284; *Dawson* v. *Paver*, 5 Hare 415; *Scales* v. *Pickering*, 4 Bing. 448; *Webb* v. *Manchester*, 4 My. & Cr. 116; *Stockton and Darlington* v. *Barrett*, 7 M. & G. 870.

This view was supported by the Judicial Committee, and in addition to the passage already quoted in Craies on Statutes, Lord Watson also said, p. 190:—

There is a great difference between giving authority to make an agree-

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ment and authorizing it to be made and forthwith carried out so as to override and destroy all private rights that may stand in its way.

But there is another view: If this contention is wrong I still think the appointment of two nominees would be futile. The property and funds will be in one corporation, and the management in another. And such a management is not likely to be very successful without having possession of the property and the funds.

I also agree that the issuing of a mandamus will be futile in another respect. While the town council may be compelled to nominate two members of the council to be members of the proposed new Board, there is nothing which requires or can compel the nominees to accept the positions or act therein. And until they do accept or act as such members the Board cannot organize or even exist. There is no penalty provided for not accepting or acting.

I am satisfied from the resolutions passed by the council and the second affidavit of Mr. Roach that any member of the council which they may nominate will refuse to accept the position or to act.

In my opinion, the application for the writ should be dismissed with costs.

Russell, J.

RUSSELL, J.:—The first objection to the issue of the mandamus in this case that I have noted is that the provincial government by appointing a member of the town council as one of its nominees on the Board has restricted the choice of the council by reducing the number from among whom it may select its representatives on the Board. I think it is a good answer to that contention to say that the member of the town council so appointed by the government either would or would not have been appointed by the council. If he would not, the council is still free to appoint the members it would wish to have on the Board. If he would, the effect of the government's action is to give the town council three of its members on the Board instead of two only, as limited by the Act, which is surely not a grievance.

It is further contended that the issue of the mandamus would be futile because the members to be appointed may not

be willing to serve, and there is no law that will compel them to serve against their will. I do not think it can ever be an admissible answer to an application for a mandamus to assume that a person appointed to discharge a public duty will refuse to do so simply because there is no law to compel him. Even if all the members of the council may have announced in advance, their intention to refuse to serve, I think they should have a *locus panatentia* afforded to them by the issue of the writ. In short, so far as this contention is concerned, I think we should have a right to assume that if the mandamus is issued and the council appoints its nominees, the persons so appointed will not persist in refusing to perform the duties devolving upon them in connection with this public trust. The case of *The Queen v. Vicar of Tottenham*, 49 L.J.Q.B. 870, cited in support of this contention, does not seem to me to bear any resemblance to the present case. In that case a mandamus was applied for to compel the defendants to insert a notice of a motion by a ratepayer to change the hour for holding the meetings of the vestry.

The decision of the Court applied to, which was affirmed on appeal, was, as I understand it, that the summoning of the meetings of the vestry rested with the vicar or the churchwardens, or both, and therefore, they must have the power to fix the hour of meeting. Whatever was said by the Judges, or any of them, in the course of the argument or decision, must be read in the light of this condition of the law. No principle of interpretation is better settled than this. The mandamus to compel the inserting of the notice of motion would be futile because the motion was itself an attempt to usurp a power not belonging to the applicant, and the mandamus would be defeated by the proper and legitimate action of the defendants. Surely that is a different case from that of a mandamus which we are told will be rendered futile, not by a legitimate exercise of the power of the defendants, but by an anticipated refusal of public functionaries to discharge duties imposed upon them by the law of the land.

It is further contended that the act involves confiscation if carried out as it appears on its face, and therefore some manner of construing it must, if possible, be discovered which will not

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involve this injustice. If there were any construction possible, other than the one which will place the control and management in the proposed Board of Trustees, it might be worth while to discuss the reasons for resorting to it. The act is in its terms so plain and unambiguous that I am at a loss to suggest any other construction than the one so clearly expressed.

But does it involve confiscation or injustice of any kind? I am unable to perceive that it does. It is conceded that the town of Windsor could not provide the money necessary to entitle it to the legacy conditionally bequeathed by Mr. Payzant. It contributed only $6,000 of the necessary $20,000, the balance, $14,000, having been supplied by the provincial government, which also, as I understand, is bound under the general law to contribute quite considerable sums from time to time based upon the services performed by the hospital. I am not forgetting that the institution has received legacies from other sources amounting to $1,500 and upwards. But even so, the balance remains heavily in favour of the government as compared with the contributions of the town, and I must confess that I fail to discern any intrinsic unrighteousness in the desire of the province as represented by its legislature and government, to have a controlling voice in the management of an institution to the maintenance and support of which it has contributed so much the larger proportion of the funds. I think it is quite possible to over-emphasize the circumstance that Mr. Payzant made his bequest to the corporation of the town of Windsor. He was not contemplating any benefit to the town beyond that of having the hospital established there, of which nobody purposes to deprive it. I see no reason for assuming that he must necessarily have contemplated that its continued management and control would be in the town council. He must have known of other institutions within the town, established for the benefit of the town, which were not exclusively controlled by the town council. Had he been endowed with the gift of prophecy he must, no doubt, have assumed that as more than two-thirds of the money required for the establishment of the hospital was going to be contributed by the province, the provincial government would be likely to claim a preponderating voice in the man-

agement. But he was not a prophet, and we must look at his will as he made it. He gave his money to the town "to assist" in building and maintaining a hospital. He no doubt assumed that it would be established in or near the town of Windsor. He could have no other desire than that it should be under the best management possible, and the ultimate authority has determined that the best possible management will be that provided for by the Act of 1915. If he had intended to confer some benefit upon the town of Windsor of which this Act would deprive the beneficiary, I should struggle, as some of my learned brethren are doing, to find some other construction than the very obvious one of the unambiguous language of the enactment. The testator, however, did not intend to confer any benefit on the town which this Act seeks to take away. The Act is merely, as it seems to me, a measure for changing the manner of administering the trust, leaving the beneficial interest in the bequest exactly where it was before, and where it was intended by the testator to remain. I think, for these reasons, that the mandamus should be issued.

Longley, J.

LONGLEY, J.:—This is an application for a mandamus. It seems to me that the chief matter for the consideration of the Court is the validity of the Act passed in the session of 1915. If it is sound and within the powers of the body that passed it, it seems to me that it is necessary to grant the mandamus.

The Governor in Council have now nominated three of the members of this Board, and the council refuse to appoint the two they are required to do. I think that the mandamus should issue to the council to appoint them. It does not seem to me that it varies the situation in the remotest to say that the town will not make this appointment, or that the members of the town council will not serve. These are things that could occur every day, and would have no weight whatever with the Court. The money that is invested in the hospital should be made available for the present Board now appointed, and if the town council hesitates about submitting the money to this present Board for the purposes of the hospital, an application can be made to the Court to compel them to do so. There seems to be no justification or excuse for regarding the action of this Court as futile

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simply because the mayor and other councillors of the town have so far indicated their opposition to it. The order should pass.

DRYSDALE, J.:—The town council opposes the motion and complains that it was not consulted by the legislature before the passage of the Act. This complaint I do not understand. I find the Act on the statute book. The subject-matter is, I think, beyond any question, within the competence of the local legislature, and the duty of the Court, as I understand our duty, is to construe it. I refrain from comment either on the wisdom of the Act or on the method of procedure the legislature saw fit to adopt in its passing. That was for the houses of parliament, and not for us. If I am able to understand what seems to be a very plain Act on its face, it is simply adding clauses to the Act of 1903, providing for the management and control of the hospital, that arose under and by reason of the 1903 legislation. I ask myself why the town council should refuse to obey the terms of very plain legislation which says, that such town council shall annually nominate and appoint two members of the Board of management of the hospital from the members of the council. For myself I have heard no satisfactory answer for such refusal. Counsel argued that the writ should not go because it would be futile to issue it. I am aware that the authorities say the writ will not issue when the party complained of can obviously render the mandamus futile. I am not satisfied, however, that that either can or will be done here if the writ is issued. I do not think it is any answer to this application (to compel the council to perform its plain statutory duty) to be told as we were in effect told by counsel that if we issue the writ the council will do something that will spoil its effective operation, that is to say, arrange with the councillors they may appoint to decline service. This, to my mind, is not an answer, and conduct that should not receive approval, if I am right in construing the Act of the legislature as imposing a very plain duty on the council to appoint. Before assuming that any such bargain could be made with men holding a public position in the town I would wait until appointment and until the exercise of their own good judgment therein.

An argument was made before us that vested rights were

interfered with and that by reason thereof the writ being discretionary should not issue. I do not understand this argument. The Act, if read as it is on its face, is a plain amendment to the 1903 Act, adding clauses providing for the management of the hospital and for nothing else. It neither seeks nor pretends to interfere with any rights vested or otherwise, save in so far as the management of a hospital can be said to interfere with rights, and such management can very properly be the subject of legislation in our local legislature.

I am unable to see any answer to the application and, for myself, I would direct the writ applied for to issue.

Harris, J.

HARRIS, J.:—The objection urged against the issue of the mandamus is that it would be futile or nugatory for two reasons: (1) Because none of the town councillors will accept the office, and (2) Because the hospital building and the funds from which the income to carry on the work of the hospital is largely derived are vested in the corporation of the town of Windsor, and controlled by these same town councillors, and they will not permit the building or funds to be used by the new Board of Trustees.

The authorities, I think, clearly shew that where a mandamus would be futile it should not issue.

In Hal's. Laws of England, vol. 10, pp. 101, 102, *R.* v. *Axbridge Corporation*, 2 Cowp. 523; *R.* v. *Wilson*, 43 L.T. 560; High's Extraordinary Legal Remedies, p. 19; see Encyc. of Pleading and Practice, p. 493.

This being the law applicable, the question is whether the writ would be nugatory for either of the reasons mentioned.

The Act of 1915, restricts the town council in making its appointments to members of its own body. It says they are to be appointed "from the members of said town council." The members of the town council say they will not accept the office and there is no law, so far as I am aware, to compel them to do so. If the Act had not restricted the choice to the members of the town council it would have been a different matter, but as there is no law to compel them to accept and they refuse to do so, they have it in their power to render the mandamus nugatory in the same sense and to the same extent as the Axbridge corporation or the vicar in the two cases I have referred to.

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The other ground urged raises a question as to the interpretation to be placed upon the Act of 1915. Does that Act divest the right of the town of Windsor in the hospital building and the funds held by the town for hospital purposes?

There are three rules for the interpretation of statutes which I think must be applied: (1) Regard must be had to the existing law and generally to all circumstances which surrounded the legislature at the time the Act was passed. (2) An enacting clause which interferes with existing rights must be construed strictly. (3) It is never assumed that parliament has given powers which would infringe existing rights even though the Act would be inoperative without them.

The authorities, I think, clearly support these propositions: *Young* v. *Mayor of Leamington*, 8 A.C. 517 at 526; *Taff Vale R. Co.* v. *Davis & Sons*, [1894] 1 Q.B., at p. 51; Maxwell on Statutes, p. 461, and cases cited; *Metropolitan Asylum District* v. *Hill*, 6 A.C. p. 203; *Western Counties R. Co.* v. *Windsor, etc., R. Co.*, 7 A.C. 178; *Wells* v. *London, Tilbury, etc., R. Co.*, 5 Ch. D. 126, 130; *Thomson* v. *Gould*, 79 L.J.K.B. 911.

If we approach the consideration of the Act of 1915 in the light of these authorities it will materially assist in arriving at a proper interpretation of the Act.

The legislature must be taken to have known of the previous legislation affecting the question in which a copy of the clause of Payzant's will is incorporated, and they must have known that the new Act had not been submitted to or approved by the town council of the town of Windsor. One cannot impute to the legislature that it passed an Act affecting the rights of the town of Windsor without first ascertaining whether or not the town council knew or had notice of the Act. It would be the first question asked by the committee.

We find no express words divesting the property and vesting it in the new corporation; no reference to compensation to the town of Windsor; and, in view of the authorities, I must decline to hold that the legislature intended by this Act to take the $20,000 left by Payzant and other assets and property belonging to and vested in the corporation of the town of Windsor and hand them over to a new corporation created without the knowledge

or consent of the town. So far as Payzant's money is concerned it would be applying it in a way not contemplated by his will. He had confidence in the town council of the town of Windsor and he left his money and the control of it to that corporation. To hold otherwise would be to suggest that the legislature contemplated (to use the words of Bramwell, L.A.), "a simple case of confiscation, and we ought not to suppose that this was intended by the legislature."

What I think we must say judicially is, that the legislature thought and expected that the town council of the town of Windsor would acquiesce in the appointment of the new Board and would acquiesce in the placing of the hospital and its income in the hands of the new Board, and that the legislature knowing that the town had no notice of the new Act expressly refrained from vesting the property in the new corporation.

If we read the Act in that way, as under the authorities I think we are bound to read it, then we must hold that the hospital and its funds are vested in the town, and were not divested by the Act.

The fact that the legislature made no provision for filling up the two seats on the Board in case the town councillors refused to accept appointment seems to afford additional reason for thinking that the Act was only intended to be operative if the town council acquiesced in the matter.

Now that we know the town council declines to acquiesce in handing over its property and income to the new corporation, it is apparent that the object of the Act fails because without the use of the hospital and the income of the moneys vested in the town, the new Board of Trustees would be powerless.

I think the mandamus would be futile for the two reasons I have mentioned.

Several other objections were raised to the application, but in view of the conclusion I have reached it is unnecessary to consider them.

The application should, I think, be dismissed.

RITCHIE, J., concurred with HARRIS, J.

Ritchie, J.

Court divided: Application dismissed.

B. C.

C. A.

MAUVAIS v. TERVO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. November 2, 1915.

1. VENDOR AND PURCHASER (§ I C—10)—DEFECTIVE TITLE—EXPROPRIATION PROCEEDING—PURCHASER; RIGHT TO RESCISSION.

An expropriation of a portion of land which is subject to a contract of sale is not an act of the vendor as affecting his covenant for title, and will not entitle the purchaser to a rescission of the contract on that account.

[*Reynolds* v. *Crawford*, 12 U.C.Q.B. 168; *Payne* v. *Meller*, 6 Ves. 349; *Robertson* v. *Skelton*, 12 Beav. 260, applied.]

Statement

APPEAL by plaintiffs from a judgment of Hunter, C.J.B.C., dismissing action for rescission of a contract for sale of land.

E. V. Bodwell, K.C., for appellant, plaintiff.

W. J. Taylor, K.C., for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This action is for rescission of an agreement whereby the defendant agreed to sell certain land near the city of Victoria to the plaintiff, part of the purchase money being payable in instalments at future dates. The purchaser was entitled to possession and was let into possession. Prior to the date of the sale a railway company had projected a line of railway through these lands, which were building lots, but did not file maps or plans in accordance with the B.C. Railway Act, so as to charge the lands through which the railway was projected, or at all events, so as to affect the title of the lands in question. Subsequently to the date of the agreement of sale these plans were duly filed, and it is admitted by council on both sides that it was from that date that these lands were affected or charged and made liable to compulsory purchase.

Two questions are involved in this appeal. The plaintiffs claim that the said agreement was procured by defendant's misrepresentation; that he told the defendant he did not want the lots unless the title were clear, and that the defendant replied, "There is not a scratch of a pen against the title." The trial Judge found that there had been no misrepresentation or wrongful concealment of fact by the defendant. Having heard the witnesses and having observed their demeanour in the witness box, he was better able to decide that fact than we are. There is much to support his conclusion of fact, and I therefore think it ought not to be disturbed. That the title was clear at the date of the agreement of sale is admitted. Defendant's

knowledge of the railway company's intentions appears to have been very vague. On the other hand the plaintiff admits a conversation, prior to his signing the agreement, with Warren, defendant's agent, concerning the railway, and that Warren told him there was some question about the railway coming there. Thereupon the plaintiff gave instructions that the matter should be looked into, and Warren, acting in this instance for plaintiff, employed a solicitor to make a search but no plans were found.

I think the plaintiff was sufficiently put upon inquiry: *Kennedy* v. *Green*, 3 Myl. & K. 699, at 719.

The second question for decision arises on Mr. Bodwell's submission that as the defendant had covenanted that upon the completion of payment of the purchase price he would convey by good and sufficient deed in fee simple all the said pieces or parcels of land described, and that the deed should contain the usual statutory covenants, and that because of the subsequent taking by the railway company of a right of way through these lands which would render the fulfilment of his covenant impossible, the agreement should be rescinded and the plaintiff repaid the purchase moneys already paid by him.

This raises a question not entirely novel, but one upon which there has been no direct decisions in our Courts. The question was raised but not decided in *Reynolds* v. *Crawford*, 12 U.C. Q.B. 168. The principle upon which, in my opinion, it must be decided is that applied by Lord Eldon in *Payne* v. *Meller* (1801), 6 Ves. 349. In that case the houses which were the subject-matter of the contract, were destroyed by fire between the date of the agreement for sale and its completion. Again, the same principle was applied by Lord Langdale, M.R., in *Robertson* v. *Skelton*, 12 Beav. 363, where it appeared that the buildings agreed to be sold fell down between the date of the contract of sale and its completion. The principle applied in these cases is concisely stated in the argument in the latter case in these words:—

In equity, an estate agreed to be purchased is considered the estate of the purchaser from the time of the contract, and the purchase money from that time is held to belong to the vendor. The consequence is that

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if after the contract the estate is improved in the interval, or if the value be lessened by failure of the tenants or otherwise, and no fault on either side, the vendee has the benefit or sustains the loss.

These cases are cited with approval in the latest text books: see 25 Hals. 368, 369; Addison on Contracts, 11th ed., 482; and Dart on Vendors and Purchasers, 7th ed., 290-91. This principle has been applied in the United States to cases like the present one: *Stevenson* v. *Lochr*, 11 Am. R. 36, 57 Ill. 509, in which it was held that:—

Where a contract is made for the sale of land, the vendor to give a warranty deed and between the time of the contract and the making of the deed a portion of the land is condemned for a railroad, damages for the taking of the land belong in equity to the purchaser, and he cannot treat such taking as an encumbrance and recover therefor on the covenants in the deed.

See also *Pinkerton* v. *Boston & Albany Rly. Co.*, 109 Mass. 527, and *Odell* v. *Gulf C. & S. F. R. Co.*, 22 S.W. Rep. 821.

Apart from the charge created by the railway company under statutory sanction since the date of the agreement, the defendant's title is admitted to be a clear title, in fact it appears to have been searched, and in effect accepted before the agreement was signed when the solicitor made the search in respect of the railway.

As I understand it, the defendant makes no claim to the compensation which will be paid for the land taken by the railway company. He may be entitled to have it so dealt with as not to weaken his vendor's lien, but that is a matter which does not affect the decision of this case. Although not decisive of this case, it may not be amiss to point out that, had the purchaser not been given time for his payments, and had the deed been given immediately, there could be no question that the plaintiff could not succeed on the covenant in the usual short form deed. That covenant is a covenant against the acts of the vendor, and the matter complained of in this action was not brought about by an act of the vendor. In my opinion, the appeal should be dismissed.

Martin, J.A.

MARTIN, J.A.:—I agree that the appeal should be dismissed, and only add some observations with respect to the contention that under the covenant for title this contract must be rescinded. Though there is not much authority in English or Canadian

Courts upon the point, yet the very similar case of *Reynolds* v. *Crawford*, 12 U.C.Q.B. 168, is sufficient to turn the scale. In it, Robinson, C.J., delivering the judgment of the Court, said, p. 173:—

The defendant could not help the land being taken by the railway company. A Court of equity would compel the plaintiff to accept and pay for the land, upon receiving proper compensation for the part taken by the company. (And again, p. 175):—

He (defendant) claims the right to treat his bargain as cancelled, because the railway company have exercised an authority which the law gives to them, and which neither the defendant nor he could prevent. If the defendant has in any point failed, which we do not see, the plaintiff has his remedy upon the agreement; but we cannot hold that by anything that was proved, the contract was rescinded.

Then there is the case of *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180, which was an action on a covenant contained in a certain lease whereby the defendant covenanted that neither he nor his assigns should or would during the term permit to be built any massuage, etc., on a paddock fronting the demised premises. Afterwards said paddock was compulsorily taken by a railway company under an Act of Parliament, and the company erected certain buildings thereon as authorized by said Act. The Court (Cockburn, C.J., Lush, Hannen and Hayes, JJ.), said, p. 186:—

The legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties.

It is true that there the Act of Parliament had been passed after the covenant, but I see no difference in principle between the subsequent passing of an Act of Parliament and the subsequent exercise of compulsory powers of expropriation under an existing Act, or powers enjoyed by the Crown for, *e.g.*, taking lands for the sea or land forces for purposes of defence, as was in fact done by the Imperial Government a few years ago in the harbour of Esquimalt, not far from the lands in question, now in the same municipality. The same result might, and often does, occur when municipalities constantly exercise their standing statutory powers of expropriation in opening new

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roads or widening, altering, or diverting old ones, or taking lands for public parks, etc. Everyone, especially near large centres, lives under the shadow of a compulsory taking of his lands for purposes authorized by the legislature. If a purchaser wishes to escape from the consequences of this state of things, he should protect himself in the way suggested by Maule, J., cited at p. 186, in *Baily* v. *De Crespigny, supra*:—

A good illustration of the difficulty and loss, without recourse from the vendor, that a vendee encounters from the exercise by a municipality of its powers to alter streets is to be found in *Monarque* v. *Le Banque Jacques-Cartier*, 31 Can. S.C. R. 474, wherein the Court said:—

Elle n'a pas garanti à l'appellants que l'autorite municipale ne changerait jamais les limites de la rue Ontario, ne l'abolirait pas toute entiere peut-etre.

The *Baily case* is noted, and the subject discussed in Williams on Vendor and Purchaser (2nd ed., 1911), pp. 1020-1:—

Suppose, however, that the house or the adjoining land were taken by the railway company after the formation of the contract but before its completion, the case would be governed by the general rule, unless the continued existence *in statu quo* of the whole property sold up to the time for completion were an essential condition of the sale. If not, the purchaser would have to pay the whole purchase money and take a conveyance of the property in its altered condition, but he would be entitled to compensation from the railway company in respect of his equitable estate or interest in the land compulsorily taken. Where it is an essential condition of the sale that the property shall be conveyed in its existing state, it appears that the contract will be discharged, if before completion the whole or any part thereof be taken away compulsorily under parliamentary powers.

And *cf.* pp. 506-8, respecting loss or destruction of the property by fire, tempest, earthquake, irruption of sea, etc., and diminution in value. The last cited paragraph as to "essential condition" does not apply to the present case.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The Chief Justice of British Columbia (Hunter, C.J.), who was the trial Judge, dismissed the action—one for rescission, upon the ground of misrepresentation.

The case for the appellant was that he informed the respondent that he wished to purchase the land for an hotel site and stipulated that it should be free from all claims by any railway company for right of way or other purposes, and gen-

erally free from encumbrances, and that he would not purchase if it was to be traversed by a railway or encumbered in any manner. The evidence led by the appellant would not appear to at all establish the claimed misrepresentation—there would not appear to have been any false representation nor any representation inducing the appellant to enter into the agreement of sale and become the purchaser of the land. In the result following upon the entry into the agreement of sale whereby the appellant became the purchaser of the land—the land became subject to expropriation proceedings by the C.N.P. R. Co. —by the exercise of the statutory powers admitting of compulsory taking, and the land taken does materially and perhaps absolutely destroys the land for the purposes by the appellant intended, when purchasing the same. The Chief Justice, in my opinion, has arrived at the right conclusion upon the evidence, and that which has resulted is not imputable to the respondent—it is an incidence that may affect any land when it comes within the route of a railway. The burden of proof was on the appellant, and that burden was not satisfactorily discharged—the appellant must be held to have purchased the land not induced by any misrepresentation upon the part of the respondent—in purchasing land the risk of expropriation proceedings may be said to be ever present, not only for railway purposes, but for many other purposes of public utility—if the appellant was desirous of ensuring himself against that which has happened—and if it was his settled purpose to have nothing to do with the land if it should be traversed by a railway—and that in such event the contract was to be rescinded—he should have stipulated for a covenant to that end—and if the respondent had entered into any such covenant, no doubt rescission would have had to be decreed—although prevention of expropriation proceedings would be impossible—such is not, however, the position, and the appellant has failed to establish those requisites which are essential in decreeing rescission (*United Shoe Man. Co. of Canada* v. *Brunet*, [1909] A.C. 330, 338, 78 L.J.P.C. 101, at p. 103). The Chief Justice, in his reasons for judgment, stated that no case had been brought to his attention—

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to shew that the Court may allow a claim for rescission and at the same time make an order in favour of the defendant for compensation for acts done by the plaintiff in diminution of the value of the property,—this would be no insuperable difficulty if it could be said, and I think in this case it could be rightly said, that the selling of 36 trees out of some 80 standing trees, would only be a matter of compensation. Lord Lyndhurst (then Lord Chancellor), in *Harris* v. *Kemble* (1831), 5 Bligh (N.S.) 730, 754, at pp. 751-2, said:—

> The question then comes to this, whether the taking and holding possession so long under the agreement altering the theatre contrary to the provision in the agreement the appellants thereby as it is contended injuring the theatre and by their conduct affecting materially the interests of the property; whether these circumstances are sufficient to induce the Court to enforce the specific performance of the agreement? I think not; because these matters are of account and compensation, and it is not necessary upon any of these grounds to decree a specific performance.

Therefore, had the respondent established a case for rescission, it was relief which could have been granted—notwithstanding the acts of possession, interference with and selling of the trees—but that case failed of being established to the satisfaction of the Chief Justice of British Columbia, and being in agreement with him, it follows that, in my opinion, the appeal should be dismissed. *Appeal dismissed.*

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LUCZYCKI v. SPANISH RIVER PULP AND PAPER MILLS CO.

Ontario Supreme Court, Boyd, C. November 4, 1915.

1. ALIENS (§ III—19)—ACTIONS BY—STAY OR DISMISSAL.

An action commenced under the Fatal Accidents Act by an alien enemy, who pays money into court as security for costs, will not be dismissed but merely stayed until after the restoration of peace.

[*Dumenko* v. *Swift*, 32 O.L.R. 87, distinguished; *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, followed. See Annotation in 23 D.L.R. 375.]

Statement

APPEAL from an order dismissing an action, on the ground that the plaintiff was an alien enemy.

O. H. King, for plaintiff.

B. H. Ardagh, for defendants.

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BOYD, C.:—On motion made to dismiss this action, on the ground that the plaintiff is an alien enemy, and therefore not competent to maintain this action, or in the alternative for failure to prosecute the action, an order was made by the Senior Registrar of the High Court Division, dismissing the action with costs, without prejudice to bringing another action

after peace had been declared between Austria and the United Kingdom. From this the present appeal has been taken.

The action is in tort, under Lord Campbell's Act, by the plaintiff, who resides in Galicia, and it was begun in June, 1913. On the 27th June, an order for security for costs was obtained, and on the 3rd September, 1913, the sum of $200 was paid into Court in response thereto. On the 13th September, issue was joined; and in December, 1913, an application was made by the plaintiff for a commission to issue to take evidence in Austria. In February, 1914, such commission was issued, and sent through the Austrian Consul to the local Court in Galicia, but, it is said, owing to the outbreak of hostilities in August, 1914, no return thereto has as yet been made.

The learned Registrar held that *Le Bret* v. *Papillon*, 4 East 502, was directly in point; and, as that case had been followed in *Dumenko* v. *Swift Canadian Co. Limited*, 32 O.L.R. 87, he, acting in conformity with that decision, dismissed the action with costs.

Having regard to many conflicting earlier English decisions, and the rather uncertain state of the practice, and the distinction which obtains in this case, I do not think I am bound to follow or to extend the *Dumenko* case.

A very clear line of division is to be marked as to cases where the alien plaintiff is rightly in Court and has a vested right of action as an alien friend before that character has been transformed by war to that of an alien enemy. Sufficient allowance has not been made for that in the case followed by the Registrar. The *Dumenko* case, as stated in the judgment, is founded on *Le Bret* v. *Papillon* and *Brandon* v. *Nesbitt* (1794), 6 T.R. 23. Now in *Brandon* v. *Nesbitt* the plaintiff was an alien enemy at the outset, and so was never rightly in Court. *Le Bret* v. *Papillon* is in point, for there the action was rightly brought, but its course was intercepted by declaration of war. The defendant's contention was made by way of dilatory plea, and the judgment was that the plaintiff should be barred from further having and maintaining the action. Nothing is said as to costs, and in form the action was not dismissed. In the *Dumenko* case, the judgment may well be rested on the fact that the plaintiff

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was in default in giving security for costs. By the order, if security was not given the action was to be dismissed. The plaintiff, the alien enemy, moved to obtain an extension of time, which favour will not be granted to an alien enemy, and the action was well dismissed with costs. There was a concurrent motion to dismiss the action because of the plaintiff being an alien enemy, and the learned Chief Justice also dismissed with costs the action on this ground—therein exceeding the relief granted in *Le Bret* v. *Papillon*.

A distinctive point in the case in hand is that security for costs had been paid into Court. It is said that this money was derived from the Austrian Consul: that does not seem material; the money was paid into Court on behalf of the plaintiff and as by her agent, and it was paid in with the intent that the action should be duly prosecuted to an issue on the merits. To dismiss the action with costs would enable the defendants to lay hands on this money in Court, and so to penalise the plaintiff for no fault of her own, and giving an advantage to the defendants not earned by them. I would adopt an observation of Williams, J., in an alien case, *Shepeler* v. *Durant* (1854), 14 C.B. 582, 583, and say that so to deal with this fund in Court would be "manifestly contrary to justice and good faith."

The plaintiff in this case was a resident of Galicia, in Austria, before the war broke out, and sued as well she might, as an alien friend, but after the cause was at issue, and pending the execution of a foreign commission, the situation was changed by declaration of war with Austria, and the plaintiff thereupon, as an alien enemy, became personally incapacitated to proceed further in the action. But this was only a temporary incapacity, which would end with the close of the war.

A new starting-point in regard to procedure and proceedings in the Courts in actions by or against alien enemies during a state of war is to be found in the decision of a very strong Court of eight Judges (the Attorney-General also acting as *amicus curiæ*), which was delivered by Lord Reading, L.C.J., in *Porter* v. *Freudenberg*, [1915] 1 K.B. 857. The enunciation of the law in this case was expressly declared to be undertaken in

order to serve as a guide to the solution of the present day problems (p. 866).

This leading case establishes these propositions, among many others: that an alien enemy cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm (p. 873); the mere fact of war operates *ipso facto* to suspend any rights of action which at the time of outbreak of war any alien enemy may possess (p. 877); the rule of law suspending the alien enemy's right of action is based upon public policy, to wit, that the alien enemy is not to have the advantage of enforcing his rights by the assistance of the King with whom he is at war (p. 880); the disability is impressed upon the alien enemy because of his hostile character (p. 880). In the case of a person, plaintiff before the outbreak of war, who thereby became an alien enemy, he cannot proceed with his action during the war. When once hostilities have commenced, he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Court in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace (p. 884).

The earlier cases shew that the fact of the plaintiff becoming during action an alien enemy merely operated in suspension of the litigation, and the question was usually raised by plea in abatement or by way of *puis darrein continuance*. There was merely temporary incapacity to go on with the action, and further proceedings remained in abeyance till the impediment was removed by the closing of the war: *Harman* v. *Kingston* (1811), 3 Camp. 150; *Flindt* v. *Waters* (1812), 15 East 260.

All these dilatory pleas have become obsolete, and are in fact abolished in this country. The convenient remedy now applicable is a stay of proceedings under the Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (*f*), "either generally, or so far as may be necessary for the purposes of justice."

In the last edition of Bullen & Leake, 1915, 7th ed., p. 496, the author says: "If the plaintiff was an enemy when the contract was made, this is a defence to an action on the contract, as the contract was illegal. If he becomes an alien enemy after

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the making of the contract, the defendant should, it seems, apply for a stay of proceedings."

In the last edition of Daniell's Chancery Practice, 8th ed. (1914), vol. 1, p. 83, it is said: "It does not appear what would be the effect of a war breaking out between the country of the plaintiff and this country after the commencement of the action: but from analogy to what was formerly the practice with regard to outlawry it is probable that under such circumstances the proceedings would be stayed."

In Trotter's Law of Contract during War, 1914, his opinion is that "if the plaintiff becomes an alien enemy subsequently to the commencement of the action it would seem that the case can either be dismissed (*Alcinous* v. *Nigreu* (1854), 4 E. & B. 217), or proceedings stayed till the restoration of peace (see *Shepeler* v. *Durant*, 14 C.B. 582)" (p. 54). This same text appears in the supplement to that volume in 1915, at p. 66, and this further is added: "In *Craig Line Steamship Co. Limited* v. *North British Storage Co.*, [1914] 2 Scots L.T. 326, the action was sisted on the prisoner becoming an enemy during its dependence." "But this alternative" (he goes on) "only exists when the contract is otherwise valid, and the sole question is its enforceability during war."

Here, I would note, there is no matter of contract involved; the action is in tort, under Lord Campbell's Act, and the plaintiff had a vested right of action and had commenced her action before the war.

In Quebec it has been held that when the action by an alien friend has been begun before the war the Court will not dismiss the case by reason of the war disenabling further progress by the alien enemy, but will order the proceedings to be suspended "*par force majeure*" till the close of the war: *De Kozarijouk* v. *B. & A. Asbestos Co.* (1914), 16 Q.P.R. 213, 218.

The matter of procedure has been fully considered in Scotch cases, and the uniform ruling is that an action brought by an alien friend cannot be further pressed when by declaration of war the plaintiff has become an alien enemy, and the proper course is to "sist" the action, i.e., to stay its further prosecution, pending the war, and this is stated to be "in conformity with

the presumed wishes of the King;" the Court "does not allow an enemy to be treated in a manner contrary to natural justice:" *Orenstein & Koppel* v. *Egyptian Phosphate Co. Limited*, [1914] 2 Scots L.T. 293, 297. And in the later case cited by Trotter, the judicial decree was to "sist process *in hoc statu*, reserving all questions of expenses:" Nov. 1914, 2 Scots L.T. 326.

Such also has long been settled law in the American Courts. The analogy between cases of outlawry and cases of disability from the operation of war is recognised, and in *Levine* v. *Taylor* (1815), 12 Mass. 7, 9, 10, it is said: "If the disability occurs after the commencement of the action, it only suspends the proceedings quousque, etc.; and, after the disability is removed, the plaintiff may recontinue the suit. . . . Accordingly, in several cases, where the action was commenced before the declaration of war, this Court have expressed an opinion that it produced only a temporary disability; and, at their recommendation, the parties have agreed to continuances without costs on either side; in order to avoid the trouble and expense of new process at the termination of the war." See also *Hutchinson* v. *Brock* (1814), 11 Mass. 119.

I think that these are well-considered words, and to this issue the procedure under English law has been steadily tending, as appears from the citations already given from legal authors. The latest deliverance is to be found in the *Law Quarterly Review* for April, 1915, which was suggested by the leading case I have so largely quoted from in 1915. It is said in the *Law Quarterly Review* for April, 1915, vol. 31, p. 167: "It would seem that in the case of an alien plaintiff who has become an enemy since the writ was issued, one of two things may happen: (1) the proceedings may be stayed on the defendant's application, and the plaintiff can move to have the stay removed when peace is concluded; or (2) if the action comes on for trial it may be dismissed, reserving to the plaintiff the right to bring a fresh action after the termination of the war."

So long as the plaintiff remained quiescent during the war, no order to stay proceedings till the close of the war was really needed. If the plaintiff ventured to make any move in the case, it was at her own risk. Should any intervention of the Court be

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asked, it is not to be by way of dismissal (when everything is tied up by the war) but at most by way of staying the proceedings till the termination of the war, and this without costs, or, as in the Scottish case, with costs reserved.

The present appeal should succeed, and, owing to the state of the authorities, with costs to the plaintiff in any event, and it does not appear fitting that any other order should be made. The case, so far as it has developed, will remain *in statu quo*, to be taken up and continued after the war is over.

If either party chooses to take out an order to stay proceedings till the war ends, it may be issued—but it is only expressing what the law declares. *Appeal allowed.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. November 2, 1915.

1. MECHANICS' LIENS (§ V—34)—TO WHAT ATTACHABLE—SCHOOL PROPERTY.
School trustees are within the meaning of the word "owner" in sec. 8 of the Mechanics' Lien Act (B.C.), and the lien is enforceable against school property, notwithstanding the provisions in sec. 3 of the Act making it inapplicable to any public work carried on by a municipal corporation or the express exemption of school property from sale under execution contained in the School Act.
[*Scott* v. *Trustees*, 19 U.C.Q.B. 28; *Connely* v. *Havelock School Trustees*, 9 D.L.R. 875; *McArthur* v. *Dewar*, 3 Man. L.R. 72; *Moore* v. *Bradley*, 5 Man. L.R. 49, 53, considered.]

2. MECHANICS' LIENS (§ VII—55)—ASSIGNMENT OF CONTRACT—WHAT IS—COMPLETION BY OWNER—EFFECT ON LIEN.
A stipulation in a building contract, that upon default of the contractor the school trustees shall be entitled to take his place to complete the contract and deduct the cost of completion from the balance of the purchase price, is in effect an assignment of the unpaid balance of the contract price within the purview of sec. 16 of the Mechanics' Lien Act (B.C.), and therefore invalid against the lien for the full balance of the contract of price acquired under the Act.

Statement

APPEAL from judgment of Grant, Co. Ct.J., under Mechanics' Lien Act, R.S.B.C. 1911, ch. 154.

W. B. A. Ritchie, K.C., for appellants, defendants.

E. V. Bodwell, K.C., for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Appellants' counsel rested their case upon two grounds, first, that the Mechanics' Lien Act does not extend to property held by public school trustees for school purposes; and, secondly, that the Judge was in error in holding that the several plaintiffs (respondents) were entitled to liens, in the aggregate, greater than the sum of $817.03.

The first question is one depending upon the true construction of the Mechanics' Lien Act read in connection with the

School Act. The School Act makes it the duty of the school trustees to provide suitable school facilities for the children within their district, and for such purpose to organise and establish schools, and it is declared by said Act that the school property shall be exempt from taxation and shall not be liable to be taken in execution.

The Mechanics' Lien Act gives labourers, sub-contractors and material men rights to liens for the price of their labour, contracts or material, upon the building or erection and the land in connection therewith upon which the labour has been expended, the contract executed, or the material supplied. The lien attaches not only to the interest of the person who contracts to have the building erected, but to the interests of other persons who consent to or acquiesce in the work being done. The word "person" in the Act is defined to include a body corporate, firm, partnership, or association, and the word "owner" includes any person having an estate or interest legal or equitable in the lands. The only other statutory provision having any bearing on the question at issue is sec. 3 of the Mechanics' Lien Act, which declares that nothing in the Act shall extend to work done upon a public street by a municipal corporation.

We were referred to a number of cases bearing upon the first question, one of the earliest in Ontario being *Scott* v. *School Trustees*, 19 U.C.Q.B. 28. As I read that case the determining factor was the provision in the statute which provided for the levy of a special rate to raise the money to satisfy the judgment—a method which is provided in our own School Act and in the legislation of many, if not all, of the provinces. Where such a method is provided, it may reasonably be inferred that the legislature intended that that remedy should be the only one, and should exclude the ordinary remedy of seizure and sale under execution. The same principle is enunciated in the recent case before the Supreme Court of New Brunswick—*Connely* v. *Havelock School Trustees*, 9 D.L.R. 875, and in some other cases which I need not refer to. In those provinces public school property was not by statute expressly exempted from process of execution.

Now, if this substituted means of obtaining payment of a judgment is the real or paramount factor leading to the conclusion that such school property, though not expressly so

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exempted, is yet impliedly so, because another means of obtaining payment of judgments against the trustees is substituted for process of execution, that factor is lacking in mechanics' lien cases where sub-contractors, or employees of the contractor, are concerned, as they cannot obtain a judgment against the School Board, and thus enjoy the substituted method of enforcing their claims. The analogy between judgment creditor and mechanics' lien claimants fails in at least one important respect. As the Mechanics' Lien Act was passed for the very purpose of giving rights beyond those against the primary debtor, the *ratio decidendi* of the cases above referred to have no application to a case like the present. If the claimant cannot reach the property through the Act, he cannot get satisfaction at all from the trustees: *King* v. *Alford*, 9 O.R. 643, was relied upon by appellants' counsel, but that case does not, in my opinion, assist the appellants' case. It decided that as the railway company could not itself alienate its property so as to defeat the public objects for which it was created, neither could a creditor nor claimant under the Mechanics' Lien Act sell such property and so defeat those purposes. To the same effect is the *dictum* of the Privy Council in *Central Ontario Co.* v. *Trusts and Guarantee Co.*, 74 L.J.P.C. 116.

In the case at bar the trustees have at least the implied power of sale of school property. They are not at all events prohibited from selling. They may acquire property either by purchase or by lease, or in any other way which will enable them to supply the proper school facilities, and, while inconvenience might be caused to such bodies by the application to them of the provisions of the Mechanics' Lien Act, yet I am of opinion that something more than that must appear before the language of the enactment can be cut down so as to exclude their property from its operation.

Mr. Ritchie, for the appellants, pressed very strongly the argument that the express exemption of school property from sale under execution contained in our School Act puts his clients in a stronger position than were similar bodies who were obliged to rely upon an implied exemption from execution, as in the *Havelock* case, *supra*. He also distinguished the Manitoba cases of *McArthur* v. *Dewar*, 3 Man. L.R. 72, and *Moore* v. *Bradley*, 5 Man. L.R. 49, 53, on the ground that in Manitoba there was

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neither express nor implied exemption from process of execution. His submission, in effect, was that, given an express or implied exemption from execution, the Court ought to imply an exemption from the operation of the Mechanics' Lien Act, but if, as in Manitoba, there is neither an express nor an implied exemption from execution, there, of course, could be no implied exemption from the operation of the Mechanics' Lien Act, and he argues that that is the reason why the Manitoba cases appear to be against his contention, but are not really so. The same argument is applicable to the decision in the Saskatchewan Courts. The answer to that contention is that these cases are of no assistance either one way or the other, because our statute differs from the statutes of those provinces, and expressly exempts school lands from execution. But, instead of the appellants being in a stronger position than such bodies would be either in Ontario or New Brunswick, they are in a weaker one. In those provinces there was no express exemption from execution, but the Courts thought, as I read the cases, that there was an implied exemption to be inferred principally from the substituted remedy already referred to. But the express exemption found in our Act shews that the legislature had in mind the subject matter of exemption of school property from forced sale, and I think, therefore, that the maxim *expressio unius est exclusio alterius* is applicable to this case. I, therefore, rest my decision on two grounds—first, that, apart altogether from the express exemption from execution, there is nothing to indicate that the legislature intended that the rights of lien holders should not attach to the property of bodies such as school trustees; and, secondly, that the existence of the express exemption from execution shews an intention not to make any other exemption, or, in other words, it exhausted the subject matter of exemptions from forced sale. Then, again, par. 3 of the Mechanics' Lien Act is a limitation on its application to property of a public body, and the maxim aforesaid is again appropriate.

On the other ground of appeal. There was some controversy as to who should be considered the *owner* within the meaning of sec. 8 of the Mechanics' Lien Act. I will not go into details, but will content myself with saying that, in my opinion, the school trustees are the owners there referred to. Owner does not necessarily mean owner in fee simple, nor registered owner,

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but one having an interest capable of being charged. The interests, if any, of the Royal Trust Co. and of the municipality are bound, because the work was done with their knowledge and consent, but they are not the owners referred to in said sec. 8.

It now becomes necessary to refer briefly to certain of the facts of the case. The appellants, unquestionably, greatly hampered and delayed the contractor Lund in his work from the beginning thereof up to the end of February, 1914, when Lund very properly declined to go on further with the work unless moneys which were withheld from him were paid. A settlement was then arrived at by which the trustees agreed to pay the arrears due on progress certificates, for which Lund accepted their promissory note; and to pay $4,500 damages for loss sustained by reason of his being hampered and delayed as aforesaid. Lund, on his part, agreed to resume and complete the work with reasonable diligence. The promissory note and damages were paid in due course, and Lund resumed work and carried it on until May 4, when he became, through lack of capital, unable to carry the work on to completion; his foreman, Briscoe, who was in charge, when asked as to the circumstances which led to his stopping work on May 4, said:—

> The reason was I could not find any place to drive a nail, and as we were short of material—building material and finishing material—I finished the contract up as far as I could go at that time. Q. You had no more material? A. No, sir. Q. Were you ordered to leave the work by the architect or by the clerk of the works? A. No, sir.

This material was within Lund's contract. Lund himself, speaking of the notification by the architect of April 28, complaining of delay in completing the work, said:—

> I could do nothing with the School Board; they took advantage of my absence and stepped in there without giving me a little bit of time to raise $1,400 or $1,500, which I am confident I could have raised amongst my friends. Q. Where did you receive this letter? A. Received it in California. Q. Did you do anything in consequence of receiving it? A. Nothing much. I waited in San Diego for 4 or 5 days before I returned, waiting for a notification from the bonding company, because I was prepared to take up the proposition with the bonding company if I had got such notification from them. I paid no attention to it, because I was absolutely disgusted with the whole thing.

Now, the architect did not take over the work under cl. 33 of the contract until May 18, after ample notice to Lund and his bondsmen that he would do so if the work were not proceeded with. I am, therefore, at a loss to understand the finding of the

Judge that Lund was wrongfully excluded from the works, and not permitted to complete the building. Lund has taken no action against the trustees and has not defended the action of the lien claimants, nor counterclaimed against his co-defendants, but appears to have acquiesced in the course taken by the trustees. In this view of the facts, there was no breach of contract by the trustees after the settlement of February, and from that time, which made a new starting point, it is not suggested that the appellants delayed or hampered Lund in any way in his work, or were in default in making payments of moneys due him under the contract. If, therefore, the appellants, as I think they did, rightly took charge of the work on May 18, and completed it themselves, what are the rights of the lien holders in the circumstances?

At that time, on the basis of the completed building, there would be due to Lund $4,197.55, as the Judge has found, and, according to an estimate made by the said Briscoe, it required only $1,355 to complete the work contracted for. The trustees, however, expended $8,379.74 in completing it, and shew a balance of only $817.81 as now due from them to Lund.

It was not contended at the bar by appellants' counsel that the liens, if any, of the several plaintiffs did not attach before May 18, the date on which the work was taken over by the respondent trustees. The only claim for wages is that of Briscoe, and his claim stands on a different basis from that of the others, and I think it cannot be disputed that he is entitled to a lien for the full amount of his claim, irrespective of what was due from the owner to the contractor.

This case raises a question under the Mechanics' Lien Act which, so far as I know, has never yet been passed upon by the Courts. By the contract between the trustees and Lund it was agreed that, in the event which happened, namely, his failure to proceed diligently with the work, the trustees should be entitled to take his place, complete the contract, and charge the cost of completion to him, deducting it from the balance of the contract price.

Section 16 of the Mechanics' Lien Act (ch. 154 R.S.B.C.) provides as follows:—

> No assignment by the contractor or any sub-contractor of any moneys due in respect of the contract shall be valid as against any lien given by this

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Act. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, set-off, or counterclaim in favour of the owner against the contractor.

In effect the parties agreed that, in the event aforesaid, the owners should become the contractors' agents to complete the contract. Now, it is clear to me that the contractor could not appoint a third person to complete the contract, assign to him the unpaid balance of the contract price, and thus defeat existing liens, even if the intent were entirely innocent, and it seems equally clear that this could not be done by arrangement between the contractor and owner.

In this view I must hold that the full balance of the contract price, namely, $9,197.55 is, as between the trustees and the lien holders, still owing by the owners to the contractor.

I do not know upon what principle the Judge allowed the lien holders' claims to the extent of $13,498.03. It is said to have been by way of *quantum meruit*, but, in my opinion view of the case, no question of *quantum meruit* is in issue in these consolidated actions. Such a question could only have arisen if the contractor had been wrongfully prevented from completing his contract and had elected to sue the trustees, not for damages for breach of contract, but upon a *quantum meruit* for the work done, but even that is not a case which could be made out by these plaintiffs, so that the question of *quantum meruit* may be excluded altogether.

In the result I think the plaintiff Briscoe is entitled to a lien for the full amount of his claim, that the balance of $9,197.55 remaining after Briscoe's claim is deducted is available to the other lien holders *pro rata* according to their several classes and rights.

A question not argued before us nor in the Court below has been raised by my brother Martin, viz., that the realization of a mechanic's lien by sale of the property is "execution" within the meaning of sec. 56 of the School Act. With deference, I am unable to agree in that construction of the section. Doubtless the term "execution" is an elastic one, and may be used to describe a sale under the Mechanics' Lien Act, but that is not the point. The question is what did the legislature mean by that term as used in said sec. 56? It seems to me that the best

answer to that question is to be found in the latter part of the section itself. After declaring that school lands shall not be liable to be taken in execution, the legislature proceeds to say: "*but* in case of any judgment being recorded against the Board of School Trustees" the money to satisfy the judgment shall be raised by special rate. The legislature was dealing with judgments against the Board of School Trustees—that is to say, judgments *in personam*. The judgment in this case is not of that nature, but is directed against the land and not against the Board of School Trustees. It seems to me, therefore, that when the legislature used the term "execution" in the beginning of the section, it had in mind an "execution" such as would be issued on a judgment of the kind mentioned in the latter part of the section, one that could be satisfied by the substituted remedy therein provided.

The Mechanics' Lien Act is a code in itself. It not only confers new rights upon mechanics and others, but provides a summary manner of realization, all of which is carried out under the direction of the County Court Judge without resort to the Execution Act. When the legislature took away the right to realize a personal judgment by the ordinary process of execution and substituted another process, it cannot, in my opinion, be inferred that it intended to take away the right of a mechanic or sub-contractor, who might have no personal judgment against the owner and leave him without any remedy at all.

Martin, J.A. (dissenting)

MARTIN, J.A. (dissenting):—A preliminary question arises before us, as it did before the trial Judge, as to whether or no "property acquired by the Boards of School Trustees or the municipal corporations for school purposes" (to quote sec. 56 of the Public Schools Act) is subject to mechanics' liens. Such property, said statute declares,

> shall not be subject to taxation, nor be liable to be taken in execution; but, in case of any judgment being recorded against the Boards of School Trustees, they shall forthwith notify the municipal council of the amount thereof, and the municipal council shall levy and collect the same as in other cases provided for by this Act."

By these two sweeping exemptions, first from taxation (and consequent sale upon default), and, second, from taking in execution by curial process, the legislature has clearly shewn its intention, in the paramount public interest of education, to free the public school property of this province from the two great burdens

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of liability to taxation and execution which the ordinary citizen cannot escape from, the manifest object being that the education of the youth of this province should not be interrupted by the closing of the schools because of legal difficulties, and the statute must be interpreted in the spirit in which it is enacted, so that the exceptional privileges which it confers shall not be frittered away by technicalities.

In the case at bar the legal estate in the property stood in the name of the municipality of Point Grey, but it was held in trust for the School Trustees of Point Grey, who entered into the contract with defendant Lund for the erection of a fireproof school building for $64,000, so the true position of the matter, for the purposes of our adjudication, is as though the property stood in the name of the trustees.

This general question of the exemption of Crown property, or, as Lord Watson puts it, in *Coomber* v. *Justices of Berks*, 9 App. Cas. 61, at 74, of buildings which "have been erected for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities," has been often discussed in England and Canada in relation to schools and railways, but, in view of our direct statutory provision above quoted, which is not to be found in other places where the point has come up in the cases cited to us, the question is narrowed down to one neat point, viz., seeing that school property is "not liable to be taken in execution," are proceedings to enforce a mechanics' lien of that nature? If so, the property (in this case, land) is not subject to said lien.

In the case of *King* v. *Alford*, 9 O.R. 643, a majority of the Court pointed out the difference between a vendor's and a mechanic's lien, and Boyd, C., took the view, p. 647, that the Mechanics' Lien Act was

> intended to be operative . . . as giving a statutory lien issuing in process of execution of efficacy equal to but not greater than that possessed by ordinary writs of execution.

Ferguson, J., pp. 653-4, points out that a holder of a vendor's lien may have lands sold to satisfy it that an execution creditor could not not have sold to satisfy his debt, though the former lien is "not of so high or stringent a nature" as the latter, which "much more closely resembles, in kind, the right of a holder of a mechanic's lien than does the latter (*i.e.*, mechanic's lien)

resemble in kind the vendor's lien," which "is in the nature of a trust." This clearly regards a mechanic's lien as being one "in the nature of an execution," as the author observes in Holmested on Mechanics' Liens (1899) 32. Then there is the direct and high authority of Killam, J., in *McArthur* v. *Dewar*, 3 Man. L.R. 72, at 80, wherein he quotes with approval Phillips on Mechanics' Liens in saying that "where property, as a public Court house, is exempted by law from sale or execution, the lien (*i.e.*, mechanic's) is not enforceable against it," and says:—

> An examination of such of the cases as are reported in the volume of reports available shews the author to be correct in mentioning the non-liability of the property to sale under execution as in general the determining ground.

He gave effect to the lien in that case because the property in question was, under the Manitoba statutes, liable to be taken in execution. That decision recognizes that the working out of the lien by sale of the property is an "execution," and the judgment of the Supreme Court of New Brunswick *en banc*, in *Connely* v. *Havelock*, 9 D.L.R. 875, 41 N.B.R. 374, proceeds upon the same assumption, and treats the point as though it were beyond question. That this assumption is correct I have no doubt. "Execution" is a broad and varying term, and has a much wider meaning and effect than "writ of execution," which has been recognized from very early times down to the present day. Thus Coke Litt. 154:—

> Execution signifieth in law the obtaining of actual possession of anything by judgement of law, or by a fine executory levied whether it be by the sherife or by the entry of the party.

Blackstone, ch. 26, p. 412, says:—

> If the regular judgment of the Court, after the decision of the suit, be not suspended, or superseded, or reversed, by one or other of the methods mentioned in the two preceding chapters, the next and last step is the *execution* of that judgment, or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

This "performance" is well illustrated by our S.C. Order xlii., entitled "Execution," where the various ways of working out judgments against goods and lands are treated, and by Rule 586 thereof it is prescribed that "in these rules the term 'writ of execution' shall include" certain specified writs, and then follows this apt definition:—

> And the term "issuing execution against any party" shall mean the

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issuing of any such process against his person or property as under the preceding rules of this Order shall be applicable to the case.

Now, what is the "process" against this property which is "applicable to the case" of a judgment *in rem*? Under our Mechanics' Lien Act the only way that this lien can be enforced is by a sale "to realise such lien" after judgment—see secs. 23, 24 (1), 28, 31, 32, 34, 36. And since the abolition in this province of writs of *fi. fa. de terris*, the only way that lands can be sold under judgments is first to obtain a "lien and charge" on the land by registering the judgment (sec. 27), and then obtaining an order of the Court to enforce that charge under the group of secs. 26 *et seq.*, entitled "Execution against Lands," in the Execution Act, ch. 79, R.S.B.C. 1911, which order directs a sale to be carried out by the sheriff of the county (secs. 32, 37, 41, etc.) to satisfy said lien and charge, who gives a conveyance to the purchaser, which vests the lands in him (sec. 45, and Form C) "under and by virtue of an order for the sale of the land" issued on a judgment, etc. This "process" of sale to realize the "lien and charge" and subsequent vesting, which is admittedly a "taking in execution," is in all respects essentially the same in principle as that to realize the lien under the Mechanics' Lien Act, the only difference in title being that, under the latter Act, the Judge executes the vesting conveyance (sec. 31), instead of the sheriff: the other proceedings are governed by that section as follows:—

> And, when not otherwise provided, the proceedings shall be, as nearly as possible, according to the practice and procedure in force in the county court: and when these are no guide, the practice and procedure used in the Supreme Court shall be followed.

The result of all this is that there is in the enforcement of the lien in question by the process of the Court under the Mechanics' Lien Act a "taking in execution," not only in the spirit but in the letter of the statute, and when that stage is arrived at, there is an end of the matter, because the rights of no private individual, however much he may have been favoured by the legislature as against others, can infringe upon the special immunity given to a privileged class of property acquired by the School Trustees for school purposes. That this contemplated result may be defeated by simply filing a lien and allowing it to remain indefinitely as a charge upon the property is a contention that I have found nothing to support. It has been held in this Court that a lien cannot exist apart from the sum for which judgment

should be given: *Champion* v. *World Building, Ltd.*, 18 D.L.R. 555, 20 B.C.R. 156. There is no personal judgment here against the trustees, but only the declaration of a lien upon their property, and there is no way of enforcing this judgment *in rem* except by sale of the land, which, indeed, is what in the respective plaints herein is prayed to be done, and the judgment has declared liens to be established for certain sums and has ordered payment of the amount thereof by the contractors, as set out in schedule 1, and, in case of default, has reserved "leave to apply for further directions as to what further proceedings may be taken for enforcing the said liens or any of them," which can and does mean one thing only—a sale of the land, because, as above mentioned, there is no personal judgment herein against the School Trustees which can be "recorded" against them under sec. 56 and collected by levy as therein provided. I do not wish it to be understood that I am of the opinion that this lien could be sustained even if the circumstances were such that a rate could be levied under sec. 56. I express no opinion upon that point beyond saying it is obviously a very doubtful one from several points of view, one of which is, *e.g.*, that, even if a rate could be levied, it could not, in the case of a bankrupt municipality (of which the Courts have had experience), be collected, and then there would be no other remedy than a sale to satisfy the lien, which, it is clear, cannot be had in the face of said section. A suggestion was made that the enforcement of the lien could be worked out by the appointment of a receiver, which is another doubtful point, but one that has no application to the present case, because there are no annual or other rents or profits from this school house that could come into a receiver's hands, and in that respect it has been "struck with sterility," as Brett, L.J., puts it in *Coomber* v. *Justices*, 9 App. Cas. 61, before the Court of Appeal.

I have carefully examined all the cases to the contrary relied upon by the Judge below, and cited to us, but they can all be distinguished either because of the absence of a section like ours, *e.g.*, *Connely* v. *Havelock*, 9 D.L.R. 875, and *Lee* v. *Broley*, 2 S.L.R. 288; or because of being decisions based on local statutes, or otherwise. In the last cited case, indeed, the Court admits "frankly" that it was departing from the *ratio decidendi* of *King* v. *Alford*, *supra*.

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In *Connely's* case, 9 D.L.R. 875, 41 N.B.R. 374, at p. 383, cited to us, there is an observation which I am unable to fully understand, wherein reference is made to a remark by Lord Blackburn, in *Coomber* v. *Justices, etc., supra*, that "I do not much doubt that, if the premises were taxable, means would be found for obtaining payment." Lord Blackburn was there speaking of the case before him, which was one wherein it was sought to make certain Justices liable for income taxes which, it was contended, were assessable on certain buildings which had been erected for public purposes, *i.e.*, Assize Courts, etc., and the extent to which his Lordship's remark goes is that, if somebody could be found who could be charged with the assessment, then means would be forthcoming to collect it. But in the case at bar the point is that the statute declares that the property in question shall not be liable either to taxation or execution. Indeed, *Connely's* case, when properly understood, is in favour of the present, because it is clear that the decision would have been the other way if it involved the sale of the property (pp. 383-5), as it unquestionably does in this case. White, J., held that the New Brunswick Lien Act could be worked out without resorting to a sale by execution because of certain provisions in regard to the report of the trial Judge which he regarded as equivalent to "a judgment obtained by ordinary suit in the ordinary way," *i.e.*, a personal judgment against the owner, which, as has been seen, is precisely what cannot be obtained in the case at bar. I can, therefore, only come to the conclusion that, on the facts of this case, the proceedings taken to enforce this lien have rendered the land in question "liable to be taken in execution" contrary to the statute hereinbefore set out. This result is unfortunate for the plaintiffs, the sub-contractors, but at least they have or had someone to look to, viz., the contractor with whom they made their bargain; and they are no worse off than was the contractor who built the schoolhouse in *Scott* v. *School Trustees*, 19 U.C.Q.B. 28.

I only add that I have not overlooked the fact that this conclusion is supported by those of Mr. Justice Proudfoot in *Robb* v. *Woodstock School Board* (1880), Holmested on Mechanics' Liens (1899) 30; and *cf.* Howay, Co. Ct. J., in *Vulcan Iron Works Ltd.* v. *New Westminster*.

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GALLIHER, J.A.:—I confess the grounds taken by my brother Martin have not left me entirely free from doubt, owing to the particular wording of our statute, but, on the whole, I think the better view is that taken by the Chief Justice, in whose judgment I concur.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A. (dissenting):—I am in entire agreement with my brother Martin, and would dismiss the appeal..

Appeal dismissed; Court divided.

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GRANT'S SPRING BREWERY CO. LTD. v. E. LEONARD & SONS LTD.

Ontario Supreme Court, Falconbridge, C.J.K.B., Magee, J.A., and Latchford and Kelly, JJ. October 4, 1915.

1. SALE (§ IIA—25) — WARRANTY OF GOOD WORKMANSHIP — BREACH — PROXIMATE CAUSE—ONUS.

In an action for breach of warranty that only the best workmanship and material will be used in the construction of boilers, the onus is upon the purchaser to establish that the leaks and cracks which rendered the boilers unfit for use were the direct and not the probable cause of bad workmanship.

[*Badcock v. Freeman*, 21 A.R. (Ont.) 633; *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, distinguished.]

Statement

APPEALS by both companies from the judgment of MEREDITH, C.J.C.P., dismissing an action to recover damages for a breach of warranty upon the sale of two boilers; and an action to recover for work done by the vendors, in repairing one of the boilers.

G. Lynch-Staunton, K.C., and *F. F. Treleaven*, for the brewery company.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the Leonard company.

The judgment of the Court was delivered by

Latchford, J.

LATCHFORD, J.:—The defendants (the Leonard company) warranted that "only the best workmanship and material" should be used in the construction of the boilers which they contracted to make and did make for the plaintiffs.

In the statement of claim it was alleged that the defects which manifested themselves in one of the boilers were due to both faulty workmanship and inferior material; but, before the trial, the plaintiffs (the brewery company) formally abandoned their contentions as to material.

Their claim for damages for breach of warranty thus fell to

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be determined upon the single ground that the leaks and cracks resulted from bad workmanship.

In two respects, and in only two, was the workmanship alleged to be bad. The lap of one plate over the other was said to be too great, and the caulking was said to be too heavy.

The onus was plainly upon the plaintiffs to establish not only that the lap or the caulking was excessive, but that the excess in one respect or the other caused the leaks and cracks which rendered the boiler unfit for use.

The learned trial Judge found that the workmanship was not so good as it might have been. Had the rivetting been better, the caulking could not and would not have been so heavy. As to the overlap, the greater it is the greater the caulking needed; and the greater the caulking the worse the joint must be. "But," he observes, "perfection in construction is not bargained for in the purchase of a boiler of the character and the price of the one in question; good workmanship, good construction, is."

Then, after adverting to the strength of the evidence adduced on behalf of the defendants, he says he is not able to find in favour of the plaintiffs upon the question whether the things they complain of were really the cause of the cracks in the plates. "They may have been. If I were at liberty to guess, I cannot say how I should guess. I am not able to say, upon the whole evidence, that that has been proved."

What is regarded as not proved is precisely what it was incumbent upon the plaintiffs to prove, that the construction and workmanship such as they were caused the leaks and cracks.

There is also a finding that the overfiring, alleged by the defendants to be the cause of the cracks, was not proved.

The statement that the things of which the plaintiffs complain *may have been* the cause of the cracks in the plates is pressed now upon the Court as a finding which, in the circumstances, entitles the plaintiffs to damages. If, it is argued, workmanship, not so good as it might have been, may have caused the defects, then, in the absence of proof, as here, that they resulted from some other cause, the defects must be attributed to the possible cause, and the plaintiffs are entitled to recover damages.

In support of this contention *Badcock* v. *Freeman*, 21 A.R. 633, and *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, were cited.

In the former case, the question before the Court was, whether there was evidence for the plaintiff sufficient to have been submitted to the jury, or whether the Judge should, as a matter of law, have directed the dismissal of the claim. The plaintiff's husband had been killed by an explosion which had blown the cover off a tank. There was no direct evidence as to the cause of the explosion. Experts had, however, sworn that the fastenings of the cover were insufficient to hold the cover down when subjected to pressure from within. They stated their belief to be that the fastenings broke from insufficiency and deterioration from constant use. This evidence the Court considered not mere guess-work or conjecture, but matter which might properly be submitted to a jury.

In the *McArthur* case the judgment of the Supreme Court of Canada, *Dominion Cartridge Co.* v. *McArthur* (1901), 31 S.C.R. 392, was reversed. But the question in that case was not whether a possible cause of the accident had been proved. Taschereau, J., in his dissenting judgment, says (p. 402): "Now, the jury, seeing an explosion in a defective machine, and having before them evidence that it was utterly impossible otherwise to account for it, have drawn the inference of fact that the machine exploded because it was defective. There is nothing in the case to justify me in saying that the two Courts of the Province (eight Judges) were clearly wrong in holding that this conclusion was not an unreasonable one." In the Privy Council, Lord Macnaghten, after referring to the erratic manner in which the machine acted, causing at times the blow which ordinarily crimped the cartridge to fall on the metal end, in which the primer or percussion cap had been inserted, says ([1905] A.C. at p. 76): "It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the

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part of the operator. The wonder really is, not that the explosion happened as and when it did, but that things went on so long without an explosion."

The effect of the decision is stated by Duff, J., to be that it is "sufficient to adduce evidence from which the tribunal may fairly infer both the existence of the fault *and the connection between that fault and the injury complained of*:" *Shawinigan Carbide Co.* v. *Doucet* (1909), 42 S.C.R. 281, at p. 311.

There is lacking in the case at bar evidence of any connection between the faults found with the workmanship and the defects which developed in the boiler. The bare possibility referred to by the trial Judge is not sufficient in the absence of the exclusion of all other reasonably possible causes. One possible cause alleged by the defendants—overfiring—has been held not proved. That other such causes existed may reasonably be inferred from the fact that the first crack developed from a rivet to the end of the plate on the inner side of a lap, where caulking could not have caused the crack, and where defective material might have caused it, as indeed the plaintiffs alleged in their letter of the 15th February, 1914, and in their statement of claim.

No reasonably probable cause for the defects having been proved, the judgment in appeal is right in holding that the action of the brewery company should be dismissed.

The defendants in turn failed to establish their claim to be paid for the repairs made in 1914. They were not to receive payment unless the defects were due to excessive firing, and excessive firing was held not to have been proved.

I consider that the appeal and the cross-appeal should be dismissed. Both appeals failing, there should be no costs.

After the foregoing was written, on the 20th September, 1915, a motion was made by the plaintiffs for leave to adduce new evidence. From the material filed it appears that, subsequent to the delivery of the judgment in appeal and the argument before the Court, a crack extending from a rivet to the edge of a plate was discovered in the second boiler supplied by the defendants. It is not suggested that any other evidence of defects could be adduced.

Without passing upon the propriety of admitting at this stage the additional evidence, I am of opinion that, if admitted, it could not affect the result, as the crack was not shewn to have arisen from either of the only two defects on which the plaintiffs based their case—too much over-lap and excessive caulking.

There is accordingly no ground for disturbing the conclusion arrived at previous to this application, the costs of which should be paid by the plaintiffs. *Appeals dismissed.*

The KING v. The "DESPATCH."

Exchequer Court of Canada (B.C. Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. December 2, 1915.

1. ADMIRALTY (§ I—1)—JURISDICTION—PRACTICE.

It is no objection to the jurisdiction conferred by sec. 34 of the Admiralty Act, 1861, because that section relates to practice only, particularly where Rule 228 provides the practice in respect of Admiralty proceedings, in cases not specially provided for by the rules, to be that of the High Court of Justice in England.

2. ADMIRALTY (§ II—7)—COLLISION WITH CROWN SHIP—ACTIONS IN REM OR IN PERSONAM—CROSS-CAUSE—SECURITY BY CROWN.

An action *in personam* against the master of a government tug, for his negligence in a collision with the plaintiff's ship, is neither an action *in rem* or *in personam* against the Crown; nor can it be considered a cross-cause to a proceedings *in rem* by the Crown against the plaintiff's ship, so as to permit a stay of the Crown's proceedings, under sec. 34 of the Admiralty Act, 1861, until it furnishes security to answer the judgment which may be obtained in the cross-cause.

[*The King* v. *The "Despatch,"* 23 D.L.R. 351, reversed.]

Statement

MOTION to vary or rescind Order reported in 23 D.L.R. 351.

W. C. Moresby, for plaintiff.

E. V. Bodwell, K.C., for defendant.

Martin, L.J.A.

MARTIN, L.J., IN ADM.:—Under r. 84, the plaintiff moves to "vary or rescind" the Order made herein on June 18 last, reported in 23 D.L.R. 351, on the ground of lack of jurisdiction to make the same. This objection was not raised upon the former motion which, as is noted in the reasons, was only opposed on the one point therein mentioned, and in an ordinary case it would not be proper to re-open the matter, but as a question of jurisdiction is now raised which could be raised at the trial, it is conceded that, in the circumstances of this case, it would be convenient and desirable to dispose of it at the outset, and the defendant offers no opposition to this being done.

It is first objected that sec. 34 of the Admiralty Court Act 1861, has no application to this Court, because it is submitted

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to be a section relating to practice only, and one which does not confer jurisdiction, with respect to which it is conceded that this Court possesses the same as the High Court of Admiralty, "to extend the jurisdiction and improve the practice" whereof is stated in the preamble to be the object of the said Act of 1861. Assuming the matter to be one of practice, it is urged that since, in our rules (made under sec. 7 of the Colonial Courts of Admiralty Act 1890, and sec. 25 of the Admiralty Act, 1891), there is none corresponding to said sec. 34, therefore there is nothing empowering this Court to exercise the practice jurisdiction conferred thereby. In my opinion, however, that section is one which "gives or defines the right" (as Lush, L.J., puts it in *Poyser* v. *Minors*, 7 Q.B.D. 329, at 333), now under consideration, which is one of those "more extensive powers conferred upon the" High Court of Admiralty which it did not formerly possess—Williams & Bruce Ad. Prac. 370-1, and cases there cited, particularly *The Seringapatam*, 3 W.Rob. 38, and *The Rougemont*, [1893] P. 275—and therefore this Court falls heir to the same jurisdiction. It is no objection to the conferring of jurisdiction that the statute which does so, at the same time "denotes the mode of proceeding by which (the) legal right is enforced"—*per* Lush, L.J., *supra*.

But if I should be wrong in this, and the matter is to be considered as one of practice, then reliance is placed on our r. No. 228 as follows:—

> In all cases not provided for by these rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

In my opinion, this covers the case and I am justified in this view by the decision of my predecessor in this Court in *Williamson* v. *The Manauense* (1899), 19 C.L.T. 23, and *cf. Williamson* v. *Bank of Montreal* (1899), 6 B.C.R. 486.

Then the further objection is taken, secondly, that in any event said sec. 34 is inapplicable to the present situation, because in the true sense of the expression, the defendant has "not instituted a cross cause" against the plaintiff. This also is a change of front on the part of the Crown since the Order now complained of was made, because then the matter was argued and disposed of on the obvious assumption that the

Crown in Canada was following the established practice of the Crown in England of assuming responsibility in the Admiralty Court for the act of its servant (McDougal) the master of its ship, under circumstances similar to these, as set out in the cases cited in my judgment. The Crown now takes the position that as there is no action here against it, either *in personam* or *in rem*, but only one *in personam* against its servant, the master, whose actions, even if negligent, it is not liable for, and now repudiates, on the authority of *Paul* v. *The King*, 38 Can. S.C.R. 126, and *cf. Japanese Government* v. *P. & O. S.N. Co.*, [1895] A.C. 644, consequently there is no "cross cause," and so it is in strict law a stranger to the proceedings of the defendant against said McDougal. Such an unusual position required corresponding consideration, and after the examination of a large number of authorities, I am forced to the conclusion that the objection must prevail. This expression, "cross cause," has been often considered, *e.g.*, in *The Rougemont*, *supra*, wherein the scope of the section is in one respect defined, and wherein there is a very instructive argument: *The Charkieh*, L.R. 4 A. & E. 120, and see Williams & Bruce Prac., *supra*, and whatever else may be said of it, it is clear, to my mind, that there cannot be a "cross cause" unless one at least of the plaintiffs in the principal cause is a defendant in the cross cause. On the other hand, the mere fact that a party is a co-plaintiff does not of itself entitle the defendant in the cross cause to obtain security, as is shewn by *The Carnarvon Castle*, 3 Asp. M.L. 607, wherein the owners of the cargo, who, to save multiplicity and expense had joined in an action with the owners of the ship, were absolved from liability to give bail. It must be borne in mind that, as Lord Watson said in *Morgan* v. *Castlegate S.S. Co.*, [1893] A.C. 38 at 52, "every proceeding *in rem* is in substance a proceeding against the owner of the ship." The contention that the section applies only to cases where both the principal and cross cause are *in rem* was rejected in *The Charkieh*, *supra*. The exact point raised herein has not come up before; at least no similar case has been cited, and I have been unable to find any. In, for example, *The Charkieh*, the cross cause was instituted by the foreign Sovereign Prince, and in *The Newbattle*,

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10 P.D. 33, the action was brought by "the owners, master and crew of the Louise Marie," and though that ship was admittedly the property of the King of the Belgians, yet the question was raised by a counterclaim in the same action, and in such circumstances the point now in question did not require consideration.

Cotton, L.J., said, p. 35:—

It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a cross action has been brought, shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action, etc., etc.

This brings out the force of the objection now taken, *viz.*, that in fact no cross action has been brought against the plaintiff herein.

The result is that as the case now presents itself, the Order which was properly made on the facts then before me must now be rescinded, as it appears the case is not within said sec. 31.

I am fully alive to the injustice which it was strongly pressed upon me might result from this refusal of the Crown to adhere to "the well-established practice in England" in cases of this description (*cf. Eastern Trust Co.* v. *Mackenzie Mann & Co.*, 22 D.L.R. 410, [1915] A.C. 750, at 759, on the duty of the Crown in general to ascertain and obey the law), but in the face of the decision in *Paul* v. *The King, supra*, I am powerless to adopt any other course, though my attention has been directed to the apt remarks of Idington, J., at p. 136 of that case:—

It certainly seems at this time of day unsatisfactory to find that one of the vessels, the property of which is in the Crown, engaged in the business of the Crown, can destroy through grossest negligence the property of a subject and he have no remedy at law; unless against the possibly penniless man who has been thus negligent.

With respect to the costs of this motion the plaintiff must pay them in any event of the cause, because the application has been made necessary solely by the omission of the plaintiff to raise these new questions at the outset, and an unusual indulgence was granted in opening up the matter. In the very unusual circumstances it is impossible now to dispose of the costs of the original motion upon any fixed principle, so I think the most appropriate course to adopt is not to make any Order regarding them. *Motion granted.*

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CASES REPORTED, VOL. XXV., PART 2.

WINDEBANK v. CANADIAN PACIFIC R. CO.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. December 6, 1915.

1. ARBITRATION (§ I—3)—HOW LOST—DEATH OF ARBITRATOR.

Where in order to ascertain the value of hotel property parties agree to submit the matter to two arbitrators, the death of one such arbitrator after the right of appointment has been exercised by the parties, and there being no provision either in the agreement for submission or by statute enabling the appointment of a successor, brings the whole matter to a standstill, to which sees. 7 and 8 of the Arbitration Act, R.S.M., 1913, ch. 9, have no application, and the right to arbitration is thereby lost.

[*Yates* v. *Caruth*, [1895] 2 Ir.R. 146, followed.]

Statement

APPEAL by defendant from a judgment of Prendergast, J.

G. A. Elliott, K.C., and *M. G. MacNeil*, for respondent.

L. J. Reycraft, for appellant.

Howell, C.J.M.

HOWELL, C.J.M., concurred in judgment of majority of the Court.

Richards, J.A.

RICHARDS, J.A.:—Mr. and Mrs. Windebank had a claim against the C.P.R. Co. in connection with the Empress Hotel at Winnipeg Beach and certain chattels therein. They and the company, on April 1, 1915, executed a document purporting to be a submission to arbitration. It really only required 2 so-called arbitrators named therein, namely, George Neil and John McDiarmid, to value the hotel building, and 2 other so-called arbitrators to value the chattels.

The document provided for everything that was to be done outside of these valuations. It stated, as to each set of so-called arbitrators, that if they could not agree they might appoint a third. It further provided that, in fixing and determining the value of the building and goods, they should have reference only to the then present value thereof and not as related to or connected with any business, going concern, or license, but should fix the value thereof at a sum which, in their opinion and judgment, the said building and chattels should reasonably command on the open market, and that they should not fix any value of the land on which the buildings were constructed.

It was further agreed that the arbitrators should proceed to make their award without calling evidence, unless they or a majority of them decided that evidence should be called, and, in such event, the arbitrators were to designate what evidence

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should be called, and no further evidence than that so designated should be submitted to them.

The arbitrators as to the chattels in the hotel seem to have done their work, and that matter is not now in question.

No award was ever made as to the value of the buildings and Neil, one of the arbitrators, died. The Windebanks then notified the company that they appointed Mr. Melville as an arbitrator in Neil's place. The company refused to recognize him as such. The Windebanks then made two applications to Prendergast, J., one to have the time for making an award extended and the other to have Melville appointed as arbitrator in Neil's place. The Judge extended the time for making the award, but postponed the question of the appointment of an arbitrator. Against this order the railway company have appealed.

A serious doubt appears from the decided cases as to whether this appointment of parties to value is really a submission to arbitration, or merely an appointment of valuers. If the latter, then there is no power whatever to appoint a further valuer in Mr. Neil's place. Without deciding that question, I think the matter can be dealt with by a consideration of the Arbitration Act.

Supposing that the document does really provide for an arbitration, so that the Arbitration Act does apply, as to which I express no opinion, the power to appoint a new arbitrator must be got under sec. 7 or sec. 8. It clearly is not under sub-sec. (*a*) of sec. 7, which refers only to a submission to a single arbitrator. It also cannot come within sub-sec. (*c*), which refers to the appointment of an umpire, or third arbitrator, or within sub-sec. (*d*), which refers to the case where an appointed umpire, or third arbitrator, refuses to act or dies. Mr. Neil was neither third arbitrator nor umpire.

Then, does it come under sub-sec. (*b*) of sec. 7, which says that, if an appointed arbitrator refuses to act, or is incapable of acting, or dies and the submission does not shew that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy, an arbitrator may be appointed as there provided?

I am of opinion, on considering it with the last part of the section, that sub-sec. (*b*) is limited, like sub-sec. (*a*), to a submission to a single arbitrator. This appears to be the opinion held at p. 121 in Redman on Awards, although the case of *Yeates* v. *Caruth*, [1895] 2 Ir.R. 146, there relied on, is not quite in point, I think, because the wording there under consideration is not as in our sub-sec. (*b*). Instead of the word "submission," the expression used is "such document," which, patently, refers to the kind of submission named in the preceding sub-section, *i.e.*, one to a single arbitrator.

As to sec. 8, the applicants are met, at the threshold, by what seems an insurmountable objection. It says:—

"8. When a submission provides that the reference shall be to 2 arbitrators one *to be* appointed by each party, then," etc.

It is argued that this case comes within the above because, though the submission names the arbitrators without distinguishing either of them as appointed by either party, subsequent correspondence between the parties seems to recognize Neil as having been appointed by the Windebanks. I cannot bring myself to so extend the construction of the Act.

It probably is the fact that the Windebanks originally named Neil, and the railway company originally named McDiarmid, but each of them was assented to by both parties in the document, so that each party exercised a control over the appointment of each arbitrator.

I take sec. 8 to refer to cases where the submission provides for arbitration by two not yet ascertained arbitrators and provides that each one of the parties to it shall *thereafter* appoint one of these arbitrators, which appointing would thus be without the consent, or control, of the other party to the submission. In such case the provisions of sec. 8 would properly apply, and, if either of the appointed arbitrators refused to act, or was incapable of acting or died, the party who appointed him might properly, without the other party's consent, appoint a new arbitrator in his place. In so doing he would only be exercising a right which it was contemplated by the submission he should have, that is, of being the exclusive chooser of one arbitrator.

The exercise of the power to appoint given by sec. 8 would

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be contrary to justice in a case where, as in the present, each party had assented to both arbitrators. This point is decided by the Irish Court of Appeal in the above case of *Yeates* v. *Caruth*, in dealing with a section substantially similar to our sec. 8.

It is difficult to say what conclusion should be come to as to the disposal of this matter. I can see no possible way in which the Windebanks can proceed under the document before us. The death of the one arbitrator, without any provision, either in the agreement, or by statute, enabling a successor to him to be appointed, brings the whole matter to a standstill. I think, with deference, that the trial Judge should have dismissed both applications. I would allow the appeal.

Perdue, J.A.

PERDUE, J.A.:—An agreement dated April 1, 1915, was made between Edward Windebank and Cissie Windebank his wife, of the first part, and the C.P.R. Co., of the second part. The agreement recites that the railway company is the owner of the Empress Hotel, at Winnipeg Beach, and of the land on which it stands; that the railway company is the chattel mortgagee of certain goods and chattels on the premises at Winnipeg Beach under a chattel mortgage made by Cissie Windebank to the company, dated July 8, 1914; that the parties of the first part, the Windebanks, claim to have made improvements on the premises; that the railway company has expended in connection with the premises the sum of $37,677.08. The operative part of the agreement declares that the Windebanks agreed to release and did thereby release to the railway company all demands whatsoever which they had against the company to any claim on the Empress Hotel or the lands on which it was erected or which the Windebanks had against the goods and chattels in the hotel and particularly described in the above mentioned chattel mortgage. The Windebanks further agreed to surrender their interest in a lease of the premises made by the railway company to Cissie Windebank, dated May 1, 1914. The parties agreed to submit to arbitration the following matters: the fixing of the then present value of the building known as the Empress Hotel at the Town of Winnipeg Beach should be submitted to the award order and arbitration of George Neale, of the City of Winnipeg, contractor, and John McDiarmid, of the City of Winni-

peg, contractor, and that the fixing of the then present value of the goods and chattels contained in the said hotel and set forth in the chattel mortgage between the parties hereinbefore mentioned should be submitted to the award, order and arbitration of Frank Mills, of the City of Winnipeg, furniture dealer, and A. Wright, of the City of Winnipeg, valuator. In the event of the said arbitrators in either or both cases not being able to agree within 5 days from the date of the agreement upon their award then it should be lawful for the arbitrators to name and appoint some third person in either or both cases as a third arbitrator, the appointment to be made in writing and the award of any two of the arbitrators appointed for the purpose of determining the value of the building should be final and conclusive, and the same provision in connection with the valuation of the chattels. It was then provided that if the aggregate amounts fixed by the arbitrators as to the present value of the building, goods and chattels exceeded $37,677.08, together with any and all other charges against the buildings, goods and chattels, then the railway company would pay the Windebanks the difference between the amount so found as the value of the buildings and goods and chattels and the aggregate of the sum of $37,677.08 and of any and all other charges against the buildings, goods and chattels; but in the event of the aggregate of the amounts to be fixed by the arbitrators as the present value of the buildings, goods and chattels being less than the sum of $37,677.08 and all the charges against the buildings, goods and chattels, then the Windebanks were to pay the difference to the railway company.

Clause 8 of the agreement provided that the arbitrators in fixing and determining the value of the buildings and the value of the goods and chattels should have reference only to the present value thereof as buildings and chattels and not as related to or connected with any business, going concern or license, but that they should fix the value at a sum which in their opinion and judgment the buildings and chattels would reasonably command on the open market, but not fix any value of the land on which the buildings were constructed.

Provision was made that the submission to arbitration should be made a rule of the Court of King's Bench.

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It was also agreed that the arbitrators should make their award without calling evidence unless they, or the majority of them, decided that evidence should be called, and in such an event the arbitrators should designate what evidence should be called and no further evidence than that designated should be submitted to them. The awards were to be made in writing on or before April 12, 1915.

The arbitration in regard to the chattels was proceeded with and an award was made. This award was abandoned and by agreement between the parties an application was made to a Judge of the Court of King's Bench under the Arbitration Act for the appointment by the Court of a new third arbitrator in the place of the one selected by the two arbitrators to assist them in arriving at a valuation of the chattels. Macdonald, J., to whom the matter was referred, named one John S. Scott as third arbitrator or umpire. Instead of taking out an order the change was embodied in an agreement between the parties. Pursuant to this appointment the umpire and one arbitrator made an award in respect of the chattels which does not appear to be attacked.

George Neil, who was named in the agreement as one of the arbitrators to make a valuation of the hotel building, died before an award was made. About a month prior to his death he wrote to Edward Windebank stating that owing to illness he was unable to act, and declining to proceed further as an arbitrator. The Windebanks then gave formal notice to the railway company and to the surviving arbitrator that they had appointed one Alexander Melville in place of Neil to act as arbitrator in their, the Windebanks', behalf, in the matter of the valuation of the building. This notice appointing Melville is dated July 20, 1915, and appears to have been served within a day or two of that date. The parties had agreed to extend the time for making the award until August 1, 1915. On August 6, the solicitor for the railway company wrote the respondents' solicitors declining to proceed further with the award. The only reason given for this refusal was that the time for making an award had expired. The Windebanks then gave notice of motion to a Judge in Chambers for an order extending the time for making

the award. Subsequently notice of motion was served by the respondents for an order to appoint an umpire to act with the arbitrators respecting the valuation of the building. The two motions came on together before Prendergast, J., who made an order extending the time until November 15, 1915, and directed the other motion to be adjourned *sine die*. The present appeal is brought from that order.

The appellants, the railway company, take the ground that the agreement between the parties did not provide, either in the case of the chattels or of the building for a submission to arbitration under the terms of the Arbitration Act. They also urge that the Windebanks had no power to appoint a new arbitrator in the place of Neil, the deceased arbitrator.

Under the first ground the appellants urge that the parties named as arbitrators were in fact only valuators and that they had no judicial functions to perform. In support of this contention the following authorities were cited: *Laidlaw* v. *Campbellford*, 19 D.L.R. 481, 31 O.L.R. 209; *Campbell* v. *Irwin*, 32 O.L.R. 48 (reversed 23 D.L.R. 279); 1 Hals., 440; Russell on Arb., 9th ed., 44; Redman on Arb., 4th ed., 2. I find much difficulty in deciding whether the provisions in the agreement of April 1, 1915, appointing arbitrators, so called, constituted a submission within the meaning of the Act, or was merely a method provided for making a valuation of the chattels and the building.

Para. 11 of the agreement enables the arbitrators or a majority of them to call evidence for the purpose of making their award. It is not a general power to hear any evidence that may be submitted by the parties, but the arbitrators are to designate what evidence shall be called and no other evidence shall be submitted to them. Still, the fact that the arbitrators may call evidence might cause the matter to assume the character of a judicial enquiry. The consideration of the matter involved such difficulty in regard to the principles upon which the arbitration was to be conducted that in the subsequent agreements of May 27 and June 22, relating to the chattels, provision is made that the arbitrators are to consult a prominent counsel, who is named, as to the basis on which they shall make the valua-

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tion under the terms of the agreement, and particularly with reference to paragraph 8 of the agreement. It appears to me that this further goes to shew that the task of the arbitrators was not one of simple valuation, but that it involved the consideration of the principles upon which they were to act in carrying out the intention of the agreement. These features of the agreement as amended appear to shew that there was something to be adjudicated upon beyond the mere fixing of values such as would be done by a valuator who would act merely upon his own skill and knowledge. This view might bring the case within the scope of such decisions as *Re Hopper*, L.R. 2 Q.B. 367, and *Vickers* v. *Vickers*, L.R. 4 Eq. 529, 536.

I do not, however, consider that it is necessary to expressly decide whether the documents in question in this case constitute a submission to arbitration or merely a method of valuation. Even if we assume that the agreement provides for an arbitration, this does not dispose of the difficulties which confront the respondents. Their first motion was for an extension of the time for making an award. To entitle them to make the motion they must shew that they have power to replace Neil by appointing a new arbitrator in his place.

The agreement in this case provides that the reference is to be to two persons named in the document itself. There is nothing in the agreement which shews that an arbitrator was named by each party. At common law if one of two arbitrators named by consent refused to act, was incapable, or died, the submisson would fall to the ground. Unless, therefore, the statute enables the respondents to appoint a new arbitrator in the place of Neil, they cannot proceed. Sec. 8 of the Act is relied upon as enabling the respondents to appoint a new arbitrator in Neil's place. That section enacts that

> when a submission provides that the reference shall be to two arbitrators, one *to be appointed* by each party, then, unless the submission expresses a contrary intention—(*a*) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place.

The correspondence and other documents indicate that Neil was in fact named as an arbitrator by the respondents and that McDiarmid was named by the railway company. This naming

of the arbitrators, however, took place before the agreement was signed. The arbitrators are named in the agreement itself and the reference is made to these two persons, and both parties have agreed upon them as the arbitrators. The reference is not to "two arbitrators, one to be appointed by each party," but to two persons agreed upon by the terms of the instrument. The case of *Yeates* v. *Caruth*, [1895] 2 Ir.R. 146, is very much in point. There the parties had agreed that the matters in dispute should be referred to two persons named in the writing. One of these persons declined to act. An application was made to a Judge to appoint an arbitrator in the place of the one who had declined to act. The clauses of the statute under which the application was made were similar to, and did not differ in any substantial respect from, secs. 7 and 8 of the Arbitration Act. On the Judge refusing to grant the motion an appeal was made to the Court of Appeal consisting of Walker, C., Palles, C.B., Fitzgibbon and Barry, L.JJ. Walker, C., said:—

It is clear the case does not come within sec. 16 of the Common Law Procedure Act of 1856 (corresponding, in so far as this case is concerned, to sec. 8 of the Arbitration Act), because, though the consent was to refer the matters in dispute to two arbitrators, the arbitrators here are not such as are mentioned in that section, viz., "one appointed by each party." The Chancellor then proceeded to point out that the case did not fall within sec. 15 of the C.L. Pro. Act (corresponding with sec. 7 of the Arbitration Act) because that section in the first two branches ((*a*) and (*b*) of our sec. 7) only dealt with cases where there was a single arbitrator to be appointed or a single arbitrator actually appointed. The other Judges took the same view. Although the decision is not binding on this Court, still we should hesitate to differ from the unanimous finding of so strong a Bench. I think, therefore, that neither under the agreement itself nor under the statute, if it were held to apply, have the respondents power to replace Neil with a new arbitrator. Reference might be made to the reasoning of the Court of Appeal for Ontario in *Excelsior Life Ins. Co.* v. *Employers' Liability Corp.*, 5 O.L.R. 609, which exemplifies how strictly the relief afforded by the statute is confined to cases clearly within the Act.

I regret very much that the respondents, by an unforeseen

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occurrence, have lost the right to an arbitration to ascertain the value of the hotel building. They, relying on the arbitration that was to take place, surrendered the hotel and its contents to the railway company. The plaintiffs will now be driven to expensive litigation to obtain whatever may be coming to them, instead of having the questions between the parties settled by the summary and inexpensive method contemplated by the agreement, a method which has failed by reason of the death of one of the arbitrators. It is to be hoped that the parties may be able to arrive at some arrangement by which their original agreement can be carried out and expense avoided.

The appeal should be allowed and the order pronounced by Prendergast, J., set aside. Under the circumstances of this case no order as to costs should be made.

Cameron, J.A.

CAMERON, J.A., concurred with the majority of the Court.

Haggart, J.A. (dissenting)

HAGGART, J.A., dissented. *Appeal allowed.*

ONT.

S. C.

Re HANNAH AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R. CO.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., and Riddell, Latchford and Kelly, JJ. November 16, 1915.

1. DAMAGES (§ III L 2—240)—EXPROPRIATION OF LAND FOR RAILWAY — ESTIMATION OF VALUE—RECONVEYANCE OF PART TAKEN.

Though an owner cannot be compelled to take back land after it has been found unsuitable for the purposes for which it was taken by a railway company, the fact, that by accepting a reconveyance, the value of the remaining land would be materially increased, should be taken into consideration when awarding compensation therefor.

Statement

APPEAL by railway company from an award of arbitrators under the Dominion Railway Act.

J. D. Spence, for appellant.

M. K. Cowan, K.C., and *J. E. Madden*, for claimant, respondent.

Riddell, J.

RIDDELL, J.:—The Campbellford Lake Ontario and Western Railway ran through the land of Robert Hannah, in the township of Camden—the company took certain land for their right of way, which they have paid for. They also took certain land for a gravel-pit, and, after taking considerable gravel away, found that it was not suitable, and they offered and continue to offer a reconveyance of the land thus expropriated—Hannah refuses to accept it, and tells us, by his counsel, that he does not want the land at all.

On an arbitration as to the damages to be awarded for severance, etc., the arbitrators found $10,500, adding in the award the following:—

"In fixing the above amount, we are of the opinion that, in ascertaining the compensation and damages with reference to the time of taking possession as aforesaid, it would not be proper nor would we be at liberty to take into consideration the deed of reconveyance of the land expropriated, tendered by the said railway company to the claimant on the 18th day of May, 1915, and declined by the claimant, and we have therefore not done so."

The railway company appealed to this Court; we thought that it would be well to have the reasons for the decision of the arbitrators, and called for them. The majority of the arbitrators have furnished the following as their reasons: "Having been asked for our reasons for awarding the claimant herein the sum of $10,500, we would state that, in arriving at the sum to be allowed the claimant Robert Hannah for compensation, we endeavoured to ascertain the difference in value of the farm to the claimant, between the farm as it existed as one continuous tract used and farmed as one body of land by him before the expropriation of the part taken by the railway, and the farm as it was left after such expropriation and the work done on it by the railway, and in arriving at this difference in value we gave such weight as we thought just to the evidence of the several witnesses produced before us by both parties, and twice visited and inspected the premises, and decided that, in our judgment, based on such evidence and inspections, the sum of $10,500 was the fair and just allowance to make for such difference or depreciation in value to the claimant."

The third arbitrator does not dissent from this method. Very considerable evidence was given of the amount by which the damages would be diminished—or the present value of the farm would be increased—by the addition thereto of the land expropriated but now useless to the railway company, the least sum being $750.

That the conduct of the owner is against the public welfare requires no argument; he desires to be paid money that land be idle rather than increase the value of his own land. But his legal rights are all we can consider here. That the general principle

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followed by the arbitrators is sound there can be no doubt. In ascertaining the compensation for land taken, it is clear that the proper principle is to ascertain the value of the whole land before the taking and the value of the remaining portion after the taking and deduct one from the other—the difference being the compensation to be allowed: *James* v. *Ontario and Quebec R.W. Co.* (1886-8), 12 O.R. 624, 15 A.R. 1.

In estimating the value of land, it is not the sentimental value but the pecuniary or commercial value that must be considered—and in determining this, of course, all potentialities must be considered and contingencies taken into account: *Re Macpherson and City of Toronto* (1895), 26 O.R. 558, 565; *In re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, 6 Can. Ry. Cas. 395; and there can be no possible reason why this should not be done when estimating the value after as well as before expropriation.

If we were considering the value of land before expropriation and found that it could be made more valuable by a trifling expenditure or none—or say by accepting a deed of adjoining property—that circumstance would be taken into account—must be taken into account—in arriving at the market, pecuniary or commercial value; accordingly, in estimating the value of what was left, the fact that by simply accepting a deed of the property the land would be increased in value must be taken into account.

In neither case before or after taking is the fact (if it be a fact) that the owner does not want and cannot be compelled to take a deed of adjoining land of any consequence—it is not what he wants to do but what is the value of the property as it stands.

We do not decide that the railway company have the right to compel the owner to accept a deed and take back the property—the effect of the readiness of the railway company to reconvey is in the present judgment considered only on the point of the value of the property being thereby increased commercially.

In much the same way, while the owner could not be compelled to till his land in a particular way, etc., the fact that the land could, by being tilled in a particular way, etc., be made much more valuable, is an element which should be considered in estimating the value of the land.

I think that it is clear from the evidence that by accepting a

deed the land remaining to the owner would be worth $750 (at least) more than it otherwise would be—this element has been disregarded (I think wrongly) by the arbitrators, and the award should be diminished by $750—the railway company to tender the deed again to the owner.

Success being divided, there should be no costs of this appeal.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD and KELLY, JJ., agreed in the result.

Appeal allowed in part.

REYNOLDS v. CANADIAN LIGHT & POWER CO.

Quebec Court of Review, Tellier, Demers and Greenshields, JJ. September 30, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT—APPLICABILITY—SUSPENSION FROM WORK.

A workman who is paid by the hour for his work, but who is laid off temporarily through no fault of his, and who is afterwards recalled and resumes his work, is entitled to estimate the amount he would have earned had he not been laid off, and add it to the amount actually received in order to shew that the Workmen's Compensation Act does not apply, and that he is entitled to bring his action under the common law.

Statement

THE judgment of the Superior Court for the district of Beauharnois, rendered by Mr. Justice Charbonneau, on May 16, 1914, is confirmed.

Construction of art. 6 (R.S. 1909, art. 7326), of the Workmen's Compensation Act. The only question submitted in Review was to know if the plaintiff had the right to sue his employer in damages under the common law (C.C., art. 1053) or whether he was bound to proceed under the above Act.

L. Codebecq, K.C., for plaintiff.

J. G. Laurendeau, K.C., for defendant.

Greenshields, J.

GREENSHIELDS, J.:—This is an action in damages taken by the plaintiff under art. 1053 of the C.C. The plaintiff alleges in his declaration, that while in the employ of the defendant company, on January 3, 1913, he met with an accident, by which he lost his two hands and one eye. The details of the accident and the causes thereof are fully set forth in his declaration. He concludes for a condemnation of some $25,000 against the company defendant.

To this action the company defendant pleads, in effect, admitting some of the allegations, particularly the happening of

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the accident, but denies responsibility, and alleges that the accident was due to the sole fault and negligence of the plaintiff, and, moreover, the defendant pleads that the plaintiff was earning less than $1,000 a year, and that his claim against the company should have been brought under the statute known as the Workmen's Compensation Act, and not under the common law.

The trial was had, and the plaintiff's action was maintained to the extent of $6,000. The trial Judge assessed the damages at the sum of $12,000 but reduced the condemnation against the defendant by $6,000, owing to the contributory fault of the plaintiff.

By the consent of the parties the sole question submitted to this Court, is, whether the proceedings taken by the plaintiff should have been taken in virtue of the Workmen's Compensation Act, or as rightly taken, under the common law.

If this Court decides that recourse under the common law was open to the plaintiff, then the judgment must remain; if not, it must be modified or reversed.

The fact is that the plaintiff entered the employ of the defendant in the month of July, 1911, at a salary or wage of 17½ cents an hour. His wage was increased from 17½ cents to 35 cents an hour up to the end of December, 1911. On January 1, 1912, a new engagement was entered into with him; his employment was changed, and his wage was increased to 40 cents an hour, and he worked continuously, with the exception of a certain period of time, to which I will refer in a moment, at that rate up to the date of the accident.

On February 15, 1912, the plaintiff was, to use the term employed by the witnesses, laid off.

I find from the proof made that his engagement was not finally and definitely terminated, but he was told that owing to existing conditions there was no work to be done, and, he was laid off, subject to be recalled to work at any time, and, as a matter of fact, on May 1, 1912, he was recalled and resumed his work—exactly the same work, and at exactly the same wage. During the time he actually worked, from January 1, 1912, to January 1, 1913, or to the date of the accident, he received from the defendants the sum of $939.50.

If the amount that he would have received, had he worked from February 15 to May 1, is added, then his wages amounted to more than $1,000 per annum, and he is removed from the operation of the Workmen's Compensation Act, and is entitled to his recourse under the common law.

When he was engaged on January 1, it does not appear that any idle days or idle time was anticipated; it certainly was no part of his engagement that he should remain idle for any space of time. His idleness from February 15 to May 1, was not voluntary; was not due to laziness, and was not due to any cause that was foreseen or expected at the time his engagement was made. It was not an idleness due to any thing different in the work itself. If this work was carried on up to the middle of the winter, viz.: February 15, there is no reason apparent in the record why it could not and would not, if different conditions happened to exist, be carried on continuously throughout the winter. There is no reason why the necessity for the work should not have existed.

I am of opinion that in arriving at a basis to estimate the yearly wage of this man, the period from February 15 to May 1, in which he did not work, should be counted, and what he would have earned at his stipulated salary during this period should be added to what he actually received during the time he did actually work between January 1, 1912, and the date of the accident.

I hold that the idle days (chômage) were due to accidental causes, and were beyond the control of the plaintiff, and for the purpose of the decision of this case, I am of opinion that the plaintiff is entitled to add to the actual amount he did receive, the amount he would have received, had he worked continuously. The discontinuance was not foreseen nor contemplated when the engagement was made, and he is not to be deprived of any benefit by reason of the accidental happening of something which prevented him, against his will and through no fault of his, from earning what his engagement entitled him to.

I should confirm the judgment on this ground and on this ground alone. *Judgment confirmed.*

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S. C.

LUTTRELL v. KURTZ.

Ontario Supreme Court, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. November 9, 1915.

1. COURTS (§ II A 4—165)—JURISDICTION OF DIVISION COURT—TITLE TO LAND—ACTION FOR RETURN OF DEPOSIT—BUILDING COVENANT.

Sec. 61 of the Division Courts Act, R.S.O. 1914, ch. 63, which denies a division court jurisdiction in actions where the title to land is involved, applies to an action for the return of a deposit on a contract for the sale of land owing to a defect in the title, because of restrictive building covenant.

2. APPEAL (§ IV F—135)—FROM DIVISION COURT—RECORD—EVIDENCE—AGREED STATEMENT OF FACTS.

The appellate court cannot review the judgment of a division court under secs. 127 and 128 of the Division Courts Act, R.S.O. 1914, ch. 63, unless the evidence taken by the division court judge is before it; a certificate of the judge as to what was proved before him might take its place, but a statement of facts agreed upon by the parties is not sufficient.

Statement

APPEAL by the defendant from the judgment of the First Division Court in the County of York in favour of the plaintiff in an action for the return of the sum of $100 paid by the plaintiff to the defendant as a purchaser's deposit upon a contract for the purchase of land from the defendant.

G. T. Walsh, for appellant.

G. Keogh, for plaintiff, respondent.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—I think this appeal should be allowed and the action dismissed, upon two grounds: first, that the Division Court had no jurisdiction to try the case; and, second, that there is no evidence certified to the Court as provided by sec. 127 of the Division Courts Act, R.S.O. 1914, ch. 63.

The Division Court is expressly deprived of jurisdiction by sec. 61 of that Act, which provides: "The Court shall not have jurisdiction in (*a*) an action for the recovery of land, or an action in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question."

This action is for the return of a deposit of $100, upon the ground that the defendant's title to certain lands is defective owing to a breach of a restrictive building covenant preventing a user of the land by the erection of a building of certain material and character nearer than fifteen feet to the street-line.

The question which the learned Judge in the Division Court had to decide was, whether or not that covenant affected the land,

and, if so, whether it had been broken, and whether that breach rendered the title defective.

In view of the difficulties always surrounding the question of whether such a covenant has ceased to bind the land (as to which see *Elliston* v. *Reacher*, [1908] 2 Ch. 374, at p. 384), it would seem to me inadvisable that such an action as the present should be determined in the Division Court. That Court is a Court of record (ch. 63, sec. 8); and if, after a decision either way, one of the parties should sue for specific performance or rescission, he would, if jurisdiction existed, be bound by the judgment.

But the Court has not, in my opinion, any right to decide upon whether the deposit must be returned, if the basis of decision involves the question of the possession, at the date of the contract or trial, of either a good or a defective title in the defendant.

Dealing with the second ground, this Court is called upon to decide whether the judgment is right without the evidence taken by the learned Judge being before it. Its place might possibly be taken by his certificate of what was proved before him, but not by a statement of facts agreed upon by the parties, which may or may not have been what he acted upon.

There is no provision for taking down the evidence by the Judge in cases where $100 or less is in controversy. But there is nothing which enables this Court to become seized of the appeal unless sec. 127 has been complied with (see sec. 128, sub-sec. 2).

Where evidence is taken, sec. 127 could not be satisfied without its being certified. This has not been done here; and, if the parties have allowed the case to proceed without taking precautions to see that the evidence can be included, they have themselves to blame.

Under the circumstances there should be no costs.

Appeal allowed.

DOMINION TEXTILE CO v. DIAMOND WHITEWEAR CO.

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Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 15, 1915.

1. DAMAGES (§ III A 1—40)—CONTRACT—BREACH—MEASURE OF COMPENSATION.

The measure of damages for non-delivery of goods is the difference between the contract price and the full price in open market, at the date of contract, but, damages for reduced output and disorganization of business on account of such non-delivery are too remote to be considered.

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DOMINION TEXTILE CO. v. DIAMOND WHITEWEAR CO.

Statement

THE judgment of the Superior Court, which is modified, was rendered by Lafontaine, J., on February 27, 1914. The present appellant, principal plaintiff, sued for $4,229.90, as the balance of the price and value of goods sold and delivered. The respondent, by plea and cross-demand alleged that the plaintiff had been tardy in its deliveries, thus compelling the defendant to supply its needs from time to time by purchase on the open market at increased price up to $763.20, leaving $3,466.70 which were tendered to the plaintiff. It was also set up that the defendant's business was disorganized by the plaintiff's failure to deliver in time. Damages were claimed under the first head for $763.20; under second head for $5,808.81, with conclusions also for the cancellation of the contract, and compensation.

The Superior Court maintained the principal demand for the full amount. The tender made was declared invalid and of no avail, because not followed by deposit. The cross-demand was maintained to the extent of $656.20 for added cost of material, and $2,500 for damages, with costs.

The reasons of the judgment as to the last damages are as follows: "Whereas, in consequence of the non-delivery by cross-defendant of the cloth, which cross-plaintiff was to receive, cross-plaintiff was obliged to buy the same goods at an increased price of $656.20; that, moreover, on account of the lack of cloth to manufacture with their whitewear clothes, the business of the cross-plaintiff was seriously hurt and almost entirely disorganized; that cross-defendant gives no good or valuable excuse for the nonfulfilment of its obligations, except an alleged scarcity of labour which would not have existed if the company had been willing to pay sufficient wages to competent hands, and that by the evidence the damages suffered by cross-plaintiff are to be arbitrated at the sum of $2,500.

The appellant declared in its factum that the present appeal is directed to this point

The Court of Appeal maintained the appeal and reduced the amount of damages granted by the Superior Court.

Mr. Justice Trenholme, rendering the judgment of the Court:—

Considering that there is error in the judgment appealed from, ren

dered by the Superior Court, at Montreal, on February 27, 1914, in awarding to the cross-plaintiff for injury to and disorganization of its business, the sum of $2,500 damages which are not established by the record, and also in awarding to it only $656.20, instead of $763.20 for additional price paid by it for cottons bought by it in public market to take the place of cottons sold to it, by the cross-defendant, but not delivered, and which sum of $763.20 is the proper and only measure of damages, to which the cross-plaintiff is entitled to recover in the case for any cause;

Doth maintain both appeals herein taken and rendering the judgment the Superior Court ought to have rendered, doth declare principal plaintiff's demand of $4,229.90 compensated to the extent of said sum of $763.20, and doth condemn the principal defendant, the Diamond Whitewear Co., to pay to the principal plaintiff, the net sum $3,466.20, with interest thereon from service of process, with costs of principal plaintiff's action in the Superior Court, and of its appeal in this Court, and doth condemn the said Dominion Textile Co. to pay to the said Diamond Whitewear Co. the costs of its cross-demand and of its cross-appeal in this Court.

Statement

Brown, Montgomery & McMichael, for appellant.

Greenshields & Greenshields, for respondent.

CROSS, J.:—The Superior Court has found that the cross-plaintiff's circumstances were known to the cross-defendant and has adjudged damages for reduction of factory output in addition to damages for increased cost of cotton bought elsewhere. I consider that damages for reduced output are too remote even with such special knowledge as the cross-defendant had, and, besides that a purchaser who charges both extra cost of buying elsewhere and loss of profit from reduced output is making claims which overlap one another.

Cross, J.

On cross-defendant's appeal I would strike out $2,500. On the cross-plaintiff's appeal I would increase the sum adjudged for extra cost of cloth purchased elsewhere from $656.20 to $763.20. See *Simpson* v. *L. & N.W. R. Co.*, 1 Q.B.D. 274, at p. 277, and *G.W. R.* v. *Redmayne*, L.R. 1. C.P. 329; Enc. Laws of Eng. vol. "Damages," 2nd ed., p. 318.

Judgment varied.

WILTON v. MANITOBA INDEPENDENT OIL.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 12, 1915.

1. EVIDENCE (§ VI C—525)—SALE OF SHARES—PROMISSORY NOTE—CONTEMPORANEOUS PAROL AGREEMENT—ADMISSIBILITY.

Where a promissory note is given for shares of stock in furtherance of a plan to erect tanks for the supply of oil, a contemporaneous verbal agreement for the return of the note upon the failure to erect such tanks is inadmissible to disprove liability thereon in an action by the maker for the replevy of the instrument.

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WILTON v. MANITOBA INDEPENDENT OIL.

Perdue, J.A.

2. REPLEVIN (§ I A—4)—FOR WHAT—PROMISSORY NOTE.

A promissory note is a chattel and subject to replevin under the County Courts Act, R.S.M. ch. 44, sec. 222, by the party entitled to the possession.

APPEAL from judgment for plaintiff in action for replevy of note.

W. D. Card, for appellant, defendant.

C. P. Fullerton, K.C., for respondent, plaintiff.

PERDUE, J.A.:—This is an action of replevin to recover a promissory note made by the plaintiff to the defendants under the following circumstances. In February, 1914, one Rosser, who was a director of the defendant company and was also engaged in selling its stock, urged the plaintiff to buy shares in the company. The defendants were then contemplating the erection of a tank at High Bluff to supply oil to local customers. The plaintiff told Rosser to go ahead and if he got enough subscribers to put in a tank there, the plaintiff would take some shares. Later, Rosser again requested the plaintiff to take shares, but the latter refused to do so until the tank was put in. Finally it was agreed that the plaintiff would take 5 shares in the company and give his note for $125, due November 1, 1914, in payment for them, but it was at the same time verbally agreed that if tanks were not put in at High Bluff by June 1 the note was to be returned. The note was signed and delivered to defendants, but the tanks were not put in by June 1. On the 29th day of that month this action was commenced for the return of the note.

The verbal agreement above referred to was contemporaneous with the making of the note. It was objected by counsel for the defendant that evidence to prove the agreement was inadmissible as being an attempt to contradict the written instrument by oral statements made at the time it was entered into.

The law upon this subject is well settled. The cases are collected in Maclaren on Bills, 4th ed., pp. 46-47, and in Falconbridge on Banking and Bills of Exchange, 2nd ed., 531-534. The general effect of the cases is that "oral evidence is not admissible to shew an agreement that the liability of a party as it appears on the face of the bill is contingent on the happening of some event:" Falconbridge, p. 532. In *New London Syndicate*

v. *Neale*, [1898] 2 Q.B. 487, a defence was set up to a bill of exchange that, at the time of acceptance, it was orally agreed between the drawers and the acceptor that if the latter could not meet the bill at maturity, the drawers would renew it. In giving judgment in the Court of Appeal, A. L. Smith, L.J., said:

> The question is whether that evidence was admissible. The bill is a written instrument by which the defendant undertakes to pay £110 at the end of three months. It has been held over and over again, that evidence of a contemporaneous oral agreement is not admissible to vary the effect of such an instrument. If the evidence be to the effect that the document is only delivered as an escrow, or that it is not to take effect as a contract until some condition is fulfilled, it is admissible. But that is not this case. This document was signed and handed over as a bill of exchange, but there was an oral agreement that it should be renewed, if the defendant required it. In other words, although the written document states that the bill is to be met upon a day certain, the parol evidence is that it is not to be then met. Nothing is more clearly settled than that evidence of such an agreement is not admissible.

In the present case the plaintiff made and delivered the promissory note for a good consideration, namely, 5 shares of stock, and he seeks to set up, not a subsequent agreement which might operate as a discharge or an accord and satisfaction, but a contemporaneous oral agreement that if a certain thing were not done at a future time the note was to lose all validity and be given up to the maker.

The plaintiff's alleged right to the possession of the note rests upon the verbal agreement made at the time it was delivered. As this agreement contradicted the terms embodied in the note, it was not receivable as evidence. The plaintiff's action must, therefore, fail.

The appeal should be allowed with costs, the judgment in the County Court set aside and the usual judgment entered for the defendants with costs in that Court.

HAGGART, J.A.:—This is an action of replevin to recover possession of a promissory note signed by the plaintiff during negotiations for the purchase of certain stock in the defendant company. Haggart, J.A.

The action is brought under the County Courts Act, ch. 44, sec. 222, R.S.M. It is contended that under this section respecting replevin the action would not lie. I think the paper and the writing on it is a chattel subject to replevin by the party entitled

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to possession. I would read the statute as wide enough to include the cause of action in this suit.

The other question raised in issue is a more serious one. There is evidence of a verbal contract that if certain tanks were not erected at High Bluff by June 1 following this note would be returned to the plaintiff. The tanks were not erected within the time stipulated, whereupon the plaintiff demanded possession of the note, which was refused by the defendant.

The defendants urge that the admission of evidence of this verbal contract was a violation of the rule of law that contracts in writing cannot be varied by extrinsic verbal evidence, and that according to this rule the contracts of parties to promissory notes cannot be varied by parol evidence. The plaintiff contended that the foregoing rule did not apply, but that this verbal agreement was a distinct, separate agreement collateral to the note and founded on a good consideration and would be enforceable under the decisions in *Morgan* v. *Griffiths*, L.R. 6 Ex. 70; *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215; *Lindley* v *Lacey*, 17 C.B. (N.S.) 578; *Erskine* v. *Adeane*, L.R. 8 Ch. 756.

Although we are not construing or interpreting that note, and although the obligation on this verbal contract matures at a time prior to the maturity of the note and the breach occurred on June 1, before the due date of this note, we are, in substance, here trying the rights and obligations of the parties to this note. The verbal agreement, if given effect to, would be that the plaintiff was not liable upon the written contract.

Again, there is no doubt that the chief inducement to sign this note was the prospect of having an oil tank at High Bluff which would be a convenience to a farmer in the neighbourhood who uses quantities of oil for fuel and lubricants in the working of his machinery, and I considered the question as to whether there was a total failure of consideration, but when the defendants accepted this note the plaintiff had the obligation of the defendant company to issue to the plaintiff the five shares of stock. I think there is no question that we are bound by the authorities, which are collected in Maclaren on Bills and Notes, 4th ed., pp. 46 and 47, and Falconbridge on Banking and Bills of Exchange, p. 432.

The judgment of the trial Judge should be set aside and the action dismissed.

HOWELL, C.J.M., RICHARDS, and CAMERON, JJ.A., concurred in the judgment of the Court. *Appeal allowed.*

HILL v. STOREY.

Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. October 12, 1915.

1. MECHANICS LIENS (§ II—8)—RIGHTS OF CONDITIONAL VENDOR—CONFLICTING LIENS.

Where the title to furnaces sold is retained by a vendor until the payment of the price, the rights of such parties are governed by sec. 9 of the Conditional Sales Act, R.S.O. 1914, ch. 136, and such vendor cannot rank as a lienholder under the provisions of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1914, ch. 140.

Statement

APPEALS from the judgment of an Official Referee in a proceeding for the enforcement of mechanics' liens.

The findings of the learned Referee, Mr. F. J. Roche, were as follows:—

"The contract price was $2,460, but it will cost $75 to complete the house as agreed, so that Rawlings is entitled to $2,385, on account of which he has been paid $2,157, directly or indirectly, thus leaving $228 still due and owing to him on the contract, subject, of course, to the claims of his sub-contractors.

"Under the statute, however, Mrs. Storey is liable to lienholders to the extent of 20 per cent. of the said $2,385, or $477.

"I disallow *in toto* the extras claimed by Rawlings.

"I disallow the lien of the Toronto Furnace and Crematory Company Limited for $94.

"I find John T. Herriot entitled to a lien for $185; R. A. Rastall & Co., to a lien for $402.80; John Hill, the plaintiff, to a lien for $95; the Whyte Supply Company, to a lien for $38.75; J. Owen, to a lien for $61.82."

The notice of appeal was, on behalf of the Toronto Furnace and Crematory Company Limited, lien-holders, and Edward Rawlings, the contractor, to set aside the judgment pronounced by the Referee, and for an order declaring that the Toronto Furnace and Crematory Company Limited were entitled to a lien under the Mechanics and Wage-Earners Lien Act against the lands of the defendant Emma F. Storey, and for an order directing payment by her of the claim for extra work done by Edward

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Rawlings in the sum of $497, and for an order directing payment by the defendants of the costs, and for such further and other order as might seem meet, on the grounds following:—

1. That the Referee erred in his finding of law that the Toronto Furnace and Crematory Company Limited were disentitled to a lien under the Mechanics and Wage-Earners Lien Act, inasmuch as that company held a lien on the furnaces installed, under the provisions of sec. 3 of the Conditional Sales Act.

2. That the Referee erred in his finding of law with respect to the provisions of sub-sec. 2 of sec. 16 and sub-sec. 1 of sec. 28 of the Mechanics and Wage-Earners Lien Act.

3. That the Referee erred in disallowing the claim for extra work done by Edward Rawlings.

J. F. Boland, for the appellants the Toronto Furnace and Crematory Co.

M. Grant, for the lienholders.

J. M. Ferguson, for the defendant Storey, the owner, the respondent.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—Two questions arise in this case: the right of the Toronto Furnace and Crematory Company Limited to a lien under the Mechanics and Wage-Earners Lien Act, and the right of the contractor to extra payment for work done in finding a foundation for his footings.

The claimants the Toronto Furnace and Crematory Company Limited have supplied or furnished furnaces for the house in question, but the title to the furnaces remains, as is found by the judgment, in them until payment of the price, by virtue of the Conditional Sales Act.

The rights of the parties must be governed by sec. 9 of that Act, R.S.O. 1914, ch. 136, which is as follows: "Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other incumbrancer thereof shall have the right as against the seller or lender or other person claiming through or

under him to retain the goods upon payment of the amount owing on them."

But for that section, the provisions of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, would apply. That statute enacts (sec. 16, sub-sec. 2) that "material" (i.e., every kind of movable property—sec. 2, sub-sec. (*b*)) "actually brought upon any land to be used in connection with such land for any of the purposes enumerated in section 6, shall be subject to a lien in favour of the person furnishing it until placed in the building, erection or work, and shall not be subject to execution or other process to enforce any debt other than for the purchase thereof, due by the person furnishing the same."

These two provisions make a sharp contrast between a chattel which is the subject of conditional sale whereby the property does not pass till payment, and the case of material supplied but on which the vendor is given a lien until it is affixed to the realty.

In the first case the owner must pay in order to become entitled to treat the article as part of his real estate, but in the latter case the seller forfeits his lien as soon as he allows it to lose the character of a chattel. In some of the United States, in the absence of such a provision as sec. 9, the vendor retaining the title to the property has been allowed to enforce a mechanics' lien. But that section prevents the doctrine of election by the furnishing or annexation of the chattel from prevailing, and leaves the seller who possesses a contract such as that of the claimants here, the right to retake.

That being so, it is clear that, insisting as the claimants do upon their conditional sale contract, they cannot rank as lien-holders and compete with others who have no right as against the furnaces and their appeal must be dismissed with costs.

Upon the other branch of the case, presented by Rastall & Co., who are entitled as lien-holders to assert the contractor's rights, it is impossible to disturb the finding of the Referee that the amount claimed as an extra was really part of the contract price. The agreement for the house contains the provision that the contractor will make a satisfactory job; and, as the walls were to be of a certain height from the footings, there can be no pre-

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tence that the contractor was not bound to build the footings so as to sustain them. It was for him to stipulate how far he was bound to go down, if he desired extra payment for additional digging.

The appeal of Rastall & Co. will, therefore, be dismissed with costs. *Appeals dismissed.*

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K. B.

MARWICK v. KERR.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., and Trenholme, Lavergne, Carroll and Pelletier, JJ. June 15, 1915.

1. PARTNERSHIP (§ V—21)—MONEY REALIZED FROM ADMITTING NEW MEMBERS—DUTY OF ACCOUNTING.

The senior members of a firm possessing the majority interest therein, who, without the assent of the other partners, enter into an agreement whereby third parties are admitted to the firm, cannot properly retain a money consideration paid them for part of their shares of profits in pursuance of the arrangement, without an accounting thereof to the other partners.

Statement

APPEAL from judgment of Panneton, J., in action for accounting between partners.

Smith & Markey, for appellants.

Lafleur & Macdougall, for respondent.

The judgment of the Court was delivered by

Pelletier, J.

PELLETIER, J.:—The firm of Marwick, Mitchell & Co., has been in business for a long time as expert accountants. It was composed of a number of members who represented it, especially in the large centres. It formed a strong combination possessing the confidence of the business world, and it made considerable money. When the events in question in this case happened, the two oldest members Marwick and Mitchell drew 77½ per cent. of the net profits, and the others, their juniors, 22½ per cent.

In the course of a trip to Europe Mr. Marwick met Sir William Peat, head of a large house in the same way of business in England and proposed to him an alliance which was accepted, and the firm of Peat & Co., came into the business which became a new firm under the name of Mitchell, Marwick, Peat & Co. A contract was executed fixing the duration of this new firm at 10 years, and settling the conditions on which the business would be carried on; all the members to the number of twelve signed. Peat & Co. put $62,500 into the funds and paid in besides $100,000 to entitle them to 25 per cent. of the net profit. An-

other member by the name of Percy Garratt came in at the same time and acquired 2½ per cent. of the net profits on payment of a sum of $5,000. But Marwick and Mitchell did not disclose a part of these conditions, and claimed that the $100,000 received from Peat and the $5,000 from Garratt were for the acquisition of 27½ per cent. upon the 77½ per cent. which they themselves possessed and they tell us that seeing it was this 27½ per cent. on their 77½ which they had sold, they were entitled to the $105,000 in question without regard to their associates.

Kerr, one of the associates, and the majority of the others obtained knowledge of this 12 or 15 months after the execution of the deed of partnership, and strongly protested against it. Marwick and Mitchell succeeded in appeasing the anger of all the others by indemnifying them and offered to do the same with Kerr, the respondent, who refused, and declared that he would adhere to his rights. Mr. Kerr took an action in which he demanded that an account should be rendered of the $105,000 in question, and his share paid to him. He succeeded in the Superior Court, and it is the judgment of that Court which is submitted to us.

I have no hesitation in finding that the judgment of the Superior Court is well founded.

When Peat & Co. were admitted into the business they acquired 25 per cent. of the total and not one-quarter of the interest of Marwick and Mitchell. The deed which is before us makes this plain, and is not susceptible of two interpretations. We find there the following: "Peat & Co. acquire one-fourth interest in the business and goodwill of Marwick, Mitchell & Co." On the following page the following: "The profits of Marwick, Mitchell, Peat & Co. will be divided as follows—one-quarter to Peat & Co., and three-quarters to Marwick, Mitchell & Co." Moreover, Marwick and Mitchell did not associate Peat with their share. It was all the members who admitted Peat and who, therefore, surrendered to him 25 per cent. of the whole; it follows from this that each of the members of Marwick, Mitchell & Co. should receive his proportionate part of all that was paid in.

QUE.

K. B.

MARWICK v. KERR.

Pelletier, J.

It is proved and is certain that if all the members who had been left in ignorance of this payment of $105,000 had refused to remain in the new business of Marwick, Mitchell, Peat & Co., the result would have been that the now combination could not have been formed; in other words, the oldest members would have played a role so considerable in the combination that their concurrence would have been indispensable. But at the time when the new arrangements were made for the long period of 10 years the majority of the members signed when they were ignorant of the fact that two members received the considerable sum of $105,000. If they had known this at the time they would certainly have protested and demanded their share. Further, the most elementary principle of loyalty among partners demanded that the receipt of this sum of $105,000 should be known. If Marwick and Mitchell had the sole right to it they should have revealed it at the time the deed was executed to the other members, and the latter would then have gone in with full knowledge.

It is too late now for them to come and tell us that the receipt of this large amount does not affect the other members. Upon the whole, I would affirm the judgment with costs.

Judgment affirmed.

N. S.

S. C.

BURT v. DOMINION STEEL & IRON CO.

Nova Scotia Supreme Court, Graham, C.J., Drysdale, J., Ritchie, E.J., and Harris, J. November 23, 1915.

1. EMINENT DOMAIN (§ III E 4—186)—CONSTRUCTION OF SUBWAY FOR RAILWAY PURPOSES—COMPENSATION TO ABUTTING OWNER—CONSEQUENTIAL INJURIES.

The construction of a subway in pursuance of an order-in-council under secs. 178 and 179 of the Railway Act, R.S.N.S. 1900, ch. 99, required for the public safety to carry a highway under a railway, entitles an abutting property owner to recover, from the company executing the work, compensation for the value of his land injuriously affected thereby though the land itself is not actually taken.

[*Parkdale* v. *West*, 12 App. Cas. 602, followed; *Burt* v. *Sydney*, 15 D.L.R. 429, 50 Can. S.C.R. 6, 16 D.L.R. 853, applied.]

Statement

APPEAL from the judgment of Longley, J. A previous action brought by plaintiff for the same cause of action against the City of Sydney was dismissed by the Supreme Court of Nova Scotia, 15 D.L.R. 429, 47 N.S.R. 480, affirmed by the majority of the Court on appeal to the Supreme Court of Canada, 16 D.L.R. 853, 50 Can. S.C.R. 6, and, as the result of opinions expressed by the latter Court, the present action was brought.

H. Mellish, K.C., for appellant.

R. M. Langille, for respondent.

RITCHIE, E.J.:—The plaintiff is the owner of lands on Victoria Road, in the City of Sydney, upon which he has a house and shop. The Dominion Coal Co., Ltd., and the defendant company had constructed and in operation a railway with a level crossing, and the Cape Breton Electric Co., Ltd., had constructed and in operation an electric railway running along Victoria Road and intersecting the railway of the defendant company at McQuarrie's Crossing. The result was that the safety of the public was endangered. The City of Sydney, the Cape Breton Electric Co., the Dominion Coal Co., and the defendant company applied, under the N.S. Railways Act, to the Commissioner of Public Works and Mines to deal with the matter of the crossing in the interest of public safety. The parties were heard before the commissioner, and a report was made by him, which is set out in 50 Can. S.C.R. on pp. 6, 7, and 8 of the case on appeal. This report was approved by the Governor in Council. It set out that it was necessary and expedient for the safety of the public that the highway be carried under the railway, and it was, among other things, recommended that a subway should be constructed by the defendant company at a cost of $35,000, of which the City of Sydney should contribute $5,000, the Cape Breton Electric Co. and the Dominion Coal Co. each to contribute one-third of the remainder, but not to exceed $10,000, and the balance of the cost of construction to be paid by the defendant company. It was further provided that all land damages should be paid by the City of Sydney.

The subway was accordingly constructed by the defendant company. The plaintiff alleges that his property has, by the construction of the subway and the lowering of the street, been injuriously affected, and that he is entitled to damages. He brought an action against the City of Sydney, 15 D.L.R. 429, which failed, and he now brings his action against the defendant company. If the plaintiff is entitled to damages, it has been agreed that the amount is to be subsequently ascertained. The damages will be assessed once for all, covering all damages, both present and prospective.

The trial Judge has held that the plaintiff is entitled to recover, and this appeal has been asserted from his decision.

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Ritchie, E.J.

The subway was constructed by the defendant company under the authority of the Order in Council, and the validity of the Order in Council is based upon secs. 178 and 179 of the N.S. Railways Act (ch. 99, R.S.N.S.). By sec. 178 it is provided that:—

All the provisions of the law at any such time applicable to the taking of land by such company and to its valuation and conveyance to the company, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Governor in Council under this section.

Sec. 88 provides that:—

The company shall, in the exercise of the powers by this chapter or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

The defendant company constructed the subway, and wholly ignored secs. 138, 140 and other sections of the Railway Act which make provision for compensation. Having taken this course, the defendant company are, in my opinion, liable for any damages which the plaintiff may have sustained. The view which I have expressed as to the liability of the defendant company is in accordance with the view expressed by the majority of the Court in *Burt* v. *City of Sydney*, 50 Can. S.C.R. 6, at 29, Anglin, J., said:—

If the work was begun and prosecuted without application or notice to treat to the plaintiff (secs. 138-141) their construction and the alteration in the level of the highway were as to him a trespass; and for that those who committed it, the railway companies, and not the present defendant, are liable, just as they would be if they had entered upon and taken the plaintiff's land.

And Duff, J., said, at p. 27:—

The provisions of the Railway Act of 1879 which were in question in *Corp. of Parkdale* v. *West*, 12 App. Cas. 602, were almost identical with the provisions of the N.S. Railways Act relating to the construction of works which trespass upon or injuriously affect the lands of private persons, and it was there held by the Privy Council that before constructing a work having such effect it was the duty of the railway company to take the necessary proceedings to ascertain and to pay the compensation provided for in the Act.

This case is concluded against the defendant company by authority binding upon this Court, but I may add that it seems clear to me, upon principle, that, inasmuch as the only justification which the defendant company can have is under the Railways Act, upon which the validity of the Order in Council depends,

it must comply with that Act in order to make out such justification.

There is clear statutory provision for compensation, and the right to take or injuriously affect land does not vest until the question of compensation has been settled. Sec. 149 of the Act provides for the vesting of such right upon payment or legal tender of the compensation awarded or agreed upon.

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

HARRIS, J.:—The plaintiff owns premises on Victoria Road, in the City of Sydney, occupied as stores and dwellings. The railways of the defendant company and of the Dominion Coal Co. cross Victoria Road near to plaintiff's premises. Prior to 1911 these railways crossed this street on a level with the street, but in 1911 the grade of the street was lowered from a point some distance from the railway crossings on each side, so that the street now runs beneath the railways. In performing this work the plaintiff's building was left far above the level of Victoria Road, and his access to this street was cut off, but a narrow sidewalk and a narrow roadway were left in front of his building on the former level of the street. The plaintiff's building is close beside the railway, and the narrow roadway left in front of his house is a *cul de sac* terminating at the plaintiff's premises.

It must, I think, be admitted that the selling value of the plaintiff's premises has been seriously diminished, and the injury is of a permanent nature.

The work of lowering the grade of the street was done by the defendant company, and they seek to justify it by virtue of an Order in Council made by the Governor in Council under the provisions of secs. 178 and 179 of the Railways Act, ch. 99 of the R.S.N.S., 1900, and they say that the damages, if recoverable at all, are recoverable only against the City of Sydney, because, by the Order in Council referred to, it was provided that all land damages were to be paid by the city.

It was admittedly a dangerous crossing, and the defendant company asked the city council to request the Governor in Council to make the Order in Council referred to.

The Order in Council reads as follows:—

The Commissioner of Public Works and Mines, in a report dated April 18, 1911, states that the Dominion Coal Co., Ltd., and the Dominion Iron and Steel Co., Ltd., have constructed and in operation certain railways in the county of Cape Breton to which ch. 99 of the R.S.N.S. 1900 is applicable.

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Harris, J.

That such railways so in operation pass over and across a highway within the limits of the City of Sydney in the County of Cape Breton at a point known as McQuarrie's crossing. That it has been represented to the Governor in Council that it is necessary and expedient for the public safety that such highway be protected.

That careful enquiry has been made in respect thereto and in respect to the best means of affording such protection and as to the apportionment of the costs thereof, and all parties interested have been heard in respect thereto.

That it is necessary and expedient for the public safety and for removing or diminishing the danger arising from the position of the said railways and crossing that the said highway be carried under the said railway.

The Commissioner recommends that the necessary subway be ordered constructed in general accordance with the plans and specifications submitted by the Dominion Iron and Steel Co., Ltd., and referred to in the report of F. W. W. Doane, civil engineer, dated September 14, 1910, and annexed to the Commissioner's report, but, however, with the following modifications, and subject to the approval of the Governor in Council as to the further details thereof:

1. Modification of the sidewalk subway arch under the Dominion Coal Co.'s railway to a span with girders and re-enforced concrete roof. 2. Leaving of the south approach, including sidewalk grade, to approval of the city engineer of the City of Sydney. 3. The Commissioner further recommends that, except as modified above, the report of the said F. W. W. Doane be adopted, and that the recommendations contained therein be carried into effect.

The Commissioner further recommends: 1. That permanent pavement be not required to be laid in the said subway. 2. It shall be the duty of the Dominion Iron and Steel Co., Ltd., and the Dominion Coal Co., Ltd., to keep the street reasonably open for traffic during the construction of said subway. 3. That the expenses of a watchman from January 1, 1911, be paid by the parties interested, *i.e.*, the Dominion Coal Co., Ltd., the Dominion Steel Co., Ltd., the City of Sydney, and the Cape Breton Electric Co., in equal shares until the traffic across the rails be diverted into the subway. 4. That the Dominion Iron and Steel Co., Ltd., shall undertake the construction of the subway at the offer made by the Dominion Iron and Steel Co., Ltd., *viz.*, $35,000, and that the City of Sydney shall contribute $5,000, the Cape Breton Electric Co. and the Dominion Coal Co., Ltd., each contribute one-third of the remainder, not to exceed the sum of $10,000, balance of cost of construction to be paid by the Dominion Iron and Steel Co., Ltd. 5. That all the land damages be paid by the City of Sydney. 6. That detailed plans and specifications be submitted by the Dominion Iron and Steel Co., Ltd., for approval by the Government. 7. That the stairway be roofed over and all parties interested pay an equal portion of the cost.

The Lieutenant-Governor, by and with the advice of the Executive Council for Nova Scotia is pleased to approve of the said report and to order in accordance therewith.

No notice was given to the plaintiff of the hearing before the Governor in Council, nor was he notified that the work was being done under an Order in Council. No compensation was

offered to him by the defendant company or by the city or by the Dominion Coal Co., and the provisions of the Railways Act with regard to filing of plans and surveys and fixing the compensation of the plaintiff were not complied with.

It appears that the plaintiff brought an action to recover the damages now sued for against the City of Sydney and failed. That case is reported as *Burt* v. *City of Sydney*, 15 D.L.R. 429, 47 N.S.R. 480, and on appeal to the Supreme Court of Canada, 16 D.L.R. 853, 50 Can. S.C.R. 6.

The trial Judge held that the city was not liable. The Supreme Court of Nova Scotia unanimously upheld this decision. In the Supreme Court of Canada the Chief Justice and Idington, J., thought the city was liable, but Duff, Anglin and Brodeur, JJ., thought the Dominion Iron and Steel Co. was, but the City of Sydney was not liable.

I am unable to distinguish this case from *Parkdale* v. *West*, 12 App. Cas. 602, in which the corporation of Parkdale had done the work of making a similar subway and sought to justify under an Order obtained under the section of the Consolidated Railway Act of 1879, corresponding to sec. 178 of the N.S. Railways Act.

I think it is clear that the provisions of the N.S. Railways Act protect the owner of land injuriously affected as fully as did the Consolidated Railway Act of 1879, and the Privy Council held that this latter Act contained ample provisions for the recovery of compensation in respect of land injuriously affected, though not actually taken.

Following the decision of the Privy Council in the *Parkdale* case, I hold that, under the circumstances here, the defendants cannot justify their act by the Order in Council.

It was urged that, as there was no provision in the Consolidated Railway Act of 1879 similar to sec. 179 of the N.S. Railways Act, *Parkdale* v. *West*, *supra*, was distinguishable.

I am unable to find anything in sec. 179 which could, by any possibility, have affected the decision of the Privy Council in that case. That case, in my opinion, concludes this. I refer also to *Hanley* v. *Toronto Hamilton and Buffalo R. Co.*, 11 O.L.R. 91, and *McIsaac* v. *Inverness Coal and R. Co.*, 38 N.S.R. 80, and on appeal to the Supreme Court of Canada, 37 Can. S.C.R. 134.

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Something was said on the argument as to the principle upon which the damages were to be assessed. The question does not arise in the case, as the parties have agreed that they are to be assessed after the question as to liability is determined. But it may save another appeal if we deal with it now. What Lord Macnaghten said in the *Parkdale* case I think applies, and, to use his language,

> As the injury committed is complete and of a permanent character, the plaintiff is entitled to compensation to the full extent of the injury inflicted.

I would dismiss the appeal with costs.

Graham, C.J. Drysdale, J.

GRAHAM, C.J., and DRYSDALE, J. concurred.

Appeal dismissed.

SASK.

S. C.

WILLETT v. ROSE.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown, and Elwood, JJ. November 20, 1915.

1. PRINCIPAL AND AGENT (§ II A—7a)—GENERAL OR SPECIAL AGENCY—AUTHORITY TO COLLECT—SCOPE OF.

An authority given by a vendor of land to a notary who drew up the contract of sale, to collect from the purchaser a cash payment due under the contract, is merely special, from which no general power to collect the other payments accruing on the same contract can be inferred, so as to charge the principal with payments thus made to such agent who fails to account for them to the principal.

[*Willett v. Rose*, 31 W.L.R. 528, reversed.]

Statement

APPEAL by defendant from judgment of Lamont, J.

E. B. Jonah, for appellant.

G. E. Taylor, K.C., for respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an appeal from a judgment of Lamont, J., who made the following findings of fact:—

By an agreement in writing, bearing date December 21, 1909, the defendant agreed to sell the east half of section 23, township 11, range 23, west of the 2nd meridian, to W. H. Netterfield, for $5,202.50, payable $100 cash, and the balance by delivering to the defendant at Rouleau one-half the crop upon the land each year.

At the time this agreement was entered into there was upon the land fifty acres of flax which was still unthreshed, and the defendant and Netterfield entered into another written agreement by which Netterfield was to stook and thresh the flax and deliver one-half thereof at the elevator at Rouleau to the order of the defendant, the proceeds of which were to be applied on the land contract.

These documents were drawn up in the office of O. G. Cornwall, a notary public at Rouleau. On June 6, 1910, the defendant wrote to Cornwall as follows:

"Please let me know if Netterfield has hauled in the flax belonging to me on east ½ sec. 23-11-23, west of 2nd.

"Please look after this and deposit the money in the Bank of Ottawa for me. "William A. Rose, Kindersley, Sask."

"Please write and let me know about this flax."

To this Cornwall replied on July 8, 1910, stating that the flax had not all been threshed, but that Netterfield had offered $300 cash in lieu of the defendant's share and advising acceptance of the offer. On August 31, 1910, the defendant, in a letter to Cornwall, says:—

"If Netterfield has not threshed the grain, accept the $300 and place it to my credit in the Bank of Ottawa."

In September, Netterfield sold all his interest in the land, but not in the crop, to the plaintiff. The plaintiff was informed that Cornwall was agent for the defendant, and he, Cornwall, and Netterfield met in Cornwall's office on September 21 and completed the deal. One-half of the crop raised by Netterfield, which was not then threshed, belonged to the defendant. In order to facilitate the completion of the deal the share of the crop belonging to the defendant was estimated and Cornwall agreed, on behalf of the defendant, to accept that fixed sum as the defendant's share, and he endorsed on the agreement itself a receipt for $229.62 paid to him by Netterfield that day. The balance of the estimated one-half crop was $607.60. This was paid later by a cheque of the plaintiff's. There was an amount to be paid to Netterfield by the plaintiff for Netterfield's equity, but instead of the plaintiff paying this amount to Netterfield and having Netterfield pay to Cornwall the $607.60, the plaintiff gave his cheque to Cornwall and Netterfield gave him credit for the payment. The payment, however, was Netterfield's payment.

The plaintiff also paid a further sum of $76.54, expressed to be on account of interest to December 21, 1910. On October 1, 1910, Cornwall wrote to the defendant as follows:—

"I beg to inform you that I have sold the Netterfield place to Mr. Willet of Drinkwater, who is first-class. I have placed $300 in the Bank of Ottawa here to your order, and as soon as the threshing is done I will see that you get your half of the grain. Please let me hear from you as soon as possible."

To this letter the defendant replied on November 17, 1910, as follows:—

"Received your letter some time ago and contents noted. You said you sold the Netterfield farm to Willett of Drinkwater and he was first-class. It will be all right, and see that the half of the crop is delivered to my order. I will be at Rouleau in January and can fix these matters up."

The defendant did not go to Rouleau in January, or at all in 1911, and he says that his letter of November 17 was the last communication he ever had with Cornwall.

In the fall of 1911 the plaintiff saw Cornwall about the defendant's one-half of the crop grown that year, and Cornwall told him to ship the grain himself and give him a cheque for the defendant's one-half. The plaintiff shipped the grain, and, on December 29, 1911, he gave Cornwall a cheque for $800.

In 1912 the defendant's one-half of the crop came to $500, and on December 19 of that year the plaintiff gave Cornwall a cheque for this sum. Before he had paid this over, however, he had learned that the defendant was advertising the farm for sale again, and that Cornwall had not forwarded to the defendant the moneys which the plaintiff had paid in 1910 ·

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Newlands, J.

and 1911. The explanation given by Cornwall to the plaintiff was that he could not locate the defendant. Subsequently the plaintiff went to see the defendant, but the defendant would not recognize him as having any interest in the farm, and said he would not deal with him unless the plaintiff agreed to pay $9,600 for the place.

The plaintiff then brought this action, paying the balance of the purchase price into Court.

Although the defendant knew that the plaintiff had taken over the farm, he never wrote to him for his share of the crop in 1910, 1911 or 1912, and he says that he never wrote to Cornwall in reference to it after the letter of December 17, 1910. He could give no satisfactory explanation of his conduct in not making inquiries during these years as to what had become of his share of the crop. He admitted being in need of money, but never wrote for it. His testimony was unsatisfactory, and the only conclusion I can arrive at and his failure to make inquiries, is that he was purposely allowing the contract to get into arrears so that he might put an end to it; or else, as suggested by counsel, that there was communication between him and Cornwall which he now denies. Cornwall has now left the country and his whereabouts is unknown.

No evidence was given that Cornwall was an agent of defendant other than as disclosed by the above facts. He was, therefore, a particular or special agent of the defendant, and not a general agent.

In *East India Co.* v. *Hensley*, 1 Esp. 112, Lord Kenyon took the distinction between a general and special agent: that in the first case the principal must be bound by all his acts, whereas in the latter he is only bound while the agent acts within the scope of his authority. And in *Fenn* v. *Harrison*, 3 Term. Rep. 757, Buller, J., said:—

I agree with my brother Ashhurst that there is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent constituted for a particular purpose and under a limited and circumscribed power cannot bind the principal by any act in which he exceeds his authority, for that would be to say that one man may bind another against his consent.

And in Smith on Mercantile Law, 11th ed., p. 159, he says:—

The rule is directly the reverse concerning a *particular agent, i.e.*, an agent employed specially in one single transaction; for it is the duty of the party dealing with such a one to ascertain the extent of his authority; and if he do not he must abide the consequences.

And Story, sec. 126, says, speaking of the extent of the authority of general and special agents:—

In the latter case, if the agent exceed his special and limited authority conferred on him, the principal is not bound by his acts, but they become mere nullities so far as he is concerned, unless, indeed, he has held him out as possessing a more enlarged authority.

In this case there were no dealings between the plaintiff and the defendant. The plaintiff relied entirely upon the representations made by Cornwall.

In *Ross* v. *Sutherland*, 32 N.S.R. 243, Townshend, C.J. (p. 254), says:—

> Now, having regard to all the circumstances, I think the essential elements to constitute estoppel are wanting here. From this conversation it is sought to establish that Miss Culton led defendant to believe that Mrs. Fraser had decided or elected to look to McLean for her money. Assuming such to be the case, it must first appear that she made such statements intending that the defendant should base his actions on the truth of the fact so misrepresented, or, at any rate, that even if she did not so intend, any man of ordinary intelligence would likely regard it as true, and believe that it was meant to be acted on. But, it appears to me, that no man of ordinary intelligence, under the circumstances in which the conversation took place, could have drawn such an inference, and *further, statements so made in conversation, not to the party, but repeated to him, without authority, will not estop the party who made them from shewing the real facts.*

In my opinion, Cornwall had authority from defendant to receive the sum of $300 only. This amount was due under a contract which was completed before plaintiff bought the land from Netterfield. Defendant gave Cornwall no authority to receive any of the payments in grain under the agreement of sale that plaintiff took over from Netterfield, nor did he ever hold out Cornwall to the plaintiff as his agent. The fact that he made no inquiries as to whether plaintiff made any payments is no evidence against him as there was no contract between himself and plaintiff. There is no evidence that he had any knowledge that plaintiff had made payments to Cornwall, so that there was no acquiescence on his part to the payment by plaintiff to Cornwall.

I think, therefore, the plaintiff made the payments at his own risk, and, as Cornwall has absconded with this money, the plaintiff must lose it, and the judgment of the trial Judge shall be varied by crediting plaintiff with the sums of $100 and $300 only, these amounts having been paid to defendant by Netterfield.

Appeal allowed with costs.

QUE.

K. B.

SHIVES LUMBER CO. v. CHALEUR BAY MILLS.

Quebec Court of King's Bench, Appeal Side, Lavergne, Cross, Carroll and Pelletier, JJ. April 8, 1915.

1. LOGS AND LOGGING (§ I—1)—JURISDICTION AS TO RATES—LIEUTENANT-GOVERNOR IN COUNCIL—REASONABLENESS—POWER OF COURTS TO REVIEW.

Questions relating to the establishment of rates and their reasonableness under art. 7300, R.S.Q. 1909, for the privilege of logging or the value of improvements made by a company to facilitate the driving of logs are left to the entire discretion of the Lieutenant-Governor in Council, whose decisions are final, and from which the law provides no appeal to the Courts.

2. PARTIES (§ III—122)—INTERVENTION OF ATTORNEY-GENERAL—WHEN—CONSTITUTIONALITY OF STATUTE—ORDER-IN-COUNCIL.

The Attorney-General is not a necessary party to an action involving an attack upon the constitutionality of an Order-in-Council.

Statement

APPEAL from judgment of Tessier, J.

Hon. John Hall Kelly, K.C., for appellant.

O'Bready & Panneton, for respondent.

The judgment of the Court was delivered by

Pelletier, J.

PELLETIER, J.:—The respondent brought an action for $2,500 based upon art. 7300 of R.S.Q. 1909. It is alleged that under the provisions of this article the Lieutenant-Governor in Council established the tariff for the driving of logs upon the Grande-Loutre, Petite Loutre and Mott's Brook rivers, which are three tributaries of the Mill Stream river. The judgment of the first instance awarded $475.04 to the respondent, and it is this judgment which is submitted to us for review.

The defendant appellant sets up a number of grounds, of which the chief are:—(*a*) That the Order-in-Council is *ultra vires;* (*b*) that it is retroactive and that this retroactivity is illegal; (*c*) that the improvements made by the respondent upon the rivers in question have no value and have not been maintained in good condition; (*d*) That the respondent did not construct the work upon the river Mill Stream and that the tariff applies to this river just as to the tributaries; (*e*) that the rates imposed are oppressive; (*f*) that the rates should have been only imposed for the logs which passed at the place where the improvements were made and not for the logs which go below these improvements; (*g*) that there is no proof of a number of logs justifying a judgment for $475.04; (*h*) that the parties had not sufficient notice before the Order-in-Council was passed, and were not heard in opposition to it.

Two Orders-in-Council were passed—one in 1909 and the other

in 1912. That of 1909 authorized a charge of 50 cents per 1,000 ft. on the Mill Stream river. That of 1912 imposed a higher rate, but for the tributaries only—Big Otter, Little Otter and Mott's Brook.

The objections of the appellant that the improvements were worthless, that they were neglected, that the tariffs were oppressive, and other complaints of the same kind, are not within our jurisdiction. These are purely and simply questions of administration placed at the discretion of the Lieutenant-Governor in Council, and it is the Lieutenant-Governor in Council who must decide what tariff should be imposed.

To inform himself upon this question the Lieutenant-Governor in Council instructs his officials, who report to him, and upon their reports the fees are imposed or not, according to the discretion given to him. The law allows no appeal from his decision. However, the Lieutenant-Governor, after having fixed the tariff, may himself repeal, modify or maintain it.

The appellant complains of the decision of the provincial government and of the official report upon which it is based, and claims that it is unjust, oppressive and one might say even unique. If we had to decide the question with the evidence on the record, we would not hesitate to say that the Order-in-Council of the Lieutenant-Governor in Council is well founded. It rests upon facts of which evidence probably could not have been admitted, but which suffices to shew us that the discretion of the Lieutenant-Governor in Council was wisely exercised.

The objection that the Order in Council is *ultra vires* and that it is retroactive has no better foundation. We are even astonished that this alleged retroactivity is urged. After the passing of the Order-in-Council of 1909, the appellant complained bitterly; it opposed it as far as it could, and has succeeded in having the Order-in-Council of 1909 appreciably modified to its advantage by that of 1912. When the Order of 1909 was passed, the appellant succeeded in having the signature to it delayed by signing an agreement by which the respondent could claim nothing under this Order-in-Council or that which amended it for the time which would pass between the Order of 1909 and the new Order which might be passed.

It is with bad grace, in the circumstances, that the appellant

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speaks of retroactivity. It has succeeded in having the operation of the Order-in-Council delayed for 3 years, because it signed an agreement for that purpose, and when it succeeded, in 1913, in having the Order modified, it repudiated its agreement for the interval between the first and second Order-in-Council. We cannot countenance this position.

The objection that the Order-in-Council imposes a charge of 50 cts. on the Mill Stream river has no better foundation. On March 7, 1912, the Hon. L. A. Taschereau, Minister of Public Works, in charge of the matter which is before us, consulted the legal advisers of the Crown as to whether or not a tariff could be imposed for the Mill Stream river. Mr. Lanctot, the assistant Attorney-General, replied that art. 7300 R.S.Q. did not authorize the imposition of a tariff for Mill Stream, and when the new Order-in-Council was passed in March, 1912, the provincial government acted upon this opinion of its advisers, and no longer imposed charges for the Mill Stream river. Therefore the claim of the appellant that the tariff of the Mill Stream river exists is founded neither in fact nor in law.

As to the objection of the appellant that the tariff should only be imposed for logs passing at the very place where the improvements stand, it is proved—and, moreover, too, is self-evident—that the improvements upon these three watercourses have improved the Great Otter, the Little Otter and Mott's Brook throughout their whole course. This, again, is a matter to be referred to the competent authority of the Lieutenant-Governor in Council.

As to whether or not there is sufficient evidence to justify the condemnation to the amount of $475 we have no doubt that the evidence amply justifies it. We believe, indeed, that the amount awarded is very little in the circumstances.

There remains the objection that the parties were not heard before the Order-in-Council was passed. If there ever was a matter of administration as to which the parties were not only heard, but as to which all possible proceedings have been taken, it is this very case. Without entering into other details, it is sufficient to look at appellant's factum to know up to what point it itself admits that it renewed its petition and its argument. (The evidence on these facts is examined.)

The citations prove that not only were the parties heard, but that they used to the fullest extent the right they had to make their representations. In spite of all the reasons given by the appellant, the Lieutenant-Governor in Council partly maintained the Order in Council of 1909; it conceded to the appellant what was demanded in respect to the Mill Stream river and considerably reduced the charges for the Petite Loutre, the Grande-Loutre and the Mott's Brook.

The appellant complains that, according to the letters summoning them, the parties were to be heard before the Minister of Public Works. It admits that the Minister of Public Works heard them and re-heard them, but claims that it was before the Lieutenant-Governor in Council it should have been called. The memorial of which the appellant speaks was addressed to the Lieutenant-Governor and submitted to him. The habitual and constitutional practice, moreover, is that the parties are heard before the Minister who presides over the department to which the matter relates, and this Minister reports to the council. If the claim of the appellant is well founded, it could only be sustained on the ground that if, at the time of the Sitting of the council at which the Order in Council was passed, the Lieutenant-Governor himself was not present in person, the decision would be illegal. We believe that this claim is not serious, and that the appellant has had every opportunity to present his case, which has been considered, studied and passed upon.

The Lieutenant-Governor has not been very urgent, and the appellant has had 3 years to make good his position. To-day it tells us that the decision is oppressive, and wishes this Court, which has not administrative powers, to substitute itself for the Lieutenant-Governor in Council and decide a matter which it is not competent to decide. We believe that the judgment should be affirmed, but are of opinion that the two considerants, which read as follows, should be struck out:—

Considering that the defendant, by alleging that the said Orders-in-Council are unconstitutional and *ultra vires*, had not made the Attorney-General a party nor given him notice of the day of the hearing;

Considering that the defendant, in its pleas, only demands that the said Orders-in-Council be declared void and *ultra vires*, but does not demand that they should be quashed and has no conclusion to this effect.

Art. 114 of the Code of Procedure provides that notice should be given to the Attorney-General when the constitutionality

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of a statute is attacked, but here it is the case of an Order-in-Council, and the article of the Code does not apply.

We believe, moreover, that it was not necessary to demand that the Order-in-Council be annulled. Besides, the Court cannot annul the Order-in-Council, which, to repeat again, is an administrative measure. Therefore, these two considerants of the judgment were unnecessary. *Judgment affirmed.*

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LAREAU v. POIRIER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. June 24, 1915.

1. CONTRACTS (§ II D 2—170)—SALE OF LAND—COMPLETENESS OF ACCEPTANCE—OMISSION OF TIME OF PAYMENT.

The acceptance of an offer for the sale of land at a fixed price, even though coupled with a request for particulars of title, constitutes a complete contract of sale and does not render such request a condition subject to which the offer is accepted; nor will an inadvertent omission of the time at which a second instalment of the purchase price is to become payable, affect the right to specific performance of the contract.

[*Poirier* v. *Archambault*, 23 Que. K.B. 495, affirmed.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, 23 Que. K.B. 495, *sub nom. Poirier* v. *Archambault*, reversing the judgment of the Superior Court sitting in review, 19 R.L.N.S. 488, and restoring the judgment of Demers, J., at the trial, in the Superior Court, District of Montreal, by which the action of the plaintiff, respondent, was maintained with costs.

S. Germain, K.C., and *C. A. Archambault*, for the appellant.

St. Jacques, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I would dismiss this appeal with costs.

The sale was complete when the respondent accepted the offer of Mr. Archambault, the vendor. There was no doubt left as to the thing (*chose*) which the vendor offered to sell, nor as to the price at which he was prepared to sell it. Once the appellant agreed to give the property at the price fixed, nothing was left to uncertainty, the obligation to pay the purchase price was then absolute.

It may be that when the vendor seeks to collect the second half of the purchase price a question may arise as to the time at which it becomes payable. In my view, nothing turns on that now. This action was brought merely to get a deed evi-

dencing the sale which was complete and produced all its effects from the moment the vendor agreed to give his property and the vendee obliged himself to take it at the stipulated price. (Art. 1472, C.C.; S. V., 87.1.167.)

No question was ever raised during the lifetime of the vendor, Archambault now represented by the appellant, as to the conditions subject to which the purchase price was to be paid. Considerable negotiations took place between the parties after the contract was entered into. But the sole dispute between them turned exclusively upon the right of the purchaser to insist upon the production of the vendor's title deeds and the registrar's certificate. The vendor's position then was that there was a concluded agreement, a completed sale, between him and the respondent here. The language which he uses invariably is "qu'il s'en tenait à la lettre stricte de son contrat" (see protest exchanged between the parties and fyled in the case). In his pleadings the appellant says:—

Le défendeur déclara alors au demandeur qu'il n'avait pas de certificats du barreau d'enregistrement ni de titres a produire, excepté son propre titre d'achat, (lequel se trouvait le et dès avant le 29 octobre, 1910, en possession du notaire Olivier, mais que le dit notaire a alors passé au défendeur qui l'avait en sa possession lors de sa recontre susdite avec le demandeur) et le défendeur lui réitera, comme dernier mot, qu'il s'en tenait à la lettre stricte de son écrit du 27 octobre, 1910, *que son écrit était son contrat; qu'en dehors de son écrit il n'y avait rien à faire*, et sur ce, les dits pourparlers de vente entre le demandeur et le défendeur prirent fin.

And he repeats the same thing again here. One witness only was examined on behalf of the respondent, plaintiff below, and his evidence is to the same effect.

There does not seem to have been any doubt as to this in the minds of the Judges below, as appears by the observations of Tellier, J., in the Court of Review.

It is true, as found by the trial Judge, that Guillouiard and Duvergier would seem to make the condition of payment of the price of sale a condition of the sale itself, but it is to be noticed here that all the conditions with respect to the purchase price and to the terms of payment were settled except as to the time at which the second instalment would become due and exigible. As I said before, I do not consider this question arises on this

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record, but if it did, I quite agree with the judges in *Bartley* v. *Breakey*, 11 Q.L.R. 1, where they say that the Court would have, in a case like this, the power to fix the delay for payment. To the same effect, Baudry-Lacantinerie, vol. 19, p. 540, No. 499; Aubry & Rau, vol. 4, par. 303, p. 87. Reference may possibly be made to Dalloz 82.2.177, and to the note. I would draw special attention to the second considérant of that judgment which explains why it was there held that the sale was not perfect. On this point see also Duranton, vol. 16, No. 107 *bis*; 17 Laurent, No. 59 *in fine*.

A question was raised as to the effect of the last paragraph in the writing accepting the offer of sale. "Faites venir vos titres et certificat chez mon notaire." Do these words qualify the acceptance; I do not think so. The vendee bound himself absolutely in the first paragraph to buy on the terms contained in the offer and the words above quoted constituted merely a request for information as to the title and not a condition subject to which the offer was accepted. As admitted by the Court of Review, the letter of acceptance contained two distinct, separate and separable things; first, an acceptance pure and simple of the offer; secondly, a request which had reference not to the sale which was complete when the offeree expressed his intention to accept (arts. 1472 and 1025, C.C.), but to the obligation to deliver, which follows on the completion of the contract of sale. I do not think there can be any doubt that the obligation to deliver the thing sold includes its accessories, (art 1492 C.C.; Pothier, Vente, No. 47):—

Les titres et tous les enseignements qui concernent un héritage, en sont des accessoires que le vendeur est obligé de remettre à l'acheteur.

See also authorities in Revue Legale, N.S. vol. 1, pages 322, 323, 324, 325, 326; *Banque Ville-Marie* v. *Kent*, 22 Que. S.C. 162.

On the assumption that the vendor brought suit, could the vendee escape on the ground that having accepted the offer absolutely he asked for something in addition which the vendor might or might not be obliged to give? I think not. All the circumstances were fully and carefully considered by the trial Judge and I agree in his conclusions which have the approval of the Court of Appeal.

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I understand that the opinion of some of my colleagues is that the sale was not complete because, although the purchase price was fixed, by an inadvertent omission, the time at which the second instalment of that purchase price was made payable was not stated in the deed. I find comfort in the thought that all the Judges below who heard this case agree that this objection is without substance.

Sir Charles Fitzpatrick, C.J.

IDINGTON, J.:—I think this appeal should be dismissed with costs.

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ANGLIN, J.:—If this case fell to be disposed of under English law I should be prepared to allow this appeal on the ground taken by my brother Duff. But after devoting a great deal of time to the question I remain in doubt whether, under the law of the Province of Quebec, the failure of the parties to fix a date for the payment of the second half of the purchase money renders the contract alleged by the plaintiff incomplete and ineffective. The weight of the authorities to which I have had access rather favours the view that it does not.

Anglin, J.

On the other branch of the case I entertain no doubt that in making his request that documents of title should be sent to his notary the respondent did not and did not intend to stipulate for that as a term of the contract.

DUFF and BRODEUR, JJ., dissented.

Duff, J. Brodeur, J. (dissenting)

Appeal dismissed with costs.

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. November 17, 1915.

1. MUNICIPAL CORPORATIONS (§ I B—11)—ANNEXATION OF PART OF TOWNSHIP TO VILLAGE—POWERS OF MUNICIPAL BOARD.

The Ontario Municipal Board has jurisdiction under secs. 17 and 20 of the Municipal Act, R.S.O. 1914, ch. 192, to make an order annexing part of a township to a village, and by virtue of sec. 39(1) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, it also has the power to make such order suspensive in its operation.

2. MUNICIPAL CORPORATIONS (§ II H 2—275)—POWERS AS TO TAXES—ANNEXED TERRITORY.

A municipality cannot validly collect taxes on land of annexed territory not on the assessment roll at the time of annexation, and it may be enjoined from so doing.

APPEAL by plaintiff from judgment of Boyd, C., in an action to enjoin tax levy.

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W. Laidlaw, K.C., for plaintiff, appellant.

W. Morison, for defendants, respondents.

The judgment appealed from is as follows:—

October 1. BOYD, C.:—The plaintiff seeks to nullify the action of the Ontario Railway and Municipal Board in annexing a part of the township of Nelson to the village of Burlington, and the further action of erecting the village so enlarged into the town of Burlington, and to enjoin the levy of taxes by the defendants upon land owned by him in the annexed district.

The first attack is on the order of the Board made on the 10th June, 1914, by which a defined strip of land adjoining the village was detached from the township of Nelson and annexed to the then village of Burlington. At the request of the inhabitants of the district attached, the Board directed that the annexation should not take place forthwith, but that from and after the 31st December, 1914, the part of the township described should be incorporated in and with the municipality of Burlington. The Board had the power to make in form such an order, suspensive in its operation: Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 39 (1); and the Board had jurisdiction to make such a change in boundaries under the Municipal Act. The point is taken in the pleadings, but not substantiated in the evidence, that the application by the municipal council was not *bonâ fide* for an increased acreage on account of the proximity of streets or buildings in the district annexed or because of future exigencies of the village; but for the purpose of increasing the population so as to procure the number required in order to erect the village into a town. This is disproved. The population of the village before the application to annex was 300 more than 2,000.

The plaintiff also relies on the terms of the order made, in the first recital of which it is stated that the Municipal Act enacts that the Municipal Board may, upon the application of a village, annex thereto lands "which may seem proper and necessary for the carrying on of the administration of the said village." No such language can be found in the Municipal Act; the only section which confers jurisdiction is sec. 17 (R.S.O. 1914, ch. 192), which reads: "The Municipal

Board may, upon the application of the council of a village, annex a district to it where from the proximity of the streets or buildings in the district or the probable future exigencies of the village, the Board deems it expedient." The scope of this section goes back to early days. By C.S.U.C. 1859, ch. 54, sec. 13, the power was to be exercised, on petition of a village, by the Governor, who might by proclamation add to the village "any part of the localities adjacent, which, from the proximity of streets or buildings therein, or the possible future exigencies of the village, it may seem desirable to add thereto." This phraseology has passed into current statutory language, and has been continued ever since through all revisions till the present time. See R.S.O. 1877, ch. 174, sec. 14; R.S.O. 1887, ch. 184, sec. 14; R.S.O. 1897, ch. 223, sec. 16. So and in like terms the law continued till 1913, when the executive power was transferred from the Lieutenant-Governor to the Ontario Railway and Municipal Board, when the enactment now in force appears which has been carried into the last revision: R.S.O. 1914, ch. 192, sec. 17.

The Board has, for some unexplained reason, seen fit to change the language of the section while professing to proceed by virtue of it. I cannot say that the meaning of the new words used is equivalent to the meaning of the statute, though the Board may have thought so: what I have to deal with is, whether the error of the recital should vitiate the action of the Board—assuming for the present that the Court has jurisdiction in the premises.

I have evidence *aliunde* of the proximity of parts of two streets. New street and Brant street, forming part of the strip annexed, were before annexation boundaries between Nelson and the village, and the effect of the annexation is to incorporate them into the village. Upon these parts of the streets public money of the village has been time and again expended in their repair and maintenance. That fact, which was known to the Board, demonstrates the expedience of the annexation. Granted that the order misrecites the statute, it does not follow that the act of annexation was beyond the jurisdiction of the Board. I think that the whole recital is inofficious and superfluous, and

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cannot be so read as to indicate that the Board disregarded the statutory directions. If the Board had simply made an order declaring and ordering the annexation of the district in question without more, that order would not have been impeachable because it was not more explicit: R.S.O. 1914, ch. 186, sec. 44.

The effect of a misrecital in a deed is discussed by Holt, L.C.J., in *Bath and Mountague's Case* (1693), 3 Ch. Ca. 96, and to be found in the English Reports, vol. 22, at pp. 991, 992: he points out that the recital [of a deed] is not at all a necessary part of the instrument; and that, if the immaterial recital appears to be repugnant to what is the material part of the instrument, it will not destroy the effect of the instrument, but may be regarded as the mistake of the clerk. His whole discourse on the point of the benignant interpretation of charters appears to me well applicable to sustain the validity of the material part of the Board's order.

An erroneous recital in the preamble of an Act of Parliament was treated as ineffective by the Supreme Court of Canada in *Dwyer* v. *Town of Port Arthur* (1893), 22 S.C.R. 241.

Having regard to the statutory safeguards which are thrown around the acts of the Board and to the fact that the Board exercises the administrative authority formerly delegated to the Lieutenant-Governor, every assumption should be made in favour of the validity of such orders—particularly when the Legislature has provided an easy means of relief by summary application to the Lieutenant-Governor: R.S.O. 1914, ch. 186, sec. 47; and also on questions of jurisdiction or of law by direct appeal to a Divisional appellate Court: *ib.*, sec. 48.

But now to pass on to the second order made by the Board —made on the 9th December, 1914. This was made on the application of the village, having, as stated, a population of 2,364, to be erected into a town, and it was granted by the Board. The statute, R.S.O. 1914, ch. 192, sec. 20, gives power to the Board to erect a village of not less than 2,000 into a town and declare the name which it is to bear: sub-sec. 1. By sub-sec. 2 it is enacted: "Where, from the proximity of streets or buildings or the probable future exigencies of the newly erected . . . town, the Board deems it desirable that part of one or more

adjacent townships should be included in it, the Board may . . . detach such part from the township . . . and annex it to the newly erected . . . town." Having regard to this and in affirmation of what had been already done in the way of annexation, the Board not only orders that the village of Burlington as at present constituted be erected into a town, but goes on to order and declare that the existing limits of Burlington, *including the territory annexed thereto by the Board on the 10th June*, 1914, shall be the boundaries of the town of Burlington.

The statute provides (sub-sec. 3) that the newly erected town shall be divided into wards as the Board may direct. It is said that the three wards which were designated by the Board in that order did not contain or include any part of the annexed territory. That perhaps is important only in view of the further contention that the council elected by the town, on this subdivision of the wards, had no power to represent, or to levy taxes on, the newly annexed territory; and this is the gravamen of the plaintiff's complaint. It may be that the Board, while recognising that the annexed territory was to be included in the boundaries of the town, may have been influenced in their allocation of the wards by the fact that such inclusion did not come into effect till after the expiry of the municipal year 1914. The nomination of the council would occur before that time, and the actual election of the council for the year 1915 would be consummated, according to the Municipal Act, on the 1st January, 1915, contemporaneously with the actual incorporation and annexation of the new territory. However that may be, I take it that, so far as regards the erection of the village into a town and the annexation to it of this adjacent land, the matter as to all lack of form or of notice (if any) is for all purposes concluded by the emphatic words of the Act, ch. 192, sec. 20, subsec. 7: "The order shall be conclusive evidence that all conditions precedent to the making of it have been complied with, and that the . . . town has been duly erected in accordance with the provisions of this Act."

A fresh starting-point is thus obtained to deal with the assessment made upon this new territory.

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True it is, as stated in the complaint, that the assessment roll of 1914 for the collection of taxes in 1915 was completed during the year 1914 without reference to the land in Nelson (which was to be annexed in 1915). Nothing else could be done in the circumstances: the plaintiff remained liable to pay his taxes in Nelson for that year; but the land was removed from Nelson at the end of 1914, and he, as a resident of the newly erected town, became liable to pay taxes in that locality thenceforward. The only trouble was as to the machinery by which they should be ascertained.

The plaintiff's contention is, that this new territory was not represented in the council of 1915, and that it was illegal to impose taxes in the absence of a properly constituted council. It may be said that the clerk of the municipality of Burlington should have made up a supplementary list of voters containing the names of those entitled to vote in the detached territory, under sec. 93 of ch. 192; and, though this omission might have invalidated the election if proper objection had been made, yet it ought not to affect the *bonâ fide* conduct of the council as *de facto* elected to carry on municipal affairs such as the imposition and collection of taxes.

The defendants felt the difficulty of the situation, and applied for advice to the Board, and received a letter giving the opinion of the Board that the proper course would be to make a supplementary assessment of the newly annexed territory after the 1st January, since up to that time the annexed district had not become part of Burlington

Acting on this suggestion, and under sec. 230 of the Act, the council, by by-law No. 283, passed on the 22nd March, 1915, appointed an assessor who assessed the property of the residents in the new territory—the plaintiff, among others, for the sum of $63.70, one-half payable before the 15th July, 1915. The by-law did not on its face specifically define the locality to be assessed, but the work was done exclusively on the new and non-assessed territory annexed. The council thereupon passed another by-law, No. 291, of the 22nd June, 1915, to ratify the assessment of the newly annexed territory. From this assess-

ment the plaintiff appealed to the Local Judge in July, 1915, and the assessment was affirmed.

It was stated and not denied that the plaintiff and other dissidents were willing that a portion of the strip, half the depth determined by the Board, should be annexed, but were unwilling that the full depth, which took in the houses on the strip, should be included. While the matters complained of began in June, 1914, the plaintiff took no action to invalidate them till the 29th July, 1915, and by his inaction has allowed liabilities to be incurred and expenditures to be made by the town which ought not lightly to be interfered with. No substantial injustice—if any—has been done to the plaintiff; and I find no satisfactory ground for setting aside the *bonâ fide* action of the *de facto* council in regard to the taxes complained of: *County of Pontiac* v. *Ross* (1890), 17 S.C.R. 406, 413; *Gill* v. *Jackson* (1856), 14 U.C.R. 119, 127.

The action will stand dismissed with costs.

RIDDELL, J.:—An appeal from the judgment of the Chancellor.

I do not think it necessary to discuss the validity of the order of the Ontario Railway and Municipal Board of the 10th June, 1914—I see, however, no reason to disagree with the view of the learned Chancellor, simply adding a reference to *Re Simpson and Village of Caledonia*, 1 D.L.R. 15. But it is wholly immaterial whether this order is or is not valid—the important order is that of the 9th December, 1914. That affects to create a town with a territory "including the territory annexed thereto by the Board on the 10th June, 1914." This is descriptive of the territory, and not of the legal effect of the order; and the invalidity in law of the order could have no effect on the description—the Board believed that their order of the 10th June would effect at some future time the annexation of certain property described therein, and the language employed in the December order referred to that topographically, not legally. I have, therefore, no doubt that this order is valid under the Municipal Act, R.S.O. 1914, ch. 192, sec. 20 (1), (2)—the latter sub-section enabling the Board to add the annexed territory. If there were any doubt, it would perhaps be removed by sec. 20 (7), but there is none.

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But a much more formidable obstacle in the way of the defendants remains to be considered.

Taxes are not payable by any moral law or rule of the common law—they are in our system a pure creature of the statute; and, before they can be required of any one, some legal and statutory obligation must be made out. Use of streets, advantage of light, etc., etc., are all of no avail—the visiting motorist may have more advantage of these than some inhabitant of the town. It is quite clear that to entitle a municipality to demand taxes a legal and proper assessment must (speaking generally) be made out—no authority can be necessary for this proposition, and I cite only one: *Re Clark and Township of Howard* (1885), 9 O.R. 576.

Here there was no legal assessment at all of this land—the only assessment made being such as could be made use of for the following year only: the Assessment Act, R.S.O. 1914, ch. 195, sec. 56 (1)—sec. 56 (2) cannot be made to apply, as there had been a final revision of the roll; the roll itself shews this plainly.

It is said that it was impossible to make a legal assessment of this land, and probably that is so, but this fact does not entitle the defendants to demand taxes on a wholly illegal assessment. (Section 54 has no reference to the present case.)

I do not think that the defendants can be permitted to exact these taxes.

The statement of claim asks that it be declared that the land in question is not within the limits of the town of Burlington, and not liable to be assessed; also that the orders of the Board should be declared invalid—in this the plaintiff fails.

He should succeed in obtaining an injunction to restrain the defendants from collecting the taxes now alleged to be payable. Success being divided, there should be no costs of action or appeal, and the appeal should be allowed to the extent indicated.

I do not think that any effect can be given to the argument that the plaintiff and those in like case have no representatives on the council, that they had no opportunity to vote for councillors, and that taxation without representation is unconstitutional. That this maxim is profoundly true may certainly be admitted—but we must carefully distinguish the meaning of the word "unconstitutional" in British and in American usage. In our usage, that is unconstitutional which is opposed to the principles, more

or less vaguely and generally stated, upon which we think the people should be governed; in the American sense, it is that which transgresses the written document called the "Constitution." With us, anything unconstitutional is wrong, though it may be legal; with them, it is illegal, though it may be right. Accordingly, to say that a measure is unconstitutional does not with us indicate anything as to its legality.

It must be remembered, too, that thousands may be made to pay taxes who cannot vote for councillors—the infant, the married woman (whether this be on the principle that if she has a good husband she should not require a vote, and if she has a bad one she has trouble enough—or upon whatever principle or want of principle). The statute does not make the liability to pay taxes depend on the capacity to vote, and we cannot legislate.

It may be worth while for the defendants to apply to the Legislature to correct the statute by supplying the *casus omissus*—the Legislature has, of course, the power to pass any legislation validating past acts or providing remedies for past errors.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

LATCHFORD, J.:—Of the many questions raised in this appeal, the only one with which, in my opinion, it is necessary to deal, is, that there could not be a valid levy by the defendants of the taxes of 1915, because there was no valid assessment.

Unless there was an assessment according to the power conferred upon the municipality by the Legislature, the plaintiff is not in law liable for the taxes levied upon his property. Whether a proper assessment could or could not have been made in 1914—as to which I express no opinion—the act of the Commissioner appointed by the by-law of the 22nd March, 1915, in making the assessment, and the confirmation in June, 1915, by by-law, of that assessment, are both without warrant by any statutory enactment to which counsel for the defendants has referred, or which a careful search has revealed.

On this point the plaintiff is, I think, entitled to succeed. He should pay the same taxes as his fellow-townsmen, and the Legislature might well in such a case enable the defendants to compel payment.

As the plaintiff fails on all other grounds, there should, I think, be no costs of action or appeal.

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BELL v. TOWN OF BURLINGTON

Kelly, J.

KELLY, J.:—I agree in the result arrived at by my brother Riddell. To impose a tax legally, there must be first a valid assessment. The Assessment Act indicates the means by which such assessment must be made; and, as a taxing Act must be construed strictly (*Cox* v. *Rabbits* (1878), 3 App. Cas. 473), failure, such as is found in the present case, to observe the imperative requirements of the Act, is fatal. By no construction which can be put upon the procedure on which the defendants rely as imposing on the plaintiff's property the tax now objected to, can it be said that the imperative requirements of the Act have been complied with.

It does not affect the legal aspect of the matter that the plaintiff and his property now in question participate in the advantages for which his neighbours pay, and towards which he is unwilling to contribute. *Appeal allowed in part.*

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TUCKER v. JONES.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. November 20, 1915.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—EXCHANGE OF LANDS—PROPERTY SITUATE IN FOREIGN COUNTRY.

The court has jurisdiction to decree specific performance of a contract for the exchange of lands situated within the jurisdiction of the court, at the instance of a foreign plaintiff whose land is situated in a foreign country and who is ready and willing to perform his part of the contract.

2. EVIDENCE (§ VII H—631)—LEGAL QUESTIONS — ABSTRACT OF TITLE—FOREIGN LAW.

The legal effect of an abstract of title to lands situated in a foreign country cannot be established by the conclusions of an attorney practising therein, but it is for the court to construe the effect of all documents, having in view the foreign law with respect to them as proved by him.

3. SPECIFIC PERFORMANCE (§ I E 2—35)—EXCHANGE OF LANDS—DOUBTFUL TITLES.

Where in an action for specific performance of a contract for exchange of lands the issue of title is raised, but not prominently put forward in the pleadings, the court will direct a reference to the local registrar to afford the parties an opportunity of taking all proper objections on that ground.

[*Mayberry* v. *Williams*, 3 Sask. L.R. 350; *Lucas* v. *James*, 7 Hare 410, followed; *Landes* v. *Kusch*, 24 D.L.R. 136, referred to.]

Statement

APPEAL by defendant from judgment in an action for specific performance of contract for exchange of lands.

J. A. Allan, K.C., for appellants.

H. Y. MacDonald, K.C., for respondent.

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The judgment of the Court was delivered by

ELWOOD, J.:—This action was brought for specific performance of an agreement entered into between the plaintiff and the defendant William W. Jones for the exchange by the plaintiff of land situate in the State of Iowa for land situate in the Province of Saskatchewan. At the trial judgment was ordered for specific performance, with a reference for apportionment of insurance moneys payable on some of the buildings on the Iowa land destroyed by fire. The defendant appeals, and contends that the plaintiff has not made out a good title to the Iowa property, and also that the Court will not decree specific performance because the claim depends on title to land in a foreign country.

Dealing with the last objection first: I am of the opinion that the cases which are cited as to the position the Court will take are applicable only to cases where the land with respect to which a decree of the Court is asked is situate in a foreign country. That is not the case here. The land with respect to which the decree is asked is situate in this province. It is quite true that the land given in exchange and with respect to which the plaintiff alleges a readiness and willingness to convey is situate in a foreign country, but the case to my mind is analogous to that of a foreign plaintiff purchaser alleging a readiness and willingness to pay the purchase-price. In the case at bar, the conveyance of the land in Iowa is in effect the purchase-price of the land in this province. The Court in this province does not make a decree against the Iowa property, but decrees that upon the conveyance of the Iowa property there will be a conveyance of the property here. I am of the opinion, therefore, that the Court has jurisdiction.

In *Jenkins* v. *Hiles*, 6 Ves. 646, at 653, I find the following:

> It is admitted that where a bill is filed for specific performance of a contract for the purchase of real estate, in ordinary cases the defendant may have a reference upon the title for asking for. I always conceived that was not a rule founded merely on practice, and not in any assignable principle, but that it is really founded in principle, and a principle somewhat of this nature; that if, instead of bringing an action for damages for breach of covenant, the plaintiff comes here for a specific performance, the defendant has a right, not only to have such a title as the plaintiff offers upon the abstract unauthenticated, but, in consideration of

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the relief sought here beyond the law, to have an assurance about the nature of his title such as he cannot have elsewhere. Therefore the Court never acts upon the fact that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract; but though the abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference.

In *Landes* v. *Kusch*, 24 D.L.R. 136, at 142, I find the following: "Having pleaded title, the vendor must prove it." There are numbers of other authorities which, I think, decide the law beyond question that the duty of the vendor is not merely to shew a title, which he does by producing an abstract, but to make a title, which he does by proving the matters set forth in the abstract.

It was contended, however, on behalf of the plaintiff that what took place at the trial proved the title. The evidence in that respect is as follows: (the plaintiff, in the Appeal Book, p. 13)—

Q. And do you own that property? Were you in a position to transfer that property to Jones when you were up there in January?

Mr. Allan: I object to that, my Lord.

His Lordship: What is the ground of your objection?

Mr. Allan: That it takes the proof away.

(Evidence of A. D. Howard, p. 38.)

Q. What is your occupation, Mr. Howard? A. Attorney at law. Q. Practising where? A. Jefferson. Q. How long have you been in practise? A. Since 1889. Q. Familiar with your system of land titles? A. I am. Q. I shew you this document. Can you tell me what that is? A. That is an abstract of title filed by the Grant Abstract Co. from the records of Grant County to the west two-thirds of lot 111, block 14, in the original town of Jefferson, Grant County, under date December 20, 1913, at 8 a.m. Since that date, and on last Saturday, I went to the record and checked all that there is on this, and in addition to that the records from that date to this. Q. And are you in a position to say who has the title to that land? A. I am. Q. In whose name is it? A. Stands in the name of H. C. Tucker without any liens or encumbrances against it. Q. And under the laws of your State, does a wife of a married man have to join in a conveyance? A. Yes.

It was contended on behalf of the respondent that the evidence of what the title to the property in Iowa was is a question of fact, and that the evidence of Howard is a conclusion as to what the legal effect of the various documents is and admissible as evidence. In *Di Sora* v. *Phillipps*, 10 H.L. Cas. 624, 637, I find the following:—

Now the proof required in this case was what, as a fact, is the

foreign law applicable to the part of the instrument to be construed, including in the expression "foreign law" the peculiar meaning (if any) of words and phrases used, and any established technical construction which the foreign tribunals have applied to a contract of a similar description. The evidence is certainly not of this nature; at least it is not confined to mere matter of fact as to the foreign law, but is rather a contest of opinions and reasonings of advocates ranged on opposite sides in favour of their conflicting views of the meaning of the instrument to be construed. The office of the Judge would be extremely embarrassing if he were called upon to decide, not upon the ground of testimony, but on the validity of the reasons given by the witnesses in support of their opposite opinions.

But it is difficult to understand how the construction of a contract can be a question of fact. The construction of a contract is nothing more than the gathering of the intention of the parties to it from the words they have used. If the law applicable to the case has ascribed a peculiar meaning to particular words, the parties using them must be bound to that meaning; but if there is no such established sense, the intention must be collected in the ordinary manner from the language employed, and we know from experience that different minds often arrive at opposite conclusions of intention from the same expressions. The meaning of a foreign instrument, therefore (cleared of the difficulty of technical terms), cannot be a fact to be proved; it is at the utmost merely a probable opinion of the witnesses as to the construction which would be likely to be put upon it by the foreign tribunal. And if the Judge is implicitly to receive the opinion of the witnesses, or of the majority of them, they in fact perform his office, and construe the instrument for him.

That the construction must be a matter of judgment on the part of the English Judge is admitted by both parties, the difference between them (undoubtedly a very wide one) being, whether he is to judge the contract itself, or to judge the opinions of the witnesses upon it. The office of construction of a written instrument, whether foreign or domestic, brought into controversy before our tribunals, properly belongs to the Judge. In the case of a foreign instrument, he necessarily requires some person's assistance. In the first place he must have a translation of the instrument, the translator being (as I have already said) a witness as to the meaning and also the grammatical construction of the words. He must then have the way cleared for him by explanatory evidence, of any words which are of a technical description, or which have a peculiar meaning, different from that which, literally translated into our language, they would bear; and, if there is any established principle of construction of the particular instrument by the foreign tribunal, proof of it must be given. But the witnesses having supplied the Judge with all these facts, they must retire and leave his sufficiently informed mind to his own proper office—that of ascertaining for himself the intention of the parties; or, in other words, of construing the language of the instrument in question.

See also *Yates* v. *Thomson*, 3 Cl. & F. 544; and *Brown* v. *Thornton*, 6 A. & E. 185.

It seems to me that the result of the above cases is that it

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was not competent for the witness Howard to state the legal effect of the various documents which constitute the chain of title, and that all that he could do would be to state the law in the State of Iowa which would affect those various documents and it was then for the Court here to construe what the effect of those documents was, having in view the law of Iowa with respect to them. And it seems to me that the evidence of Howard went no further than to shew that there were filed certain documents which on their face shewed a title. It will be noticed that he refers to a certain abstract and says that since the date of it he checked the record from which the abstract was made up and as a result of that checking he states what the title is, who has the title. If the evidence went further than that a title was shewn and was intended to give the conclusion of the witness as to the title, then such evidence was not receivable. I cannot bring myself to the conclusion that it was considered to be the conclusion of the witness, because it will be noticed that Mr. Allan, counsel for the defendant, objected to a conclusion of the plaintiff in the early part of the evidence, and I feel satisfied that if he had considered this evidence to be a conclusion of the witness he would have objected to that.

Once having reached a conclusion that the conclusion of a witness is not admissible in evidence to prove the title, but that the Court itself has to pass upon the title, then there was no proof of the title before the learned trial Judge.

Counsel for the plaintiff urged before us that if we should come to the conclusion that the title had not been proved, then there should be a reference. The defendant's counsel objected to this, stating that this is a matter that should have been proved at the trial. In *Jenkins* v. *Hiles*, *supra*, I find the following head-note:—

> General rule that Court will not decide upon a title without reference to the Master, unless unequivocally, and without fraud or surprise, waived; a plaintiff seeking specific performance being entitled to opportunity of making a better title before the Master, and the defendant having a right to further inquiry upon the principle that the bill seeks relief beyond the law.

At page 655 of the above report the Lord Chancellor says:—

> As to *Rose* v. *Calland*, 5 Ves. 186, I consider it only as a case, in which the plaintiff did state himself as not being able to state a better title, not

as an authority that if he had said he could make a better title between the hearing and the report, the Court would have bound him to what he had stated in his bill, and that on account of that statement he had given up the right to a specific performance. It is impossible to deny, that upon the old authorities a specific performance might be obtained if the title could be made good before the report.

From the perusal of the various cases in which specific performance is refused on the ground of a defect in title, it will be observed that those are cases in which there is a defect appearing in the title, and a defect which the vendor cannot cure. The decree for specific performance which is made in a case of this kind provides for a reference as to title. See 27 Hals., p. 85; Seton on Decrees, 6th ed., p. 2226. A title is shewn when the abstract states all matters which if proved make a good title. A title is made when the matters are proved: *Parr* v. *Lovegrove*, 62 E.R. 66. In the case at bar, a title was shewn at the trial by the production of the abstract and the evidence of Howard. In 27 Hals., p. 83, I find the following:—

> In actions by a vendor of land to enforce specific performance by a purchaser of the contract for sale, the defendant may succeed at the trial on the ground of a defect in the plaintiff's title if such defect has been expressly pleaded,

and the authority for that proposition is *Lucas* v. *James*, 7 Hare 410. In that case, at p. 425, I find the following:—

> I do not in the least degree doubt the power of the Court to enter upon the question of title at the hearing of the case, or to make such a question a ground for dismissing the bill; but in order that it may be proper so to deal with a cause, the defect or supposed defect in the title should be prominently put forward in the pleadings. I cannot say that I think such is the case here. The question on these pleadings is, agreement or not, and the question of title in such a case ought to be the subject of reference to the Master which would afford an opportunity of taking all proper objections on that ground.

In the case at bar the statement of defence, in par. 10, reads as follows:—

> This defendant further alleges that the buildings erected upon the said premises have been wholly destroyed by fire and that the plaintiff is not in a position to transfer the said property to the defendants or to either of them.

I am of opinion that that paragraph—and that is the only paragraph (except a denial of readiness and willingness to convey) which deals with the title—was not intended to raise any question of title, but was directed entirely to the fact that the

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buildings had been destroyed by fire and that in consequence the whole property agreed to be purchased could not be transferred. In any event the defect or supposed defect in the title, if there is any such—to quote from *Lucas* v. *James*, *supra*—was not "prominently put forward in the pleadings"; and I am of the opinion that there should be a reference to the local Master on the question of title.

I think that the judgment in this case should follow *Mayberry* v. *Williams*, 3 Sask. L.R. 350, and that the judgment should be varied by a reference to the local registrar to hold an inquiry as to the title of the plaintiff to the land in Iowa, and to report thereon, and that upon such report being filed either party to be at liberty on notice of motion to apply to the trial Judge in Chambers for such judgment as he may be entitled to. I am of the opinion that the costs of this appeal should be reserved with leave to either party to apply for them on notice of motion after the report of the local registrar is filed.

Judgment varied.

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WESTMINSTER WOODWORKING CO. v. STUYVESANT INS. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. November 2, 1915.

1. INSURANCE (§ III A—41)—INTERIM ORAL AGREEMENT PRELIMINARY TO POLICY—BINDING EFFECT.

A verbal interim agreement by the agent of an insurance company to protect the insured pending the issuance of the policy is binding upon the insurance company although the agreement is for a smaller amount than contemplated on the entire risk.

Statement

APPEAL by defendant from judgment of Macdonald, J., in action on insurance contract.

Ritchie, K.C., for appellants, defendants.

Martin Griffin, for respondents, plaintiffs.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The salient facts are not in dispute. Seeley & Co., who were parties defendants in this action, but were dismissed and are no longer in the case, were appellants' general agents for this province. They had power to bind appellants by any contract of insurance not *ultra vires* of the appellants. In addition to these general agents, whose head office for this province was at Vancouver, the appellants had a local agent at New Westminster, H. H. Lennie, who also was an original party to this action, but was dismissed from it.

Respondents had a number of policies of insurance, against fire in their factory, about to expire, covering in all risks aggregating $35,000. Lennie desired to obtain this insurance for companies which he represented, including the appellants. A rate was agreed upon between him and the respondents, who thereupon gave him authority to place insurance to the amount of $40,000 to replace the expiring policies and to give an additional $5,000 protection. On the morning of February 13, 1914, one of said policies being about to expire on that day, Lennie assured the respondents' manager that the risk, namely, the new line of insurance, which he was authorized to place, was accepted, and that respondents were "covered." He then proceeded to Seeley & Co.'s office, respondents' manager being aware of the nature of his errand, to arrange the placing of the risks. Seeley & Co. undertook this and immediately allocated to four companies, for whom they were general agents, $18,000 of the amount, *inter alia* $6,000 to the appellants, and a memo was made of it in writing by Seeley & Co.'s manager at the time, which memo has since been lost. Seeley & Co. assured Lennie that the respondents were covered or protected pending the issue of the policies. They then took steps to procure the placing of the balance with other companies with whom they had writing facilities, but the loss occurred before these arrangements were completed, so that only $18,000 of the total $40,000 appears to have been actually placed.

In a letter dated February 17, the day after the loss, Seeley & Co., writing to appellants' New York agent, said:—

> On the 13th instant we bound $5,000 in the Stuyvesant on the plant of the Westminster Woodworking Co.

Before coming to the main question in the appeal, namely, whether a verbal agreement to protect the insured pending the issue of policies can be enforced, I shall clear the ground of one or two matters relied upon by the appellants' counsel. He argued that as the insurance applied for was to be in the total sum of $40,000, no contract could be complete until the whole risk was placed.

I cannot agree to that contention. The line of insurance agreed upon was to the knowledge of both Lennie and Seeley &

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Co. intended to replace old policies, one for $15,000 expiring on that day, namely, February 13, and another for a large sum on the following day. It was essential as Seeley & Co. knew that these expiring risks should be covered on that day. They were verbally covered in part on that day as Seeley & Co. admitted in the letter above quoted by their accepting $6,000 of the risk on appellants' account. I think, therefore, it was quite well understood between all parties that the insurance was to be placed in such a way as to give immediate interim protection without waiting for the placing of the whole of the aggregate risks.

Mr. Ritchie also contended that Seeley & Co.'s assurance to Lennie on the afternoon of the 13th that the risk was covered to the extent of $18,000 did not bind the appellants because it was not then communicated to the respondents. In my opinion it was not necessary to communicate that assurance, Lennie, also an agent for the appellants, had given the assurance in the morning, and while it is true that, at that time, no part of the risk had been allocated to the appellants, yet for the purpose of carrying out the details of the transaction with Seeley & Co. I think Lennie should be regarded as representing the respondents as well as the appellants.

There is ample evidence of a practice or usage amongst insurance companies, including the appellants, to give verbal assurance of interim protection pending the issue of the policy. That was a practice admittedly followed by both Lennie and Seeley & Co. as agents for appellants, as well as by other companies.

I now come to the main question in this appeal, viz., the enforceability of a verbal interim agreement and the appellants' power to bind themselves by a verbal contract of this kind, the contention of their counsel being that the making of a verbal or informal contract is *ultra vires* of appellants under their charter.

Both questions have been decided adversely to the appellants' contention in the Courts of the United States: see *Ruggles* v. *Amer. Central Ins. Co.*, 114 N.Y. 415; *Insurance Co.* v. *Colt*, 20 Wall. 560.

In our own Courts there is very little authority, but what there is would seem to me to point to the same conclusions:

Montreal Assce. Co. v. *McGillivray*, 13 Moo. P.C. 87, was cited, but in that case the Judicial Committee declined to express an opinion concerning the validity of a parol contract of insurance.

Citizens Insce. Co. v. *Parsons*, 7 App. Cas. 96, the character and functions of an interim receipt or covering note is explained at p. 124, and the improbability that the legislature intended to subject it to the same formalities as are required in the case of policies is commented on: The effect of that judgment as I read it is to draw a distinction between a formal contract of insurance evidenced by the policy and an informal contract leading to the policy and protecting the insured in the meantime; in other words, while the one, namely, the policy, must be formally executed, the other need not. The same distinction is made in the case of *Thompson* v. *Adams*, 23 Q.B.D. 361. In that case Matthew, J., held that a memo shewing the particulars of the risk, and which was initialled by the brokers, was evidence of a contract to insure in the interval between its date and the issue of a policy, and so enforceable in the Courts.

In *Jones* v. *Provincial Ins. Co.*, 16 U.C.Q.B. 477, the Court on demurrer dismissed the plaintiff's action based on a verbal contract of insurance, but intimated that in an action properly framed the plaintiffs might be entitled at law to damages for not delivering the policy or to be relieved in equity, meaning, I take it, that a bill in equity for specific performance of the agreement to issue a policy might have been filed.

The principles discussed in these cases are applicable to the case at bar. I am not concerned here with the question whether or not the main contract could be made by parol. I will assume that it could not. What I am concerned with, and it is the crux of this appeal, is whether the preliminary agreement to give a line of insurance and to protect the risk in the meantime may be made informally, and if it may, then does it make any difference that the informal contract is not in writing, but merely by word of mouth? It is not suggested that the statute of frauds applies, nor do I think the Insurance Act or the appellants' charter precludes the making of this informal contract. If then the contract may be informal, I see no reason why, provided it conforms

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to the law respecting parol contracts, this contract should not be binding though made by word of mouth.

The manner of enforcement, whether by action for specific performance compelling the issue of a policy or otherwise, is not in question here as it was not raised before us, and appears not to have been raised in the Court below.

I would dismiss the appeal.

MARTIN, J.A.:—I agree with the judgment of my brother McPhillips.

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

MCPHILLIPS, J.A.:—I would dismiss the appeal. The trial Judge in my opinion arrived at the right conclusion. The contract of insurance upon the evidence is clearly established—it was entered into by the agents of the assured and the insurance company—all the elements were present to bring about the contractual relationship—the parties were *ad idem* and a valid and enforceable contract was entered into. The law admits of an oral contract of insurance and no magic exists in it being in writing and there is no requirement that it should be in writing. It is true where the company is under statutory requirement to proceed in a certain way in effecting insurance—that procedure must be followed, *i.e.*, a requirement which is "public" but no private or indoor management: *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327; *Mahoney* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869; *Bargate* v. *Shortridge*, 5 H.L.C. 297; *McKnight Construction Co.* v. *Vansickler*, 24 D.L.R. 298, 51 Can. S.C.R. 374, Duff, J., at pp. 300-1, Anglin, J., at pp. 302-5, can limit the ordinary and fair scope of authority of the accredited agents of the company and the holding out of such agents as being clothed with authority to effect insurance; in the absence of it being brought home by the most conclusive evidence, the Court is entitled to hold that there is authority to contract. The evidence makes it clear that the custom and usage is to enter into insurance contracts verbally and even over the telephone—Courts cannot be unmindful of present conditions and the course of business existent round about them—the business community are under no trammels save where the law intervenes and lays down what shall constitute the contract. The contract entered

into here would appear to have been in the usual course of business; middlemen are common in such transactions, especially where any considerable amount of insurance is being placed and to admit of a transaction such as this appeal discloses being rendered nugatory and to hold that it is a case of no contract would, in my opinion, be acceding to and admitting of dishonesty in business. It is well known that there is eagerness displayed in obtaining insurance risks and great competition and the placing of insurance is in general a transaction of more than ordinary expedition not admitting of the time to have policies written or even the giving of "interim protection notes," "slips" or "binders," and it is only fair to say that the insurance companies speaking generally have always exhibited adhesion to the highest principles of honesty and the business world has had cogent testimony to this in settlements made by the insurance companies following the great conflagrations which have taken place throughout this continent. It would be the working of injustice to have the assured held to the strictest proof, and documentary in its nature, when it cannot be gainsaid that custom and usage obtains to place insurance as the insurance was placed in this case and which is established as being in accord with the ordinary course of business in the placing of insurance established by witnesses of the highest standing and character engaged from day to day in the transaction of this class of business, and in fact not dissented from by the agents of the appellant company. To hold the appellant company liable is carrying on the principle of English law as applicable to civil obligations; all the essentials of a contract are present and no injustice is done. That a policy of insurance would have issued in due course had not a loss supervened goes without saying, but owing to a loss occurring within 2 days of the placing of the insurance this no doubt has given rise to litigation. In saying this I am not animadverting in any way upon the good faith or honesty of the appellant company as it may well be that the elucidation of the facts consequent upon the trial laid matters bare and in a different light than may have been the understanding of the appellant company and an acquaintance with all of these facts is the explanation of the denial of obligation. *Citizens*

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Ins. Co. v. *Parsons*, 51 L.J.P.C. 11, was a case where a claim arose before a policy issued, an interim receipt had been given and a fire happened on the same day; Sir Montague Smith, delivering the judgment of their Lordships, at p. 25, said:—

The interim note in this case is what it professes to be, preliminary only to the issuing of another instrument, namely, a policy which the parties *bonâ fide* intended should be issued.

In the present case the contract of insurance was an oral one, but equally effective in law, and I am confident that it was in contemplation—in fact was agreed would be followed by a policy (in the language of Sir Montague Smith) "which the parties *bonâ fide* intended should be issued." That the legislature of British Columbia considered that fire insurance might be entered into by oral contract is well demonstrated when sec. 4 of the Fire Insurance Policy Act, R.S.B.C. 1911, ch. 114, is read, which is as follows:—

4. The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every contract, whether sealed, written or *oral*, of fire insurance hereafter entered into or renewed or otherwise in force in British Columbia with respect to any property therein, or in transit therefrom or thereto, and shall be printed on every policy of fire insurance, with the heading "Statutory Conditions."

There is no inhibition against oral contracts of fire insurance, only that written or oral the statutory conditions shall apply. The counsel for the appellant company in his very able argument relied greatly upon *Montreal Ass. Co.* v. *McGillivray*, 13 Moo. P.C. 87, as being a decision helpful to him in his contention that the appellant company would only be liable where a policy of insurance had been issued by the agents in pursuance of the authority given to them, viz. (excerpt in part from authority given to agents):—

With full power to receive proposals for insurance against loss and damage by fire in ..... Vancouver and vicinity ..... to fix rates of premiums, to receive moneys and to countersign, issue, renew, and consent to the transfer of policies of insurance signed by the president and attested by the secretary of the Stuyvesant Insurance Co., subject to the rules and regulations of said company, and to such instructions as may from time to time be given by its officers;

but it is to be remarked that there is not here any prohibition from entering into oral contracts of insurance. Now in the *Montreal Ass. Co. Case*, *supra*, it was held, p. 87:—

1st. That the powers of M. as manager being *public* must be taken to have been known to H. the insurers and that the acts of M. in the transaction were *ultra vires* and void, not being within the scope of his general authority as manager and, therefore, not binding upon the Montreal Assurance Co.

2nd. That as such a contract was not binding on M.'s principals it did not become binding upon them by reason of its having been entered into through the medium of M., their agent, his powers as agent being restricted by the limitation of the powers of his principals.

The Right Hon. Sir John Coleridge, delivering the judgment of their Lordships, said at pp. 120, 121 (and this is important upon the question of private instructions which is the case before us):—

And upon this they think the true question for the jury to have been not what was the real extent of authority expressly or in fact given by the appellants to Murray, but what the appellants held him out to the world to persons with whom they had dealings, and who had no notice of any limitation of his powers as authorized to do for them. For it cannot be doubted that an agent may bind his principal by acts done within the scope of his general and ostensible authority although those acts may exceed his actual authority as between himself and his principal: the private instructions which limit that authority, and the circumstance that his acts are in excess of it, being unknown to the person with whom he is dealing.

It is, therefore, apparent that the *Montreal Ass. Co. Case*, *supra*, does not assist the appellant company where there is limitation of authority and that limitation is not known—which is the present case. The appellant company is not governed or controlled by any law or statute which is *public* which stipulates in what way insurance shall be effected. The further language of the Right Hon. Sir John Coleridge, at pp. 122, 123, with the facts of the present case in mind, supports the imposition of liability upon the appellant company:—

These are the laws under which the company came into existence, from which it receives all its powers and by which they must be limited: they certainly contain no express power to make any contracts for fire insurance except by policy and in order as it should seem to secure the solvency of the company, the exercise of that power is guarded by specific provisions whereas none are made in respect of fire insurance by parol. . . .

Murray was the manager for the company, he held an office recognized in the Ordinance and Act, importing very large powers and a wide discretion, but then he was the manager for a company whose powers in respect of policies at least were subject to limitations which were *public* and must be taken to have been well known. He was clearly the agent for granting policies. . . .

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M. Phillips, J.A.

Now Murray was, indeed, their general agent; and had he merely made an unwise contract for them, or had he been satisfied with answers which ought to have been deemed unsatisfactory; in these, and many more supposable cases (collusion on the part of the person seeking to be insured being out of the question), the company would have been clearly bound; in all such supposed cases he would have been acting within the scope of the authority which the company held him out as possessing. But if he was, and was known to be, an agent only for affecting insurances *by policy on payment of a premium* (and their Lordships see no evidence beyond this), then he was not their agent in the act which he really did, and they are not bound by it.

It is clear that the agents in the present case, in the light of and in accordance with the exposition of the law, so strikingly portrayed by the Right Hon. Sir John Coleridge, bound the appellant company, and an enforceable contract of insurance must be held to have been effected. It follows that, in my opinion, the judgment should be affirmed and the appeal dismissed. *Appeal dismissed.*

QUE.

K. B.

La COMPAGNIE D'APPROVISIONNEMENT D'EAU v. La VILLE DE MONTMAGNY.

Quebec Court of King's Bench, Appeal Side, Lavergne, Cross, Carroll, and Pelletier, JJ. June 29, 1915.

1. TAXES (§ III B 2—125)—VALUATION BELOW ACTUAL VALUE—VALIDITY OF ROLL.

A municipal valuation roll in which all properties as a whole are valued below their actual value is illegal and will be annulled by the court.

2. TAXES (§ III D—135)—ILLEGAL VALUATION ROLL—SETTING ASIDE—JURISDICTION OF SUPERIOR COURT.

The Cities and Towns Act (Que.), providing an appeal from an illegal valuation to the Circuit Court, does not exclude the jurisdiction of the Superior Court over actions to annul the whole of an illegal valuation roll.

3. PARTIES (§ I A 4—46)—ACTION TO ANNUL ILLEGAL VALUATION ROLL—SUFFICIENCY OF INTEREST IN.

A ratepayer, particularly one having a contract with the municipality by which the amounts of taxes he is obliged to pay are based upon a valuation roll, has a sufficient interest to maintain an action to set aside the whole of such valuation roll because of illegality.

Statement

APPEAL by plaintiff from judgment of Flynn, J., Superior Court, in an action for annulment of valuation roll. The judgment was reversed.

Maurice Rousseau, for appellants.

Gagné & Gagné, for respondent.

The judgment of the Court was delivered by

Pelletier, J.

PELLETIER, J.:—The respondent made a first valuation roll

which was contested by the appellant and annulled for non-observance of the Act which requires the valuation of property to be made at its actual value. That judgment was given by Cimon, J. This first case was inscribed in review; the Court of Review held that it had no jurisdiction, and therefore there is now as to that case *chose jugée* between the parties.

The judgment given by Cimon, J., is based on good grounds, and it declares that the valuation of properties upon the roll so annulled was from 25 to 30 per cent. lower than the real value. Cimon, J., ordered a new roll to be made. The second valuation roll was made. The same appellant attacked it anew and largely for the same reasons. There is one fact absolutely certain, palpable and tangible; in place of proceeding to make a valuation of the properties upon the basis indicated by the judgment which was given, viz: by increasing them by 25 or 30 per cent., the respondent and its appraisers contented themselves with adding 7 per cent. more, to wit, $42,500 for the whole.

To justify its action in face of the judgment which was given, the respondent should prove facts and circumstances which would justify this manner of acting. For example, it should prove that since the making of the prior roll the properties had generally diminished in value; but this proof was not made and it seems to me that it wilfully ignored the judgment and did not comply with the law as the judgment had interpreted it.

The valuators have refused to allow themselves to be convinced or even to consider the imporant documentary evidence presented to them. Coming again before the council when they sanctioned this way of proceeding by the appraisers, this documentary evidence was admitted but it was attempted to contradict it by producing other documents which still denote wilful opposition.

The appellant produced a number of deeds of sale contemporaneous with the valuation which was made and these deeds shew beyond doubt that the valuation is very inferior to the actual value as stated by the best evidence which can exist on this head.

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One can well understand that the witnesses have their own opinion upon questions of value; there are few subjects upon which opinions so differ and while on one side fantastic figures are given, so on the other side there are very low figures. Opinions upon this head when given under oath are still more surprising in their differences than those of medical experts when they undertake to deliver a real scientific opinion.

There is evidence somewhat more certain and which, in my opinion, is the best under this head; it is that of sales made by persons who possess the properties in question, and I find purchasers who would buy at the price fixed by the vendor or at the price upon which the vendor and the purchaser agree.

In the case of *Dodge* v. *The King*, 10 Can. Ex. 208, the Exchequer Court, whose judgment was affirmed by the Supreme Court (38 Can. S.C.R. 149), held that this evidence was the most satisfactory that could be got and the same thing has been sanctioned in several other decisions.

In the case of *The King* v. *Macpherson*, 15 Can. Ex. 215, I find a definition given by Cassels, J., of the Exchequer Court which appears to me excellent.

Here is this definition:—

> It is the price that a vendor who is not obliged to sell and who is not dispossessed against his will, but who wishes to sell succeeds in obtaining from a purchaser who is not obliged to buy, but who wishes to buy.

Cimon, J., says that the real value is that which exists at the moment. Now nothing shews the value which exists at the time as well as a notarial act signed by a vendor who wishes to sell and by a purchaser who wishes to buy. This proof wholly exists in the present case. Even one of the appraisers fixed a smaller value on his property than that fixed by a notarial deed to which he is himself a party. The documents of title filed in answer to this confirm rather than weaken the evidence given on this head by the appellant. It is not sales by the sheriff nor sales with the right of redemption which can satisfy us on this head; and since there has been placed before us many of this nature there remains very little to be offered which could effectively contradict upon this point the evidence of the appellant.

The respondent was obliged to submit to the act which requires a valuation at the actual value and appears to be determined not to do so. It is greatly to the public interest that this law should be observed and every ratepayer has a right to invoke grounds of public interest to have the respondent observe the law which governs it.

On the value of the property placed upon the roll may depend the electoral franchise and a number of other matters which it would take too long to enumerate.

The judgment of first instance tells us that as to a great number of the properties, the council has consented to increase the valuation and the Judge asks himself if the valuation of these properties should not be final. He hesitates to annul the whole valuation roll, since certain valuations have been properly made; but if the whole of the roll is badly made in correcting it or making it anew, a value could be placed upon the properties as to which there would be no ground of complaint.

This Court cannot correct the valuation roll; it must be annulled or maintained. But as it is illegal and much below the actual value on the whole property it seems difficult to do anything else than to entirely annul it.

It is claimed that the Act respecting Cities and Towns would furnish a ground of appeal against illegal valuation in the roll and that this appeal should be taken to the Circuit Court.

The clauses of this Act give an appeal to this Court in a special case in which a ratepayer complains before the municipal council and that the council has not given him justice; but the Cities and Towns Act does not exclude the jurisdiction of the Superior Court, in a case such as the one which is before us, that is to say, the nullity of the whole roll over which the Circuit Court has no jurisdiction.

A doubt has been raised as to the interest of the appellants to bring this action. This interest exists in the clearest possible manner as to the Water Co.; it has a contract with the respondent by which the amounts it has to pay are based upon the valuation roll; it is sufficient to mention this without adding more to shew the evident interest of the appellant company and its right to take proceedings. We are told that the appellant

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by its contract submitted itself in advance to whatever the council of the town should decide upon this head. The answer is apparent. The appellant had the right to assume and must assume that the respondent would act illegally and would value the properties at their actual value.

The interest of the other appellant, Mr. Rousseau, is equally manifest. We are told that if the judgment is reversed there would be chaos from the point of view of public interest in the town of Montmagny. But if it is wished to avoid this chaos it seems to me that the most simple means is to conform with the judgment of the Court and with the law.

I would reverse the judgment and maintain the action with costs. *Judgment reversed.*

MAN.
C. A.

YOUNG v. BRANDON.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. December 20, 1915.

1. ELECTRICITY (§ III A—24)—INJURY TO EMPLOYEES OF THIRD PERSON—LIABILITY.

An electric light company whose wires are constructed under municipal authority and are carried 29 feet above the surface, even if originally not insulated, owes no duty of safety to workmen of a telegraph company operating on poles erected in dangerous proximity to the high tension wires, and cannot, therefore, be held liable for injuries resulting to them from contact with such wires.

[*Roberts* v. *Bell Telephone*, 10 D.L.R. 459, applied.]

Statement

APPEAL from a judgment of Curran, J.

J. F. Kilgour, for Brandon Electric, appellant.

E. J. McMurray and *D. Campbell*, for plaintiff, respondent.

H. E. Henderson, K.C., for Brandon City, respondent on cross-appeal.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—The defendant company (which I shall hereinafter call the defendants) many years ago procured from the city of Brandon the right to erect poles on the streets and lanes of the city for the support of their wires used in transmitting electric current for lighting purposes. The city had full power to grant this right, and in pursuance thereof the defendants erected poles on the lane where the accident happened. To support the wires the defendants attached to the top of each pole a wooden cross-bar at right angles to the line of the lane and to

this bar they attached 3 insulated wires each parallel with the other and all in the same horizontal plane. These poles were about 29 ft. high and at the place where the accident happened the wires were exactly 28 ft. 6 ins. above the level of the lane.

There is no question, I take it, that in the erection and placing of these poles and wires the defendants were acting within their legal rights and powers and that they were in no way guilty of any negligence, and I can see no reason why they should insulate their wires, so far, at all events, as the public are concerned. After this work had been completed and had been in operation for some time, a telegraph company erected poles in the lane where the accident happened, which were much longer and extended much higher than the poles of the defendants. They were placed on the same side of the lane and in a line with the defendants' poles. The pole upon which the accident happened was one of those erected by the telegraph company and for some reason it was placed between the wires of the defendants so that one wire was on one side of it and 2 on the other side and, according to the plan referred to in the judgment of the trial Judge, I should think it stood about midway between the poles supporting the wires of the defendants. The telegraph company strung wires at about the top of their poles and at this pole their wires were 10 ft. 6 ins. above the wires of the defendants.

For some reason some one attached the single wire of the defendants, which hung on one side of this pole, by a bracket with an insulator to the side of the pole next to which it was hanging in such a manner that it was thus fixed 4 ins. from the pole, and this had been done more than a year before the accident. The 2 wires on the other side were not attached to the pole in any way, but from the evidence I would think that it would require care for a man to go up or down the pole without touching the fixed wire on one side or the nearest loose one on the other.

The insulation upon the fixed wire was worn or drawn off for a few inches next to where it was fastened to the bracket and probably this contributed to the accident, it may have been caused by the method of attachment.

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There was no evidence that the telegraph company had acquired from the city any right to erect their poles on this lane, but considering that their poles have been standing in this lane for many years apparently without objection by the city, I would think with the trial Judge that they were lawfully there, so far as the city could grant the right.

The defendants' wires usually carried very large voltage and were dangerous, which it seems to me, the telegraph company must have known.

The plaintiff was, at the time of the accident, in the employ of the telegraph company, and in the performance of his duty he ascended this pole to the top necessarily passing the defendants' wires and on his way down having a guy wire which reached to the ground on his shoulder, a circuit was in some way formed with the defendants' wires and he received such a shock that he fell to the ground and hence this action.

Curran, J., held that fixing this wire of the defendants carrying high voltage only 4 ins. from the pole which frequently had to be climbed by a man looking after the interests of the telegraph company was an act of negligence, and he draws an inference from certain facts proved and from the plan above referred to that the defendants fixed this wire to the telegraph company's pole.

One of his reasons for drawing this inference of fact was that the plan shewed that the defendants' wires were fixed to and supported by the adjoining telegraph pole next westerly, thus shewing that the defendants really used these telegraph poles as a part of their system. On the argument this fact was disputed, and counsel for the plaintiff then admitted that the plan was wrong in that respect and that the adjoining pole next westerly was a pole of the defendants and not the telegraph company's pole, and was not used by that company in any way.

There is no evidence whatever that the defendants fixed or permitted their wire to be fixed to the pole in question and on the contrary, officers of defendants who should know if it had been so fixed swore that they had no knowledge of the matter whatever, and did not know before the accident that it had been so fixed. It does seem to me that it would be more probable that

the telegraph company would do this work. It might be dangerous for such a wire by swaying in the wind to strike the pole, and perhaps when wet carry a heavy electric current, or perhaps the company might fear some injury to this wire and be liable therefor to the defendants. The onus to prove that the negligence was that of the defendants was on the plaintiff, and in my view of the facts he has not proved it.

The defendants put up their wires 29 ft. above the surface within their lawful right, and without negligence, even if originally not insulated. The telegraph company afterwards erected their poles unduly and dangerously close to these wires and invited their workmen to use these poles. The defendants owed no duty to these workmen, and I cannot see why the defendants should be held liable for negligence because the telegraph company erected a pole dangerously near these high tension wires. The decision in *Roberts* v. *Bell Telephone Co.*, 10 D.L.R. 459, is in harmony with this view of the law.

The appeal is allowed with costs and the judgment is set aside and must be entered for the defendants with costs.

Appeal allowed.

LEE v. CHAPIN.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. October 19, 1915.

1. SALE (§ III C—70)—DEFECTIVE AUTOMOBILE—RESCISSION—WHEN REFUSED—IMPOSSIBILITY OF RESTITUTION—LOAN AS PART OF SALE.
Where as part of the transaction in the sale of an automobile the seller is also required to procure a loan for the buyer to meet the purchase price, the buyer, after receiving the benefit of the loan can not claim a rescission of the sale for misrepresentations as to concealed defects, where from the nature of the contract the parties cannot be completely restored to their original position.
[*Lee* v. *Chapin*, 23 D.L.R. 697, affirmed.]

Statement

APPEAL from judgment of Walsh, J., 23 D.L.R. 697, dismissing claim for return of purchase price of automobile on ground of misrepresentation.

W. P. Taylor, for plaintiff, appellant.

A. H. Clarke, K.C., for defendant, respondent.

Harvey, C.J.

HARVEY, C.J.:—In the winter or early spring of 1913, one Woods, representing the defendants, approached the plaintiff with the view to selling him a Packard motor car which had just been received from the factory. This car was, subsequently,

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but not till July 29, sold to the plaintiff for $5,900. In the meantime the car had been used for demonstration purposes and, in the month of April, suffered a small accident to the crank case. The injury was repaired at a cost of about $5. This was the only accident to the car prior to the sale, but subsequent to the sale the car was found to be injured in certain respects which the plaintiff contends was consequential upon the accident mentioned. The trial Judge accepted the testimony of the defendants' witnesses regarding the particulars of the accident and the treatment of the car in connection with it, and having done so, drew the conclusion which appears to be the only reasonable one that these injuries could not have resulted from that accident.

The accident was not mentioned to the plaintiff, the defendants themselves being unaware of it, and Mr. Woods stating that he did not consider it of sufficient importance to speak of it.

The plaintiff's contention is that the car was sold as a new car and that the fact of this accident and the repairs to the car should have been communicated to the plaintiff, and that the concealment of that fact entitles him to rescind the contract.

The trial Judge held that the defect, if it might be called such, since the evidence satisfied him that it in no way affected the efficiency of the car, was one which, under the circumstances, the defendants owed no duty to disclose.

While expressing neither approval nor disapproval of this view, I am of opinion that for another reason there cannot be rescission of the contract, which, in effect, is what the action claims.

It was a term of the contract that the defendants should secure a loan of $15,000 for the plaintiff, and at the time that the plaintiff signed the order for the car Mr. Woods gave him a document in the following terms:—

> This is to certify the order given the Chapin company for one Packard car will be considered null and void in event of the writer being unable to secure you a loan of $15,000.

Mr. Woods had in fact already made arrangements for the loan, and the securities proving satisfactory the money was

advanced and the cash payment on the car was made out of the proceeds of the loan.

That the procuring of this loan was not merely a collateral matter, but was really a most essential part of the transaction, is clear from the plaintiff's own evidence, for he says that he did not want the car at that time but he did want the money. He was asked:—

> Q. Is it a fact that the only reason you signed the order for a car in July was in connection with the loan which Mr. Woods assisted you to get? A. I really wanted the money that day. Q. You wanted the money and did not want the car? A. I wanted the money and was not prepared to take the car. Q. So, you only signed the order in order that you could get the money? A. At that time.

That it was both substantial and essential is apparent from the fact that the plaintiff offered to pay Mr. Woods 1 per cent. for procuring the loan, but Mr. Woods stated that he was satisfied to make the sale of the car without any other commission. The contract between the parties therefore was not simply a contract for the sale of a motor car for $5,900, but it was for the sale of a car and the procuring of a loan for that sum, and the mere return of the car will not restore the full consideration passing to the plaintiff.

As far back as 1804, Lord Ellenborough said in *Hunt* v. *Silk*, 5 East 449, 7 R.R. 739: "Now, when a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put in *statu quo*." In that case the plaintiff had received a benefit which he could not restore and rescission was refused. The principle is expressed in Benjamin on Sales (5th ed., p. 442), as follows:—

> A repudiation of a contract on the ground of misrepresentation is only competent to the party misled when *restitutio in integrum* is possible, that is, when the parties can be restored to their original position as before the contract, for it is a general rule that when a contract is to be rescinded at all it must be rescinded *in toto* and the parties put in *statu quo*.

It is impossible for the parties in this case to be put in their original position, for the plaintiff has had the benefit of the defendants' efforts in procuring the loan and cannot restore it to the defendants. There cannot, therefore, be rescission, and the plaintiff must be left to his claim for compensation by way

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of damages. There is no alternative claim made for damages, but the evidence in the opinion of the trial Judge indicated that the plaintiff had suffered no damage. Such being the case, one scarcely feels regret at coming to the conclusion that he has no legal ground for rescinding the contract. I would dismiss the appeal with costs.

Beck, J.

BECK, J.:—I accept the trial Judge's finding of fact.

He finds that the car sold was a particular car; that it was sold as a "new car;" that before the contract of sale the car had, to the knowledge of the defendant's employees, but not to his personal knowledge, met with an accident—in a structural as distinguished from a mechanical part—which had been immediately repaired; that no harm whatever had resulted to the car from this accident, its subsequent repair having put it in its original perfect condition, and no damage thereby having been caused to it in its subsequent operation. I think that the statement that the car was "new" created a condition of the sale which, if not fulfilled, would have justified rescission.

The accident and its result and the consequent repair were, as has been said, though not known to the seller, known to the seller's agent. It is not made to appear that he purposely refrained from mentioning these things to the purchaser, but, I think, the question of non-disclosure or of the intention underlying it is of no consequence, but that the sole question is, was there a *substantial* compliance with the condition that the car was "new." As Erle, J., says in *Lucas* v. *Bristow*, 27 L.J.Q.B. 364, "they (the jury) are to say whether this was a substantial compliance with the contract." See 35 Cye. p. 216. It is not seriously contended on any other ground than the result of this accident that the car did not fulfil the conditions.

I think, on the facts set forth by the trial Judge in his reasons for judgment, and which I need not repeat, that the condition in this case that the car was new was fulfilled. I would therefore dismiss the appeal with costs.

Scott, J.
Stuart, J

SCOTT and STUART, JJ., concurred. *Appeal dismissed.*

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Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. January 22, 1915.

1. HIGHWAYS (§ IV A 1—120)—WHAT ARE—PUBLIC TRAVEL—DUTY TO KEEP IN SAFE CONDITION.

In order that a street may be considered public, so as to render a municipality liable for injuries resulting from a failure to keep it in a safe condition, it is not necessary that it should be indicated on the plan or the registry of the city; it is sufficient that it is free for public passage and that the public use it therefor.

2. HIGHWAYS (§ IV A 6—155)—EXCAVATION IN SIDEWALK—INJURY TO PEDESTRIAN—LIABILITY OF MUNICIPALITY.

A municipality is answerable for the death of a pedestrian resulting from his falling into an excavation on the sidewalk, around which there was no enclosure or safeguard to warn against the danger, although the street itself was partly closed by a barrier indicating dangerous operations thereon.

3. TRIAL (§ II C 8—110)—QUESTIONS OF LAW AND FACT—NEGLIGENCE.

The question of negligence is a mixed question of law and fact; it is for the judge to explain the law to the jury, from which they may draw their conclusion as to the question of liability, which will be binding upon the court.

[*Montreal Light* v. *Regan*, 40 Can. S.C.R. 580, 590; *Tobin* v. *Murison*, 5 Moore P.C. 110, followed.]

Statement

APPEAL from judgment of Beaudin, J.

The action claims $15,000 damages, brought by a widow as well personally as on behalf of her minor children, on account of the fall of her husband in an excavation made in one of the streets of the city of Montreal, where he was killed.

The plaintiff alleged that Joseph Simard, her husband, about 3 o'clock in the morning, on returning to his home walked upon this space reserved for pedestrians on the east side of Chabot street in Montreal, when he suddenly fell into an excavation about 30 ft. deep, being precipitated to the bottom upon the rocks, and she adds that this Chabot street was 50 ft. wide, had been open to the public for a long time and was under the control and maintained by the City of Montreal.

The space reserved for foot passengers was then opened for passage without any indication of danger, was not lighted, and had no indication whatever of the excavation which was not protected nor surrounded by a guard or a fence. On account of the darkness and of the absence of any signs, it was absolutely impossible for Joseph Simard to have perceived his danger.

The defendant contested the action by alleging: The accident

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was caused by the negligence and carelessness of Joseph Simard. In fact, it says, he knew perfectly the condition of the place where the accident happened, having frequently passed it and having for a very long time lived in the vicinity. At the time of the alleged accident the part of the land which was destined later to become Chabot street was closed to all passengers on account of work which the city was doing at this place and barriers had been placed at the intersection of this land with St. Jerome and Gilford streets, and red lights indicating the danger were placed upon these barriers every night, and especially on the night of the alleged accident. The husband of the plaintiff had been warned shortly before the accident of the danger to which he exposed himself by passing over this land not open to public passage by many of his friends who accompanied him at the time and who refused to follow him and to pass over this place on account of the danger which they perceived there. In thus passing over land closed to public passage and where everything indicated that there was danger, the plaintiff's husband did so at his own risk and peril and was guilty of grave fault and inexcusable negligence.

The case was submitted to a jury which by its verdict declared that the City of Montreal was alone responsible for the accident and awarded to the plaintiff personally $3,000 damages, and to each of the infant children $1,000, forming a total of $11,000. The Superior Court gave judgment pursuant to this verdict.

Laurendeau & Archambault, for appellant.

Maxime Raymond, for respondent.

The judgment of the Court dismissing the appeal was delivered by

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J.:—As it has been said, a verdict of a jury is not considered to be against the evidence unless it is of such a character that the jury in examining all the testimony could not reasonably have found it. Art. 501 C.P.Q. The jury are judges of the questions of fact, and it is necessary that the ground should be strong in order to set aside their findings. So long as there is on the record, evidence which can justify the verdict, it should be maintained. The Courts

should not substitute their appreciation of the evidence for that of the jury.

Then, was the verdict rendered in the present case against the evidence according to the rule which I have mentioned? Let us consider this question from the three following points of view:—

1. Was the place where the accident happened a public street open to the use of passengers?

Chabot street is a street running from north to south. The part where the accident happened is situated between St. Jerome and Gilford streets. The land of this part of Chabot street was given in 1907 and 1908 to the municipality (then the village of Delorimier, since annexed to Montreal) to be made into a public street. In that time vehicles and foot passengers had freely passed over it and continued to do so until now; school children pass over it in large numbers; there is a drain in the street; there is also a wooden side-walk on the west side; one Walter Eccles has built a house there which he occupies and pays taxes to the City of Montreal for removal of snow and maintenance of the side-walk during the winter. When the accident happened, the city was doing work of levelling and paving the street. It had completely closed the entrance to Gilford street, but had only closed the roadway to St. Jerome street by placing barriers across this roadway; on each side there was an opening 10 ft. wide to give the public access to the sidewalk. I said above that there was a wooden side-walk on the west side. On the east side there was no side-walk but there was a strip of land of the same width as the side-walk, 10 ft., which was higher by 6 or 7 inches than the level of the roadway. The pedestrians passed over this strip of land the same as over a side-walk. Does this evidence justify the finding of the jury that this part of Chabot street was a public street open to public passage?

In order that a street may be public it is not necessary that it should be indicated on the plan or the registry of the streets of the city; it is sufficient that it is free for public passage and that the public use it therefor. This point which cannot be controverted is admitted in letters of the appellant city. In

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my opinion the verdict of the jury upon this point is not only not against the weight of the evidence but is absolutely in accord with it. The jury could not have found otherwise than they did in this respect.

2. In the second place, was the death of Joseph Simard caused by his own fault and is the verdict of the jury against the evidence when it finds that the accident was due entirely to the fault of the City of Montreal?

The appellant claims that Simard was the author of his own injury because he ventured upon a street under construction, not lighted, dangerous and partly closed by barriers; that he followed the east side of the street, having for side-walk only a strip of land in place of taking the wooden side-walk which was on the west side, and that he thus was guilty of gross negligence and of inexcusable fault.

This means that when a danger exists it is the victim of the accident caused by such danger who is responsible for it and not the one who has caused the accident by failing to protect the victim against the danger.

This doctrine would be very convenient for a negligent person, but a Court of Justice could not sanction it. The city has certainly been negligent in not closing the street to the public over all its width. The barrier on the roadway alone indicates that the danger only existed upon this roadway. There was nothing at the place where the accident happened to indicate danger.

Simard, in following the side-walk, or the strip of land which served as a side-walk, arrived at the place where the excavation cut the side-walk, and fell into it without having any suspicion of the existence of danger. There was no enclosure around the excavation nor light to attract the attention of pedestrians; as I have already said, it was very dark at this time and it was quite impossible for Simard to see the excavation. If Laganiere did not fall as Simard did, it is because he walked upon the roadway alongside the side-walk where the excavation did not extend.

Under these circumstances there is no doubt that the accident happened by the sole negligence of the city which did not

protect the public against the danger which existed and which invited pedestrians to pass over this place by only barricading the roadway and leaving the side-walks open to public passage.

The verdict of the jury upon this point is then entirely in accord with the evidence in the record.

In the third place, the appellant claims that it cannot be said that the death of the victim was caused by his fall to the foot of the excavation, rather than by some other cause.

What I have said of the evidence as to the circumstances leading to the accident is an answer to this claim of the appellant. It was for the latter to shew that the death of Simard was caused by something else than the accident and there is not a tittle of evidence on the record to this effect.

The respondent took action jointly and severally against the city and the owner of the land, James E. Wilder. The verdict of the jury finds that the latter was not responsible for the accident. He was owner of the land but he was not making use of it. He had transferred the use of it to other persons. The appellant complains also of this part of the verdict saying that Wilder should have been held liable and that in this case it would have a right to be reimbursed the half of the damages given against them. But here again the verdict is in accord with the facts and it cannot be set aside on this ground.

There remains a last objection by the appellant to be considered. It claims that the jury in finding that the accident was caused by its fault and negligence, determined a question of law in connection with a question of fact. The question of determining what constitutes fault and negligence before involving liability and damages is, says the appellant, strictly a question of law. According to it the jury is only called upon to find the cause of the accident, the fact which was the origin of it. It is then for the Judge to determine if this cause makes the party who is the author of it liable.

The appellant cites upon this point the authority of Sir Henri Taschereau in the case of *Montreal Light, H. & P. Co.* v. *Regan*, 40 Can. S.C.R. 580.

This opinion, I believe, stands alone in the jurisprudence. Taschereau, J., dissented in review in this case, and I have

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CITY OF MONTREAL v. GAMACHE.

Archambeault, C.J.

been unable to find other authority in the same sense. The question of negligence is a mixed question of law and of fact. The Judge should explain the law to the jury and the jury draw therefrom the conclusion which governs the Judge as to the question of liability. The English and American doctrine upon this point is given in the A. & E. Encyc., vol. 23, p. 550.

I would cite also the opinion expressed by Duff, J., in the Supreme Court in this case of *Montreal L. H. & P. Co.* v. *Regan*, 40 Can. S.C.R. 580, 590.

The Privy Council in the case of *Tobin* v. *Murison*, 5 Moore P.C. 110, has also decided that the question of negligence is a question of fact and not a question of law and that it should be decided by the jury.

For all these reasons we are of opinion that the appeal should be dismissed. *Appeal dismissed.*

MAN.

C. A.

CITY OF WINNIPEG v. WINNIPEG ELECTRIC R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Perdue and Haggart, JJ.A. December 20, 1915.

1. MUNICIPAL CORPORATIONS (§ II C 3—90)—REGULATION OF STREET RAILWAYS—REMOVAL OF SNOW FROM TRACKS—SAFE PASSAGE FOR VEHICLES—LIABILITY TO MUNICIPALITY FOR COSTS OF REMOVAL.

A provision in a municipal by-law requiring an electric railway company to remove accumulations of snow or ice from their tracks to afford a safe passage for "sleighs and other vehicles" is not *ejusdem generis* intended in its limited sense, and includes also the safe passage for wheeled vehicles, and a failure of the railway company to comply with a written demand by the city's engineer to remove the snow entirely from the streets will entitle the municipality to recover, under the terms of the by-law, the expenses it had incurred in carrying out the work.

Statement

APPEAL from judgment of Metcalfe, J., in favour of plaintiff.

The following statement of the facts are taken from the judgment of Metcalfe, J.

The plaintiff sues for the cost of removal of snow from its streets. The defendant is the successor of the applicants mentioned in by-law No. 543 of the City of Winnipeg. This by-law was in the year 1892 ratified and confirmed by statute, 55 Viet. ch. 56. Sec. 3 of the said by-law contains the following paragraph:—

(*f*) The said applicants shall at all times keep so much of the streets occupied by the said line of railway as may lie between the rails of every track and between the lines of every double track and for the space of

eighteen inches on the outside of every track cleared of snow, ice and other obstructions, and shall cause the snow, ice and other obstructions to be removed as speedily as possible, the snow and ice to be spread over the balance of the street so as to afford a safe and unobstructed passage-way for carriages and other vehicles. Should the said engineer at any time consider that the snow or ice has not been properly or as speedily as possible removed from or about the tracks of the railway lines or not properly or as speedily as possible spread over the street, he may cause the same to be removed and spread as aforesaid and charge the expense to the said applicants who shall at once pay the same to the city. If, however, the engineer is of opinion that the snow or ice should be removed entirely from the streets so as to afford a safe passage for sleighs and other vehicles, the said applicants shall at once do so at their own expense and charge, or in case of their neglect the engineer may do so and charge the expense to them and they shall pay the same.

At the trial the plaintiff moved to amend by adding an alternative prayer for damages for breach of contract, by-law 543, and alleging sec. 19 of the said by-law, and further alleging that the defendant had not appealed to the city council. I reserved the question of amendment.

Sec. 19 of the by-law is as follows:—

19. (*a*) It is specially hereby provided that if the applicants at any time or times in respect of any of their lines do not comply with the provisions herein or any of them or with the provisions of any by-law or regulation made hereafter by the council or any of them as to, (1) speed of trains or cars, (2) frequency of trips or service, (3) the running of cars during the hours of the day or night prescribed and provided for, the engineer, in such cases, shall decide from time to time the length of time the applicants have been in default, and the applicants shall, for each day in default in each and any of said particulars, pay to the city through its treasurer an amount not exceeding the sum of ten dollars, to be fixed by the engineer in respect of the railway route or line in respect of which default has been made, which sum shall, in all cases, be treated as liquidated damages. The city may collect such amount by suit or action at law in any Court of competent jurisdiction, and in such case the certificate of the engineer, or if appealed, the decision of the council shall be final and conclusive evidence of default and damage, and amount thereof due by the applicants to the city. For this purpose the lines on the following streets shall be considered separate routes: (1) Main street, (2) Portage avenue, (3) Central avenue, Nena and connecting streets, (4) 17th avenue north.

This provision as to payment for default shall apply to each new line or route when constructed.

The applicants shall receive ten days' notice, and when a notice be once given, it shall apply to all cases of default, during a period of six months after the expiration of said ten days whether the default be continuous or not. The fine or liquidated damages for default as aforesaid shall be computed from and include the first of said ten days.

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CITY OF WINNIPEG v. WINNIPEG ELECTRIC R. Co.

Statement

On the night of November 30, 1914, snow commenced to fall heavily, continuing until the afternoon of the following day. On December 1, the city engineer notified the railway company to remove the snow entirely from the streets in accordance with by-law 543, and not to spread it over or dump it on the balance of the street, and if not so done the city will carry out the work and charge it to the company under the provisions of the by-law. The company responded that it had fully met the emergency by removing the snow from the car tracks and refused to remove the swept up snow from the remainder of the street, or to pay the expenses which the city incurred in removing the snow.

Metcalfe, J.

METCALFE, J. (after stating the facts):—Considering the special circumstances, I think the snow so swept from the street car tracks and piled on the fallen snow on the street, made the passage unsafe for wheeled vehicles.

The extraordinary conditions were well known both to Brereton and the defendant. Phillips says the defendant was attempting to comply with Brereton's request. Further on he says the defendants hauled away great quantities of snow with teams, dumping some on the river bank and some on vacant lots.

The defendant now says it received no notice. While there is no express provision requiring notice, I think reasonable notice should be given.

I find the engineer was of the opinion that the passage was unsafe for wheeled vehicles. He demanded the removal of the snow. The defendant so understood the demand. Under all the circumstances, I find the notice sufficient.

The defendant seeks to invoke the doctrine of *ejusdem generis*, claiming that it is not liable unless the passage is unsafe for "other vehicles" of the nature of sleighs.

This doctrine has been sometimes abused and has many sins to answer for: *per* Riddell, J., in *Re Morlock and Cline*, 23 O.L.R. 165 at 167. It is a valuable servant but a dangerous master: *per* Lopes, L.J., in *Anderson* v. *Anderson*, [1895] 1 Q.B. 749, at 755. It should be applied cautiously: *per* Richards, J., in *London Guarantee* v. *George*, 16 Man. L.R. 132 at 135.

The modern tendency has been to construe general words

in their ordinary sense. *Primâ facie*, general words are taken in their larger sense unless the true construction of the instrument requires the conclusion that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before: *per* Lord Esher, in *Anderson* v. *Anderson*, *supra*, at pp. 752 and 753.

The rule is not of universal application. Its use is to carry out, not to defeat, the intent. It is never used in an arbitrary sense, but operates as a sort of suggestion to the judicial mind. It does not apply where the specific words signify subjects greatly different from one another. Where the particular words embrace all the subjects of the class mentioned and thereby exhaust the class or genus, there can be nothing left for the rule to operate on, and a meaning must be given to the general words different from that indicated by the specific words or there can be ascribed to them no meaning at all. Ann. Cas. 1914, C. 305, 306.

In *Truman* v. *Inland Revenue*, [1912] 3 K.B. 377, at 402, Hamilton, J., said:—

> As I understand the *ejusdem generis* rule it is a principle applicable where there is an enumeration of two or more particulars completed by general words, which thus indicate a genus of which the enumerated particulars are species, and into which genus every other species capable of coming within it is gathered by the concluding words.

That case went to appeal. Both in the Court of Appeal and in the House of Lords the finding of Hamilton, J., on this point was approved. While not adopting the rule as specified by Hamilton, J., no dissent was taken to his enunciation of the rule, and I take it that the terms of the rule as laid down by him met the general approval of all the Judges in the Courts above.

I think the word "vehicles" is not intended in its limited sense, and includes wheeled vehicles.

I was asked to find only as to liability, the amount, if any, to be left to a reference.

There will be judgment for the plaintiff with costs. There will be a reference to Mr. G. H. Walker to ascertain the amount owing.

MAN.

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CITY OF WINNIPEG v. WINNIPEG ELECTRIC R. Co.

Howell, C.J.M.

E. Anderson, K.C., and *D. H. Laird*, for appellant, defendant.

T. A. Hunt, K.C., and *J. Preudhomme*, for respondent, plaintiff.

The judgment of the Court dismissing the appeal was delivered by

HOWELL, C.J.M.:—The sole question in this case, to my mind, turns upon the construction to be put upon that section of the by-law set out in par. 4 of the statement of claim. The chief object of this section was to compel the defendants to keep their tracks and that portion of the highway lying between their double tracks and a space 18 inches wide on each side of the tracks cleared of snow and ice. The other object aimed at by the section was to direct how the defendants were to dispose of this snow and ice so removed. Apparently it was ordinarily to be spread evenly over the remainder of the street on each side of the tracks, and the engineer was given arbitrary power, if he thought this was not done properly to have it done and "charge the expense to the said applicants, who shall at once pay the same to the city." It was apparently considered necessary to provide also for a condition when, if this process was continued or carried out there might be a great valley in the centre of the streets and high roads on each side, for the section further provides as follows:—

> If, however, the engineer is of opinion that the snow or ice should be removed entirely from the streets so as to afford a safe passage for sleighs and other vehicles, the said applicants shall at once do so at their own expense,

and then follow provisions in case of neglect for the work to be done and charged to the defendants. There are thus provided two ways by which this snow and ice which the defendants are bound to remove from their tracks shall be disposed of so that the streets may still be useful highways. My view of this section is, that if the engineer is of opinion that this snow and ice should be entirely removed from the street in order to facilitate traffic by vehicles, then the defendants must so remove it.

I do not think that the words "a safe passage for sleighs" limit the engineer's power to compel the removal of this snow

until the conditions of the street are such that with the spreading of the snow and ice on each side of the centre valley, it would, in his opinion, make the high roads on each side unsafe for sleighs as the defendant's counsel contends. If such was intended, pedestrians who attempted to cross the street would be in a precarious position, and the streets would be practically impassable for wheeled vehicles. I think it was intended that the city streets might at all times be used in the ordinary way without any undue accumulation of snow or ice, and the snow and ice which the defendants had on their hands, if I may use this term, were not to be added to the accumulation on the streets, they were bound to place it elsewhere, when the engineer in his judgment should so direct.

In this view of the case I see no necessity to decide the meaning to be given to the words "sleighs and other vehicles." On this question, however, I see no reason to differ from the decision of Metcalfe, J., and I would agree with his view of the law. *Appeal dismissed with costs.*

[Appeal pending to Supreme Court of Canada.]

LIVINGSTONE v. EDMONTON INDUSTRIAL AND CITY OF EDMONTON.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. December 21, 1915.

1. PARTIES (§ III—122)—INTERVENTION OF ATTORNEY-GENERAL—MUNICIPAL ACTIONS.

The Attorney-General is not a necessary party to an action in which the public outside of the municipality have no interest.

[*Gallagher* v. *Armstrong*, 3 A.L.R. 443, followed.]

2. MUNICIPAL CORPORATIONS (§ II D—146)—MODE OF CONTRACTING — POWERS OF COMMISSIONS—RATIFICATION BY COUNCIL—WHAT CONSTITUTES.

Under the Edmonton Charter the power of the commissioners is subject to the supervision of the council, and when, after submitting to the council, the latter authorized a particular contract, the commissioners have no authority to make a contract in conflict with the council's authorization; nor will a resolution of the council authorizing tests of the proposed undertaking and the submission of a by-law to raise funds presumably necessary under the agreement, in the absence of knowledge of the terms thereof, operate as a ratification of the agreement.

3. MUNICIPAL CORPORATIONS (§ II D—146)—AGREEMENT NOT CONFORMING TO RESOLUTION—MODE OF SETTING ASIDE.

It is not necessary to follow the procedure under sec. 578 of the Edmonton charter by a motion to quash a resolution where no exception is taken to the resolution, but only to an agreement because not in accord with the resolution.

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4. COSTS (§ I—11)—DISCRETION AS TO RULE FOR FIXING—MUNICIPAL ACTIONS.

Although the question of costs is a matter for the discretion of the trial judge, which will ordinarily not be interfered with on appeal unless there has been a misapprehension of fact or disregard of principle, the general guiding principle is that the party who succeeds is entitled to costs against the unsuccessful party; but a municipality, on whose behalf a ratepayer successfully contests the validity of an agreement with a company, cannot be properly taxed with the costs of the co-defendant company.

[*Gariepy* v. *Greene*, 23 D.L.R. 797, referred to; *Livingstone* v. *Edmonton*, 24 D.L.R. 191, varied as to costs.]

Statement

APPEAL from a judgment of Ives, J., 24 D.L.R. 191, declaring invalid an agreement purporting to be made between the defendants.

A. Macleod Sinclair, for plaintiff, respondent.

G. B. O'Connor, K.C., and *C. A. Grant*, K.C., for defendants, appellants.

J. C. F. Bown, K.C., for the city.

Harvey, C.J.

HARVEY, C.J.:—I agree with the trial Judge that in a case such as this in which the public, outside of the City of Edmonton, have no interest whatever, there is no necessity that the Attorney-General should be a party. In principle I can see no reason why he should be, and I am satisfied from the reasons for judgment of Stuart, J., in *Gallagher* v. *Armstrong*, 3 A.L.R. 443, and the cases cited by him, that authority does not require it. The trial Judge held that the agreement which it was sought to have declared invalid was not authorized by the resolution of the council, and in this I am of opinion that he was right. In many respects it contains provisions not authorized by the resolution, and it is made with a corporation which was not in existence when the resolution was passed which authorized it to be made with certain individuals.

It is argued in support of the agreement that, under the Edmonton Charter the commissioners have authority without the assistance of the council to enter into this agreement. There seems to me to be a complete answer to this in that the agreement was not made by the commissioners by virtue of their authority under the charter but on its face purports to be made in pursuance of the authority of and "upon the terms agreed upon by the council," and is executed on behalf of the city—not by the commissioners but by the mayor and city clerk.

I express no opinion as to whether, in the absence of action by the council, the commissioners would have power to enter into such an agreement as this but it is clear that their power is subject to the supervision of the council and when, as in this case, they had submitted the matter to the council which had itself authorized a particular contract, I feel no doubt that the commissioners would have no authority to make a contract that would conflict with the council's authorization.

It is argued, however, that the council by its action subsequent to the making, ratified it. Assuming for the moment that validity might be given in that way, the evidence upon which such alleged ratification rests is of the most indefinite and vague character. There is a resolution by the council authorizing tests to be made of the well and the submission of a by-law to raise $150,000, presumably to pay the city's liability under the agreement. It may perhaps be argued with some force that this involves the knowledge or at least belief of the existence of an agreement, but it furnishes no evidence whatever that the council was aware of the terms of the present agreement. The reasonable presumption, if any, would be that the council assumed the agreement to be the one it had authorized. In the absence of knowledge of the terms of an agreement, there can be no question of ratification.

It is also argued that the action does not lie because the proper procedure to be followed would have been to move to quash the resolution under sec. 578 of the charter. The plain answer to that is that the plaintiff takes no exception to the resolution, but only to the agreement because it is not in accord with the resolution. I think, therefore, without considering any of the other grounds argued, that the judgment was right in declaring the agreement invalid.

The trial Judge, however, directed that the city should pay all the costs including those of the company its co-defendant. Against this portion of the judgment the city appeals by leave of the trial Judge.

It has been repeatedly held that the question of costs is a matter for the discretion of the trial Judge, which will not be interfered with unless there has been a misapprehension of

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facts or a disregard of principle. This rule was affirmed by this Court only a few months ago in *Gariepy* v. *Greene*, 23 D.L.R. 797.

The trial Judge has given no reason why he ordered the city to pay its co-defendants' costs, and I am unable to find any principle which would justify it. The general guiding principle is that the party who succeeds is entitled to costs against the unsuccessful party. The plaintiff who sued on behalf of all the ratepayers, himself represented the city, and the contest, therefore, was decided in favour of the city in this aspect. As the plaintiff represented the city's interests there was no necessity for the city, as defendant, to do more than see that the facts and the rights were duly presented to the Court, and in so far as there could be said to be any contest the company is the unsuccessful party. There would appear, therefore, in principle to have been justification for making an order that the company should pay all the costs including those of its co-defendants. I can see no proper principle, however, upon which the order which was made can be based.

The extent of the city's appeal is only as to the order to pay its co-defendants' costs, and for the reasons stated, I think it is entitled to succeed.

In the result I would dismiss the defendant company's appeal with costs, and I would allow the defendant city's appeal with costs, and direct that the judgment be varied by striking out that portion which orders the city to pay the company's costs of the action.

Scott, J.
Stuart, J.
Beck, J. (dissenting)

SCOTT, and STUART, JJ., concurred; BECK, J., dissented.

Appeal dismissed; judgment as to costs varied.

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ST. LAWRENCE FURNITURE CO. v. BINET.

Quebec Court of King's Bench, Appeal Side, Lavergne, Cross, Carroll and Pelletier, JJ. March 12, 1915.

1. CORPORATIONS AND COMPANIES (§ IV G 5—133)—ILLEGAL DECLARATION OF DIVIDEND—PAYABLE IN STOCK—PROVINCE OF COURT.

A resolution of a board of directors declaring a dividend payable partly in money and partly in stock of the corporation is illegal under sub-sec. 4 of art. 6036 of R.S.Q. 1909, and will be quashed; but the court will not assume jurisdiction to substitute itself for the company and declare a dividend payable completely in money.

Statement

APPEAL from judgment of Belleau, J.

S. C. Riou, for appellant.

Lapointe, Stein & Lévesque, for respondent.

The judgment of the Court was delivered by

LAVERGNE, J.:—The appellant company is a joint stock company, created under the provisions of R.S.Q. 1909, arts. 5957 *et seq.* The appeal is from a judgment given by the Superior Court, in the District of Kamouraska on November 9, 1914, condemning the appellant to pay to the respondent the sum of $619.50 under the following circumstances. The directors of the appellant company on July 4, 1913, passed the following resolution:—

It is moved by M. Alex. La Palme and seconded by Jos. Vile, that as authorized by a by-law of the directors dated August 6, 1912, for the distribution of accumulated profits, the said by-law having been ratified at a general meeting of the shareholders of this company held on the same day, the directors declare three dividends, 8, 9, and 10 of 7 per cent. each upon the preferential stock of this company, immediately payable, part in paid up preferential shares and part in money according to the list annexed hereto, forming in all $10,500 and that the certificates for shares be issued to each of the shareholders whose names are to-day on the books of the company for the amount mentioned on said list. That the balance of $3,672.27 which will remain to the credit of the profit and loss account shall be left to be disposed of until the next meeting of the board of directors. This resolution was authorized and ratified by the unanimous vote, with one exception, of the shareholders. This respondent was absent.

The certificates were subsequently prepared and mailed to the shareholders in payment of their dividends with a balance in money after allotment of the new shares in conformity with the resolution.

The dividends declared, at the rate of 7 per cent., if they had been payable in money only, would have amounted to the sum of $619.50 for the respondent. He was allotted 9 shares of $50 and in addition was given a cheque for $169.50. The respondent refused to accept the certificates and the cheque and returned all to the company demanding to be paid en-

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Lavergne, J

tirely in money. Upon refusal of the company he took action to have the resolution in question quashed and claimed the payment in money of his dividends, to wit, the sum of $619.50.

G. A. Binet, the original plaintiff is dead and the present respondent became plaintiff by revivor. The respondent claims that the resolution by which the directors declared the dividends of 7 per cent. payable partly in paid up preferential shares and partly in money is illegal and he invokes sub-sec. 4 of art. 6036 of the R.S.Q. This sub-sec. provides as follows:—

> The capitalization of surplus earnings, and the issue of stock to represent such capitalized surplus are also prohibited, and all stock so issued shall be null and void, and the directors consenting to such issue of stock shall be jointly and severally liable to the holders thereof for the reimbursement of the amount paid for such stock.

This sub-section entirely forbids the action of the directors and therefore the resolution in question is absolutely void. This appears to me to be virtually admitted by the parties. The resolution in question was quashed by the Superior Court, but after having quashed it that Court condemned the appellant to pay to the respondent the sum of $619.50, an amount equal to 9 paid up preferential shares in the stock of the company plus $169.50.

As I have said above the resolution in question was absolutely void. But could the Court substitute itself for the company and declare for it a dividend completely payable in money? I believe not. I believe that it is beyond its powers and might work a serious injustice. The company may not be in a position to pay these dividends entirely in money and evidently does not desire to do so as the evidence on the record proves; it would be impossible to do so without embarrassing its operations and perhaps completely paralyzing its business.

The judgment quashing the resolution should be maintained and the action of the respondent maintained on this head, but the judgment should be reversed as to the condemnation against the appellant in favour of the respondent for the sum of $619.50. The costs in the Superior Court should be given to the respondent and the costs in this Court to the appellant against the respondent. *Judgment varied.*

ANDERSON v. FORT WILLIAM COMMERCIAL CHAMBERS Ltd.

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., and Riddell, Latchford and Kelly, JJ. November 4, 1915.

1. MECHANICS' LIENS (§ VII—55)—HOW WAIVED—ESTOPPEL IN PAIS.

Under sec. 6 of the Mechanics Lien Act, R.S.O. 1914, ch. 140, an estoppel *in pais* from claiming such lien cannot arise, and such right can only be waived by a signed agreement.

2. MECHANICS' LIENS (§ VIII—66)—TIME OF FILING—ABANDONMENT OF WORK—WHAT CONSTITUTES.

A cessation of work by a sub-contractor under a mistaken belief that the contract was completed, but which is later resumed by him and finished, constitutes no "abandonment" of the work within the meaning of sec. 22 (1) of the Mechanics Lien Act, R.S.O. 1914, ch. 140, requiring the claim for a lien to be registered within 30 days after the completion or abandonment of the contract.

Statement

APPEAL from the judgment of a District Court Judge in favour of the plaintiff.

Thomson, Tilley & Johnston, for appellants.

C. C. Robinson (for *C. A. Moss*, absent on active service with His Majesty's Forces), for plaintiff, respondent.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—One Stewart had a contract to build for, and on the property of, the defendants; he entered into a sub-contract with the plaintiff for the plaintiff to put in certain heating apparatus.

Stewart and the plaintiff contended in good faith that their contracts were completed, but the defendants refused to accept as complete. Stewart and the plaintiff left the building, believing their work done.

After the lapse of some time, it was agreed by Stewart and the defendants to submit to arbitration all matters in dispute—the plaintiff gave evidence in the arbitration, but was not a party to it.

The award made on the 24th June, 1914, found that "there is now due and owing from the said the Fort William Commercial Chambers Limited to the said . . . Stewart for work done and materials supplied, including all claims for extras, less deductions, the sum of $15,345.36 over and above the contract price, but subject to the condition that the sum of $1,500 of the said amount is to be retained until the following work is completed to the satisfaction of . . . the architect, . . . namely"—setting out in detail what was to be done, including some of the work in the plaintiff's sub-contract. The result was that the

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ANDERSON v. FORT WILLIAM COMMERCIAL CHAMBERS LIMITED.

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main contract was held not to be completed; as a necessary consequence, the plaintiff's sub-contract was also held not to be completed. All parties were satisfied with the award, and the money found due was paid shortly thereafter to Stewart. Before this payment, Stewart's manager, Webster, saw the plaintiff and had some conversation with him. In one view of the case, the precise words of this conversation would be material, but not in the view I take of it. The substance of the transaction is that the plaintiff was informed that the defendants were going to pay the balance to Stewart, and was recommended to take proceedings to protect himself; he was also told that the defendants had no right to pay him anything and would pay the money direct to Stewart. He made no objection and took no steps to protect himself; he had perfect confidence in Stewart, and in fact Stewart would have paid him but for circumstances over which neither had any control.

Stewart went on to finish the contract, and the plaintiff went on to finish his, according to the original plan. Stewart did not finish his contract, and it will cost the $1,500 to complete it. The plaintiff did complete his contract and filed a claim of lien under the Act, R.S.O. 1914, ch. 140.

On the matter coming on for trial before His Honour Judge McKay, the plaintiff obtained judgment for his claim for $915.18 and $125 costs, in all $1,040.18. The defendants now appeal.

The first ground of appeal argued before us was that the plaintiff had estopped himself from claiming a lien by his conduct. I should require further consideration before deciding that the conduct disclosed here could, in law, effect an estoppel; but I do not think it necessary to pass upon that point, because, in my judgment, sec. 6 of the Act prevents any such effect following from such conduct. "Unless he signs an express agreement to the contrary . . . any person . . . shall . . . have a lien . . ." It would emasculate this section to hold that an estoppel in pais would do what the section declares only a signed agreement can do.

It is, however, claimed that the first cessation of work was an "abandonment" under sec. 22 (1)*; and no claim for lien was

*22.—(1) A claim for lien by a contractor or sub-contractor, in cases not otherwise provided for, may be registered before or during the performance of the contract, or within 30 days after the completion or abandonment thereof.

registered within 30 days from that time. But what took place in the present instance was not an "abandonment" of the contract. An abandonment of the contract contemplated by this section is, not leaving a work under the belief that the contract is completed, but, knowing or believing that the contract was not completed, declining to go on and complete it. Nothing of the kind was done here. The plaintiff, on it being decided that he was wrong, went on and finished his work. There never was any intention on his part to refuse to complete a contract which he knew or believed was not completed. That being so, I think that sec. 22 (1) does not apply. The contract was not completed or abandoned.

The judgment appealed from is right, and the appeal must be dismissed with costs. *Appeal dismissed.*

SPARTA STATE BANK v. ALBERTA FINANCIAL BROKERS.

Alberta Supreme Court, Harvey, C.J., Stuart and Beck, JJ. December 21, 1915.

1. BILLS AND NOTES (§ VB 3—147)—COLLATERAL SECURITY TO BANK—HOLDER IN DUE COURSE.

The fact that a note was discounted by a bank on the strength of another note which it had required as collateral security does not in any way negative the fact that consideration was given for the note sued on, which, if received in good faith and without notice of defects in the title of the payee, makes the bank a holder in due course under sec. 56 of the Bills of Exchange Act.

Statement

APPEAL from Carpenter, Dist. Ct. J.

F. W. Griffiths, for appellant.

W. H. Sellars, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The only question involved is whether the plaintiffs are holders in due course of a promissory note given by the defendants. The circumstances of the negotiations of the note to the plaintiff are related by its vice-president. He says that about June 1, more than 3 months before the note fell due, Brown, the payee, was introduced to him in the bank by Brown's partners, when Brown asked to have the note discounted and the proceeds placed to the credit of the American Specialty Co. The request was not acceded to, and a couple of weeks later the same 2 persons and the 3 directors of the Specialty Co. came in again and made the same request. The vice-president, however, was not satisfied with the security without a report as to the financial standing of the makers, but agreed to accept the

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note if the 3 directors would give the bank their demand note for the amount, which was $500. This was done, and the note in question was endorsed by Brown to the bank and the proceeds were placed to the credit of the Specialty Co. The vice-president states that he had no notice of any fraud or any other defect until after the note fell due. There seems to have been some arrangement or undertaking, that if the report to be obtained was satisfactory, the note in question would be treated as the principal security, but at the time of the action the plaintiff still held the note of the Specialty Co.

On these facts it appears clear that the note sued on was taken only as collateral security and that the advance was really made on the faith of the other note, but it is also equally clear that the note was given as part of the security upon which the money was advanced, even though its value was not known at the time to the bank, which is a quite common situation regarding collateral securities. It does not in any way negative the fact that consideration was given for the note, and, as the bank had no notice of defects in title of the payee, it was taken by them in good faith for value without notice of defect, which makes the bank a holder in due course under sec. 56 of the Bills of Exchange Act, and the appeal should be dismissed with costs.

Appeal dismissed.

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THE GUARDIAN ASSURANCE CO. v. THE TOWN OF CHICOUTIMI.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. June 24, 1915.

1. INSURANCE (§ VI F—405)—DEMOLITION OF BUILDING TO PREVENT FIRE—PAYMENT OF LOSS BY MUNICIPALITY—RIGHT TO SUBROGATION.

Upon an assignment of fire insurance policies to a municipality after the latter has indemnified the owner for all damages sustained from the demolition of a building under art. 4426, R.S.Q. 1888 to arrest the progress of a fire, the municipality is entitled to be subrogated to all the rights of the owner and recover from the insurance company the loss payable under the policies.

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of Letellier, J.

A. W. Atwater, K.C., for the appellants.

N. A. Belcourt, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I will state briefly the facts which I think are relevant and which are very simple. On June 24, 1912, a fire broke out in the Town of Chicoutimi which

attained the proportions of a general conflagration. In order to check the progress of this fire the mayor of the town ordered a house adjoining that of Mme. Claveau to be blown up by dynamite. The explosion involved the accidental demolition of Mme. Claveau's house as well.

The action of the mayor was authorized by art. 4426 of the R.S.Q. 1888, which is as follows:—

To authorize certain persons to cause to be blown up, pulled down or demolished such buildings as may appear necessary in order to arrest the progress of any fire, saving all damages and indemnity payable by the corporation to the proprietors of such buildings, to an amount agreed upon between the parties, or, on contestation, to an amount settled by arbitrators. In the absence of any by-law under this article, the mayor may, during the course of any fire, exercise this power by giving a special authorization.

Mme. Claveau was insured in the appellant's office and the town having paid her the full amount of the damages which she sustained by the demolition of her house now seeks to recover from the appellant the amount of the insurance moneys.

Mme. Claveau would have had a right to collect these insurance moneys from the appellant and to recover from the town any further sum necessary to indemnify her for the destruction of her property. The town having paid the whole damage sustained by her is, I think, entitled to pursue the appellant for the value of the policies of the insurance.

In the case of *Simpson* v. *Thomson*, 3 App. Cas. 279, at 284, the Lord Chancellor in the course of his judgment referred to the well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.

I can see no difference in the present case except that the indemnity is provided by the statute instead of by agreement between the parties, and that does not appear to affect the principle.

In ordinary circumstances where A. has without any fault of his own damaged the property of B., A. is under no liability to indemnify B. for his loss. It is otherwise if A. was a wrongdoer, in which case he is liable to B. for the whole of the damage, and if B. recover any part of the loss from insurers, these latter are entitled to recover, in the name of B., the amount of their payment.

A statute may authorize the doing of an act which without such authorization would be unlawful. In the present case the

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act of the council in blowing up a building to prevent the conflagration spreading might have been unlawful, but the statute legalized its action.

A statute may, however, as in the present case, impose upon an innocent party a liability to indemnify for damage caused by him.

Another instance of this may be found in the Railway Act, R.S.C. 1906, ch. 37, sec. 298, as amended by 9 & 10 Edw. VII., ch. 50, sec. 10. By this section it is provided that:—

Whenever damage is caused to any property by a fire started by any railway locomotive the company making use of such locomotive whether guilty of negligence or not shall be liable for such damage.

Provided also that if there is any insurance existing on the property destroyed or damaged the total amount of the damages sustained by any claimant in respect of the destruction or damage of such property shall for the purposes of this sub-section be reduced by the amount accepted or recovered by or for the benefit of such claimant in respect of such insurance. No action shall lie against the company by reason of anything in any policy of insurance or by reason of payment of any moneys thereunder.

The legislature might have provided any indemnity it thought fit either, as in the case of the Railway Act, expressly limiting it to the net loss after deduction of any insurance moneys or making it the total loss and so relieving the insurance company of its liability. In the absence of any express provision in art. 4426 the question to be determined is the extent of the liability under the indemnity it provides. Is the indemnity to be interpreted by the principle which would apply in the case of a wrongdoer as being the total amount of the loss or only the net loss sustained by the owner after deducting from the total loss the amount for which the property was insured?

The respondent had not only a right, but a duty to destroy the property and unless the statute had provided for indemnity there would have been none. There is no reason to suppose that the statute meant to relieve insurance companies of their contractual liabilities, I think it merely intended to secure a complete indemnity to property owners for whatever loss they might suffer.

The case is different from the liability of a wrongdoer. In *Yates* v. *Whyte*, 4 Bing. N.C. 272, in which the plaintiff was suing the defendants for damaging his ship by collision and the defendants sought to deduct from the amount of damages to be paid by them a sum of money paid to the plaintiff by his insurers in respect of such damage, Tindal, C.J., said:—

If the plaintiff cannot recover the wrongdoer pays nothing and takes all the benefit of a policy of insurance without paying the premium.

In construing the indemnity provided by art. 4426 to be given by an innocent party I do not think the principle governing the liability of a wrongdoer is to be looked to. On the contrary, I think the indemnity should be confined to the narrowest limits which the words of the statute will permit. I think it should be taken to cover the actual loss sustained after deducting therefrom any insurance moneys paid in respect thereof; it should not be held to relieve an insurer of liability in respect of which he has been paid a premium.

Whatever may be the rights of the insurer, under the English law, to subrogation upon payment to the insured of the amount covered by the policy, in my opinion the insurance company is not entitled in the Province of Quebec, after subrogation, to recover from a third party who may be liable to the insured, where there has been no fault on the part of the third party. The only right of subrogation is contained in art. 2584, C.C., which says:—

The insurer on paying the loss is entitled to a transfer of the rights of the insured against the person by whose fault the fire or loss was caused.

In the present case the acts of the corporation were authorized by statute. There was, therefore, no fault and the insurance company, if they had paid the insured, could not have recovered back the amount so paid, from the corporation.

The whole subject is fully and very learnedly discussed in La Revue Trimestrielle de Droit Civil, vol. 5, 1906, at p. 37. See also Planiol, Droit Civil, vol. 2, nos. 2142 and 2143, and Labbe's note to S.V. 80.1., 441.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant had insured one Mme. Claveau in respect of a house, in the town of respondent, against loss by fire.

In a disastrous fire the mayor of respondent directed the use of some explosive to be applied to an adjacent house in order to arrest the progress of the fire. In so using the explosive not only was the house to which it was applied blown up, but that of Mme. Claveau was also destroyed. The operation was successful in arresting the fire. The respondent town was threatened by Mme. Claveau with a claim for damages and settled with her for

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an amount in excess of the amount of her insurance, upon the condition that she should assign to the respondent her claim under the policy of insurance issued to her, to indemnify her against loss, and she accordingly assigned to it, contemporaneously with and as part of the settlement, her claim (if any) against the appellant upon the policy in question. The respondent then sued appellant thereon. The trial Judge allowed the claim and this the Court of Appeal has maintained. The appellant contends it is not liable because it alleges the respondent was primarily liable therefor.

Of course, if this can be maintained as a legal proposition the appellant should succeed. It is just there in my view that the case turns. For if the insurer can shew that the respondent was a wrongdoer and in law liable for the loss, then it could pay the insured and have recourse over against the respondent as a wrongdoer.

There may be, under other circumstances not present to my mind just now, possible cases where such right over or of subrogation might exist. But in this regard the appellant seemed to me in argument singularly weak.

I could not on the argument elicit from able counsel for the appellant any authority substantiating such a proposition as resting upon the facts herein would have entitled his client to an assignment of Mme. Claveau's rights or otherwise in any way of subrogation as against the respondent.

Much reliance was placed upon the positions taken by respondent in the Court below and in its dealings with the insured in way of acknowledgment of liability to her which seem to me entirely irrelevant.

It is not what respondent or its advisors imagined the law to have been, and her legal rights resting thereon to have been, that should have any weight with us.

We must decide upon what we conceive to have been the actual legal rights of the parties and discard all such other imaginary legal positions as irrelevant.

If respondent was a wrongdoer, and in law liable therefor, the appellant is entitled to so answer any claim it (the respondent) may have imagined it either had or could acquire as against the appellant.

In that case, repeating what I have already said, the appellant in virtue of its right of recourse over could not be held liable herein.

The respondent, however, was not a wrongdoer, by reason of what was done, because the mayor, who ordered that to be done which was done, had the legal warrant embodied in the last part of the sec. 4426 of the R.S.Q. of 1888, which is as follows:—

In the absence of any by-law under this article, the mayor may, during the course of any fire, exercise this power by giving a special authorization.

To my mind it is exceedingly doubtful if, armed with such authority, he or those he represented, could be held liable for anything. That authority when acted upon might produce great hardship, but I fail to see how a man so acting could be said to have committed any legal wrong.

Of course, there is an argument for the construction of the section just quoted which might imply a right of indemnity, as in the case of a by-law authorizing such action as provided for in the section.

Assuming that argument good and liability resting upon the statute, what should be the measure of damages?

It does not appear to me that a person fully insured against loss could claim to have been damnified thereby. Her damages should be measured by the actual loss she sustained. And the insurance which she was entitled to have received must in such case have gone in reduction of the aggregate amount of such damages, and the assessment be made accordingly.

The course of events has been such that, instead of her suing therefor, she has compounded with the respondent upon the terms which entitled her to receive what she suffered, but upon the condition of subrogating conventionally respondent to her rights as against appellant. She might have accepted from respondent the part of the sum total in excess of the insurance and have sued the company. In that view I can see no reason for appellant's complaining.

The appellant primarily was liable and possibly has secured by what respondent's mayor did, great benefits beyond what appear herein.

Of this latter suggestion we have no evidence and it weighs naught with me save as an illustration of the legal position in which appellant stands.

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The cases cited do not help. The principles upon which they proceed are either against appellant or irrelevant to the peculiar facts of this case.

The *Mahoney Case*, Q.R. 10 K.B. 378, may be perfectly good law. I express no opinion thereon, but it does not touch what is involved herein.

The leading cases upon subrogation in relation to the rights of an insurer are lucidly explained in Bunyon on Insurance. I can find nothing in that or the cases so referred to justifying this appeal. Take the case of *Castellain* v. *Preston*, 11 Q.B.D. 380, at 388, where the exposition of the law by Brett, L.J., is as follows:—

> Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished.

This covers the whole of the subject matters out of which the right of subrogation can arise to the insurer. There is nothing of a contractual nature in question therein. And, as already shewn, there is nothing in the way of tort which in any way can found a right in the insured to be acquired by the insurer. Any right the insured had must rest in the right to be indemnified. She got that only to the extent of her actual loss, less what she had covered by the appellant's insurance which she chose to assign rather than follow.

In doing so she gave nothing appellant was entitled to claim.

I have given most careful consideration to the several articles of the Civil Code dealing with the subject of subrogation in general and to the subject of insurance in particular, to which we were referred in argument.

I cannot find therein anything essentially different from the principles expounded in said authorities as I read them.

Art. 2584, C.C., seems that most directly applicable to this case. It is as follows:—

> 2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.

I do not think this case falls within that. Indeed, it seems possibly narrower than the rule of Brett, L.J., above quoted. If there is any difference in their effect, preference should be given to the article.

It is exceedingly desirable there should be no difference in the laws governing such a subject.

If there had been legal negligence shewn in the doing that which was done, the result might have given rise to the application of the doctrine in that case, or legal principles outside that case.

I can find no negligence, and, indeed, though suggested, that ground was not much relied upon or pressed as it appeared to me.

The appeal should, therefore, be dismissed with costs.

Duff, J., dissented. Duff, J. (dissenting)

ANGLIN, J.:—Incorporated by 57 Vict. ch. 66 (Que.), the Town of Chicoutimi is governed by the provisions of the Town Corporations' General Clauses Act, 1888, art. 4178, *et seq.* Applicable to towns incorporated prior to 1903 which have not been subsequently taken out of its operation (R.S.Q., 1909, art. 5884), this Act is still in force and unrepealed. See R.S.Q., 1909, vol. 4, p. 373. By arts. 4389 and 4426 of the R.S.Q. 1888, town corporations are authorized to pass by-laws:— Anglin, J.

4426. To authorize certain persons to cause to be blown up, pulled down or demolished, such buildings as may appear necessary in order to arrest the progress of any fire, saving all damages and indemnity payable by the corporation to the proprietors of such buildings to an amount agreed upon between the parties, or on contestation to an amount settled by arbitrators. In the absence of any by-law under this article, the mayor may during the course of any fire, exercise this power by giving a special authorization. (40 Vict. ch. 29, sec. 251.)

It does not appear upon the record that any by-law such as is authorized by this article was passed by the Town of Chicoutimi. But the demolition of Mme Claveau's house resulted from the blowing up of the adjacent Tremblay residence under the special direction of the mayor, and the liability of the municipal corporation to the owner was, in my opinion, the same as if the work had been carried out under the provisions of a by-law. This, I think, is the effect of the words "may exercise this power." That the demolition of Mme. Claveau's house was not directed or intended, but was occasioned by the use of an excessive charge of dynamite in blowing up the Tremblay residence, owing to a

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desire to insure the complete destruction of the latter, does not, in my opinion, suffice to take the present case out of the purview of art. 4426, or to render the mayor or the municipal corporation liable therefor *ex delictu*. Under the circumstances—regard being had especially to the emergency which called for prompt and effective action—a case of fault has not been established against them under art. 1053, C.C., in respect of liability for which the appellants might be entitled to subrogation. Art. 2584, C.C., and report thereon of the Codification Commissioners.

Upon consideration of the scope and purpose of art. 4426, R.S.Q., 1888, I am convinced that it was not the object of the legislature, in enacting it, to indemnify insurance companies against losses occasioned to them through the demolition of buildings pursuant to its provisions for the purpose of arresting the progress of fires. The intention was, in my opinion, to subject the municipality to liability to the proprietor of any building so demolished for his own benefit, and not through him for the benefit of any insurance company interested, for the net loss which he would sustain in consequence—that is, for his damages over and above any indemnification to which he might be entitled under the provisions of any insurance policy. The fact that in most cases where buildings are demolished under the provisions of art. 4426 they would themselves, if not so destroyed, become a prey to the conflagration which their demolition is designed to arrest, with consequent liability of the insurance companies, seems to me to confirm the view that the construction which I put upon that article is what the legislature intended it should bear. Where the building demolished is not covered by insurance, or, for any reason not attributable to his own fault, the proprietor is unable to recover upon his insurance, the municipal corporation would, of course, be liable to the full amount of the value of the property destroyed. But where the owner is entitled to the benefit of insurance the amount thereof recoverable must be first deducted from the total value of the property destroyed in estimating the amount of damages and indemnity payable to him by the corporation. To place any other construction upon art. 4426 would, I am satisfied, be to give it an effect not intended by the legislature. In my opinion, therefore, the statute did not subject the respondent to any liability in respect of the part of

Mme. Claveau's loss covered by insurance, and she, therefore, had no such rights against it to which the appellants could claim subrogation. As already stated delictual liability of respondents has not been established. On the other hand it is admitted by the appellants—and I think there is no doubt—that they were liable, under their policy, to Mme. Claveau. Her loss was caused "by the means used for extinguishing the fire," art. 2580, C.C.

In settling with Mme. Claveau for the sum of $5,500 the municipal corporation insisted upon her assigning her interest in her policies of insurance with the appellant company, which she did. Although in making this settlement it was not explicitly stated that the municipality assumed liability only for the amount of Mme. Claveau's loss in excess of her insurance, it is quite clear that it was not intended by the payment made to her to satisfy or extinguish the liability of the appellants. If it were, the taking of an assignment of her claims under her policies would be meaningless. I think the proper interpretation of what was done is that the municipality intended to purchase Mme. Claveau's rights against the insurance company and to pay to her, in discharge of its liability under art. 4426, only the difference between the amount recoverable under her insurance policies and the sum of $5,500, the balance being the purchase price of the assignment of her claims against the insurance company. Her policies amounted in all to $4,700 and the loss recoverable under them has been fixed by the learned trial Judge at $4,000. No appeal has been taken against this assessment of the amount of the appellant's liability. The assignability of Mme. Claveau's rights accrued against the insurance company has not been questioned.

I am, for these reasons, of the opinion that the judgment in appeal should be affirmed and this appeal dismissed with costs.

BRODEUR, J., for reasons given in writing, was of opinion that the judgment should be affirmed. Brodeur, J.

Appeal dismissed.

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HOUSEMAN v. LePAGE.

Quebec Court of King's Bench, Appeal Side, Lavergne, Cross, Carroll and Pelletier, JJ. May 5, 1915.

1. LOGS AND LOGGING (§ I—10)—WOODMEN'S LIEN—WHO ENTITLED.

The lien provided by art. 1994 (*c*), C.C. Que., to secure the charges of any person engaged in cutting or manufacturing lumber applies not only to those who are directly engaged in the work themselves, but also to those who have the work done by others.

Statement

APPEAL from judgment of Letellier, J.

Elzéar Levesque, K.C., for appellants.

L. G. Belley, for respondent.

Lavergne, J.

LAVERGNE, J.:—The company in liquidation is an American company, which has its principal place of business in Fulton, in the State of New York, and timber limits and patented land in the County of Chicoutimi. In 1913 it entered into a contract with the respondent by which the latter agreed to cut, manufacture and take out from the woods and put on the banks of the rivers 15,000,000 ft. of lumber for $4.60 per 1,000 ft. The respondent fulfilled his contract, but in the spring of 1914 the company was placed in liquidation. The respondent got out wood to the extent of $51,339.99 and only received $15,000 during the winter, leaving still the sum of $36,959.43.

The appellants were appointed liquidators for the property of the company in the Province of Quebec. The respondent filed his claim, claiming moreover, on the logs which were in the river in March, the lien of art. 1994 (*c*) C.C. and other articles. The liquidators contested the claim and the lien of the respondent, and final judgment was given declaring that the respondent had the lien under art. 1994 (*c*) C.C. It is of this judgment that the appellant complains.

Art. 1994 (*c*) C.C. gives to any person who is engaged in cutting or manufacturing lumber or taking it out of the woods, etc., to secure his wages or his price, the privilege ranking with that of claims for creditors who have a right of pledge or of retention of all the lumber belonging to the person for whom he works. The appellants claim that the lien given by this art. 1994 (*c*) is only granted to day labourers.

In the case of *Ross* v. *St. Onge*, 14 Que. Q.B. 478, it was decided that a person who manufactures logs according to an undertaking *à forfait* has, for what would be coming to him, the lien of art. 1994 (*c*) C.C.

The person who undertakes to cut and manufacture lumber may do so through others; to have the lien in question it is not necessary that he should cut the logs himself or take them out of the woods himself. The lien is given to the person who undertakes to cut logs or take them out of the woods, but the fact that he has the work done by day labourers or by other persons in no way affects his lien. The respondent has fully established his claim as well as his lien.

According to the terms of art. 1994 (*c*) and the jurisprudence cited, this case appears to me so plain that it does not need further discussion. The judgment is well founded. The appeal should be dismissed with costs.

Pelletier, J.

PELLETIER, J.:—The only question is whether or not the respondent LePage should be considered, in respect to his work, as coming within the terms of art. 1994 (*c*) C.C. He has cut logs for the appellant. Art. 1994 (*c*) C.C. gives to every person who is engaged in cutting or manufacturing logs the lien in question. Now, the contract of LePage, which is filed, is clearly a contract to cut or manufacture logs. It is not necessary to be a lumberman nor to have himself handled the axe to come under the effect of the lien. If I have employees who work for me, and to do my work, it is I, myself, who cut and manufacture by their arms, which become mine for the purposes of the work in question.

The case of *Ross* v. *St. Onge*, *supra*, is a precedent applicable to this case, and our judgment is in conformity with that rendered in said cause by the Court of Appeal. I would confirm the judgment.

Judgment affirmed.

GREENE v. APPLETON.

Alberta Supreme Court, Harvey, C.J., Scott, and Stuart, JJ. June 12, 1915.

1. Vendor and purchaser (§ I C—13)—Defective title—Encumbrance—Agreement of sale—Rights of sub-purchaser.

An agreement for the sale of land cannot be enforced by a vendor who himself has merely an equitable interest in the land under a contract of sale from the registered owner; nor can such interest be properly considered an encumbrance so as to entitle him to require the sub-purchaser to pay the money into court for the purpose of discharging it; such vendor must be in a position, as a condition precedent to his right for the purchase price, to deliver of himself a valid certificate of title.

[*Goodchild* v. *Bethel*, 19 D.L.R. 161; *Lee* v. *Sheer*, 19 D.L.R. 36; *Robinson* v. *Harris* (1890), 21 O.R. 43, distinguished.]

Statement

APPEAL from a judgment of Ives, J., in favour of the defen-

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dants in an action for the balance of the purchase money under an agreement for the sale of land.

O. M. Biggar, K.C., for plaintiffs, appellants.

J. E. Wallbridge, K.C., for defendants, respondents.

HARVEY, C.J.:—This is an action brought by the plaintiffs for $88,651.22, the balance of purchase money under an agreement of sale of lands the purchase price of which was $150,000. The prayer of the claim is for: (1) payment of the said sum; (2) declaration of a lien on the land for the same; (3) sale of the land to realize the lien; (4) foreclosure of defendants' interest; (5) other relief; (6) costs. The only defence which has evidence to support it is that the plaintiffs have no title to the land and that the defendants are ready and willing to perform the agreement on their part as soon as the plaintiffs obtain title.

The plaintiffs' interest in the land was as purchasers under an agreement for sale from the registered owners. The purchase price was $123,000, $23,000 cash at the date of agreement, April 15, 1912; $20,000 on October 15, 1912; $40,000 on April 15, 1913, and $40,000 on April 15, 1914. The payments under the agreement with the defendants were $30,000 cash at date of agreement, May 15, 1912; $20,000 on October 15, 1912; $50,000 on April 15, 1913, and $50,000 on April 15, 1914. Both agreements provided for interest at 7 per cent. This action was begun on March 3, 1914, before the last instalment was payable, but it was alleged by the statement of claim to be due and no exception is taken by the defence, so it may be treated as if that were the fact.

The payments under each agreement are due on the same days, so that if the defendants did not make default the plaintiffs with perhaps a little consideration on the part of their vendors would be able to make their profit of $27,000 without requiring to use any of their own money. The plaintiff who made the sale to defendants swears that the arrangement was made with them that the payments should be concurrent. The defendant who acted for all the defendants, however, swears that there was no arrangement that the payments should be concurrent and apparently the plaintiff only means that the arrangement with the defendant was for payments which were in fact concurrent

with those which the plaintiffs had to make, because when asked by his own counsel when the defendants became aware of the other agreement he says, "They were certainly aware of it when they paid the taxes for 1913." If he had meant to say that they were aware of it in the spring when the agreement was made, he would scarcely have expressed himself in this way only three questions away.

The defendants, however, were aware of the nature of the plaintiffs' title as purchasers under an agreement and took no objection.

The first deferred payment in October was paid on both agreements, the principal and part of the interest of the defendant's payment being paid on the day it fell due and the remainder a few days later. The payment due in April, 1913, was not paid when due by the defendants and the plaintiffs apparently made no attempt whatever to meet their obligation to their vendors, except by calling on the defendants when their vendors called on them.

On April 16, one day after due, the defendants paid the plaintiffs $20,000, leaving according to the plaintiffs' statement filed a balance of $33,510.28. The plaintiffs did not pay this $20,000 to their vendors, but on April 22, nearly a week later, they paid them $9,310.70, which would leave a balance of $33,543.80. Why this exact sum was paid does not appear, but it seems not improbable that it was considered that the balance on each agreement would be the same. The explanation given as to why the whole $20,000 was not paid is that the plaintiffs had an equity of $10,000 coming to themselves at that time, which indicates that the obtaining of their equity was of greater concern to them than the performance of their obligations. The plaintiffs' vendors apparently became tired of waiting and brought action against the plaintiffs, who in their turn brought this action against the defendants. The plaintiffs up to the time of judgment in their action had not paid anything further to their vendors and there appears in the appeal book the formal judgment in the action against the plaintiffs, though why it should be there does not appear. There is no consent to its being there, and it is founded on a judgment delivered on the same day as the judgment in this action and was not formally prepared and entered

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until nearly a month later. It is not settled by the Judge whose judgment it purports to be, and if it is to be considered part of the record in this appeal it certainly ought to be accompanied by the statement of the fact that it is not in accordance with the judgment which the trial Judge delivered. If the parties to that action, after judgment was given in this action, consented to a judgment which did not exist when this case was decided it can have no bearing on the correctness of the decision in this case.

In the view I take it is of no importance, but if it were, I would consider that it ought to be disregarded. I would just like to say in passing, however, that I consider it contains one provision at least which is highly improper, and which I think no Judge would have authorized, but which is quite evidently inserted with regard to the relations of the parties to this action, that is, the provision which directs the plaintiffs to deposit in Court a transfer, with the space for the name of the transferee blank, with a direction to the clerk to fill in the name of the person directed by the defendants upon payment being made.

It is apparent, from the facts related, that the attitude of the plaintiffs was and is that they are not bound to obtain this land to convey it to the defendants, but that the defendants must purchase it for them to enable them to do what they agreed to do. Although not expressed in those words, that is practically the argument of their counsel on this appeal, and he urges that if the Court refuses to adopt this view it is making one law for the rich and another for the poor. The Court does not make any laws, but it must recognize the laws that exist whether they are natural laws or legislative enactments. One does not need to live long in this world to find out that there is one law for the rich and another for the poor, but it is a law beyond the power of the Legislature to alter, though attempts are made from time to time to modify its operation. A rich man may have what he wants because he can pay for it, a poor man may not because he cannot pay for it. To suggest that the merchant must supply with goods the man who cannot pay as well as the man who can would appear to almost any person as most unreasonable, and I fail to see that the argument in this case differs from that in principle.

There are innumerable cases deciding that the obligation of a vendor to convey and the obligation of the purchaser to pay the

purchase price are mutually dependent, and neither can be called on to do his part unless the other is ready and willing to do his.

Williams on Vendor and Purchaser, 2nd ed., at p. 46, states:—

(1) The purchase shall be completed so soon as the vendor shall have shewn a good title. . . . The purchaser shall thereupon at his own expense prepare a proper conveyance of the property to the purchaser or as he shall direct, and shall tender the same to the vendor for execution, at the same time tendering the whole amount due in payment of the purchase money, and the vendor shall thereupon accept such payment and execute the conveyance at his own expense, and shall give possession of the property to the purchaser. (2) A proper conveyance of the property means an assurance effectual to vest the whole estate contracted for, both legal and equitable, in the purchaser or his nominee. (3) If the state of the vendor's title be such that in order to convey to the purchaser the whole estate contracted for, other parties must join in the conveyance, the vendor shall at his own expense procure all such other necessary parties to join in and execute the conveyance.

The contract in the present case alters some of the above provisions, because it provides that the vendors shall prepare the transfer at their own expense.

Williams, again, at p. 578, speaking of these respective obligations, states:—

But the performance of either party's duty in this respect cannot be exacted by the other unless he himself be ready to fulfil his own part of the contract. Thus a vendor cannot require payment of the price and call upon the purchaser to take possession unless and until he have shewn a good title and be ready and willing to execute a valid conveyance to the purchaser.

The plaintiffs apparently think they will comply with this by having the transfer from their vendors made a transfer to the defendants upon the latter paying the money into Court, by directing the clerk to fill in the defendants' names, but they apparently have overlooked the provisions of the contract in this regard, for it provides that upon the purchasers paying the purchase price the vendors shall immediately (and not some time later) convey the land by a good and sufficient transfer, and shall produce at the Land Titles Office a certificate of ownership in their own favour, so that upon registration of the transfer the purchasers may obtain a certificate of ownership in their own favour. The appellants have attempted to support their case on the ground that it is not a matter of title but one of conveyance, and that their vendors' interest is merely an encumbrance. On this state

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of facts they argue that the Court will direct the defendants to pay the money into Court to discharge the encumbrance.

Whether the Court should do this if the vendors' claim were only an encumbrance I need not consider, because it was unanimously held by this Court in *Krom* v. *Kaiser*, 21 D.L.R. 700 at 709, at its last sitting, that the rights of owners of lands subject to agreements for sale are not to be treated as encumbrances.

The interest of a purchaser under an agreement of sale may be protected by a caveat, and it, perhaps, under the Land Titles Act, then becomes an encumbrance on the title of the vendor, but to speak of the interest of the vendor being an encumbrance on the title of the purchaser is an entire misnomer. The purchaser has no title. To call him an equitable owner does not make him an owner. He has an interest under which he may subsequently become owner, and that interest carries with it some of the substantial incidents of ownership, *e.g.*, the right to all increase in value and the liability for all depreciation, but he is nevertheless in fact not the owner in the sense that he has a title to the land which may be subject to encumbrances. Indeed, at the present time the Courts are very plentifully supplied with cases in which the purchaser attempts to escape becoming the owner, and in many of the cases he succeeds. In the present case the defendants may as properly be called the owners as may the plaintiffs. Each is the owner of an interest. The defendants' interest is not, as far as appears, encumbered; the plaintiffs' is, but not by the interest of their vendors, but by the interest of the defendants, their purchasers.

Reliance is placed on *dicta* in cases decided recently in this Court, *Lee* v. *Sheer*, 19 D.L.R. 36, and *Goodchild* v. *Bethel*, 19 D.L.R. 161, but it is to be observed that those *dicta* have references to encumbrances, and therefore are not applicable to this case.

Appellants' counsel states that there is no doubt that until completion there are only two possible courses of action open to a purchaser, *viz.*, either (a) the performance of his contract for payment, or (b) repudiation. In this I think he is not correct. The defendants here do not repudiate. They say they are willing to carry out the contract if the plaintiffs will give them

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what they agreed to give. They do not pay of course, because the plaintiffs cannot give them what they agreed to give.

This case, therefore, has no analogy to *Robinson* v. *Harris* (1890), 21 O.R. 43, 19 A.R. 134, 21 Can. S.C.R. 390, in which the purchaser had attempted to repudiate with, as the Court held, not sufficient notice, and the plaintiff had subsequently acquired title.

The plaintiffs need not have sold the land they did not own. They might have sold and assigned their interest under the agreement. Then they could have compelled the purchasers to have saved them from their liability and the purchasers could have dealt directly with the original vendors. They apparently preferred to sell something they did not own. Having done so, I know of no law nor can I see any just reason why there should be a law to compel the purchasers to buy for them the property which they have agreed to sell in order that they may perform their part of the agreement.

I would dismiss the appeal with costs.

SCOTT, J., dissented.

Scott, J. (dissenting).

STUART, J.:—I concur in the views expressed by the Chief Justice in this case, but I desire to add a word or two.

Stuart, J.

I have found no English case and have been referred to none in which the legal estate of a vendor who has made an agreement to sell is treated as an encumbrance upon the equitable estate of the purchaser where the purchaser has entered into another agreement, as vendor, for a re-sale to a sub-purchaser. It seems to me that the very essence of the term "encumbrance" is that something which is in form a legal, or if you like, an equitable estate has had a burden or charge put upon it by the owner of it. This is a very different thing from the debt which a purchaser owes to a vendor from whom he has agreed to buy, and also from a burden or charge placed upon his vendor's estate by the vendor himself or some antecedent owner. A purchaser is no doubt owner of an equitable estate in the land, but only to the extent of his payments. In *Rose* v. *Watson*, 10 H.L.C. 672 (at p. 678), Lord Chancellor Westbury said:—

> Where the contract undoubtedly is an executory contract in this sense, namely, that the ownership of the estate is transferred subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance of and execution

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of the contract, and, *to the extent of the purchase money so paid*, does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate.

No doubt a purchaser may encumber this partial equitable interest, but I am unable to see how the unpaid portion of his debt or purchase money can be properly called an encumbrance upon the equitable interest he has acquired by what he has paid. I do not see how he can encumber that which he has not yet even in equity acquired. The earlier portion of Lord Westbury's remark, read in the light of the concluding phrase, simply means that the purchaser had a *right* under his contract to pay the money, but until money is paid, and only to the extent that the money is paid, is an equitable *estate*, which may be encumbered, acquired.

Nor do I see anything in my concurrence with the views of the Chief Justice which is inconsistent with the decision in *Goodchild* v. *Bethel*, 19 D.L.R.161. In that case the plaintiff was a registered owner at the time of the trial. There was no question raised by the defendant as to the plaintiff's inability at that stage to perform his part of the contract. The defendant relied entirely upon the previous existence of a difficulty which had been removed, and the Court held that in the circumstances of that case the defendant could not do so. In the present case the defendants in their defence express their willingness that the contract should be specifically performed, but they contend that they should not be ordered to do their part before the plaintiffs do theirs when the two acts are stipulated to be concurrent.

The plaintiffs cannot do what they agreed to do until they get a certificate of title in their own name, and I do not think the Court should undertake to direct and attempt to control the meeting of not merely the two parties to this contract, but with them also a third party who is not a party to the contract or to the action.

Appeal dismissed.

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TORONTO POWER CO. v. RAYNOR.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 24, 1915.

1. MASTER AND SERVANT (§ II A 4—66*b*)—INJURY TO EMPLOYEE FROM CONTACT WITH WIRE—PROPER PRECAUTIONS—LIABILITY.

Where it appears that every reasonable precaution had been taken for the safety of employees and there being nothing from which it may be inferred that the accident was due to the negligence of some other person for which the master is liable, a power company is not responsible for injuries to an employee resulting from contact with an electric wire represented to be harmless but which had in some way become charged.

[*Raynor* v. *Toronto Power Co.*, 22 D.L.R. 578, 32 O.L.R. 612, reversed.]

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Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 22 D.L.R. 578, affirming the judgment at the trial in favour of the plaintiff.

The appellant company generates electrical energy at Niagara Falls, Ont., and transmits it by high voltage wires to Hamilton and Toronto. The wires are divided into units consisting of three each, two of which are, for the purposes of this case, known as units A. and B.

On September 2, 1913, the respondent, Raynor, was engaged in painting a tower supporting a wire of unit A. As the trial Judge found he had been assured that this unit contained no current and that he could safely work there. He had been working about fifteen minutes when he received an electric shock which resulted in severe injuries. The trial Judge also found that the shock came from contact with a wire on unit A.

At the trial, without a jury, the Judge held the appellant company liable and assessed the damages at $1,200. This judgment was affirmed by the Appellate Division.

D. L. McCarthy, K.C., for the appellants.

J. H. Campbell, for the respondent.

Sir Charles Fitzpatrick, C.J. (dissenting)

SIR CHARLES FITZPATRICK, C.J., dissented.

Davies, J.

DAVIES, J., concurred with ANGLIN, J.

Idington, J. (dissenting)

IDINGTON, J., dissented.

Duff, J.

DUFF, J.:—This appeal should be allowed. There is nothing in the so-called invitation augmenting the duties which the law imposed on the company as incidental to the relation of master and servant; it cannot reasonably be construed as involving anything like a warranty against accidents. If it had that effect it was clearly *ultra vires* of the foreman.

The respondent fails to make out a case and he fails in my opinion for this reason: When the evidence is looked at as a whole and I have carefully examined it, all the proper conclusions are: (1) That the appellant company neglected no duty which the common law cast upon it in relation to the safety of the respondent; that is to say, the appellant company neglected no precaution suggested by science or practical experience which could reasonably be required of them for the diminution of the risk of accident. Further assuming that the accident was the result of negligence of some servant of the company there is no ground whatever for

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saying that it was the negligence of anybody of whom the appellant company would be at common law responsible *vis à vis* the respondent. (2) There is nothing in the evidence to bring the respondent's case within any of the classes of the cases in which by the terms of the Workmen's Compensation Act he would be entitled to recover. I asked Mr. Campbell during the argument more than once to refer to the clause of the Workmen's Compensation Act upon which his right to recover could be based, but the question, of course, does not admit of an answer from the record.

The judgment of Clute, J., in the Court of Appeal proceeds as far as I can gather, on the application of the doctrine of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330.

This doctrine has never been applied and could not, without bringing the direst confusion into the law on the subject, be applied in cases of this description between master and servant where apart from statute the question must always be (the master being charged with responsibility for harm coming to the servant in the course of his employment): Was the harm caused by the failure of the master in any duty to the servant arising out of the relation subsisting between them? The duty of protecting or compensating the servant for harm arising from the perils incidental to the service which cannot be avoided by any reasonable degree of care on the part of the master, is not one of the duties which the law casts upon the master. Even where the peril can be avoided the master performs his duty if he provides adequate means and appliances and competent servants, and provides a proper system of working with a view to securing safety.

The doctrine of *Rylands* v. *Fletcher* imposes a responsibility which in the first place is, speaking generally, absolute for the consequences of the escape of the noxious agent (excepting where the escape is due to the act of God or the mischievous intervention of a third party) and in the second place cannot be discharged by employing independent contractors or servants never so competent and never so well equipped as to skill and means.

Such a principle could only become part of the law of master and servant by the instrumentality of legislation and, one must add, revolutionary legislation.

Anglin, J.

ANGLIN, J.:—With very great respect for the trial Judge and the majority of the Judges of the Appellate Division, I am of the

opinion that the judgment in favour of the plaintiff cannot be sustained. The trial judge found as a fact that the electric current which the plaintiff received came from the supposedly dead wire on which he was working, and, while he did not accept that finding, Mr. McCarthy conceded that he could not attack it with any hope of success. But the Judge did not suggest how the wire had become charged; nor did he indicate any negligence, which would be imputable to the defendant company, as the cause of this having occurred—and it is only, if there was such negligence, that the plaintiff can recover.

It may not improperly be assumed in favour of the plaintiff that the happening of the accident under the circumstances in which it occurred cast upon the defendants the burden of proving that they had taken every reasonable precaution to ensure the plaintiff's safety while at his work. That burden the defendants assumed and counsel for the plaintiff was unable to point to any particular in which they had failed to discharge it. Improbable—almost impossible—as it may seem in view of the precautions taken and the surrounding circumstances, if the wire upon which the plaintiff was working became charged with electricity, upon the evidence it is quite as likely that this was due to some inexplicable electric phenomenon against which no precaution known to science would be effective as that it occurred through the negligence of any person. If it was the result of negligence it must be the purest conjecture that such negligence was in a matter which would entail liability at common law, or was that of a person for whose fault the company would be responsible under the Workmen's Compensation Act (R.S.O. 1914, ch. 146), and was not the negligence of some workman against which the defence of common employment would prevail alike at common law and under the statute. The case does not fall within the maxim *res ipsa loquitur*. Indeed, upon the evidence accepted as veracious, negligence of any kind is, I think, completely disproved. I am, with respect, unable to understand the application of the doctrine of *Rylands* v. *Fletcher*, *supra*, invoked in the Appellate Division to the case of a claim against his master by a servant injured in the course of his employment.

It may be that this case affords a striking illustration of an evil which the new Ontario Workmen's Compensation Act is

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designed to remedy. But under the law as it stood when the plaintiff was injured he had, in my opinion, no recourse against his employers.

The appeal must be allowed and the defendants are entitled to their costs of the litigation throughout, if they should see fit to exact them. *Appeal allowed.*

QUE.

K. B.

BARNARD v. De SAMBOR.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Carroll, and Pelletier, JJ. June 15, 1915.

1. PARTNERSHIP (§ V—21)—ACCOUNTING—INCONSISTENT CLAIMS—DILATORY EXCEPTION.

There is no inconsistency between a prayer for an accounting and a prayer for a declaration of ownership to a share of securities belonging to the firm, in an action for accounting between partners, and the defendant cannot by means of a dilatory exception demand the plaintiff to elect between the two.

Statement

Appeal from judgment of Charbonneau, J., dismissing dilatory exceptions.

The judgment appealed from is as follows:—

The parties were partners in carrying on a business of making matches near Varrennes. Two lots of land were purchased in the name of the appellant, who looked after the finances of the firm. These two properties were sold for $1,649,500 to the Mount Royal Brick Co., of which $1,499,500 was paid on account to the appellant, and the balance, namely, $150,000, was payable in 60 days after the sale, with mortgage security.

The action taken by the respondent is for an accounting. He asks that the defendant be condemned to render him the account and to pay the share which would be due to him; that, on default of rendering the account, he be condemned to pay him the sum of $823,750; that the registrar, who was made a party to the action, should be ordered not to expunge from the registry the securities guaranteeing the balance due of $150,000 until a new order was issued therefor; that the plaintiff should be declared owner of half of this security, and that the half of the debt due the financial partner should be $75,000.

The defendant filed a dilatory exception alleging that the plaintiff could not at the same time demand that an account should be rendered to him of the whole of the profits made, that is to say, of the sum of $823,750, and also that he be declared owner of the half of the security of $150,000, because this latter amount was included in the amount of the profits realized; that it was inconsistent, and the plaintiff should be obliged to elect between the two claims, which were separate and distinct.

Considering that the plaintiff sets forth, in his conclusions, that he has joined with the defendant to buy a property, which was resold by the defendant to the *mis-en-cause* with a large profit for their joint account, that it had been agreed that they would share said profits by halves, that part of said profits are now represented by a *bailleur de fonds* debt due by the *mis-en-cause* to the defendant of $150,000;

Considering that the plaintiff has a right to a liquidation between

himself and the defendant of said joint venture, the same as if it was ordinary partnership;

Considering that said liquidation would consist partly in giving him one-half of what has not been realized upon by the defendant, that is to say, the balance of the *bailleur de fonds* claim and partly accounting by the defendant for the part of the profits he has been paid for;

Considering, therefore, that there is no contradiction or incompatibility between the two sets of conclusions (art. 177-6 C.P.; 87 C.P.);

Considering that even if this case was taken as an ordinary action to account, part of the duty of the party accounting is to hand over to his principal whatever is left in his hands of the things he administered for him or what was given in lieu thereof, if it is shewn that he has no claim against the *mandator* for unpaid disbursements and charges (art. 1713 C.C.). Dismiss said exception with costs.

Leopold Choquette, for appellant.

Duff & Merrill, for respondent.

The judgment of the Court affirming judgment of Charbonneau, J., was delivered by

PELLETIER, J.:—The dilatory exception asks that it be declared that the two claims are distinct and separate, not leading to condemnations of the same nature, and that the plaintiff should abandon one of them. Pelletier, J.

The case does not appear to me to present any difficulty. It is true that the plaintiff asks that the defendant should render an account to him of half of the money paid on account and that he also asks to be declared owner of the half of the security of $150,000, but the conclusions to the effect that the defendant should render an account of $823,750 can be reconciled with the others without danger of his having to pay twice the sum of $75,000.

In fact, upon the action as framed, the Court may condemn the defendant to render an account of the amount that he received on account, and, if he do not do so, he will not necessarily be condemned to pay $823,750.

This part of the claim of the plaintiff, if it appears excessive to the Court to which it will be submitted, can be reduced to its proper proportion.

Moreover, the demand for condemnation to pay $823,750 is only in default in rendering an account. The Court will, at the same time, examine the claims of the plaintiff to have $823,750 and to be declared owner of half the security of $150,000, and can adjust the two matters so that no prejudice will result to the defendant.

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The two items claimed, namely, the half of the amount received on account and the half of the security which remains due, it appeared to me to be absolutely connected, and I do not believe that the plaintiff would have been justified in taking two actions to settle this matter, which appears indivisible.

Evidently the plaintiff had a right, after deduction of all that should be withdrawn from the $823,750 to judgment in pursuance thereof, and he undoubtedly has the right also to be declared owner of half the amount due on the security.

He makes the registrar a party, and asks that the latter be ordered not to register anything that would prejudice his rights. There is nothing in all this which cannot be settled by the final judgment.

I share in the opinion of the Judge of first instance, who dismissed the declinatory exception and would affirm his judgment with costs. *Judgment affirmed.*

CAN.

S. C.

HAMILTON STREET R. CO. v. WEIR.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. June 24, 1915.

1. STREET RAILWAYS (§ III B—29)—DANGEROUS PLACING OF POLE—WANT OF LIGHTS—COLLISION—LIABILITY.

A street railway company is not liable for injuries resulting from a collision of an automobile driven at night with a wire pole erected between the tracks, where the placing of the pole was done in pursuance of a municipal by-law and under the supervision of the city engineer, and there being no municipal regulation as to lighting the pole.

[*Weir v. Hamilton Street R. Co.*, 22 D.L.R. 155, reversed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 22 D.L.R. 155, 32 O.L.R. 578, affirming the judgment at the trial in favour of the plaintiffs.

D. L. McCarthy, K.C., and *A. H. Gibson*, for appellants.

Howitt, for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I would allow this appeal.

Davies, J.

DAVIES, J.:—I confess myself unable fully to appreciate the meaning of the statement of the Judge who delivered the judgment of the second Appellate Division of Ontario, and on which that judgment was founded as to "the limited character of the power of the provincial legislature to interfere with a public highway."

I have always understood that when legislating within any of the powers conferred upon it by sec. 92 of the B.N.A. Act, the

powers of the provincial legislature are plenary except in so far as its legislation may be over-ridden or controlled by legislation of the Parliament of Canada under some one of the enumerated powers of sec. 91 of that Act. No such question, however, of the clashing of the powers of the Parliament and the legislature arises in this case.

In my judgment, the by-law under which the pole in question was placed in its specific location in the street was fully authorized by the incorporating statute of the appellate company and the pole must, therefore, be held to have been there properly.

The finding of the jury that the trolley poles "should have been placed in a uniform position" cannot be upheld under the proved facts and the law. The company placed the poles in the places where they were directed by the city authorities under the by-law to place them. No other negligence on the defendants' part was found and this specific finding excludes any other.

I think, therefore, the appeal must be allowed and the action dismissed with costs, including any costs which may have been incurred by the city, the third party to the action.

IDINGTON, J.:—The appellant company is found by the verdict of a jury, maintained by the judgment of the Appellate Division of the Supreme Court of Ontario, guilty of negligence because its "trolley poles should have been placed in a uniform position along the entire thoroughfare," and, therefore, condemned to pay damages suffered by the respondents in consequence of driving, at 13 miles an hour, along that part of the street whereon the appellant's electric street railway was constructed and colliding with one of the said trolley poles, although there was alongside the said railway a travellable space of street 25 ft. in width upon which they might easily have driven.

Idington, J.

The Legislature of Ontario which has absolute legislative power in the premises delegated to the municipal council of the corporation of the City of Hamilton the powers contained in the following amongst other sections:—

7. The company are hereby authorized and empowered to construct, maintain, complete, and operate a double or single iron railway, with the

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necessary side tracks and turnouts, for the passage of cars, carriages, and other vehicles adapted to the same, upon and along streets and highways within the jurisdiction of the Corporation of the City of Hamilton, and of any of the adjoining municipalities, as the company may be authorized to pass along, under and subject to any agreement hereafter to be made between the council of the said city and of said municipalities respectively, and the said company, under and subject to any by-laws of the said corporation of the said city and municipalities respectively, or any of them, made in pursuance thereof, and to take, transport, and carry passengers and freight upon the same, by the force or power of animals or such other motive power as they may be authorized by the council of said city and municipalities respectively by by-law to use, and to construct and maintain all necessary works, buildings, appliances, and conveniences connected therewith.

15. The council of the said city, and of any of the said adjoining municipalities, or any of them, and the said company, are respectively hereby authorized to make and to enter into any agreement or covenants relating to the construction of the said railway; for the paving, macadamizing, repairing, and grading of the streets or highways; and the construction, opening of, and repairing of drains and sewers; and the laying of gas and water pipes in the said streets and highways; *the location of the railway*, and the particular streets along which the same shall be laid; the pattern of rail; the time and speed of running of the cars, the time within which the works are to be commenced; the manner of proceeding with the same, and the time for completion; and generally for the safety and convenience of passengers; the conduct of the agents and servants of the company; and the non-obstructing or impeding of the ordinary traffic.

16. The said city, and the said municipalities, are hereby authorized to pass any by-law or by-laws, and to amend, repeal, or enact the same for the purpose of carrying into effect any such agreements or covenants, and containing all such necessary clauses, provisions, rules, and regulations for the conduct of all parties concerned, including the company, and for the enjoining obedience thereto, and also for the facilitating the running of the company's cars, and for regulating the traffic and conduct of all persons travelling upon the streets and highways through which the said railway may pass.

The said council pursuant thereto passed a by-law which permitted the use by appellant of certain streets for its railway, and amongst other things relative thereto, provided as follows:—

28. The poles to be used for the company's wires on James St. from Cannon St. to Hunter St., and on King St. from Bay St. to Mary St., shall be of iron and of the most improved pattern, except where the company shall use the poles of any telegraph or telephone company, and the wooden poles used by the company shall all be straight and perpendicular, and as nearly as possible of the same shape and size, and shall be dressed and painted throughout, and all poles shall be placed on the sides of the street except on King St., between Hughson and Mary Sts., where *they shall be*

placed between the tracks, and all the poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes.

31. All works of construction and repair and of removal and spreading of snow or ice shall be done, and all poles shall be placed under the supervision and *to the satisfaction of the city engineer*.

The poles complained of were accordingly placed as directed some 20 years before this accident now in question. The location of the railway was wholly within the power of the council. Ample reason is assigned for placing the poles as was done.

The matter was wholly within the legislative power thus conferred upon said council who no doubt exercised their best judgment (aided as appears by able and experienced counsel as to the law and by an engineer of skill) relative to public safety and convenience.

I do not think it is competent for a jury to sit in review upon such legislative work 20 years later, and to find that such legislative action was an act of negligence.

And if it was not negligence on the part of the councillors so directing, it certainly could not be negligence on the part of the appellant bound to conform therewith or have their road removed off the street.

I am also unable to understand how a gentleman driving an automobile, on a dark and misty night, at the rate he admitted over that side of the street whereon the appellant's track was laid, even though well lighted, could be acquitted of negligence, when he had no occasion for such a proceeding and a reasonably wide street alongside the track to travel upon. Possibly the city council has been guilty of negligence in failing (if it has) to pass and enforce a by-law prohibiting such conduct.

I think the action should have been dismissed and that this appeal should be allowed with costs throughout.

Duff, J.

DUFF, J.:—There are two questions: First, is the company liable as for nuisance in placing its poles where it did place them? That question must be answered in the negative for the short reason that by-laws passed under the authority of statute expressly required the poles to be placed where these poles were placed. The precise thing that was done was authorized by the legislature. It, therefore, could not be a nuisance in contempla-

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tion of law. If harm arises from the placing of poles where the legislature directs they shall be put, such harm, as Lord Blackburn said, is *damnum absque injuriâ*. As to the authority of the legislature, with great respect, I think item 10 of sec. 92, B.N.A. Act, must have been overlooked. If the construction of the B.N.A. Act adopted below were accepted the result would be that every provincial railway crossing a highway with its locomotives, and every tramway worked under provincial authority in the streets of a city, is a public nuisance.

The next question is whether there is evidence of negligence to go to the jury in the failure to provide a light. I think the answer to that also lies in the fact that the company was authorized to put its poles where it did put them, the city council having power to exact conditions for the protection of the traffic, and the city council also assuming the lighting of the streets. I do not think that any jury would be entitled to find that in these circumstances any legal duty was cast upon the railway company to apply itself to the question whether the lighting provided by the municipality in the particular locality was or was not sufficient for the protection of persons using the highway.

Anglin, J.

ANGLIN, J.:—I am, with respect, of the opinion that this appeal should be allowed.

The ground of the plaintiffs' claim, which has been upheld in the provincial Courts, is that they were injured as the result of an automobile in which they were travelling colliding with a trolley pole of the defendants placed in the middle of the space between the double track, commonly called the devil-strip, on King St. in the City of Hamilton. This they allege was an unlawful obstruction of a highway amounting to a nuisance. The defendants maintain that they were obliged by the provisions of the statute under which their railway is constructed and operated to place and maintain the pole in question precisely where it was. There is no doubt that the pole was placed where a by-law of the municipality expressly required that it should be. The contention of counsel for the respondents is that the provincial statute does not authorize such a by-law, and that, if it does, the statute is *pro tanto ultra vires*.

Its incorporating statute (36 Vict., ch. 100), authorizes and empowers the appellant company

to construct, maintain, complete and operate a double or single iron railway . . . upon and along streets and highways within the jurisdiction of the corporation of the City of Hamilton . . . subject to any agreement hereafter to be made between the council of the said city . . . and the said company and under and subject to any by-laws of the said corporation of the said city . . . made in pursuance thereof . . . and to construct and maintain all necessary works, buildings, appliances and conveniences connected therewith.

It is further enacted that

the council of the said city . . . and the said company are respectively hereby authorized to make and to enter into any agreement or covenants relating to the construction of the said railway . . . the location of the railway and the particular streets upon which the same shall be laid . . . and generally for the safety and convenience of passengers, the conduct of the agents and servants of the company and the non-obstructing or impeding of the ordinary traffic;

and the city is authorized

to pass any by-law or by-laws and to amend, repeal or enact the same for the purpose of carrying into effect any such agreements or covenants and containing all such necessary clauses, provisions, rules and regulations for the conduct of all parties concerned, including the company and for the enjoining obedience thereto and also for the facilitating the running of the company's cars and for regulating the traffic and conduct of all persons travelling upon streets and highways through which the said railway may pass.

The by-law in question was passed under this legislation and was subsequently appended as a schedule to an amending statute (56 Vict. ch. 90), which, however, does not in terms approve or confirm it. The effect of this legislation is discussed in the dissenting judgment of Hodgins, J., and I concur in his opinion that it empowered the municipality to enact the by-law under which the pole in question was placed and maintained where it was.

But I cannot agree with the view of the Judge that there should be a new trial to permit of an investigation being made to ascertain whether some such precaution as the placing of a light on the pole should have been taken. There is no by-law or regulation of the municipality which prescribes anything of the kind and it was to the council of the municipality and not to the defendants that the legislature entrusted the regulation of the operation of the railway so far as it might affect the safety

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of traffic on the highway. In my opinion the statute and the by-law afford a complete answer to the plaintiff's claim.

Mr. Justice Sutherland appears to think that if the by-law in question is authorized by the provincial statute the latter involves an interference with the legislative jurisdiction of Parliament over criminal law. "Common nuisance" as defined in the Criminal Code would not cover an obstruction in a highway authorized by a provincial legislature in which control over highways as local works and undertakings is vested. Moreover, we are now concerned merely with a question of civil rights, over which the legislature of the province had undoubted jurisdiction. With respect, I am unable to appreciate the ground on which the Judge bases his view that there has been an invasion of federal jurisdiction.

I would, for these reasons, allow the defendants' appeal and would dismiss this action with costs throughout.

Appeal allowed.

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KING v. LONDERVILLE.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and Elwood, JJ. July 15, 1915.

1. EVIDENCE (§ XI K—831)—RELEVANCY AND MATERIALITY—SIMILAR ACTS—SLANDEROUS WORDS.

For the purpose of proving malice in action for slander actionable *per se*, evidence of similar slanderous words other than those set forth in the statement of claim is properly admissible.

Statement

APPEAL from the judgment of McKay, J.

G. E. Taylor, K.C., for appellant.

N. R. Craig, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—This was an action for slander actionable *per se* spoken by the defendant of the plaintiff, and was tried before my brother McKay with a jury. The statement of defence contained a bare denial of the publication. During the course of the trial the plaintiff tendered evidence of a slander, also actionable *per se*, spoken by the defendant of the plaintiff, other than the slander set forth in the statement of claim, and which evidence was admitted. The appellant contends, first, that there was no evidence to justify the jury in finding that the slanders alleged had been spoken, and, second, that the trial Judge erred in admitting the evidence of the further slander.

In my opinion there was evidence which, if the jury believed it, was sufficient to justify them in finding as a fact that the defendant did speak the slanders alleged.

In support of the contention that the trial Judge erred in admitting the evidence of the further slander, the following cases were cited: *Stuart* v. *Lovell*, 2 Starkie, 93; *Pearce* v. *Ormsby*, 1 M. & Rob. 455; *Defries* v. *Davis*, 7 Car. & P. 112; and Starkie on Libel & Slander, 6th ed., pp. 482–483.

In *Stuart* v. *Lovell*, Lord Ellenborough held that evidence of subsequent declarations of the defendant would be admissible to show the intention of the party if it were at all equivocal, but if they were not admitted for that purpose they certainly were not admissible for the purpose of enhancing the damages.

In *Pearce* v. *Ormsby*, Lord Abinger, C.B., held that evidence of subsequent words might be given to explain the words, but that where there is nothing equivocal in the words charged, evidence of subsequent words of the same import, for which subsequent words another action might be brought and damages recovered, cannot be given.

In *Defries* v. *Davis*, Tindal, C.J., states as follows:—

> You may show anything that is evidence of malice, but you must not shew anything that would be the subject of another action. It has been a very usual course of late to restrict the evidence in that way, and there is good sense in so doing, as the jury ought not to mix up the words in question with other words in considering the amount of damages. I will receive any evidence of a repetition of the same words, so if you have any other words which shew an animus, not by separate slander but by a repetition of this slander or by other words which show the same train of thought, I will admit the evidence.

Starkie on Libel and Slander, 6th ed., at p. 483, states as follows:—

> It is perfectly clear that subsequent libels cannot be received in evidence with a view to enhance the damages, for they are substantive and independent causes of action;

and I take it that it is upon what is laid down in *Stuart* v. *Lovell* and in *Finnerty* v. *Tipper*, 2 Camp. 72, that the author arrives at the above conclusion.

In *Pearson* v. *Lemaitre*, 5 Man. & G. 700, Tindal, C.J., in delivering the judgment of the Court, says:—

> And this appears to us to be the correct rule, viz., that either party may, with a view to the damages, give evidence, to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose establishes another cause of

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action, the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. And perhaps the cases of *Pearce* v. *Ormsby* and *Symmons* v. *Blake* went no further than this. It may be difficult to reconcile all the *nisi prius* cases upon this subject, and the point does not appear to have been decided by any of the Courts in Westminster Hall. But upon principle we think that the spirit and intention of the party publishing the libel are fit to be considered by a jury in estimating the injury done to the plaintiff, and that evidence tending to prove it cannot be excluded simply because it may disclose another and different cause of action.

It will be noticed that the words quoted above appear to be in direct conflict with what the same learned Chief Justice held in *Defries* v. *Davis*. What was stated in *Defries* v. *Davis* was apparently during the course of the trial, and some years prior to *Pearson* v. *Lemaitre*, and I can only conclude that what is said in the latter case is the result of mature consideration, and that possibly what was intended in *Defries* v. *Davis* and the other cases was that evidence of other slanders could not be given simply for the purpose of obtaining damages for those slanders, but that the evidence could be given for the purpose of showing malice and the obtaining of damages for the malice.

In *Anderson* v. *Calvert*, 24 T.L.R. 399, at p. 400, Buckley, L.J., states as follows:—

> That he agreed with the judgment of Chief Justice Tindal in *Pearson* v. *Lemaitre:* "This appears to us to be the correct rule, namely, that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter, but that, if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered merely for the purpose of obtaining damages for such general injury it will be properly rejected."

In 18 Hals. Laws of England, 721, I find the following:—

> Either party may, with a view to the damages, give evidence in proof or disproof of malicious motive in the mind of the publisher of defamatory matter.

And *Pearson* v. *Lemaitre* is cited as authority for the above.

I take it, therefore, to be established on the authority of the above that the evidence in this case was properly admitted for the purpose of proving malice.

It was urged, however, that in any event, under the pleadings the question of malice was not raised, that the libel was defamatory *per se*, and there was no reason to plead malice. In the case of *Pearson* v. *Lemaitre* the evidence was admitted, as I take

it, solely with a view to the damages to be recovered for the malicious motive, and it seems to me, as a result of the authorities, the question of malice is always an issue. But apart from that, the statement of claim distinctly alleges that the defendant maliciously spoke and published a slander. The case of *Scott* v. *Sampson*, 8 Q.B.D. 491, appears to me to be quite distinguishable. In that case the defendant sought to justify by giving evidence as to the plaintiff's general bad character. This evidence was rejected on several grounds, and one of these was that the defendant proposed to prove certain facts which were not stated or referred to in the pleadings as required by O. 19, r. 4, and that under that order it would be necessary for the defendant to raise all matters which showed a defence to the action. In *Barham* v. *Huntingfield*, [1913] K.B. 193, the plaintiff sought to administer to the defendant interrogatories asking whether the defendant had in any of the 3 years uttered the words complained of or words to the same effect, to any persons other than the persons named, and the names of the other persons, if any. It was held that these interrogatories were inadmissible, on the ground that they were fishing interrogatories administered with the intention of ascertaining by minute examination whether the plaintiff could find out some cause of action against the defendant other than the specific cause of action alleged in the statement of claim. The principle upon which the interrogatories were held inadmissible does not, to my mind, apply to the admission of the evidence in the case at bar. There can be no question that the trial Judge instructed the jury as to what effect should be given to the evidence which was objected to, and in view of the verdict it does not seem to me that injustice could possibly have accrued. In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

KOOP v. SMITH.

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. May 18, 1915.

1. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES—RES IPSA LOQUITUR—IMPEACHMENT—BURDEN OF PROOF.

The principle of *res ipsa loquitur* applies to assignments made between near relations under suspicious circumstances, and when impeached by creditors the burden of proof is upon the defendant to establish by corroborative evidence, other than the testimony of interested parties, the *bona fides* of the transaction.

[*Koop* v. *Smith*, 20 D.L.R. 440, 20 B.C.R. 372, reversed.]

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Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, 20 D.L.R. 440, 20 B.C.R. 372, reversing the judgment of Hunter, C.J., at the trial, and dismissing the plaintiff's action with costs.

The action was brought to set aside a bill of sale executed in favour of the defendant by her brother, at a time when the latter was financially embarrassed, and to have the bill of sale declared void as a preferential assignment in fraud of the rights of the other creditors of the assignor.

E. Lafleur, K.C., for the appellant.

J. F. Orde, K.C., for the respondent.

Davies, J.

DAVIES, J.:—I think this appeal should be allowed and the judgment of the trial Judge restored. He thought the circumstances under which the bill of sale was executed suspicious and declined to accept the uncorroborated testimony of the plaintiff's brother, who made the assignment to his sister now being impeached.

The Chief Justice of the Court of Appeal seems to have thought that although the trial Judge did not accept the evidence of the defendant, Smith, still the burden of proof lay upon the plaintiff and that he had not discharged it.

The trial Judge on the contrary found that the circumstances were so suspicious, connected with and surrounding the impeached bill of sale, as to throw the burden of proof of its *bona fides* upon the grantee, the plaintiff's sister. I agree with his findings in that regard. I think the rule laid down by the Courts of Ontario with regard to assignments made between near relations and impeached by the creditors of the assignor as fraudulent is a salutory one, namely, that where it is accessible some corroborative evidence of the *bona fides* of the transaction should be given. No attempt was made by the defendant to act upon that rule in this case. Smith's evidence was not accepted and the trial Judge pointed out many alleged facts which were accessible and could have been proved, if true, as corroborative evidence but were not. Under all the circumstances I think the trial Judge was right and that the appeal should be allowed with costs and his judgment restored.

Idington, J.

IDINGTON, J.:—This appeal presents a rather unsatisfactory case. The Court of Appeal in reversing the trial judgment pro-

ceeds upon the ground that the bill of sale attacked was not shewn to be void as against creditors on the ground of being preferential to the knowledge of the appellant. In that I quite agree if regard is had to the authorities relied upon by the majority of the Court of Appeal.

But the trial Judge seems to have discredited the judgment debtor who had made the assignment and was the only witness called to support it.

I cannot say as matter of law that he erred in so finding. These cases of alleged fraudulent assignment must generally depend largely upon the view of the facts taken by the trial Judge. It is quite competent for him, if impressed with the veracity of the assignor, to accept and act upon his unsupported statement. The transaction and established surrounding circumstances might be such as to justify his doing so. Or, on the other hand, they might be such as to render his doing so questionable.

In this case he has found the surrounding circumstances and the statements such as to call for corroboration, and that view is not attempted to be disputed and hence has not yet been reversed. The reversal of the judgment of the learned trial Judge proceeding upon the question of a preferential assignment does not touch the want of *bona fides* in the transaction upon which he proceeded. The pleadings, I suspect, are partly responsible for this curious result.

The pleader improperly blends, in almost every sentence that is essential to his pleadings, the two distinct grounds of complaint. Casually looked at one might say it was intended only to attack the transaction on the ground of the assignment being preferential.

The case I imagine must have been argued upon that assumption. There does not appear in the case any notice of appeal to the Court of Appeal or reasons for or against same to enlighten us as to how all this happened.

The appeal must be allowed.

DUFF, J.:—I think this appeal should be allowed and the judgment of the Chief Justice, who tried the action, restored. The majority of the Court of Appeal appear, if I may say so with respect, to have fallen into the error of treating the relationship

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of the parties to the impeached transaction as possessing no very material significance. The trial Judge, on the other hand, treated the relationship as decisive in this sense that it determined the point of view from which the evidence was to be considered and the all important question of the onus of proof. The trial Judge indeed appears to have laid it down as a proposition of law that a transaction of this kind between two near relatives, carried out in circumstances in themselves sufficient to excite suspicion, can only be supported (in an action brought to impeach it by creditors) if the reality or the *bona fides* of it are established by evidence other than the testimony of the interested parties; and there is a series of authorities in the Ontario Courts which has been supposed to decide that, and it may be that it is the settled law of Ontario to-day.

I do not think the proposition put thus absolutely is part of the English law or of the law of British Columbia; but I think it is a maxim of prudence based upon experience that in such cases a tribunal of fact may properly act upon that when suspicion touching the reality or the *bona fides* of a transaction between near relatives arises from the circumstances in which the transaction took place then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and that, in such a case, the testimony of the parties must be scrutinized with care and suspicion; and it is very seldom that such evidence can safely be acted upon as in itself sufficient. In other words, I think the weight of the fact of relationship and the question of necessity of corroboration are primarily questions for the discretion of the trial Judge subject, of course, to review; and that any trial Judge will in such cases have regard to the course of common experience as indicated by the pronouncements and practice of very able and experienced judges such as Armour, C.J., and Mowat, V.C., and will depart from the practice only in very exceptional circumstances.

I may add that I think it doubtful whether the Ontario decisions when properly read really do lay it down as a rule of law that the fact of relationship is sufficient in itself to shift the burden of establishing the burden of proof in the strict sense. It may be that the proper construction of these cases is that the burden of giving evidence and not the burden of the issue is shifted.

(As to this distinction see the admirable chapter IX, in Professor Thayer's "Law of Evidence.") In my own view as indicated above, even this would be putting the matter just a little too high; I think the true rule is that suspicious circumstances coupled with relationship make a case of *res ipsa loquitur* which the tribunal of fact may and will generally treat as a sufficient *primâ facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact. Having examined the evidence carefully I am satisfied that the trial Judge was entitled to take the course he did take and not only that the evidence, as I read it in the record, casts the burden of explanation upon the respondent, but that the testimony given by her brother ought not in the circumstances to be accepted as establishing either the actual existence of the debt or of the *bona fides* of the transaction.

ANGLIN, J.:—Having regard to the circumstances of the impeached transaction, as deposed to by the transferror, who is the defendant's brother, and was her only witness—the relationship between the parties to it, the making of the transfer while the entry of judgment on the plaintiff's claim was deferred to enable the brother to make an arrangement to meet it, the nature of the property transferred, and the brother's admission that a power of attorney to the defendant would have served his alleged purpose of realizing on the property—the burden rested on the defendant of establishing the rectitude of her bill of sale. Whether this transaction was *bona fide* was eminently a question for the trial Judge, and he has found that, "the outstanding fact is that this story of this transfer is not supported *in any particular*." It was, I think, clearly his view that no real debt from her brother to the defendant had been shewn to exist—that the purpose of the transfer was to protect the property covered by the bill of sale against his creditors, and that that purpose was sufficiently known to the defendant to involve her participation in it. After carefully considering the reasons given by the majority of the Judges of the Court of Appeal and the argument presented on behalf of the respondent, I am, with respect, unable to find any ground on which the reversal of the judgment of the Chief Justice of British Columbia can be supported. The only evidence of the existence of a legal debt owing to the defendant by her brother was the testimony of the latter, which the Chief Justice declined

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to accept. It is difficult to conceive what was his motive for transferring to his sister his only exigible property, if it were not to stave off the plaintiff and his other creditors. Her knowledge of his financial embarrassment would seem to be a fair inference from all the circumstances. Although loath to reverse a considered judgment of the Court of Appeal of British Columbia on a question of fact, I think this is a case in which the opinion of an able and experienced trial Judge, in whose conclusions two members of the Appellate Court have agreed, must prevail.

I would allow the appeal with costs in this Court and the Court of Appeal and restore the judgment of the Chief Justice of British Columbia.

Brodeur, J.

BRODEUR, J.:—The plaintiff's action was for a declaration that the sale of the horses made by T. J. Smith to his sister, the defendant respondent, was null and void under the provisions of the Fraudulent Preference and the Fraudulent Conveyances Acts of British Columbia (R.S.B.C., ch. 93, secs. 2 and 4, and ch. 94, sec. 3).

The trial Judge maintained the action on the ground that the conveyance was fraudulent. The Court of Appeal, by a judgment of three to two, reversed the finding of the trial Judge.

The debtor, T. J. Smith, was very largely indebted and had given a confession of judgment in favour of the plaintiff, Koop, on February 13, 1912, for the sum of $63,000 and, on May 15 following he sold the larger part of his assets to his sister.

He claimed, when under oath at the trial, that the consideration of that sale was the salary he owed to his sister. He said that she had been living with him for eight years and that he had always paid her a salary of $1,500 a year. That evidence was not corroborated and was not accepted by the trial Judge.

It would have been very easy for Smith to shew by his books or by his cheques that the alleged salary had been paid; but he did not do so. The sister could have given evidence to corroborate her brother; but she would not do so, claiming she was too nervous to appear in public. It is in evidence, however, that she had been able to attend horse shows and to ride horses.

The decision of the trial Judge in these circumstances should not have been disturbed. I am of opinion that his judgment should be restored and that the appeal should be allowed with costs of this Court and of the Court of Appeal. *Appeal allowed.*

BOIVIN v. CHICOUTIMI WATER & ELECTRIC CO.

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Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. June 29, 1915.

1. ADVERSE POSSESSION (§ IF—25)—PRESCRIPTION—HUSBAND AND WIFE.
Art. 2233 C.C.Q., which provides that husband and wife cannot prescribe against each other, cannot be invoked for the benefit of third parties.

2. BOUNDARIES (§ II A—5)—BORNAGE—LIMITS—CONTENTS OF LOTS.
Where in an action *en bornage* the documents of title filed indicate the precise limits, regard should be had to these limits rather than to the contents. (See Arts. 504, 504*a*, C.C. Que.)

Statement

APPEAL from judgment of Letellier, J., in an action *en bornage*.

Elzear Levesque, K.C., for appellant.

Lapointe & Langlais, for defendant.

The judgment of the Court was delivered by

Pelletier, J.

PELLETIER, J.:—The two parties have a common but very far back predecessor in title, the Catholic Episcopal Corporation of Chicoutimi, but their immediate predecessors are Mme. L.G. Belley, for the plaintiff, and her husband, L. G. Belley, advocate, for the defendant. The land involved is situated between the Saguenay River, on one side to the north, and Racine St., on the other side to the south.

According to his title, the respondent purchased his property in three parts, the whole of which would give to him, from the east to the west, 134 ft. in extent, one of the small lots of land having 40 ft., another 64 ft., and the other 30 ft., which formed the whole 134 ft.

The defendant is in a less advantageous position, because the contents of his land are not given, and the immovable that he bought is declared to be of irregular shape and of unknown superficial quantity.

The respondent tells us (and the Superior Court has adopted this view) that, as the title deeds of the plaintiff give him 134 ft. and those of the respondent do not state the contents, the respondent should be given 134 ft. mentioned in his deeds at the expense of the appellant, whose deeds do not indicate the exact extent of his land. But, as will be seen, it is far from certain that it is to the appellant that it is necessary to go in order to find the 3 ft. which the respondent wants.

But the defendant answers to this, and successfully, in my view, that the title deeds of the respondent, by indicating the contents as 134 ft., indicate also the exact limits of the property

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to the east, and it is that rather than the contents which should be considered.

And upon this point the appellant has in his favour a judgment rendered by this Court in 1909, *Vallée* v. *Gagnon*, 19 Que. K.B. 165.

So long as the respondent, as we will now shew, has not possession and has an adverse title, it is the appellant who has an uninterrupted chain of title, and, by himself and his predecessors, a beneficial possession. The respondent well understands this difficulty, and practically admits that the appellant would have a non-impeachable possession by the prescription of 10 years under title and in good faith if the action had been brought only on August 5, 1913, but triumphantly exclaims: I have brought my action 2 months and 13 days before your prescription was acquired and I have the better of you. To complete this reasoning it adds: You cannot invoke the possession of your predecessors to complete the 10 years, because, before August 4, 1903, it was Mr. Belley who was in possession on the east and his wife on the west, and, as there can be no prescription between husband and wife, Mr. Belley has not acquired by prescription nor possession the land against his wife.

It is true that the husband cannot acquire prescription against his wife, but no more can the wife acquire against her husband; and it is precisely because Mr. and Mme. Belley cannot acquire by prescription the one against the other that the possession of Mme. Belley up to the old fence at the west should, during all the time in which they were neighbours, continue as it had been. The time during which M. and Mme. Belley were neighbours is from July 16, 1898, up to August 4, 1903.

Two questions present themselves here. First, can art. 2233, which declares that prescription does not run between consorts, benefit third parties? In the second place, is the claim of the respondent, according to this record, well founded in fact and in law? Let us say, in the first place, that art. 2233 is not found in the Code among the matters which interrupt prescription, but is placed among the articles of the section which treats of the running of prescription being suspended. It is necessary not to confound the interruption and the suspension of the prescription, for they are entirely different. Here is what is found in Aubry & Rau as to the two questions which I have propounded:

In fact, the fence having been erected in 1896 or the beginning of 1897, the 10-year possession under title and in good faith of the appellant began on August 10, 1897, when Jean Boivin bought from the Episcopal Corporation; it continued when Elzéar Boivin, another auteur of the appellant, acquired in his turn the title in 1898; it thus continued up to July 16, 1898, the time when Mr. Belley bought from Elzéar Boivin. But, assuming that from this date, July 16, 1898, up to August 4, 1903, the prescription was suspended between the husband and wife, it would, as concerns third parties, only have slumbered during that time, to use the expression of Aubry & Rau, and would have began to run again on August 4, 1903. Therefore, 2 months would not be wanting in the prescription of the appellant, and he would have had beyond the 2 years more than he needed, if the time during which Mr. and Mme. Belley were neighbours is not counted. And if this time is counted as to third parties, the possession of the appellant under title and in good faith would be 17 years. I am, then, of opinion that the claim of the respondent is not well founded, and that the appeal should be maintained.

The line separating the property of the parties should be placed in accordance with what the Stein plan calls "the old fence."

As to the costs, it is clearly established that the appellant has always been ready to have the boundary fixed following the line of the old fence. Therefore, I would order that the costs of the *bornage* should be in common, but that all the other costs up to to-day should be borne by the respondent. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 24, 1915.

1. INSURANCE (§ V B 5—216)—ESTOPPEL OF INSURER—ACCEPTING PREMIUM NOTE—LAPSE OF POLICY CAUSED BY CONDUCT OF INSURER.

The acceptance of a note in payment of a premium on a life policy manifests an election on the part of the insurance company to treat the policy as in force and not to take advantage of the default of the insured; and if before maturity of the note the insured is led to believe by the representations of the company that the policy had lapsed, and in reliance of such representations he ceases to meet the subsequent premiums, the company, by its conduct will be estopped from denying liability on the ground that the policy had lapsed for non-payment of premiums.

[*Parker* v. *Capital Life*, 22 D.L.R. 325; 48 N.S.R. 404, affirmed.]

APPEAL from a decision of the Supreme Court of Nova Scotia Statement

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affirming by an equal division the judgment at the trial in favour of the plaintiff, 22 D.L.R. 325.

J. J. O'Meara, for the appellants.

Mellish, K.C., and *Finlay MacDonald*, K.C., for the respondent.

IDINGTON, J.:—This is an action on a policy of life insurance for $1,000. The defence set up is non-payment of premiums and consequent lapsing of the policy. The appellant received through the hands of its local agent at Sydney a promissory note for one premium and a small part of another. This note was on a printed form evidently supplied by appellant for such uses. Its heading in type is as follows:—

Renewal Premium Note.

Note $..... Due.....

T. R. (if any) $.....

Ottawa ....., 1914.

Balance $.....

Interest $.....

The part on right hand is filled in by writing of date. That on left hand is filled in opposite word "note" by figures $39.20, and opposite the letters "T. R." in figures 20c., and opposite the word "balance" $39.40, but nothing opposite the word "interest." No explanation is given in evidence or argument of what "T. R." stands for. The figures opposite that "T. R." and the words due, date and balance seem to me from the ink to have been done by a later filling in than the remainder of the filling in of the blank.

Without attaching undue importance thereto, I think the fair inference, from the fact that this note was received in due course and never returned, but retained till the trial by the company, is that this note was received and accepted as payment.

The pretence that the small part of the note as clearly indicated to those at the head office being for a part of a past due payment must suffice to justify treating the policy as lapsed, seems idle. It may have been competent for the company to have so treated it on receipt and forthwith accordingly to have returned it and said do.

It was not competent for the head office to have held on to the note and later on attempt to repudiate it. Neither in law, justice nor common sense can such a position be maintained. Another payment of premium fell due on March 20, which remained unpaid at the death of the insured.

By the trial Judge it is found as fact that on a date between February 27 and March 2 before the note fell due, the appellant's superintendent of agencies called on the insured and finding him in such a physical condition that an early death must be expected, told him, in language sworn to by two brothers of the insured, and not denied, that the policy was not in force because one part of the premiums had been carried forth into a note covering the next premium.

One of the brothers swears the premiums, but for this assertion, would have been paid, and doubtless that is true. They and deceased were this dissuaded from tendering the amount of the note and of the March premium. It is not pretended that if tendered such payments would have been accepted. The repudiation of the policy in such distinct and absolute terms dispensed with such tenders.

There was no justification under the circumstances for appellant's repudiation after accepting and retaining the note given in payment and receipted for as such by the local agent.

The superintendent alleges he wanted information or instructions from the head office of appellant before stating as alleged, so there can be no doubt of his conduct being duly authorized or confirmed.

Even his dispute of the date of this repudiation which was a leading question in contest at the trial, did not induce him to produce and file in evidence the telegram or other written communication to the head office or replies thereto.

The appeal should be dismissed with costs.

DUFF, J.:—The controversy on this appeal reduced to its lowest terms presents two questions of fact both of which are, as I think, conclusively determined against the appellants by reference to two pieces of evidence; the letter of August 29 addressed by the secretary to Mr. MacDonald, the respondent's solicitor, and the evidence relating to the interview between the assured and Mr. Jorey, referred to in the judgment of Ritchie, which the Judge finds took place between February 22 and March 2.

The letter is as follows:—

Finlay MacDonald, Esq., *Re William J. Parker.*

Your favour of the 24th instant received. Policy No. 624 called for a premium of $27.65 payable four times yearly in advance, commencing Dec. 20, 1912. At Dec. 20, 1913, there remained a balance of $10.70 unpaid on

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account of the 4 instalments of premium due for the first policy year. This balance of $10.70 with interest of 85 cents for delay up to that time was merged by our agents with the next quarterly instalment due December 20, 1913, and a note for the combined amounts, in all $39.20, was taken by them. This note fell due by its terms March 4, with no payment whatever made thereon, and the policy consequently lapsed automatically. It might have been reinstated upon payment of the amount due, and submission of satisfactory evidence of health, but no application was ever made. So far as official receipts of premiums are concerned, these are handed to the insured upon his settling by cash or note. If a note is given, the policy, by the terms of the note, lapses unless payment is made on or before the due date thereof.

M. D. GRANT, *Secretary.*

In itself this letter, a guarded letter, written by the secretary of the company after the death of the insured and no doubt framed in view of the probability of a claim being made under the policy, is sufficient evidence that the note of February 2 was accepted in payment, conditional payment, of course, of the moneys then due in respect of renewal premiums and that the company had treated the policy as a policy in force down to the maturity of the note. "No payment having been made" upon the note, "the policy," to quote the last letter, "consequently lapsed automatically." The letter, of course, is not conclusive evidence. It was open to the company to shew at the trial that the secretary had made a mistake, or to supplement the facts stated in the letter by other evidence shewing as was contended by the appellant that the policy had lapsed in consequence of non-payment of the premium due on September 20, or of that due on December 20; that the agent at Sidney had acted in excess of his authority in taking the note of February 2, and that his action had not been ratified by the company. But no attempt was made to do this, no testimony was offered to shew how the note was treated at the head office of the company or what communications were made with respect to it by the agent to the head office. The statement made by Mr. Jorey in the conversation above referred to, to the effect that the note had been "put through," confirms the conclusion suggested by the perusal of the letter itself.

I concur with the two Courts below in thinking that the proper conclusion of fact is that the note was accepted in payment and—assuming (a point on which I am by no means satisfied) that on February 2 when the note was received, the insured was in default and that the company was entitled by reason of

his default to treat the policy as a lapsed policy—the company by accepting the note as payment manifested its election to treat the policy as a policy in force and not to take advantage of the default of the insured. The company being bound by its election the policy was, of course, at the time of the interview between the insured and Mr. Jorey (some time before March 2, as the trial Judge found) a policy in force, and the company was bound on payment of the note at maturity and renewal premiums as they should fall due to observe and carry out its contract of insurance according to the terms of it. That was the state of affairs when the interview referred to took place.

The trial Judge has accepted the account of that interview (which he has set out in his judgment) given in the evidence of George Richard Parker and Thomas Parker. I see no reason for the slightest doubt as to the correctness of his finding, and I think the proper interpretation of that interview is the interpretation contended for in the respondent's factum and on the oral argument before us. The insured was in fact told by Mr. Jorey (and it was upon this view of what he was told that he acted) that his policy had lapsed; and that the company would accept no payment from him except upon the condition that he furnished satisfactory evidence of health. This condition Mr. Jorey admits was obviously an impossible condition and the insured rightly interpreted the intention of the company's representative when he construed it as a refusal on the part of the company to continue the insurance. The declaration of the company of its intention not to carry out its contract was on well known principles an actionable breach of contract. *Frost* v. *Knight*, 26 L.T. 77; *Hochster* v. *De La Tour*, 2 E. & B. 678; *Honour* v. *Equitable Life* [1900] 1 Ch. 852. The insured, as he was entitled to do, treated it as a refusal to carry out the contract and a right of action immediately arose.

It is no answer to say that he might have tendered the amount of the promissory note and the renewal premiums. There is no suggestion and it could not have been suggested that any such tender would have been accepted and there is nothing in the law making it incumbent upon the insured to go through any such idle formality. Indeed, considering the evidence before us as to the state of health of the insured if the action had been brought

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in March immediately after the repudiation of the policy by the company the damages could have been but little less than the amount of the policy less the amount of the note and such premiums as the insured might be expected to be obliged to pay.

I think the judgment below is right and should be affirmed.

ANGLIN, J.:—I entertain serious doubts whether upon the evidence before us the assured was so in default when the local agent of the respondent company took his note covering the premium due in December and a small balance of the September premium that the company was then entitled, to terminate his policy. But if it was, I am satisfied that by what occurred in connection with that note (it was promptly sent to the head office of the company, it was there "put through," we are told by the defendants' superintendent of agencies, presumably as a payment of the premium, it was held for nearly a month before the insured was notified that there was any question as to its being accepted or as to his policy being in force, he being left in the meantime under the belief that the note had been accepted and that his policy was in good standing) the company is estopped from alleging that it elected to terminate the policy for any default prior to the taking of the note, and that if the amount of that note and of the March premium had been paid at maturity or had been duly tendered to the company there would have been no ground upon which they could have successfully resisted payment. Very shortly before the maturity of the note, however, the company, through a leading official (their superintendent of agencies), specially sent from the head office to deal with this matter, notified the assured that his policy was void because the local agent had exceeded his authority in including in the note taken for the December premium the balance of the premium due in September. The evidence, I think, supports the conclusion of the trial Judge that the statement of the company's representative that the policy was void led the insured to believe that payment of the note and of subsequent premiums would not be accepted, and caused him not to tender them. This was a reasonable inference which the company's representative should have contemplated would be drawn by the insured. Although this misrepresentation might not justify the insured refraining indefinitely from tendering premiums or entitle his beneficiary after

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the lapse of a long period (how long it may be difficult to say) to prefer a claim for payment of the policy, I think the conduct of the company's representative precludes their setting up the failure of the assured to pay his note and the March premium, which fell due only a few days afterwards, as a defence to this action. *National Mutual Ins. Co.* v. *Home Benefit Society*, 181 Pa. 443; *Hayner* v. *The American Popular Life Ins. Co.*, 69 N.Y. 435, at p. 439; *Heinlein* v. *Imperial Life Ins. Co.*, 101 Mich. 250 and other cases cited in May on Insurance, vol. 2, sec. 358, and 19 Am. & Eng. Encyc., p. 57, N. 4; and *Webb* v. *New York Life Ins. Co.*, 22 Can. L.T. 179. Of course, the defendants are entitled to deduct the amount of the note and of the March premium and also of the July premium (which had accrued due before the death of the insured, although the 30 days of grace had not expired) from the sum to be recovered on the policy.

In another aspect of the matter, the assured might have treated the declaration of the company's representative as a repudiation of the contract entitling him to maintain an action of damages for breach. *Honour* v. *Equitable Life Assurance Society* [1900], 1 Ch. 852. Having regard to his precarious state of health, the amount of his damages—the value of his policy at the date of the repudiation—would be little less than the sum insured. *Re Albert Life Ins. Co.*, 22 L.T. 92.

I am, for these reasons, of the opinion that this appeal should be dismissed.

FITZPATRICK, C.J., and DAVIES, J., dissented.

Fitzpatrick, C.J. Davies, J. (dissenting)

Appeal dismissed.

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Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. November 4, 1915.

1. PARTNERSHIP (§ IV—15)—LAND SYNDICATE—DUTIES OF MEMBERS—OPTION.

There is no duty on the part of the member of a land syndicate to exercise an option to lands he obtained at a lower price in favour of the syndicate.

[*Gluckstein* v. *Barnes*, [1900] A.C. 240; *Bentley* v. *Craven*, 18 Beav. 75; *Re Cape Breton*, 29 Ch. D. 795, distinguished.

2. PARTNERSHIP (§ V—21)—ACCOUNTING—RIGHT OF PARTNER TO COMPENSATION.

A contract of partnership excludes any implied covenant for the payment of services rendered the firm by any of its members, and can not be allowed as an item in an accounting between them; nor does a a partner, who occupies the position as manager, stand in any better position.

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Statement

APPEAL by the defendants from an order of Lennox, J., dismissing their appeal from the report of an Official Referee.

The following is a statement of the facts.

On the 3rd April, 1912, R. E. Kemerer, believing there would be a good speculation in certain land near Welland, procured an option on land in the township of Crowland, about 60 acres in all, for $225 per acre, less certain commission payable to one McCormick. While the option is in Kemerer's own name, he really bought for a "small syndicate" composed of himself, his wife, and some whose names are not disclosed. Not finding it practicable to deal with the land in this way, he approached Kenderdine, who was in the land business in Toronto, and between them they organised a new "syndicate" called the "Welland Industrial Reserve Syndicate." The articles of agreement set out specifically that this syndicate is formed "for the purpose of purchasing from the Trusts and Guarantee Company Limited the lands (setting out the lands) for the sum of forty thousand dollars, payable as follows: ten thousand dollars in cash and ten thousand dollars every sixty days thereafter until the said sum is fully paid, and for the purpose of disposing of the same at a profit." The articles provided: "4. W. B. Kenderdine . . . shall be the manager of the syndicate." "8. The manager shall have entire control of the affairs of the syndicate, and may conduct them in such manner as he thinks fit, but the manager is hereby directed to do the following things, at a date as early as practicable: (a) to make an agreement with the Trusts and Guarantee Company for the purchase of the said property for the sum of $40,000, payable as above set out . . . ; (b) . . . (1) that the deed . . . shall be made by the said trust company to the said Kenderdine Realty Company . . . ; (2) that the said Kenderdine Realty Company shall hold the said property in trust for this syndicate . . ." The Kenderdine Realty Company were to be the sole selling agents, at a commission of 10 per cent., plus all expenses. The manager was given power to "convene meetings of the syndicate to deliberate and decide on any of the affairs of the syndicate . . . the majority of votes to decide. . . ."

The first member of this syndicate did not come in until the

30th April (so far as the evidence shews): Kenderdine and Kemerer were both members of it; the Kenderdine Realty Company was controlled by Kenderdine.

The syndicate being thus under way, Kemerer exercised his option, his wife paying the price, and the deed being made to the Trusts and Guarantee Company, on the 9th May, 1913. On the 27th May, Kenderdine, the manager of the syndicate, carried out (in substance) the direction to him numbered (a) above: a conveyance was made by the Trusts and Guarantee Company to the Kenderdine Realty Company for $40,000, $20,000 down and $20,000 on mortgage.

Considerable land was sold and at a handsome profit by the Kenderdine Realty Company. On the 23rd February, 1914, a conveyance was made by the Kenderdine Realty Company to the Fidelity Securities Corporation, which I do not further notice, as that conveyance has been got rid of by a consent judgment of the Court.

On the 28th February, 1914, this action was begun by certain dissatisfied members of the syndicate (these were allowed at the trial to amend by claiming to sue on behalf of all) against the Kenderdine Realty Company and the Fidelity Securities Corporation, claiming an account, a receiver, etc. A judgment was ordered by MEREDITH, C.J.C.P., which did not grant the prayer for a receiver, but directed as follows:—

"1. An account of the assets, property and effects, real and personal, of the Welland Industrial Reserve Syndicate, in the pleadings mentioned, come to the hands of the defendants the Kenderdine Realty Company Limited, as trustees of the said Welland Industrial Reserve Syndicate.

"2. An account of the dealings of the defendants the Kenderdine Realty Company Limited with the assets, property and effects, real and personal, of the said Welland Industrial Reserve Syndicate.

"3. And an account of the property, moneys, and securities of the said Welland Industrial Reserve Syndicate in the hands of the said defendants the Kenderdine Realty Company Limited, or now outstanding and unrealised."

Mr. McAndrew, the Referee, took considerable evidence, and

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on the 21st April, 1915, made his report. In his report, the Referee disallowed as follows:—

"4. I have disallowed the following amounts claimed by the Kenderdine Realty Company Limited, as having been properly paid by it on account of the Welland Industrial Reserve Syndicate:—

"On account of purchase-price of land	$28,500.00
"As overriding commission to W. B. Kenderdine	5,226.66
"Office expenses	1,718.84
"Rent	1,259.67
"Salaries and fees	2,731.17
	$39,436.34."

From this disallowance the Kenderdine Realty Company appealed; their appeal was dismissed by Mr. Justice Lennox; and they now further appeal.

A. McLean Macdonell, K.C., for appellants.

A. Cohen, for plaintiffs, respondents.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—The ground of disallowance of the first item is as follows: this sum was paid as part of a purchase-price of $40,000; the Referee considers that the Welland Industrial Reserve Syndicate, being a partnership of which Mr. and Mrs. Kemerer were members, is entitled to the benefit of their (his or her) purchase (and option); and, consequently, the real purchase-price should not have been $40,000, but the amount fixed by the option—that the Kenderdine Realty Company were well aware of all the facts, and should not have paid the larger amount.

It may be said at once that, if the syndicate was entitled to the benefit of Kemerer's bargain, the Referee is right.

That the syndicate was a partnership may be conceded (that is, while technically it was not a partnership proper, it may for all purposes of this appeal be treated as a partnership); that Kemerer and his wife were members thereof is also true—but I cannot see that the partnership could insist on taking his or her property at the price paid for it.

Cases such as *Gluckstein* v. *Barnes*, [1900] A.C. 240, are not infrequent, but they are cases of plain fraud—lying: these have

no application here. Nor are the cases of a member of a partnership buying for the partnership his own property, applicable—such are *Bentley* v. *Craven*, 18 Beav. 75, *In re Cape Breton Co.*, 29 Ch. D. 795, and the like. The former line of cases depends on well understood and undoubted principles—the latter is thus expressed by the Vice-Chancellor, Sir John Leach, in *Burton* v. *Wookey*, Madd. & Geld. 367, at p. 368: "It is a maxim of Courts of Equity that a person who stands in a relation of trust or confidence to another, shall not be permitted in pursuit of his private advantage to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The defendant here stood in a relation of trust or confidence toward the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price: . . . the saving by a low price of the article purchased was to be equally divided between him and the plaintiff;" accordingly the defendant, who made a profit by trading goods of his own for those of his partnership, was ordered to account for the profit made by him.

Had the syndicate been formed to buy land generally, or even to buy this specific piece of land (without more), these cases might apply—the duty of Kemerer would then be to buy land or this land "at the lowest possible price:" the other members of the syndicate would have the right to expect that he would use every reasonable endeavour to keep down the price.

But here there was no such duty—the syndicate was formed to buy this specific land at a specific price—Kemerer had the right to have this price paid for this property—that was the basis of the contract between him and the other members of the syndicate: and there was no duty cast upon him to try to have the price reduced.

The same remarks apply to Mrs. Kemerer, and to Kenderdine and his wife.

Of course there is no evidence that Kemerer would have taken partners on terms more advantageous to them than that the sum of $40,000 should be paid for the property—and assuredly he never did so. To my mind it is wholly unjust that the plaintiffs, who have already made a profit of over 200 per

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cent., should be allowed a profit which is contrary to the express terms of their agreement.

The manager was commanded by the agreement to pay $40,000 for the property, and he has followed out the express agreement and direction—he has, indeed, made a variation in the time of payment, but that is advantageous to the syndicate, and in any case is a matter of detail, not affecting the present question.

Then it is said that the deed of the land was not obtained till after the formation of the syndicate; and, consequently, it must be considered that this deed was really for the syndicate. But this I do not accede to—it was the option which was material, and which occasioned the deed—Kemerer held the option, and by the expenditure of money, not the money of the syndicate, he carried the option into effect—there was no duty on his part to exercise the option for, and for the benefit of, the syndicate—they were to have the land for $40,000.

Nor do I think it material that the deed was taken as it was—bearing in mind the express condition of the agreement, it must needs be so taken, or, at least, the title to the land must be got into the Trusts and Guarantee Company in some way.

The other items stand on a different basis. Speaking broadly, the claim is based on something like this: to make a sale of land a success, a sales-agent should be employed, such a sales-agent would have cost what is charged in the items which are disallowed—therefore, it is argued, these sums should be allowed. This will not do—the agreement provides that Kenderdine shall be manager, but does not provide a salary or allowance as such.

It is quite clear that the contract of partnership excludes any implied contract for payment for services rendered the firm by any of its members: *Thompson* v. *Williamson* (1831), 7 Bli. N.R. 432; *Holmes* v. *Higgins* (1822), 1 B. & C. 74.

Moreover, the managing partner or "manager" stands in no different position in this respect from any other partner: *Hutcheson* v. *Smith* (1842), 5 Ir. Eq. R. 117; *Thornton* v. *Proctor* (1793), 1 Anst. 94; *East-India Co.* v. *Blake* (1673), Finch 117. Some interesting and valuable remarks by Sir John Romilly, M.R., on a cognate matter, are to be found in *York and North*

Midland R.W. Co. v. *Hudson*, 16 Beav. 485, at pp. 499, 500. Adapting the language in that case to the facts in this, it may well be that Kenderdine was content to accept the added dignity and prestige he would achieve from being manager of a successful land scheme—and the handsome commission paid to his own company—as sufficient remuneration for his services as manager. However that may be, he cannot charge this partnership with the benefit it has derived from his services or the amount he might have had to pay another for such services.

But it is said that at a meeting of the syndicate called under clause 9 of the articles, a majority ratified these payments. I cannot read an agreement that the meeting might "deliberate and decide on any of the affairs of the syndicate" as justifying such a meeting (by a majority) giving away the funds of the syndicate to one of its members—it would require much stronger language to justify such an interpretation of the powers of the majority.

I think this appeal should be dismissed. As success is divided, there should be no costs here or before Mr. Justice Lennox. *Appeal dismissed.*

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. November 4, 1915.

1. RECEIVERS (§ I B—10)—IN WHAT CASE—PARTNERSHIPS—DISCRETION AS TO APPOINTMENTS.

In partnership actions, the court has power, although reluctantly exercised, to appoint a receiver at any stage of the action for sufficient cause; but no such appointment will be ordered because of a failure to comply with the court's direction to pay into a named bank all money received in connection with the partnership business, particularly where such neglect was due to a misunderstanding, before allowing an opportunity to remedy such neglect.

Statement

APPEAL from judgment of Middleton, J.

The judgment appealed from is as follows:—

Middleton, J.

MIDDLETON, J.:—The plaintiffs are some only of the members of the syndicate. It is asserted by the defendants and denied by the plaintiffs that the plaintiffs are a dissentient minority only. The action was brought claiming many things—among others substantially the relief now sought. At the trial, a judgment was given cancelling a conveyance made to the Fidelity Securities Corporation, and referring it to an Offi-

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cial Referee to take an account of the dealings of the Kenderdine Realty Company with the property held by it in trust for the syndicate. Further directions and costs were reserved.

The account has been taken, but the report is not yet confirmed, as an appeal to the Appellate Division is pending; so the case is not ripe for a motion for judgment upon further directions.

Counsel for the plaintiffs practically abandoned all claims for relief save the appointment of a receiver and an order for payment of the assets to the receiver. This relief was sought in the action, and was not granted; and I do not think that I can now interfere.

It appears to me that there is no practice which authorises the removal of a trustee and the appointment of a new trustee or of a receiver in his place, in the absence of all those beneficially interested. One of the *cestuis que trust* has no right, for any such purpose as this, to assume to represent all. All have a right to be heard before the property is taken from the custody where it has been placed by the joint action.

Substantially this syndicate was a partnership. What is really sought is a dissolution of that partnership, and the winding-up of its affairs, in the absence of a majority of the partners.

The motion will be refused, with costs, but without prejudice to any application that may be made in a properly constituted action, and without prejudice to any motion that may be made against the defendant the Kenderdine Realty Company, if, as was alleged, it has failed to obey any orders that have been made in the action.

A. Cohen, for appellants.

A. McLean Macdonell, K.C., for defendants, respondents.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—The judgment at the trial of this case (see *Merriam* v. *Kenderdine Realty Co.* (No. 1), *ante*) directed the defendant the Kenderdine Realty Company Limited as follows:—

"3. And this Court doth further order and adjudge that the said defendant the Kenderdine Realty Company Limited do pay all moneys received or to be received by it in connection with the business matters and transactions of the Welland In-

dustrial Reserve Syndicate into the Standard Bank of Canada to the credit of the Kenderdine Realty Company Limited, less all necessary expenses, including proper payments to the Trusts and Guarantee Company Limited, necessary to obtain discharges of mortgages in reference to parcels of land sold, and less all necessary expenses to the collection of such moneys, including agents' commissions, and do not withdraw any of the said moneys therefrom, or do pay the same into Court to the credit of this action, subject to the order of this Court."

The appointment of a receiver was claimed in the writ and pleadings; but this was not directed in the judgment at the trial.

On the 23rd September, a motion was made by the plaintiffs before Mr. Justice Middleton for the appointment of a receiver and other relief, but in the argument only the claim for a receiver was pressed. The learned Judge (on the 24th September) dismissed the motion, on the ground that the appointment of a receiver had been refused at the trial, and there was no appeal from that judgment—and, so far as the application could be based on "further directions," the time for further directions had not yet arrived, the report not being confirmed.

We agree that no ground for the appointment of a receiver can in this action be at present urged which existed at the time of the trial of the action—or at all events at the teste of the writ.

But it is urged that since the trial the defendants are at fault—that they have failed to comply with the order of the Court to pay into the bank the money received before the trial. This is admitted, and counsel for the defendants contended that the judgment contained no order for paying any money except that received after the trial. The original judgment being produced, he admitted his error.

There is no doubt as to the power of the Court to appoint a receiver at any stage of the action and for any sufficient cause. In partnership actions, in view of the very serious effect of such an order, the Court is loath to exercise this power, but in a proper case will unhesitatingly do so: sometimes to mark its sense of the impropriety of the conduct of an offending partner,

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as in *Evans* v. *Coventry* (1854), 3 Drew. 75, 82, 5 D.M. & G. 911; where a partner has so misconducted himself as to shew that he is not to be trusted, etc.—*Estwick* v. *Conningsby* (1682), 1 Vern. 118; *cf. Young* v. *Buckett* (1882), 30 W.R. 511; *Baldwin* v. *Booth*, [1872] W.N. 229; *Jefferys* v. *Smith* (1820), 1 J. & W. 298; *Chaplin* v. *Young* (1862), 6 L.T.N.S. 97; and the very important case of *Hall* v. *Hall* (1850), 3 Macn. & G. 79, 86; *Const* v. *Harris* (1824), Turn. & Russ. 496, 523.

Were this a wilful default on the part of the defendants, I think we should appoint a receiver and manager, notwithstanding the serious effect upon the undertaking: it would not do to allow a company to defy the order of the Court and retain moneys in its own hands which should be safe in the bank. But it would seem that the neglect has been due to a misunderstanding of the direction of the Court: the defendants then may have an opportunity to put themselves right by paying the money into the bank as ordered.

If the defendants, within ten days, pay the amount into the bank as ordered, filing at the same time a statement under oath verifying the amount, and pay the costs of the motion and of this appeal within ten days after taxation thereof, the appeal will be dismissed: otherwise the appeal will be allowed with costs here and below. In the latter case, the particular form of the order may be spoken to.

[NOTE: The Court was, by special leave, moved by counsel for the defendant the Kenderdine Realty Company to vary the minutes of this judgment, on the ground of mistake in the admissions of counsel. The Court allowed the applicant company a further period of two weeks to pay into the bank the sum of $10,936.34 improperly retained by the company; and, the company making default, a receiver was appointed on the 1st December, 1915.]

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WESTERN MOTORS LTD. v. GILFOY.

Alberta Supreme Court, Harvey, C.J., and Scott, Stuart and Beck, JJ. December 16, 1915.

1. PARTNERSHIP (§ III—14)—LIABILITY OF—INDIVIDUAL AND FIRM CREDITORS.

The fact that a son is in partnership with his father does not, in the absence of positive evidence that it was in the scope of the partnership business, render the firm liable for accounts in connection with automobile rentals and supplies contracted by the son.

2. APPEAL (§ VII L 3—492)—REVIEW OF FACTS—FINDINGS OF COURT — AGENCY.

An appellate court has the legal power to review a finding of fact made by the trial judge upon contradictory testimony, as to whether a son in business with his father acted as agent for the firm.

APPEAL by the defendant from a judgment of Walsh, J.

F. W. Griffiths, for defendants, appellants.

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

The judgment of the Court was delivered by

STUART, J.:—The defendant William Gilfoy and his son, the defendant, Sylvester Gilfoy, were carrying on business in partnership under the name of Gilfoy and Son as real estate and insurance agents. It appears that about January 4 or 5, 1914, one Adamson, the representative of the plaintiff, approached the son Sylvester with a view to selling him a car. The son spoke of a pending timber deal which the firm had in hand and said, so Adamson put it in his evidence, that "they" (which would mean the firm, or at any rate his father and himself) were thinking of buying a six cylinder car. The evidence of Adamson as to this conversation shews that he used this word "they" very loosely. For instance although the conversation was evidently with the son alone and the father was not there, Adamson said "*they* asked me about the White six cylinder car;" and again, "they said if this money came through they would phone me up or I would call them up in a day or so," and again "I called them up 3 or 4 days after and they said," etc., etc. On a telephone it must have been only *one* person who said anything. It is clear that in these 3 cases he used the word "they" improperly when the word "he" was the only word which could be used accurately and truthfully. This is, in my opinion, of much importance when it is remembered that the whole matter in dispute turns upon the question whether the son, in conducting the negotiations and making any bargain which was made, was acting for himself alone or was acting as the authorized agent of the firm. The evident impropriety of the use of the word "they" in these instances casts great doubt upon the propriety of the use of it in other phrases where Adamson, assuming to tell of his conversation with the son, states that the son said that "they" were considering buying a car, etc., etc., and Adamson said that he promised to loan "them" a car, a roadster, and "they" said that would do. Here is a fourth instance of the improper use of the word "they," Adamson said that he did loan "them" a car to use until the timber deal was put through.

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Then, in about 3 weeks, hearing nothing more from Gilfoy, and thinking it was necessary to have some definite arrangement about the use of the car he went and saw the son again. Adamson stated that the son then said his father always left the managing of the automobile end of the business to him because his father did not know anything about cars, that he could not drive a car and he left it to him; anything he did his father was quite agreeable to. Adamson also stated that the son then said he was prepared to hire the car and asked what the charge would be and that he (Adamson) had replied that that matter had better be left open until it was decided whether he bought the six cylinder car, and if it was bought, the plaintiffs would make the hire cost very reasonable, and so he continued to use the car only on the understanding that it was hired to him.

The son was unmarried and lived with his father. A chauffeur was employed and the car was stored when not in use in the plaintiffs' garage. The plaintiff supplied gasoline and a number of repairs for the car. The accounts for these latter were during January, March and April rendered simply to "Mr. Gilfoy." An account of May 14, and another of May 31, were rendered to "S. Gilfoy."

The accounts of June 30 and July 16, were rendered to "Gilfoy & Son," those of July 31 and August 6, to "S. Gilfoy & Son." The last account, which was a summary of the others and was dated September 22, was rendered to S. W. Gilfoy, and the same is true of an account shewing deductions of $31.25, which Adamson had agreed to make, which was dated September 23.

The evidence does not shew any interview between Adamson and the father until as late as August. The son had been away in June and part of July getting married, and the father had, prior to that, himself been absent during all of April, May, and the most of June.

The rent charged for is for 7 months from January 6, to August 6. It was not until the very end of this period that Adamson sought an interview with the father as to the accounts. No monthly account for rent had in fact been rendered to any

one, but a total sum of $750 for rental for the 7 months was inserted in the account of August 6.

It is necessary to inquire what evidence there was to shew that in renting the car the son was acting as agent for the firm of Gilfoy & Son rather than for himself alone. His statements to Adamson are, of course, not evidence against the father. The father denied any connection with the matter. Adamson swore that at one interview in August the father had discussed the accounts with him, complained of their being too high and finally promised to pay $700 in full settlement, and to give his promissory note, but that he refused at an interview the following day to give the note or make any payment. This was all denied by the father at the trial, although, on his examination for discovery, he had only gone so far as to say that he did not remember it.

It seems to me that even if we accept Adamson's evidence on these points, it falls very far short of establishing an admission on the part of the father that the son was acting for the firm. It would certainly be a very natural and probable thing that a father should discuss an indebtedness of his son and even speak of paying it by note or otherwise without such an action necessarily implying that he was admitting his own original liability.

In giving judgment against the father and the firm the trial Judge said, "there is contradiction between him (the father) and Adamson as to what took place, and I am disposed to give greater credit to Adamson's than the defendant's as the outside circumstances tend to strengthen Adamson's story. The payments that were made were made by cheques of the firm. The car was undoubtedly used to some extent in the business of the firm, to some extent used for the personal convenience of William Gilfoy himself. The services of the chauffeur were paid for by the firm. All these are incidents which tend to corroborate the story told by Adamson."

It seems to me, however, with much respect that as I have pointed out there is not sufficient even in Adamson's story, with possibly the exception of one point with which I shall specially deal, to justify an inference that the firm or the father had

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given the son authority to rent the automobile. And, looking at the corroborative evidence suggested by the trial Judge, it appears to me that there must have been some misapprehension in his mind as to what had been said. I have read the evidence carefully and I can find very little, if any, trace of any evidence that the automobile was ever used on firm business. The father did admit that he did often ride in it from his house where the son was living with him. The only other piece of evidence is the statement of the son: "Well, I used it for pleasure and when I wanted to do some of my own work I used it, but it wasn't necessary." That statement is obscure. Of course it might mean that when he was doing some of his own part of the firm's business he used it or it might mean that when he had some work of his own outside the firm, as distinguished both from the firm's business and from pleasure he used it. And even if it meant the former it may still be asked why a firm must be inferentially attached with liability for the hire of an automobile because one member of it hires it and at times uses it in his part of the firm's business. If the father had been shewn to have used it in the firm's business instead of merely riding from his residence to the office in it, the situation would have been much different. In the next place I can find no statement that the chauffeur was paid by the firm, although, even if there had been such a statement it might not have gone any further than that the firm paid him in the first instance, while in the accounts of the firm it might have been charged to the son. In any case it seems to me that the father might very well think he should bear some part of the cost of the chauffeur when his son was placing the car at the service of the family. Then, as to the payments of the accounts for gasoline and repairs, it is indeed shewn that these were paid by firm cheques. But it is not shewn whether it was the father or the son who signed cheques, and whether the son had not the privilege of drawing firm cheques for his own debts and being chargeable with the amount. And here again the father might very well have thought that he should stand some part of the expense when the son was placing an automobile at his service. It seems to me that where a son is in partnership with his father and is living with him as in

this case, the father would be in an exceedingly dangerous position if he personally and his firm as well were to be rendered liable for what the son may have done in hiring an automobile merely because he gets the use of it, not in his business, but for mere personal convenience in going to and from his office with his son, and because some of the expense is paid by firm cheques without, at any rate, any evidence that the son was not ultimately to be charged with the whole of it. The son, in fact, does say that it was to be a matter of adjustment in the accounts. There is the further very significant fact that it was only in June and July when the son was away that the accounts rendered were rendered to the firm, and that in September, long after the father had refused payment, the summarized account was made out to S. W. Gilfoy. It occurs to me, of course, that since, on two occasions, July 16, and August 6, the account is rendered to S. W. Gilfoy and Son, the plaintiffs may have thought the father's initials were "S. W.," but I cannot understand how that mistake, if it had previously been made, could have been confirmed in September, several weeks after the dispute between Adamson and the father. Surely by that time the plaintiffs must have taken care to ascertain the father's real initials, and moreover, if there had been any such explanation possible I think that Adamson would have given it in his evidence. He did suggest a mistake of the bookkeeper, but it is not suggested that the bookkeeper had anything to do with the Gilfoys.

He must have written what he was told to write. The only point upon which there was contradictory testimony, and as between Adamson and the father, was in regard to an alleged statement by the father in August, when Adamson says he went to him and said that he had a chance to sell the roadster car, to the effect that he, Adamson, need not worry that "we will take that small roadster car, and it will be settled up when Mr. Sylvester gets back." This statement is denied by Gilfoy. Now, there is no doubt that this Court has the legal power to review a finding of fact made by the trial Judge upon contradictory testimony. It is true that we have frequently laid down the rule that the Court will not interfere where the trial Judge has

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clearly indicated his belief in the veracity of one witness and his disbelief in that of the opposing witness. Where he has done this merely upon his observation of the conduct and general appearance of the witnesses in the box, this Court has not felt itself free to interfere. But in the present instance it will be observed that the trial Judge expressed no opinion as to the veracity of the witnesses as evidenced by their demeanour in Court. From the passage above quoted it is clear that he decided to accept Adamson's account merely because the outside circumstances, in his opinion, tended to corroborate his story. As I have shewn, he must have been under a misapprehension as to two of the outside circumstances suggested, viz., the use of the automobile in the firm's business, and the payment of the chauffeur by the firm, or if there were some slight support in one remark of the son in respect of the first of these circumstances, viz., that the son used the car at times "in his own work," this circumstance is equivocal, and his remark ambiguous. The third circumstance, viz., the payment of the supplies account by the firm is also really equivocal in the particular circumstances. I think therefore that there was after all nothing in the outside circumstances to justify the Court in adopting Adamson's story rather than the elder Gilfoy's. On the other hand there were two matters which have, in my opinion, an opposite tendency. These are, first, the matter of the accounts rendered, which I have referred to and which may be more or less significant according to the view taken of them; second, the fact brought out in cross-examination by the plaintiff's counsel that the son had previously bought a car himself and had given his own notes for it, his father having had apparently nothing to do with it. Such evidence might perhaps have been inadmissible if tendered by the father defendant, though I express no opinion on the point, but it was put in by the plaintiff and being there, is proper to be considered.

In the result, therefore, I think the matter was left as oath against oath without any choice by the trial Judge on the direct ground of higher credibility on the one witness or the other. The burden of proof was on the plaintiff to establish the fact that the son was acting for the firm in what he did or that the

father ratified what he had done. This burden, I am of opinion, the plaintiff did not satisfy. I think, therefore, the appeal should be allowed with costs, the judgment below as against the defendants William M. Gilfoy and the firm Gilfoy and Son set aside and the action dismissed as against these defendants. I think the dismissal should be without costs because all the defendants joined in one defence and appeared by one solicitor and one counsel. To give the appellants their costs of the action would be in effect to make the plaintiffs pay the costs of the defendant Sylvester Gilfoy against whom they succeeded.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., and Riddell, Latchford and Kelly, JJ. October 22, 1915.

1. BANKS (§ IV C—111)—GUARANTY OF DRAFTS—BILLS OF LADING ATTACHED—SCOPE OF SECURITY.

A bank's guaranty of the payment of drafts with bills of lading attached given for a consignment of fruit, implies a condition that the bills should be such as would afford the bank the desired protection; but the fact that the bills of lading were drawn in the name of the seller instead of the buyer, and the shipment being otherwise deliverable upon the order of the seller's agent without the production of the bills, constitutes no impairment of the security, such as will relieve the bank from liability on its guaranty.

Statement

APPEAL by the defendants from the judgment of Meredith, C.J.C.P.

R. C. H. Cassels, for appellants.

D. W. Saunders, K.C., for plaintiffs, respondents.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—The material facts are as follows. One McCabe, a fruit dealer in Toronto, was desirous of buying California oranges. He got into communication with one Hicks, a buying broker of oranges, etc., in November, 1913, who bought for him from the Mutual Orange Distributors, a California organisation, two car-loads of California oranges on cars P.F.E. 8304 and P.F.E. 11911. Hicks telegraphed McCabe accordingly, and asked for a "bank guaranty." McCabe saw his bank, the defendants, and they telegraphed the plaintiffs, on the 21st November, 1913, thus: "We guarantee payment of drafts on J. J. McCabe with bills lading attached not exceeding in all sixteen hundred

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and twenty-nine 70/100 dollars covering two cars oranges containing 396 boxes each in P.F.E. 8304 and P.F.E. 11914."

The cars had already been set "rolling" towards the east; bills of lading attached to a draft came forward, and the draft was refused. In the meantime, the agent of the consignors had changed the destination of the goods or part of them; but, when the goods arrived at Toronto, McCabe could have got them if he so desired; prices had changed, however, and he did not want the oranges.

In the bills of lading, the Mutual Orange Distributors are consignors and consignees—the latter appearing thus: "Consigned to Mutual Orange Distributors—notify J. J. McCabe" (the name being in pencil.) On the face of the bills of lading appears: "Deliver without bills lading on written order of Mutual Orange Distributors' agent."

At the trial before the Chief Justice of the Common Pleas, the learned Chief Justice seemed to treat the case largely as one between McCabe and the vendor. But, of course, it is only the banks we should consider, and our determination is only as to the obligation of the guarantors, the Canadian Bank of Commerce, upon their written agreement.

Much argument was advanced in this appeal by the Canadian Bank of Commerce that they had the right to have the bills of lading in the name of McCabe. I do not accede to that argument, in view of the object of demanding the bills of lading. I cannot see that any legal advantage would have accrued to the Canadian Bank of Commerce from McCabe being named as the consignee rather than the Mutual Orange Distributors.

But I think the effect of the added clause permitting delivery without bills of lading on the mere order of the agent of the consignors (consignees) is different.

No doubt, the "bills of lading" were attached to the draft, and therefore, literally, the condition was fulfilled; but "in construing a contract, a term or condition not expressly stated may, under certain circumstances, be implied by the Court, if it is clear from the nature of the transaction . . . that the contracting parties must have intended such a term or condition to be a part of the agreement between them:" Halsbury's Laws of

England, vol. 7, p. 512, para. 1035; and see cases in the notes to that section.

Of course, if the document is silent, and there is no bad faith on the part of the alleged promisee, the Court will be extremely careful how it implies a term: *In re Railway and Electric Appliances Co.* (1888), 38 Ch.D. 597; *Douglas* v. *Baynes* (1908), 78 L.J.P.C. 13. The implication is founded on the presumed intention of the parties and upon reason: *The Moorcock*, 14 P.D. (C.A.) 64, *per* Bowen, L.J., at p. 68. And such an implication is made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have: *Lamb* v. *Evans*, [1893], 1 Ch. 218; see *per* Bowen, L.J., at p. 229. (The whole matter is carefully considered in para 1035, previously cited, of Halsbury, vol. 7).

Not infrequently the implication arises from the use the promisee intends to make of something supplied. For example, in *The Moorcock*, 14 P.D. 64, the defendants, for good consideration, agreed to allow the plaintiff to discharge his vessel at their jetty, which could not be done without grounding at low tide. On the vessel grounding, it sustained damage from the uneven condition of the river-bed adjoining the jetty. Mr. Justice Butt held that, as the defendants knew that the bottom of the river must be reached by the plaintiff's vessel, they impliedly contracted that the bottom should be fit for such grounding. This was affirmed by the Court of Appeal. That case may be expressed in this way: the defendants undertook to supply a jetty which would enable the plaintiff to use it for the purpose intended without injury.

In *The Bearn*, [1906] P. 48, a railway company invited the plaintiff's vessel to use their wharf; the berth at which the vessel lay was defective from stoke-hole refuse, etc., having been thrown into the water. Bargrave Deane, J., held the company liable, and his judgment was affirmed by the Court of Appeal.

I do not cite any more cases; many will be found in Halsbury, vol. 7, pp. 512 *sqq.*

Looking now at the transaction in question, the object of attaching the bills of lading to the draft was the security of

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the Bank of Commerce. This might have been effected by a bill of lading properly drawn and (or) endorsed, whereby the bank became entitled to the goods themselves—this was not asked for. Or the bill of lading sent forward might be for the protection of the bank, in that the bill of lading being in their hands no one could legally obtain possession of the goods covered by the bill of lading without the bank's consent. It seems to me clear that both banks quite understood that such a protection should be afforded by the bill of lading, and that anything, even though called a bill of lading, which did not afford that protection to the Bank of Commerce would cause "such a failure of consideration as cannot have been within the contemplation of either side:" *The Moorcock*, 14 P.D. 64, at p. 68, *per* Bowen, L.J.

Admittedly the bills of lading sent did not, as they could not, prevent the goods being dealt with (and lawfully dealt with so far as the carrier is concerned) without the bank's consent; and, therefore, in my opinion, these were not such bills of lading as the bank had a right to receive before being bound by their guaranty.

I have already said that we should not give effect to the appellants' contention that the bill of lading should have made McCabe consignee; the security of the bank would not thereby have been increased.

It was argued by the respondents that the form of bill of lading here is the usual and necessary form; if that were so, there might be some efficacy in the fact. But the evidence does not establish the fact; one witness swears that it is not the usual form, although "understandable and O.K.;" another says it is the usual form but often not used, i.e., *a* not *the* usual form. And there is no actual necessity for such a form, convenient though it may be and is.

The conduct of the Bank of Commerce and of McCabe does not affect the legal right of the bank to insist on the strict performance of the condition precedent to their guaranty attaching.

I would allow the appeal with costs here and below.

Appeal allowed.

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Nova Scotia Supreme Court, Graham, C.J., Longley, and Drysdale, JJ., Ritchie, E.J., and Harris, J. November 23, 1915.

1. EXECUTION (§ I—9)—RETURN OF SATISFACTION—SETTING ASIDE—LEVY ON PROPERTY OF OTHERS.

The court has power to summarily set aside a sheriff's return of satisfaction on an execution founded upon a wrongful seizure and sale of property belonging to third persons, the value of which the execution creditor and the sheriff were compelled to repay to the claimants thereof in an action for conversion.

Statement

APPEAL by defendants from the judgment of Meagher, J.

E. P. Allison, K.C., for appellant.

H. Mellish, K.C., for respondents.

The judgment of the Court was delivered by

Graham, C.J.

GRAHAM, C.J.:—This is an action on a former judgment of this Court between the same parties, and (by amendment) to strike out a return of satisfaction on an execution issued upon it. The defence is that the judgment was satisfied and discharged by a sale under execution on that judgment of certain goods and chattels not of the defendant, but of goods and chattels of a third person, Levi Hart, who obtained them under an assignment from the defendants just before the judgment, and who afterwards recovered from this present plaintiff Bell, and the sheriff, in an action of damages, a sum in excess of the original judgment which was paid. So that the supposed satisfaction of the judgment was wiped out by this repayment. Then, in these circumstances, the plaintiff having recovered nothing by his fruitless execution, and the defendants having suffered nothing thereby, for it was a third person's goods which were seized, we are asked to say that defendant has satisfied the original judgment and that the plaintiff ought to be satisfied, although he has had nothing. The defendants have paid Levi Hart with these goods and satisfied his claim, and the plaintiff is to be satisfied in some way with the empty spoon. Of course nothing but an estoppel of sorts could bring about such a freak as that. The sheriff's return to the execution in the original action that the judgment was satisfied has been formally set aside in this action. I think it could and should have been set aside. It was founded on a mistake of the sheriff of this Court at Guysborough, he having, contrary to the command of the writ, levied on goods of a third person instead of on these defendants' goods,

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and returned in mistake that he had levied on the goods of these defendants, and thus satisfied the execution. The defendant is not questioning the amendment of the pleadings.

It would be a strange thing in these times if that return should prevent a plaintiff from enforcing his judgment. A mistake and a false return of a third person is to bar a litigant of his right to a satisfaction of his judgment, no third person's rights having intervened.

Who ought to lose the debt? the sheriff and Bell who only made a mistake and there is no estoppel *in pais* and should be righted, or the defendants who never paid anything on the judgment or had any goods taken to satisfy it and have not been prejudiced? The simple question is, whether the Court cannot set aside or vacate a return which is founded on a mistake and is contrary to the truth?

It is said by an American text writer that the American decisions of different states are irreconcilable. Whether this is so or not it must be remembered that the question has arisen in different ways and the circumstances have varied.

In some cases reliance is placed on this circumstance, that a record of a Court is an absolute verity, as for instance an execution returned satisfied and cannot in a Common Law Court be amended right or wrong.

In others, the question has come up in this way, and the doctrine of *caveat emptor* applied to a purchaser at a sheriff's sale. A man with paramount title to chattels may sue the purchaser at a sheriff's sale for the conversion, or he may sue the sheriff and the creditor for the conversion. If the sheriff sells the mere interest of the debtor in something, particularly if it is land, and a purchaser buys it and there is a defect in the title and the paramount owner recovers or evicts, *caveat emptor*, the purchaser may lose, and he has no recourse over against the sheriff and (or) the creditor. That case has arisen too, where the plaintiff in the original action has bought at the sale, and some of the American cases hold that he ought to lose and his judgment be satisfied to the extent of his purchase. In other states it is said he may have a remedy in equity against the exe-

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cution debtor because the execution debtor had his judgment satisfied to that extent.

In respect to the first class I have mentioned I shall make an extract from the case of *Cowles* v. *Bacon*, 21 Conn. 451; S.C. 56 Am. Dec. 371, to shew the history of the law in England. The Court, by Storrs, J., said, at 460:—

It was anciently an established principle of the common law of England (Coke, 1 Inst. 190 a.) that an extent upon the land of the defendant returned and filed of record is a full satisfaction and end of the suit, and that therefore the plaintiff is not entitled by any further means of satisfaction by writ, action or execution. And if the tenant by *elegit* were divested of the lands so held under that writ of execution by one having a title paramount to his own, that is, a better title than the debtor from whom he extended the lands, the rule of law, that the debt was considered satisfied by the extent, remained unchanged and unaffected by the circumstance. And the creditor could not afterwards resort to any other writ or have any other remedy for the portion of his debt thus deemed to be satisfied. The reason upon which this principle was adopted was that the creditor elects to hold the land for so many years till the debt be satisfied out of the rents and profits, and the judgment roll shews that it was to be satisfied by the *elegit*. This rule was so manifestly unjust that in the 32nd year of the reign of Henry VIII. (ch. 5), a statute was enacted for that reason, expressed in its preamble by which it was provided that when the creditor is lawfully divested of the land so delivered to him on such extent he may have a writ of *scire facias* against the defendant; and thereupon if no sufficient cause, other than the acceptance of the said land on the former writ of execution, is shewn to bar the suit, a new writ or writs of execution on the judgment of the like nature and effect as the former for the residue of the debt unsatisfied by such former execution. And the same provision is re-enacted in similar terms by 8 George I., ch. 25, under which provision the plaintiff on the new writ of execution has the same privileges as on the issuing of the original *elegit*. That is, if the plaintiff can have no fruit of it he may sue out a *scire facias* against the debtor's goods and chattels or a *ca. sa.* to take his person in satisfaction of the debt. The Courts in England early after the first of these statutes was passed, decided that the equivalent remedy of debt on judgment would lie if the creditor thought fit, in lieu of a writ of *scire facias*, which action of debt may now be brought on an unsatisfied judgment at any time, although further writs of execution cannot be issued without a *scire facias*. See Foster on Scire Facias, 52 *et seq.*

That was an action of debt on a judgment purporting to be satisfied by a sale of land in which the title failed.

The same interesting history is given in the case of *Bank of Utica* v. *Mersereau*, 3 Barbour's Chancery (N.Y.) 528, at 586, 590. That, too, was a case of a sale of land under execution and

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the title failed. It was held that the Court of Chancery could afford relief.

Again, in New York, in the case of *Lansing* v. *Quackenbush*, 5 Cowan 38, where there had been a sale of land under execution and the debtor had no title and the plaintiff had bid it in and his bid of $4,096 was indorsed as paid upon the *fi. fa.*, the Court said, "clearly there must be a remedy in this case, but we do not grant it upon this motion because we think the proper *forum* is a Court of equity."

In the later case of *Adams* v. *Smith*, 5 Cowan 280, the amendment was granted upon a motion to strike out the indorsement. This is the note:—

> Where the sheriff sold certain personal property on a *fi. fa.* against the defendants, and endorsed the amount of sale upon the execution but the property turned out to belong to a third person who recovered value in an action against the sheriff and the plaintiff jointly, the Court ordered the endorsement stricken out and that an alias *fi. fa.* should issue for the whole.

And *Richardson* v. *McDougall*, 19 Wend. 80, is to the same effect.

In Ontario it has been the law for ninety years, that by a summary application you may have the return of "satisfaction" on an execution amended and another execution when the debt had not been in fact satisfied.

I refer to *Hinnerley* v. *Gould*, Taylor 143; *Commercial Bank* v. *McDowell*, 1 U.C.Q.B. 406.

One can understand some of the diversity in the States resulting from one Court saying that that part of the common law of England was never adopted in this state and another Court saying that common law was adopted but not the statutes, etc.

But here in Nova Scotia we have both the common law as modified by these statutes passed before we had a legislature of our own, and we are to follow the English decisions. In equity the Chancery Court could clearly amend the return of satisfaction when not in accordance with the fact, and by the statutes a common law Court could do so. Legislation is much too advanced since then to say that it is not to be by a summary application in this kind of a case in a Court where equity as well as common law prevails.

The defendant relies on the case of *Freeman* v. *Caldwell*, 10 Watts (Pa.) 9, a judgment delivered by Gibson, C.J. It was a case of a sale of chattels under execution, and a return of satisfaction. He invokes the old common law principle of England in respect to land and says: "Here there is distinctly announced the common law principle which rules the case, and though it has been abrogated in England so far as regards land, there is no statute on the subject in Pennsylvania."

He admits (I suppose he means in a Court of Chancery): "Like every other record, it may be amended to make it conform to the truth."

I say that because he criticizes the New York Court for amending the return in the case of *Adams* v. *Smith*, 5 Cowan 280, when it was not a Court of Chancery.

He extends the common law notion applicable to land which no English solicitor would pass the title of until he saw whether the judgment docketed against the debtor had been satisfied and would find by the record it had been to personal chattels which generally belong to the person in apparent possession of them. I think there was a difference. Of course, as against a third person, without notice, having purchased the land, it would not do to vacate the satisfaction. In 11 Am. & Eng. Ency., p. 712, it is said:—

> The levy of an execution on land when followed by a sale thereof does not result in a satisfaction of the judgment if, because of the want of title in the defendant, insufficiency of the proceeds, or their application to prior liens, interruption by legal process or proceedings, or for any other reason there is no actual satisfaction.

Later, p. 715:—

> If an execution is returned as satisfied when, for any reason there has been no satisfaction, and the plaintiff is entitled to another writ to issue, either on motion or on *scire facias*.

One would hardly expect to hear of that old common law notion being applied to a writ of execution, a sale of personal property thereunder and a return of satisfaction, and the question raised that you could not amend the return. Probably the shortest answer to that case would be that it is not in accordance with the law of England to-day which we in this province try to follow. Moreover, this is a suit in chancery to set aside

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the return of satisfaction, and the Pennsylvania decision is complied with.

I need not refer to *Vattern* v. *Lytle*, 6 Ohio 447, cited by the defendant. It is founded on the Pennsylvania cases first mentioned, and also on the other class of cases, and it is only fair to say that the Ohio Court afterwards receded from that view: *Hollister* v. *Dillon*, 14 Ohio St. 205.

I come now to the other class of cases depending on the principle of the doctrine of *caveat emptor* applied to the sheriff's sales which, while it has its place in some cases, has to be very much extended in this case, if it applies at all.

The defendant relies on the case of *Jones* v. *Burr*, 53 Am. Dec. 699, a South Carolina case, and it is much in point. It appears that Bartlett & Co. set up a store under the superintendence of Aaron Burr. Jones & Hughson had a judgment against Burr, and the sheriff, by direction of the creditors, levied under a *fi. fa.* on the goods in the store of Bartlett & Co. as if they were Burr's property, sold and returned an execution as satisfied. Bartlett & Co. brought several actions against Jones and the sheriff for the amount of the goods and they recovered. The plaintiff Jones in the original action made an application for an order to set aside the entry of satisfaction, and to authorize him to have further execution, and the Court denied the application, the judgment being delivered by Frost, J. This is the reasoning: If the goods had been bought by a stranger, and Bartlett, with paramount title, had recovered against him for the conversion, he, the stranger, could not have recovered over against the plaintiff or the sheriff, because he had bought at a sheriff's sale: *caveat emptor*. Then, as the plaintiff had at the sheriff's sale bid in the goods and the action for conversion was against him, he could not have recovered over against the defendant because the doctrine of *caveat emptor* applied. (I think it is because there is no implied indemnity on the part of a defendant debtor in such a case.) And as the plaintiff had not the right to recover over against the defendant he had not the right to have the return of satisfaction amended because he could then issue an execution and recover and that

would be in effect a recovery over. I copy the conclusion for fear of misrepresenting it:—

"The rule that there is no warranty in sheriff's sales must be enforced in favour of the defendant (*i.e.*, Burr). What right of action can Hughson and Jones (*i.e.*, the plaintiffs) have against Burr to be reimbursed the damages which Bartlett has recovered against them? Burr had no agency in their trespass when they seized and sold Bartlett's goods. On the contrary he protested against the proceeding. The effect of vacating the satisfaction is a summary recovery of indemnity to the amount of their execution by *Hughson and Jones* v. *Burr*. If they have no claim against Burr for indemnity they should not be enabled to recover it by granting the motion to vacate the entry of satisfaction and give the plaintiff a fresh execution against him. The motion is dismissed."

That decision is not as good as even a layman's view would be.

Of course, I concede there was no right to recover over against the defendant Burr. But that was irrelevant. In some states, in order to get rid of the supposed magical effect of the sheriff's return of satisfaction which they thought could not be amended, it was held that there was in equity a remedy over against the defendant as he had obtained the benefit of the credit, but I think that was not the true solution. However, I concede that there was no remedy over against a defendant. At least there is no implied indemnity which at law at any rate could be made use of against him.

But if there is no such remedy over why should the Court have refused something of a different kind altogether, namely, to amend the return and obtain another execution? That always remained but for the entry on the execution of satisfaction.

I revert a moment to the first point put in that decision—a purchase by a stranger—although it is not necessary to do so. Then the purchaser must *caveat emptor* lose his money. And the sheriff and the others are entitled to hold on to it in that decision. But suppose the recovery in trover is against them? And besides, that is all very well when, as in sales of land, for instance, there is a defect in the title, but the plaintiff has never-

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theless acquired an interest of some kind. In the case of buying the goods, of which another has paramount title and no interest passes to the purchaser, there is no consideration, and the purchaser need not pay the price, and if he has paid it he can recover it back. The Court would compel a sheriff, its own officer, to return the money, and the plaintiff would lose it, and he can only have his remedy by obtaining an amendment of the return and another execution. Here the execution commanded the sheriff to levy on goods, not on any interest in goods.

The action of the third person for conversion with a paramount title, both in that case and in the present case, was recovered against the plaintiff and the sheriff. Why? Because they had jointly or as principal and agent, by physical interference, converted the goods. The sheriff could not justify because his levy vested in him no title to the goods as happens where the goods are those of the debtor, because they were the goods of a third person not of the debtor. And any person who bought them from the sheriff for the same reason got no title.

The goods of a person (unless perhaps they are sold in market overt) cannot ordinarily be acquired by any purchaser from another than the owner or be used to satisfy any judgment against another.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

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REX v. HUDSON'S BAY CO.

Alberta Supreme Court, Harvey, C.J., and Scott, Stuart, Beck and Walsh, JJ. November 23, 1915.

1. LOTTERY (§ I—2)—COUPON WITH STORE PURCHASES—GIFT OF AUTOMOBILE TO PERSON WITH WINNING NUMBER—CR. CODE SEC. 236.

The giving of an automobile by a department store under an advertised scheme whereby all purchasers of $1 worth of goods or more obtained a free coupon belonging to a series from which one particular number had been selected as the winning number to be disclosed after the close of the competition, is an offence under the lottery clauses of the Cr. Code; and the advertisement and management of such scheme are punishable under sub-secs. (*a*) and (*c*) respectively of Cr. Code sec. 236.

[*Taylor* v. *Smetton* (1883), 11 Q.B.D. 207; *Hall* v. *McWilliam* (1901), 85 L.T. 239; *Willis* v. *Young*, [1907] 1 K.B. 448, referred to; and see Annotation on "Lotteries" at end of this case.]

Statement

CROWN case reserved by Simmons, J.

The defendants were convicted upon the following charge, viz.:—

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"For that the said the Governor and Company of Adventurers of England trading into Hudson's Bay, commonly known as 'The Hudson's Bay Co.,' a body corporate doing business at Edmonton and elsewhere in the Province of Alberta, on or about the 9th day of November, 1915, and at sundry and divers times subsequent thereto in the said month of November, 1915, at Edmonton aforesaid did unlawfully advertise and publish and cause to be advertised and published a certain proposal, scheme or plan for disposing by mode of chance of a McLaughlin Five Passenger Automobile of about the value of $1,185."

"And also for that the said company at Edmonton aforesaid, on or about the 9th and other days of November, 1915, unlawfully did conduct and manage a certain scheme for the purpose of determining who, or the holders of what lots, tickets, coupons, numbers or chances, are the winners of certain property, to wit, a McLaughlin Five Passenger Automobile, proposed to be given or disposed of by a mode of chance."

The charge is laid under sec. 236 (*a*) and (*c*) of the Criminal Code, which is in the following terms:—

"236. Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars, who:—

"(*a*) Makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever; or,

"(*c*) Conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of."

The question reserved was whether the undisputed facts disclosed by the evidence constitute the offence charged.

Pescod, for defendants, appellants.

Griffith, for the Crown.

The judgment of the Court was delivered by

HARVEY, C.J.:—It appears that the defendants have adver- Harvey, C.J.

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tised that on the 31st day of December next they will give an automobile to one of their customers without charge. The advertisement was published in the Edmonton *Bulletin* and the *Journal* and by means of hand bills circulated from the store. The advertisements differ slightly in form, but in substance they appear to be much the same.

The hand bill is in the following terms:—

"Announcement Extraordinary. (Here follows picture of automobile.) McLaughlin Model D. 60, 5 passenger $1,185 car to be given away on December 31st, 1915.

"This is an offer of extraordinary importance, and all patrons of this store (employees of any branch of the Hudson's Bay Co. service only excepted), have an equal opportunity to obtain this $1,185 automobile absolutely free, in addition to the satisfaction you will obtain by doing your buying at the largest departmental store in this section of the country, a store where values, assortments, and service stands head and shoulders over all competition.

"We are proud of the increased patronage that is being accorded us, but we will not be content until all sections of the community are numbered among our patrons. We are taking this means to enlarge our ever-increasing circle of friends, and to have the opportunity of demonstrating to those who have not hitherto been numbered among our patrons how we can best serve their interests."

"*Read how we purpose doing it.*

"A coupon envelope will be given to every customer making a purchase of $1 or over.

"All you have to do is to fill in your name and address on same, insert your bill of purchase in envelope, seal and deposit it in box provided for that purpose in the store (taking note of number of your coupon).

"To decide who shall be the future owner of the car, we have adopted the following plan as being the fairest to all concerned. A number placed in a sealed envelope, selected by the Stores Commissioner of the Hudson's Bay Co., has been handed to the manager of the Bank of Montreal. He will hold it until the contest is closed and then at the stated time he will open the

envelope and read the number thereon. The person whose coupon bears this number will be given the automobile free of charge. "THE HUDSON'S BAY CO., Edmonton."

It is shewn that a customer who purchased goods of the price of $1 was given a coupon with a number with instructions by the clerk in accordance with the terms of the advertisement.

It appears also from the evidence of the defendants' local manager that as indicated the winning number had been selected and placed in the hands of the local manager of the Bank of Montreal, that there had been no increase in the price of goods, the purchasers receiving the same value in goods as before. He also admits that the object of the scheme is to increase sales.

It is argued by counsel for the company that this is not a lottery because each person receiving full value for the money he spends, runs no risk of loss, and that unless there is such risk or chance of losing, it is not a lottery.

It may be noted, however, that the section so far as applicable to the present case says nothing about a lottery though in other portions of the section a lottery is referred to. The offence is (*a*) the advertising, or (*c*) the conducting of a scheme for giving, selling or in any way disposing of any property by any mode of chance.

That description would no doubt include a lottery, but it may perhaps include more, and it is perfectly clear that if the method above outlined for determining the winner of the automobile is a mode of chance the case falls within the portions of the section contained in the charge. Then how can it be said that it is not a mode of chance? There is certainly no room for skill, and there is equally no certainty as to who will receive the winning number, provided, at least, that the plan is carried out honestly, for it is quite clear that the company's manager knowing the number which he has selected could dishonestly, in fraud of all the other customers, have the corresponding number given to a particular customer, in which event the charge would be one of obtaining money by false pretences or some such similar charge instead of the present one. There is, however, no room to excuse what is charged by suggesting such a dishonest course and, therefore, it seems quite clear that the obtaining of the

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number is a matter of entire uncertainty and depends entirely on chance, and the case falls quite clearly within the section.

Moreover, although as indicated it need not necessarily do so, it seems also to fall well within the decided cases of lotteries. In *Taylor* v. *Smetton* (1883), 11 Q.B.D. 207, the accused sold tea, in each packet of which was a coupon entitling the purchasers to a prize, the character of which was unknown till after the purchase, and which varied in different packets. It was admitted that the tea was good and worth the price paid, but it was held that it was a lottery and that included in the price paid for the tea was the price of the prize which was determined by chance.

In *Hall* v. *McWilliam* (1901), 85 L.T. 239, the scheme was as follows: In a certain newspaper from day to day spots of varying sizes were printed, some of which were distinguished as winning spots. The announcement was to be made at a later date which were the winning spots for which different prizes were to be given to those persons who had sent to the newspaper office the portion of the prior newspaper in which such winning spot appeared. The newspaper was a halfpenny paper. It was held that this was a lottery and that the price of one halfpenny paid for the newspaper included something for the chance, though it was the regular price of the newspaper.

In *Willis* v. *Young*, [1907] 1 K.B. 448, the proprietors of a newspaper distributed gratuitously large numbers of medals upon each of which were the words, "Keep this, it may be worth £100. See the *Weekly Telegraph* to-day." The winning numbers were arbitrarily selected by the proprietors and published weekly. It appeard that the sales of the newspaper had been increased about 20% during the progress of the scheme, and that the purpose of the scheme was to increase sales. It was held that this was a lottery and though an individual who won a prize might not have paid anything, yet the chances were paid for by the general body of purchasers. Lord Alverstone at p. 458 says: "If the scheme had been to deliver a medal with each copy of the paper to the person buying that copy there would have been no question that it would have been a lottery." This situation is exactly which is presented in the present case: the coupon is

delivered to the purchaser with each purchase of over a dollar's worth of goods purchased which makes it exactly the hypothetical case suggested by the Lord Chief Justice and which he says is undoubtedly a lottery.

As I have indicated, the words of the section do not appear to make it necessary that anything should be bought or paid for as these cases seem to suggest is necessary for a lottery, but even if it were not so it is apparent from the cases referred to that in the present case the chances should be deemed to be paid for and not received without compensation.

It seems abundantly clear, therefore, that the offences charged against the defendants have been committed and the question submitted by the trial Judge should be so answered.

Conviction affirmed.

Annotation—Lottery (§ II—5)—Lottery offences under the Criminal Code. **Annotation**

Lottery defined.—A lottery is a distribution of prizes by lot or chance without the use of any skill. Archbold Crim. Plead. (1900), 1141; *R.* v. *Harris* (1866), 10 Cox C.C. 352; *Barclay* v. *Pearson*, [1893] 2 Ch. 154, 62 L.J. Ch. 636; *Stoddard* v. *Sagar*, [1895] 2 Q.B. 474; *Hall* v. *Cox*, [1899] 1 Q.B. 198.

Sec. 236 of the Code covers not only the operation in Canada of lottery schemes, but the advertising in Canada of a lottery to be conducted there or elsewhere. Special exception is made of the division by lot of joint interests in real estate, sub-sec. (6*a*), the operation under municipal authority and under restrictions mentioned in sub-section (6*b*) of raffles at church bazaars and charity bazaars, and certain associations existing for the patronage of artists (sub-sec. (6*c*)).

The present section 236 is derived from sec. 205 of the original Code of 1892 with the various amendments made in 1895, 1900 and 1901.

The sale of immovables (real estate) with the intention, agreed upon between vendor and purchaser, of organizing a lottery and disposing of it by public drawings, is radically null, being simulated between the parties as accessory to the main design of committing an act prohibited by law. It cannot, therefore, be relied on in opposition to a subsequent legal sale to a third party. *Bedard* v. *Phœnix Land and Improvement Co.*, 8 D.L.R. 686, Q.R. 42 S.C. 1.

The parties.—The advertiser or manager of a lottery scheme may be indicted and so may the person selling lottery tickets

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(sec. 236*b*), but the buyer of a lottery ticket is subject only to an offence punishable on summary conviction and a fine of $20 (sub-sec. 2), the payment of which may be enforced by means of Code sec. 739 under penalty of imprisonment.

Gift or sale by lottery is void.—In addition to the specific mention of what is indictable, sub-sec. (3) of sec. 236 gives an independent remedy by action or information to have declared forfeited "to any person who sues" the property sold, lent, etc., by any lottery, ticket, card or other mode of chance which is to be determined by chance or lot. Lottery sales and gifts are declared void. No action is maintainable to recover money under a contract for the operation of a lottery scheme which would contravene the criminal law. *Brault* v. *St. Jean Baptiste Association*, 4 Can. Cr. Cas. 284, sub nom. *St. Jean, etc.*, v. *Brault*, 30 Can. S.C.R. 598; *Pigeon* v. *Mainville*, 17 L.N. (Que.) 68. It is not within the power of a provincial legislature in Canada to authorize the running of a lottery. *Brault* v. *St. Jean Baptiste Association*, 4 Can. Cr. Cas. 284, 30 Can. S.C.R. 598, *supra*. It was held in *Society of Quebec Schools* v. *City of Montreal*, 19 Que. S.C. 148, by the Court of Review for Quebec that its provincial legislature could authorize a tax on the operation of lotteries, but that case is necessary overruled by the decision of the Supreme Court of Canada in *Brault* v. *St. Jean Baptiste Association*, *supra*.

What is indictable in lottery offences.—Sec. 236 of the Code declares that—

"Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars who,—

"(*a*) Makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever; or,

"(*b*) Sells, barters, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property, by lots, tickets or any mode of chance whatsoever; or,

"(*c*) Conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the win-

Annotation *(continued)* — Lottery (§ II—5) — Lottery offences under the Criminal Code. ALTA.

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ners of any property so proposed to be advanced, loaned, given, sold or disposed of."

The subject-matter of the lottery offence.—The printing, advertising, etc., prohibited by sub-sec. (*a*) is with reference to modes of chance by which "any property" is to be disposed of by means of the scheme or plan. The same phrase, "any property," appears in sub-sections (*b*) and (*c*) and in sub-section (3), but throughout there must be excepted from what would otherwise be "property" within the scope of sec. 236 the matters as to which by sub-sec. (6) the section itself is declared not to apply. These are "the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests (*droits indivis*) in any such property; or the excepted charity raffles for goods under $50 in value held with municipal authority, or the distribution of pictures by chance to subscribers to the "Art Union of London, Great Britain," or "the Art Union of Ireland." See the Art Unions Act (Imp.), 1846, 9 & 10 Vict. ch. 48.

Subject to these exceptions the term "property" would by clause (32) of the interpretation section (Cr. Code sec. 2) include every kind of real and personal property, and all deeds and instruments relating to or evidencing the title or right to any property or giving a right to recover or receive any money or goods.

The disposal by a lottery or mode of chance "of any property" need not be of any specific article or property, and it will constitute an offence, although the winner obtains only the privilege of choosing from certain prizes offered. *R.* v. *Lorrain*, 2 Can. Cr. Cas. 144, 28 Ont. R. 123.

Sweepstake on horse race.—In *Hardwick* v. *Lane*, [1904] 1 K.B. 204, 20 Cox C.C. 576, the Divisional Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.)., held that a sweepstake on a horse race is an illegal lottery within the English Gaming Act, 1802, if the operator makes a profit from its operation; and see *R.* v. *Hobbs*, [1898] 2 K.B. 647, 67 L.J.Q.B. 928, 79 L.T. 160.

Proceedings against a corporate body.—Where a corporation is defendant the proceedings upon its indictment are governed by Code secs. 916-920, notice being served on the corporation under Code sec. 918 requiring it to plead in two days and in default of compliance authorizing the Court to enter a plea of not guilty and proceed with the trial.

In provinces where there is no grand jury system and, there-

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fore, no indictment in the primary sense of the term, a corporation may be compelled to answer to an indictable offence (ex. gr., conducting a lottery scheme) by a formal written charge in lieu of an indictment, such charge being laid by the Attorney-General or by his direction or with the consent or order of a Judge and notice thereof being served on the corporation under sec. 918 of the Code. *R.* v. *Standard Soap Co.* (1907), 12 Can. Cr. Cas. 290.

And by the Code Amendment Act of 1907 the word "indictment" now includes "any formal charge under sec. 873A" used in lieu of an indictment in the Provinces of Saskatchewan and Alberta. Cr. Code sec. 2(16) as amended, 1907, by 6 & 7 Edw. VII. ch. 8.

Canadian cases.—In an Ontario case the complainant went to the defendant's place of business, and having been told by defendant that in certain spaces on two shelves there were in cans of tea, a gold watch, a diamond ring, or $20 in money, he paid $1 and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional 50 cents and received another can, which also contained an article of small value; he handed this can back also, paid another 50 cents and received another can which also contained an article of small value. It was held that the object really sought for, and for the chance of obtaining which the money was paid was one of the three prizes named; and that the transaction constituted an offence. *R.* v. *Freeman* (1889), 18 Ont. R. 524.

But the offer of prizes to the nearest guesser of the number of beans contained in a jar exhibited to view is not a lottery, as it is a matter of judgment or skill and not of chance. *R.* v. *Dodds* (1884), 4 O.R. 390.

And where a shopkeeper placed in his shop window a jar containing a number of buttons of different sizes, and advertised a prize of a pony and cart, which he exhibited in his window, to the person who should guess the number nearest to the number of buttons in the jar; stipulating that the successful one should buy a certain amount of goods; this was held not to be a "mode of chance" for the disposal of property within the meaning of the Lottery Act, as the approximation of the number of buttons depended upon the exercise of judgment, observation and mental effort. *R.* v. *Jamieson* (1884), 7 O.R. 149.

The advertising by a firm of shopkeepers in a newspaper of a prize to be awarded to the one of their customers who could make the nearest guess to the number of their cash sales on a

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given day, is not a violation of this section. *R.* v. *Fish*, 11 Can. Cr. Cas. 201.

Defendant company, as a means of advertising their soap at an exhibition held at St. John, offered a piano as a prize for the person guessing the correct weight or the nearest to the correct weight of a large cake or block of soap exhibited at the said exhibition. The guessing was free and all persons who desired to guess were provided with coupon tickets upon which to mark their guesses. The tickets were deposited, or were supposed to be deposited, in a box, and the corresponding coupons retained by the respective guessers. The plaintiff guessed within a shade of the correct weight, and after the soap had been weighed presented her coupon with her guess marked thereon, but the Judges could not find her ticket in the box and awarded the prize to another person whose guess was not so near the correct weight as the plaintiff's. Plaintiff afterwards brought an action for breach of contract. It was held by the Supreme Court of New Brunswick on demurrer to plaintiff's declaration, that the competition was not a lottery within the meaning of the Criminal Code, and that the exercise of judgment required in the guessing was a sufficient consideration to support the contract. *Dunham* v. *St. Croix Soap Co.* (1897), 33 Can. Law Jour. 444.

The sale of lottery tickets is an offence, whether made for profit or not. *R.* v. *Parker*, 9 Man. L.R. 203.

Where tickets for a drawing by lot are sold as part of a scheme for the disposal of goods, and the holder of the winning ticket is required by the conditions of the drawing to shoot a turkey at fifty yards in five shots in order to win the prize, such circumstance does not necessarily take the case outside of the lottery sections of the Criminal Code. It is a question for the jury whether such condition was imposed as a contest of skill, or as a mere pretence in evasion of the lottery law. Where the evidence shews that any person could easily comply with the condition and the jury found the advertiser of the scheme guilty of advertising a lottery, the verdict will be supported as, in effect, finding that there was no real element of skill involved in the condition. *The King* v. *Johnson*, 6 Can. Cr. Cas. 48, 14 Man. L.R. 27.

A competition for a prize offered for the nearest estimates of the number of votes to be cast at a coming election and the sale of certificates of admission thereto in consideration of money paid or services performed, does not constitute a lottery offence under Code sec. 236. *R.* v. *Johnston* (1902), 7 Can. Cr. Cas. 525.

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Annotation *(continued)* — Lottery (§ II—5) — Lottery offences under the Criminal Code.

In a case at Brandon, Man., the accused had made sales of certain securities called "Bon Panama," which had originally been issued in Paris, France, in 1889, by the Panama Canal Company under the authority of the laws of France. These bonds promised the repayment of 400 francs in the year 1988, and carried with them the chances of getting prizes varying in amount from 500,000 francs to 1,000 francs given to the holders of the lucky numbers by drawings to take place at frequent intervals during the life of the bonds. The accused, in canvassing purchasers of the bonds, held out as an inducement the chance of winning one of these prizes, and the belief that there was such a chance influenced the purchasers in paying the price which they gave for the bonds. It was held that the accused was rightly convicted of selling lottery tickets contrary to sec. 236. *R.* v. *Picard,* 13 Can. Cr. Cas. 298, 17 Man. L.R. 343.

Upon a charge of carrying on a business by modes of chance contrary to the lottery clause of the Criminal Code sec. 236, evidence of persons who had canvassed for business on her behalf with which the lottery features were proposed, is not admissible evidence against the accused where not connected by evidence that the accused did in fact hold the lottery drawings suggested by the canvassers. *R.* v. *Lumgair* (1911), 19 Can. Cr. Cas. 123, 3 O.W.N. 309.

Where the charge is for carrying on an illegal lottery business and not for fraudulently representing that the accused was carrying on such business, the prosecution must prove that the business was in fact carried on as alleged and not merely that the accused represented that she was conducting such business or that she authorized her agents to so represent. *Ibid.*

English cases. — In *Scott* v. *Director of Public Prosecutions,* [1914] 2 K.B. 868, an information was laid under the Lotteries Act, 1823 (4 Geo. IV., ch. 60), against the appellant Scott for breach of the Act. The appellant was the publisher of a newspaper in which he advertised a competition called Bounties. A list of forty-two words was given and competitors were to chose any of these words, and opposite the word chosen were to write two or three other words bearing on the meaning of the word chosen, and each of the two or three words must begin with one of the letters in the word chosen and the same letter might not be used twice unless it also appeared twice in the word chosen. The question was whether this was a lottery within the meaning of the Act and the Divisional Court held that it was not, because the competition

Annotation *(continued)* — Lottery (§ II—5) — Lottery offences under the Criminal Code. ALTA. Annotation

called for the exercise of skill on the part of the competitors, and there was no evidence that the number of competitors was so large as to make it impossible for the sentences to be considered on their merits, and they, therefore, concluded that the competition was not one the result of which depended entirely on chance.

The defendant was printer and publisher of a newspaper which announced that in certain issues spots of varying size and shape would appear, and that any person cutting out and sending to the office that portion of the paper containing the spots which turned out to be the winning spots would receive a prize:— Held, that the scheme was a lottery within sec. 41 of the Lotteries Act, 1823, and defendant was liable to be convicted of having published a scheme for sale of chances in a lottery, though purchaser paid no money beyond the price of the newspaper. *Hall* v. *McWilliam*, *McWilliam* v. *Bottomley*, 65 J.P. 742, 85 L.T. 239, 20 Cox C.C. 33.

A "cheap jack" sold from a tent packets of tea with coupons attached entitling the purchaser to a prize, the nature of which was unknown to the purchaser or seller at the time of delivery, and it was held this constituted a lottery within the meaning of the statute. *Taylor* v. *Smetten*, 11 Q.B.D. 207, 48 J.P. 36, 52 L.J.M.C. 101.

Where the competition is such that what the competing persons do depends upon mere chance, as, for instance, the filling in of missing words in the case of the missing word competition, the transaction may be a lottery, the question really being whether a person who competes has to exercise any skill or is driven to take his chance. *Barclay* v. *Pearon*, 62 L.J. Ch. 636, 68 L.T.R. 709, [1893] 2 Ch. 154.

In the case of a newspaper sold with coupons to be filled up by purchasers with the names of the winning horses in a horse race and the reward of a money prize for the correct guesses, it is a question of fact to be decided whether the money received was paid in consideration of a promise to pay a prize on the event of the race or was only the ordinary price of the newspaper. *R.* v. *Stoddart*, [1901] 1 Q.B. 177, 19 Cox C.C. 587, 83 L.T. 538, 70 L.J.Q.B. 189. And the sale of extra coupons at a fixed price is a fact to be taken into consideration. *Ibid.* *Stoddart* v. *Sagar*, [1895] 2 Q.B. 474, 18 Cox C.C. 165, 73 L.T. 215; *Caminada* v. *Hulton*, 17 Cox C.C. 307, 64 L.T. 572.

An offer of a money prize by a newspaper coupon scheme under which the readers were asked to predict the number of

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Annotation *(continued)* — Lottery (§ II—5) — Lottery offences under the Criminal Code.

registered births and deaths in a certain district during a certain period, was held not to constitute a lottery. *Hall* v. *Cox*, [1899] 1 Q.B. 198, 68 L.J.Q.B. 167, 79 L.T. 653.

The proprietors of a weekly newspaper distributed to the public promiscuously a number of medals, each bearing a different number and the words, "Keep this, it may be worth £100. See the *Weekly Telegraph* to-day." Numbers were arbitrarily selected for prizes by them and the winning numbers were published weekly in their paper. The object of the scheme was to induce the public to buy the paper. Information as to the winners could be obtained without any payment, or sending in any coupon. The newspaper proprietors were found guilty of holding and carrying on a lottery within the Gaming Act, 1802. *Willis* v. *Young*, [1907] 1 K.B. 448, 23 Times L.R. 23, 21 Cox C.C. 362.

H. kept a confectioner's shop, and sold American caramels in penny packets. Some of the packets contained, besides a fair pennyworth of sweets, a halfpenny, others contained two halfpence. No advertisement or notification was made that money was in the packets:—Held, it was immaterial how the fact became known, and H. was properly convicted. *Hunt* v. *Williams* (1888), 52 J.P. 821. A wholesale dealer in similar packets of sweets, some of which contained a coin, was rightly convicted of aiding and abetting the retailer. *Barratt* v. *Burdon* (1893), 57 J.P. 772, 63 L.J.M.C. 33.

Search order for suspected lottery.—Cr. Code sec. 228 makes it an offence to keep a disorderly house and includes in that designation the common gaming house and common betting house as defined by secs. 226 and 227 respectively, but the statutory definitions do not cover the place where a lottery is carried on. Sec. 226 (as amended 58-59 Vict. ch. 40), sec. 227 (as amended 9-10 Edw. VII., ch. 10) and 228 (as amended 8-9 Edw. VII., ch. 9, and by 3-4 Geo. V., ch. 13, sec. 10), do not apply to lottery cases. Neither are secs. 985 and 986, which treat of the finding of gaming instruments and of places equipped with contrivances for unlawful gaming, applicable to offences under the lottery clause sec. 236. But a search order may be made under Cr. Code sec. 641 (as amended by the Code Amendment Act of 1913, ch. 13), and all persons found at the place where it is suspected that a lottery is carried on may be arrested, if the officer has been regularly empowered to search the place in conformity with sec. 641. The search order further authorizes the seizure of all instruments and devices for the carrying on of a lottery or of

Annotation *(continued)* — Lottery (§ II—5) — Lottery offences under the Criminal Code. ALTA.

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any scheme, contrivance or operation for determining the winner in any lottery, and of all lottery tickets, circulars, advertisements and printed matter, which may be found at the place searched and which appear to have been used or to be intended for use for the illegal business of a lottery.

It never was intended that after a complaint made and an order for search given, the order should be filed away without any attempt to enforce it for years, and yet it remain operative. The premises may no longer be used for an improper purpose and "it would be contrary to justice that the stringent provisions of this section should be put in force when or how the police thought proper." Per Drake, J., in *R.* v. *Ah Sing* (1892), 2 B.C.R. 167.

The finding of lottery tickets and other paraphernalia of a lottery on the premises entered under a search order for instruments of gaming does not in itself constitute a primâ facie case nor shift the onus of proof to the defence. Section 985 which declares that the finding of instruments of gaming upon an order of search under Code sec. 641, shall constitute primâ facie evidence that the place is used as a common gaming house and that play was going on, has no application to a charge under sec. 236 for selling lottery tickets. *R.* v. *Hong Gucy* (1907), 12 Can. Cr. Cas. 366 (B.C.)

Query as to the application to lotteries of sec. 642 under which a magistrate on the return of a search order to require persons arrested under its authority to give evidence "touching any unlawful gaming" in the house or place raided and may thereupon grant immunity certificates to such witnesses.

Confiscation of lottery equipment.—Under sec. 641 of the Code the magistrate issuing a search order in respect of a suspected lottery, or the magistrate before whom persons taken into custody on being found at the suspected place when the search order was executed, may hold an investigation for the purpose of determining whether or not the money or securities for money seized under the search order shall be forfeited to the Crown and whether or not any other thing seized shall be destroyed or otherwise disposed of.

The Parliament of Canada has the constitutional power to authorize a magistrate to adjudge forfeiture to the Crown of moneys, etc., found in a common gaming house, and to declare the keeping of a gaming house a criminal offence; and the judgment of confiscation is not an interference with "property and civil rights," the jurisdiction in regard to which belongs to the

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Annotation *(continued)* — Lottery (§ II—5) — Lottery offences under the Criminal Code.

provinces, although the party claiming the money was not a party to the proceedings in which the confiscation was decreed. *O'Neil* v. *Attorney-General* (1896), 1 Can. Cr. Cas. 303, 26 Can. S.C.R. 122. In an action to recover from the constable and the clerk of the peace the moneys so seized, the rules of evidence in force in the province in civil matters will apply, and not the Canada Evidence Act. *Ibid.*

The constitutional power of the Canadian Parliament extends to confiscation of lottery equipment in like manner as to the equipment of a gaming house, the enactments in each case being substantially laws for the suppression of crime.

It is specially provided, however, by sec. 641(2) that articles other than money or securities for money seized under a search order and liable to confiscation and destruction upon an adjudication made in conformity with that section shall not be destroyed or disposed of pending any appeal or any proceeding in which the right of seizure is questioned or before the time has expired in which such appeal or other proceedings may be taken. The special jurisdiction of search under sec. 641 is not limited to the ordinary judicial officers having a power to hold a preliminary inquiry as to an indictable offence, but is by the terms of the section itself given to the following functionaries:—

(1) Mayor or chief magistrate, (2) police magistrate, stipendiary magistrate or district magistrate of the municipality or district, (3) any police or stipendiary magistrate having jurisdiction in the municipality or district, (4) failing these, any justice having jurisdiction in the municipality district or place in which the suspected house or premises is situate.

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CENTRAL TRUST & SAFE DEPOSIT CO. v. SNIDER.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Parker of Waddington, and Lord Sumner. December 21, 1915.

1. TRUSTS (§ I D—24)—ABSOLUTE CONVEYANCE FOUNDED ON PROMISE TO SETTLE LANDS—PRESENT OR RESULTING TRUST—RIGHT TO SPECIFIC PERFORMANCE.

An absolute conveyance of land for a nominal consideration and principally founded on the grantee's promise to pay half the income thereof less disbursement during the grantor's life and thereafter to settle the property itself to the latter's heirs, merely gives right to have the promise specifically performed, but does not create a trust *in praesenti*, as respecting the land, in the grantor's favour, nor a resulting trust in the event of a failure to carry out the promise.

[*Fremoult* v. *Dedire*, 1 P.W. 429, considered; *Howard* v. *Miller*, 22 D.L.R. 75, [1915] A.C. 318; *Synge* v. *Synge*, [1894] 1 Q.B. 466, applied.]

2. TRUSTS (§ I B—6) — CONTRACT TO DEVISE — PRESENT DECLARATION OF TRUST.

A contract to devise a beneficial interest assumes an estate in the

person who contracts to enable the contract to be performed, and not a promise to settle as a present declaration of trust.

3. TRUSTS (§ I D—24)—RESULTING TRUSTS—FAILURE OF CONSIDERATION—BREACH OF COVENANT—REMEDIES.

If property be conveyed in consideration of a covenant to pay money, the breach of the covenant to pay does not bring about a failure of consideration; the consideration is the covenant, and a failure to observe it results in a right of action at law on the covenant for its breach, and not in any equitable right based on failure of consideration.

4. SPECIFIC PERFORMANCE (§ I C—24*a*)—CONTRACT TO DEVISE LAND—LEGACY IN LIEU—ELECTION.

A monetary bequest *in lieu* of a contract to devise land puts the legatee to election between specific performance of the devise or the acceptance of the legacy in lieu thereof; but specific performance will not be decreed unless the legatee is first willing to disclaim the legacy. [*Snider* v. *Carlton*, 6 O.W.N. 337, reversed.]

Statement

APPEAL from the Supreme Court of Ontario, Appellate Division, *sub nom Snider* v. *Carlton*, 6 O.W.N. 337.

The judgment of the Board was delivered by

Lord Parker.

LORD PARKER:—The questions for decision in this case concern the title to certain hereditaments in Toronto, known as 78 Bay street, and arise under the following circumstances:—

The late Martin Edward Snider died in the year 1888 intestate. He was, at the time of his death, the owner of the property in question, which then consisted of about 23 ft. of frontage on the west side of Bay street, with a small half-brick residence erected thereon. He left two children, Thomas E. Snider and the defendant, Mabel Carlton, and the property devolved upon them as his co-heirs. After their father's death they went to live with their uncle, Thomas A. Snider, hereinafter referred to as the testator.

On September 4, 1899, the testator purchased and took a conveyance of the moiety of the property belonging to Thomas C. Snider. The validity of this transaction is not now in dispute. The testator having thus become entitled to a moiety of the property, proceeded to erect thereon a warehouse, at a cost of some $10,000.

On May 15, 1900, the defendant, Mabel Carlton, by deed conveyed to the testator all her estate and interest, legal or equitable, in the property in question, to hold the same unto and to the use of the testator in fee simple. The consideration expressed in the deed was the nominal consideration of $1, of which she acknowledged the receipt. The real consideration was

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admittedly that expressed in a letter dated May 9, 1900, and written to her by Mr. Irwin, the testator's legal adviser. According to this letter she was to be paid during her life one half of the rents of the property, less any disbursements, and after her death one moiety of the property itself was to be conveyed to her heirs. This was to be secured partly by the management of the property being left as theretofore in the hands of her maternal uncle, Frank Hillock, and partly by a will which the testator was to make in her favour.

It is in their Lordships' opinion probable that the last-mentioned transaction was, having regard to the relationship existing between the parties, originally voidable in a Court of equity. Whether, having regard to what subsequently happened, it still remains voidable, is a different matter, and one which need not be considered, for no claim has been made to avoid it. On the contrary, the defendant, Mabel Carlton, claims on the footing that, by virtue of the conveyance of May 15, 1900, and in the events which have happened, the testator at his death held the property conveyed in trust for her. Her counterclaim asks for a declaration that this conveyance, though absolute in form, was intended only as a conveyance in trust for her, and the first reason in her case on the present appeal is that, the conveyance having been made in consideration of a promise which was never carried out, there is a resulting trust in her favour. Neither the suggestion of an intention to create a trust nor the suggestion of there being a resulting trust is consistent with a claim to have the conveyance set aside on equitable grounds. It is worth while, however, before proceeding further with the history of the case, to consider both these suggestions.

In their Lordships' opinion, the intention of the parties must be gathered from the conveyance and Mr. Irwin's letter. The intention, as manifested by the conveyance, is clear enough. All the interest of the defendant, Mabel Carlton, whether legal or equitable, is intended to pass. The letter contains nothing inconsistent with, and a good deal to, confirm this. The testator was evidently intended to be put in a position to grant a lease or leases of the property on such terms as he might think desirable, which could not be properly done if the defendant,

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Mabel Carlton, remained equitable owner of a moiety of the property. Further, the testator's promise to devise a moiety of the property in her favour is inconsistent with her being intended to remain in equity the owner of such moiety, whether the testator did or did not make such a devise. A contract to devise a beneficial interest assumes an estate in the person who contracts, sufficient to enable the contract to be performed, and it would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust. With great deference, their Lordships think that the trial Judge, in holding that the letter created a trust, did not give sufficient weight to these considerations. In their opinion, it is impossible to impute to the parties any intention of creating a trust *in præsenti*.

The suggestion that there was a resulting trust does not appear to have been dealt with in the Courts below. It is, in their Lordships' opinion, equally untenable. When once the conclusion is arrived at that a grantor intends to part with his whole legal and beneficial interest in favour of another, there can be no resulting trust unless, in the view of a Court of equity, there be no consideration to support the transaction, or the consideration, if any, entirely fails. It is not alleged that there was no such consideration in the present case. It is suggested that the consideration failed. But how can there be a total failure of a consideration consisting, in part at any rate, of a promise to do something in future? If property be conveyed in consideration of a covenant to pay money, the breach of the covenant to pay does not bring about a failure of consideration. The consideration is the covenant, and failure to observe the covenant results in a right of action at law on the covenant or for its breach, and not in any equitable right based on failure of consideration.

In their Lordships' opinion, Meredith, C.J., put the matter on a surer ground. There being no question of setting the transaction aside, the only point to be determined is whether, by virtue of the testator's promise to settle the property given in the letter of the 9th May, 1900, for valuable consideration, the defendant, Mabel Carlton, became entitled in equity to any

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and what interest. The learned Chief Justice refers to the case of *Fremoult* v. *Dedire*, 1 P.W. 429, as having decided that a covenant to settle lands makes the covenantor but a trustee for the parties who would be interested if the covenant were performed, and to a passage in Lewin on Trusts, 12th ed., p. 160-1, where it is stated that if a person agrees for valuable consideration to settle a specific estate, he becomes a trustee of it for the intended objects, and all the consequences of a trust will follow. *Fremoult* v. *Dedire* was undoubtedly a sound decision, and there is little fault to find in the statement in Lewin on Trusts as to the general equitable principle. But it must be remembered that this principle is but the logical consequence of the power of a Court of equity to grant, and its practice in granting specific performance of a contract to convey or settle real estate. It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would, in a Court of equity, be enforced specifically.

If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the case of *Howard* v. *Miller*, 22 D.L.R. 75, [1915] A.C. 318, in connection with the law as to the registration of titles in the Province of British Columbia, and came to the conclusion that though the purchaser of real estate might, before conveyance, have an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a Court of equity in specifically performing the contract, and could only be defined by reference to the relief which the Court would give by way of specific performance.

If, therefore, the defendant, Mabel Carlton, has any interest in the property it can only be because an action would lie for

specific performance of the testator's contract to settle the property in her favour. Their Lordships will assume that the contract is one in its nature capable of specific performance as against volunteers under the testator's will—as indeed would appear from the case of *Synge* v. *Synge*, [1894] 1 Q.B. 466, and that the defendant, Mabel Carlton, is in the present action seeking to have it specifically performed. On this footing two questions arise: First, was the contract varied by substituting for the promise to settle the property a promise to leave the defendant, Mabel Carlton, the legacy of $20,000 which the testator in fact gave her by his will? Secondly, if there was no such contract to vary, can the defendant, Mabel Carlton, enforce specific performance without abandoning her interest in this legacy? In considering these questions it is necessary to deal in some detail with what happened after the original promise was made.

It appears that the testator, shortly after the conveyance of May 15, 1900, granted a ten-year lease of the property at an annual rent of $977, and one-half of the rent, less outgoings, was duly paid to the defendant, Mabel Carlton. In the year 1904 the warehouse built by the testator was burned down, and the testator thereafter erected on the property a larger warehouse at a cost of $27,000. This sum was provided partly out of moneys received for insurance, partly by a mortgage of the property for $20,000, and partly out of the testator's private moneys. On June 26, 1905, the testator granted a lease of the property for 10 years at an annual rent of $2,632.72. In the year 1909, the testator, through Frank Hillock, proposed to the defendant, Mabel Carlton, to modify the arrangement contained in the letter of May 9, 1900, as follows, that is to say, the defendant Mabel Carlton, was to be paid $600 a year during his life and he was by his will to give her an annuity of $1,200, with a legacy of $20,000 to her children after her death, she on her part giving up all interest in the property in question. The answer of the defendant, Mabel Carlton, to these proposals is contained in her letter to Mr. Frank Hillock of May 20, 1909. She refers to the arrangement as to receiving half the rents of the property and complains that she has not even had the $600

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now proposed to be paid to her. She insists on this arrangement being adhered to. She says, however, "As to uncle T. A.'s will, that is all right," and in their Lordships' opinion this can only mean that she is willing to accept the new proposals so far as they relate to the provision of the $1,200 annuity and the legacy of $20,000 to her children after her death instead of the interest in the property itself, which was to be secured to her according to the original arrangement by her uncle's will. The letter, therefore, is at most a proposal, and not the acceptance of an offer so as to constitute a contract modifying the original arrangement.

There the correspondence ends, but it appears that the testator thereafter paid her $600 a year, which amounted approximately to one-half the rents of the property, and also made a will bequeathing to her an annuity of $1,200, and to her children after her death the sum of $20,000. The defendant, Mabel Carlton, discussed these provisions with him, evidently on the footing that they were to be in substitution for her interest in the property after his death. She suggested that there was no reason why the legacy should not be left to her absolutely instead of to her children. There was no reason why anybody but herself should benefit by her father's property. By his last will the testator left her an immediate legacy of $20,000, but did not leave the property itself, as provided by the letter of May 9, 1900. Under these circumstances their Lordships conclude that the $20,000 was left to her on the footing that she had relinquished or would relinquish her interest in the property itself, and that she knew it was so left, and did nothing to bring home to the testator the fact that she would not accept it on this footing. It would be clearly inequitable to allow a legatee, while insisting on her legal right to the legacy, to appeal to a Court of equity to complete her title to the property itself.

A person who asks equitable relief must himself be willing to do what is equitable. It follows that, even if the agreement of May 9, 1900, has not been varied by mutual consent, it can only be specifically performed if the defendant, Mabel Carlton, is willing to disclaim the legacy. The appellants being willing that the defendant, Mabel Carlton, should take either a moiety

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of the property itself, subject to the existing mortgage, or the legacy, whichever she may prefer, it is unnecessary to decide whether there was ever any binding agreement for the variation of the original contract.

Under the circumstances, their Lordships are of opinion that the appeal succeeds, and that the right order will be to declare that the defendant, Mabel Carlton, cannot take both the interest in the property, to which the Courts below have declared her to be entitled, and the $20,000 legacy, and to limit a period of 3 months within which she is to exercise her election.

Their Lordships will humbly advise His Majesty to this effect, and they think that the respondent, Mabel Carlton, should pay the appellants' costs here and in the Court of Appeal. With regard to the costs here and in the Court of Appeal of the other respondents, they should be paid out of the estate of Thomas A. Snider. *Appeal allowed.*

Re WILSON ASSIGNMENT.

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Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. July 15, 1915.

1. ASSIGNMENTS FOR CREDITORS (§ VIII—69)—PRIORITY OF CLAIMS—BUSINESS CARRIED ON BY CREDITORS—DEBTS INCURRED MEANWHILE.

The business of an insolvent carried on by the creditors in pursuance of an agreement with the debtor for the purpose of liquidating their claims does not necessarily constitute the creditors a partnership of the business, so as to render them personally liable for goods furnished the estate during the continuance of the business by the creditors; nor will the claims of those who become creditors subsequently to such arrangement be accorded a priority over the claims of the old creditors.

[*Cox* v. *Hickman*, 8 H.L.C. 286, followed.]

Statement

APPEAL from the judgment of Newlands, J.

J. Lynd, for appellant Hepburn.

B. M. Wakeling, for Swift Canadian Co.

J. W. Blyth, for the National Trust Co.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This matter comes before us by way of appeal from an Order made by my brother Newlands, on a reference for directions under the Assignments Act. James S. Wilson was carrying on a butcher business at Saskatoon, under the style and firm of Wilson & Co. He became financially embarrassed and, on May 29, 1913, held a meeting of his creditors, at

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which it was decided that he should turn over his business and property to one Laird, to hold the same until the creditors were paid. The conveyance of the property is not before us, but the agreement signed by Laird and Wilson is. That agreement recites that Wilson was indebted to the creditors in the amounts set out in the schedule. By it, Wilson assigns all his real and personal property to Laird, "to have and to hold until the creditors had been paid in full." The agreement provided that Laird should be at liberty to carry on and continue the business of Wilson & Co. until the creditors deemed such carrying on undesirable. It was agreed also that all goods purchased by Laird, for the purpose of carrying on the business, should be paid in priority to the claims of the creditors to whom Wilson was then indebted, and Wilson made Laird his lawful attorney for the carrying out of the agreement.

The agreement further provided that, in case the creditors deemed the further carrying on of the business undesirable, Laird should sell the real and personal estate and stand possessed of the moneys therefrom upon trust: 1. To pay the costs and other incidental legal expenses. 2. To retain such remuneration as shall be fixed for him by the creditors. 3. To pay the debts and liabilities of Wilson to the creditors, and, after payment of all claims in full, to hand the balance back to the debtor Wilson.

Laird carried on the business for some time. In doing so he ordered goods from persons who, on May 29, 1913, were not creditors of Wilson & Co., and also from some who were creditors.

In February, 1914, the creditors deemed the further carrying on of the business undesirable, and, on the 29th of that month, Wilson made an assignment for the benefit of his creditors to the National Trust Co., which company proceeded to realize the estate, and has now the proceeds thereof in its hands.

A difference of opinion as to the proper distribution of these moneys having arisen, the Trust Company took out an originating summons for directions. On its return, those persons who had sold goods to Laird after May 29, 1913, but who were not creditors of Wilson & Co. on that date, contended that

they should be paid in priority to the accounts, not only of all creditors to whom Wilson & Co. were indebted on May 29, but, also, in priority to the accounts of those creditors incurred by Laird after that date.

My brother Newlands held that all accounts in the conduct of the business by Laird should, as among themselves, be paid *pro rata*, and be paid in full before any of the original debts were paid. From this order Hepburn appeals.

For the appellant it is contended that, after May 29, 1913, the business was no longer that of Wilson & Co., but of the then creditors; and that these creditors are personally liable for the accounts incurred by Laird and, consequently, cannot have any claim upon the proceeds of their own business until the appellant has been paid in full.

I cannot give effect to this contention, for two reasons: 1. Because the affidavit of Laird shews that orders for the new goods were signed: "Wilson & Co., per E. H. Laird," thus shewing that it was Wilson & Co. who were ordering the goods. 2. If the business after May 29 did not belong to Wilson & Co., or if the appellant did not sell to that firm, he has no claim on the funds in the hands of Wilson & Co.'s assignee. The moneys in the hands of the assignees are moneys belonging to the estate of Wilson & Co., and it is only by virtue of being a creditor of that firm that the appellant has any standing to make a claim against the fund. That the appellant was dealing with Wilson & Co. is evidenced, not only by the acceptance of an order over the signature of that firm, but also by the fact that he now claims against the estate.

Taking the business after May 29, as the business of Wilson & Co., the case of *Cox* v. *Hickman*, 8 H.L. Cas. 286, is very much in point, and is authority for holding that the agreement between Laird and Wilson, even if it had been signed by the creditors—which it was not—would not have constituted the creditors a partnership carrying on the business, nor would it make them liable for the goods ordered by Laird. That being so, the accounts for goods ordered by Laird from the old creditors stand in precisely the same position as the debt of the appellant. The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

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STEEDMAN v. DRINKLE.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Parker of Waddington and Lord Sumner. December 21, 1915.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR SALE OF LAND—WHEN REMEDY REFUSED—TIME AS ESSENCE.

In an action for specific enforcement of an agreement for the sale of land, courts of equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise jurisdiction which enables them to decree specific performance in cases where justice requires it, even though liberal terms of stipulations as to time have not been observed; but they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain, unless the parties have expressly or by implication waived such provision.

[*Kilmer* v. *B.C. Orchard Lands Co.* 10 D.L.R. 172, [1913] A.C. 319, distinguished.]

2. FORFEITURE (§ I—4)—OF PAYMENTS UNDER LAND CONTRACT ON DEFAULT—PENALTY—RELIEF AGAINST.

A provision in a contract for the sale of land, that in case the purchaser should make default in any of the payments the vendor shall be at liberty to cancel the agreement and to retain any payments made on account of it by way of liquidated damages, and to retain all improvements made on the premises, is in the nature of a penalty, against which the court will grant relief on proper terms.

[*Drinkle* v. *Steedman*, 14 D.L.R. 835, 7 S.L.R. 20, reversed.]

Statement

APPEAL from judgment of Supreme Court of Saskatchewan, *sub. nom Drinkle* v. *Steedman*, 14 D.L.R. 835, 7 S.L.R. 20.

The judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—This is an appeal from the Supreme Court of Saskatchewan reversing the judgment of Newlands, J., who had dismissed an action for specific performance. The facts were shortly these: James Campbell White agreed by writing, dated December 9, 1909, to sell 160 acres of land in the province to one Loveridge for $16,000, of which $1,000 were paid on signing the agreement, and the balance was payable in annual instalments on December 1, in each year. Loveridge entered into the agreement on behalf of the respondent John C. Drinkle, who, along with one Hair, was the real purchaser. In January, 1910, the interest of Hair, under the agreement, was acquired by the respondent W. R. Drinkle, and on January 24, 1910, Loveridge assigned the agreement to the respondents. Just before this date White died intestate. On April 18, 1910, letters of administration to his estate were granted to Steedman, the appellant, in the Province of Ontario, and on May 25, 1911, the grant was re-sealed in the Province of Saskatchewan. On

July 22, 1910, the appellant, as administrator, purported to approve the assignment.

The material provisions of the agreement, in addition to those already stated, were that the instalments of purchase money and interest thereon were payable at Hamilton, in the Province of Ontario; that the purchaser would cultivate the land in manner specified, and would pay the instalments as they fell due on the days mentioned. It was further provided, that on any default the whole of the principal and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined, at the option of the vendor. On payment of the sums of money mentioned, with interest, the vendor was to convey to the purchaser, who was to have possession on the execution of the agreement, the purchaser holding the premises as tenant to the vendor at a yearly rent equivalent to and applicable in satisfaction of the instalments.

It was further agreed that in case the purchaser should make default in any of the payments to be made, the vendor should be at liberty, without notice, to cancel the agreement and declare it void, and to retain any payments made on account of it as and by way of liquidated damages, and to retain all improvements made on the premises, or else to proceed to another sale, any deficiency in price, with costs, charges, and expenses to be borne by the purchaser. In case the vendor thought fit to declare the contract void under these provisions, he might make a declaration by notice to the purchaser, addressed to a post office mentioned. It was also provided that time was to be considered as of the essence of the agreement. No assignment was to be valid unless approved by the vendor or his agent.

The first deferred instalment, falling due on December 1, 1910, was not paid. The appellant thereupon, by his solicitors, gave notice cancelling the agreement. The respondent, W. R. Drinkle, thereupon, on December 21, tendered the amount due, but the appellant declined to receive it, and repeated this refusal, whereupon another and formal tender was made a few days later. The respondents then brought the action in which this appeal arises, claiming specific performance, and in the

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alternative relief from forfeiture under the terms of the agreement. Newlands, J., thought that the appellant was entitled, under the terms of the agreement providing that time should be of its essence, to cancel it on the default which had been made. He was willing to relieve the respondents from the forfeiture of the amount paid under the agreement. The respondents, however, did not accept this offer, and appealed. The Supreme Court held that the case was governed by the decision of this Board in *Kilmer* v. *B.C. Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, in which it was held on a somewhat similar agreement that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for a penalty and should be relieved against. In that case, under the circumstances, specific performance was also granted, notwithstanding a provision that time was to be of the essence. The Supreme Court followed what it believed to have been laid down by this Board, and decreed specific performance in addition to relief from forfeiture.

As to the relief from forfeiture, their Lordships think that the Supreme Court were right in holding, for the reasons assigned in the former decision of this Board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court were wrong in reversing Newlands, J.'s judgment. Courts of equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach.

In the case referred to this appears to have been what happened. For *Kilmer* v. *British Columbia Orchard Lands Co.*, *supra*, was an appeal in which the facts were that the company

had sold land for a price to be paid in instalments at specified dates, with a clause of forfeiture, in default of punctual payment, both of all rights under the agreement and of all payments already made. Time was, as in the present case, declared to be of the essence of the agreement. Default in punctual payment having occurred, the company claimed a declaration that the agreement was at an end, and for their strict rights under its terms. Kilmer, who was the purchaser, counterclaimed for specific performance. This Board held that, as regards the company's claim, the stipulation for forfeiture on which it was founded was in the nature of a penalty, against which relief ought to be granted on terms.

So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion, so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board, it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counterclaimed.

In the present case there has been no such agreement to extend time, nor anything that amounts to waiver of the right to treat time as of the essence. While, therefore, the Court below was, in the present case, right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement, their Lordships are of opinion that there was no justification for decreeing specific performance. They think that the respondents should, even at this late stage, be relieved from forfeiture of the sums paid by them under the

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agreement as proposed by the learned Judge who tried the case. For this purpose the respondents should have liberty to apply to the Court of first instance. For the rest, the judgment of the Court of Appeal should be reversed, and the claim for specific performance dismissed, the appellant to have his costs here and in the Courts below. Their Lordships will humbly advise His Majesty accordingly. *Appeal allowed.*

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S. C.

REX v. STUBBS.

Alberta Supreme Court, Harvey, C.J., and Scott, Beck, and Walsh, JJ. June 15, 1915.

1. GAMING (§ I—6)—GUM-VENDING MACHINE—PREMIUMS INDICATED BEFORE EACH PLAY—CHANCE—CR. CODE SECS. 228, 986.

A person does not keep a common gaming house under Cr. Code secs. 228 and 986, because of the maintenance of a chewing-gum vending machine with a varying premium feature automatically operated in connection therewith whereby the exact result of the next operation of the machine is indicated immediately following its last operation; the fact that the inducement is thereby held out that in some future play of the machine the operator may receive something more than an adequate return for his money, does not introduce the element of chance essential to constitute the crime.

[*Rex* v. *Stubbs*, 21 D.L.R. 541, reversed; *R.* v. *Langlois*, 13 Can. Cr. Cas. 43, referred to.]

Statement

APPEAL from the judgment of Stuart, J., *R.* v. *Stubbs*, 21 D.L.R. 541, 24 Can. Cr. Cas. 60.

F. E. Eaton, for defendant, appellant.

F. W. Griffiths, for the Attorney-General.

J. T. Shaw, for the magistrate.

Harvey, C.J. (dissenting)

HARVEY, C.J. (dissenting):—The charge in this case is of keeping a common gaming house, laid under sec. 228. By sec. 986, the presence on the premises of any "means of contrivance for unlawful gaming" is *primâ facie* evidence of guilt. The only question, therefore, for consideration is whether the machine in question is such a contrivance.

There are numerous authorities, some of which are mentioned by my brother SCOTT, deciding that slot machines of the kinds there in question are such contrivances. Two Canadian authorities, to which my brother SCOTT has also referred, held that machines, apparently the same as the one here, are not. These are decisions by a junior County Court Judge of Manitoba and a Judge acting as a justice of the peace holding a preliminary inquiry in Quebec. Against these authorities we have the opinions of the

police magistrate of the city of Calgary, who made the conviction in this case, and that of my brother STUART, upholding him. So that, as far as the weight of authority is concerned, up to the present the appellant can hardly be said to have anything in his favour.

As far as the reasons are concerned, those of the magistrate and my brother STUART are the only ones that appeal to me with any force as far as the evidence in this case is concerned, and the single point to be determined on the motion to quash, and I agree with them in thinking that this machine is a contrivance for gaming.

It is in evidence that very little of the gum that comes from the machine is taken by the operator, but that on the contrary nearly all of it is taken back into the machine, which is constructed so as to accomplish this result. As each stick of gum is charged against the machine at one cent, it follows that apart from the trade checks which come from the machine the value of what it returns for a five-cent piece is negligible, yet that is the only certain return. As most operators do not take the gum, it is evident that they are not paying their five cents for the gum. As the trade checks when put in the machine will give no return of gum, it is also clear that those who put in a check worth five cents in trade are not buying gum. I think the magistrate was quite right in saying that if there were nothing more involved than putting in five cents and taking out what the indicator shews you will receive there would be no game played any more than in obtaining a postage stamp from an automatic vending machine. It seems absolutely clear to me that what the operator in nine cases out of ten spends his five cent piece and in all cases spends his five cent trade check for is the chance of some trade checks in the next operation of the machine, and that is where the chance is. I do not see that the game can be said to be confined to a single operation of the machine any more than a game of poker could be said to be confined to one draw of the cards. If no man were permitted to operate the machine twice in succession it would be the case so long as there could be no collusion between him and another to operate for each other, but also all incentive to operate the machine would thereby be gone. As it is, with the privilege of operating the machine more than once, the operator's game is to put in nickels or checks for the purpose of getting back

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something more valuable, and that is not gum. Having control of the machine and thereby the right of the next operation, there is a chance in a single throw, not a chance of what will be discharged from the machine, but a chance of what may be shewn on the indicator as what the operator will receive in the next operation. In that is the chance, and that is the game he is playing. I would dismiss the appeal with costs.

SCOTT, J.:—This is an appeal from the judgment of STUART, J., dismissing the application of the defendant to quash a conviction made by Gilbert E. Sanders, a police magistrate in and for the city of Calgary, on the sixth day of February, 1915, whereby the defendant was convicted "for that he, the said Ray E. Stubbs, of Calgary, on the 19th day of January, A.D. 1915, at Calgary aforesaid, did unlawfully keep and maintain a disorderly house, to wit, a common gaming house, by keeping and maintaining for gain certain premises situate and being at No. 124, 8th Avenue West, Calgary, to which persons did then and there resort for the purpose of playing at a game of chance contrary to sec. 228 of the Criminal Code," and was adjudged for his said offence to forfeit and pay the sum of $25 and the further sum of $5.25 for costs.

The premises referred to in the conviction were, at the time the offence charged was committed, occupied as a cigar store and pool room known as Hoad's Cigar Store, carried on by one R. J. Hoad and his partner or partners, the names of which were not disclosed. The defendant appears to have been in charge of the premises.

The only evidence that the premises were kept as a gaming house was that there were kept and operated therein three slot machines which were constructed and used ostensibly for the purpose of vending chewing gum. The operation of each machine may be described as follows:—

Upon the operator depositing an American five-cent nickel coin in an aperture on the face of the machine and pulling a lever thereon a five-cent package of chewing gum will be exposed, which he will be entitled to appropriate up to the time of the next operation of the machine, at which time it disappears. The pulling of the lever also caused the rapid revolution of three discs placed side by side in the machine, upon the outer edge of which certain characters appear, and, when the discs ceased to revolve,

a combination of these characters on the three discs will appear at a certain point thereon. Upon certain combinations appearing at that point a number of metal trade checks will be discharged into a cup in the face of the machine, which checks can be removed by the operator and exchanged by him at the value of five cents each for goods in the premises where the machine is operated; or they may be played into the machine in lieu of nickels, but, if so played, the operation would not result in the discharge of any chewing gum, and the only object in playing them will be to obtain the proceeds of the next following operation or to ascertain the result of some future operation. The number of checks discharged varies with the different combinations of characters, the number varying from two to twelve. The result of many of the possible combinations would be that no trade checks would be discharged, and these probably form the greater proportion of the whole.

These machines, however, differ from all the slot machines and devices which have been held by the Courts to be games of chance in one important particular, *viz.*, that they plainly inform the persons proposing to operate them, before depositing their nickels or trade checks, what the result of the operation will be, that is, whether they will receive a package of chewing gum alone, or, in addition thereto, a certain number of trade checks, that information being given by a notice appearing on the face of the machines.

It will thus be seen that, as the operator is informed before playing his money or trade checks into the machine what the result of the operation will be, the element of chance is entirely removed. In that respect it differs from the slot machines which were in question in *Fielding* v. *Turner* (1903), 1 K.B. 867, 72 L.J.K.B. 542, 20 Cox C.C. 531, 89 L.T. 273, 19 T.L.R. 404, 67 J.P. 252, and in *Thompson* v. *Mason*, 90 L.T. 649, 20 Cox C.C. 641, 20 T.L.R. 298, 68 J.P. 270, where that element was involved in each operation. Of the machines the operation and effect of which have received judicial consideration that known as the "Yale Wonder Clock" bears the nearest resemblance to those now in question. Its operation is described in the judgment of the New York Court of Appeal in *Re Calliman*, 20 Am. & Eng. Annotated Cases 134, and it was there held to be a game of chance, but in that machine also the element of chance was involved, as, although the operator was certain to receive one cigar for each

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five cents played into the machine, he had also the chance of obtaining either two or three. I quote the following extract from the judgment in that case:—

"The chief element of gambling is the chance or uncertainty of the hazard. The chance may be in winning at all or the amount to be won or lost. In using the present machine we may assume that the player cannot lose. By far the greater majority of the checks called in trade for the precise sum deposited in the slot. If every ticket represented five cents the machine would not be patronized. The bait or inducement is that the player may get one of the checks for a sum in excess of the nickel he ventures, and that is the vice of the scheme. If he wins more than he pays the proprietor must lose on that discharge of the ticket. To constitute gambling it is not important who may be the loser . . . the inventor of the present machine has attempted to obviate the criticism to which other slot machines have been subjected by cunningly returning to the player operating the machine a check or ticket which secures to him in cigars or liquor the amount of his stake. Like most endeavours to adhere to the letter of the law while violating its spirit, he cannot succeed."

Similar machines to those now in question, or machines the operation of which has the same effect in that they announce to the operator before he plays his money into them what he will receive in return for it, have been the subject of judicial consideration in *R.* v. *Langlois*, 13 Can. Cr. Cas. 43, and *R.* v. *O'Connor* (unreported judgment of Dawson, J., Winnipeg C.C.), and in both these cases they have been held not to be games of chance.

While I am strongly inclined to the view that the machines in question are not designed or used merely for the purpose of vending chewing gum, and that they are also intended as an incentive and a lure to induce persons to continue to operate them with hope that upon some future operation they may receive in return something more than a package of chewing gum, I am nevertheless of opinion that their operation does not constitute a game of chance, but, on the contrary, is a game the result of which is an absolute certainty. Each operation of the machine is, in itself, a game, and the fact that the inducement is held out that in some future game the operator may receive something more than an adequate return for his money does not introduce

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the element of chance into any game which may be played upon the machine, and, therefore, while it may be open to question whether the machines adhere to the spirit of the law, they do not violate its letter, and, this being a criminal charge, the latter question is the only one to be considered: Blackstone, vol. 1, p. 92. See Beal's Cardinal Rules of Interpretation, 2nd ed., p. 444 *et seq.*, and the authorities there cited.

Scott, J.

I would allow the appeal with costs, and quash the conviction.

Beck, J.

BECK and WALSH, JJ., concurred with SCOTT, J.

Walsh, J.

Appeal allowed.

[NOTE.—The Appellate Division of Ontario refused to follow this decision in *R.* v. *O'Meara* (34 O.L.R. 467), 25 D.L.R. *infra*.]

DOUGAN v. The **AUER INCANDESCENT LIGHT MAN. CO.**

QUE.

K. B.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll and Pelletier, JJ. April 24, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—DEFECTIVE CEILING—INEXCUSABLE FAULT.

The failure to remove a defective part of a ceiling deemed not dangerous while repairing it, though constituting negligence, does not amount to inexcusable fault of the employer under the Workmen's Compensation Act, art. 7325, R.S.Q., 1909, as rendering the employer liable to an increase of the amount of compensation for injuries to an employee resulting from a fall of the plaster.

Statement

APPEAL from judgment of Dunlop, J.

J. M. Ferguson, K.C., for appellant.

Atwater, Duclos & Bond, for respondent.

The judgment of the Court was delivered by

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J.:—This is a labour accident case. The only question arising is as to whether the accident was caused by the inexcusable fault of the respondent company.

The Workmen's Compensation Act fixes the amount of indemnity which is due to the victim. In the case of absolute and permanent incapacity, that indemnity consists of an annuity of 50 per cent. of the annual salary of the victim. (R.S. 1909, art. 7322).

In the present case, the appellant was earning a salary of $5.50 a week. The Court of first instance has decided that she had been struck with an absolute and permanent incapacity and has consequently granted her an annuity equal to one-half that salary, *i.e.*, $143 a year.

Art. 7325 of the Act says that the tribunal may decrease the

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indemnity if the accident is due to the inexcusable fault of the employee or increase it if it is due to the inexcusable fault of the employer.

The appellant complains that the accident of which she was the victim is due to the inexcusable fault of the respondent and that the Court of first instance should have increased the indemnity granted by law. She asks that such indemnity be fixed at $5,000.

I have examined the evidence very carefully, reading it over twice in its entirety, and it is impossible for me to come to the conclusion that there was an inexcusable fault on the part of respondent. No doubt, there has been, on his part, some negligence constituting a fault and which would have given to the appellant a recourse against the respondent, even without the Workmen's Compensation Act. But that negligence does not constitute an inexcusable fault. By virtue of the common law, there is responsibility even in the case of a light fault; but this rule does not apply in the case of accidents under the Act. The Act grants a remedy to the employees against the employer, even in the absence of fault being proved; but, as a compensation, the indemnity is fixed at an amount lower than the real damage suffered. It is only in the case of an inexcusable fault that the amount of that indemnity can be increased. If the doctrine was necessarily that any fault of the employer entitles the victim to an increase in the indemnity, the law would be unjust to the employer. He would be responsible for a reduced indemnity in the case of absence of fault on his part, and to the whole indemnity in the case of fault. This certainly is not what the legislature intends. The Act is a compromise; that is, if the indemnity falls on the employer in almost every case it does not amount to the total of the prejudice caused, and therein lies the compensation granted to him by the Act for the responsibility imposed upon him, even when there is no proof of fault on his part.

An inexcusable fault is a grievous fault, I should say almost a voluntary one. The employer must, knowing the danger, refuse or neglect to do anything whatever to avoid it.

Sachet (Traité sur les accidents du travail, vol. 2), tells us

that an inexcusable fault implies on behalf of the employer: first, the will to do or to omit doing a thing; secondly, the knowledge of the danger which might result from the action or the omission; thirdly, the absence of any justifying or explanatory cause.

Here, the accident happened under the following circumstances:—

The appellant was washing her hands in a basin, when a piece of plaster left the ceiling and struck her head.

It is proved that a few months before the day of the accident the respondent company had had the ceiling of the hall tested, and had caused to be removed every part that was not solid. Here is what is told us by Sherman Granger, the secretary-treasurer of the company: "I had our store man" (see p. 190), etc.

A part had not been removed. It is exactly the part that fell from the ceiling on the occasion in question. That part was above a lavatory which had a ceiling and was at the side of the basin where the appellant was at the time of the accident. It was thought unnecessary to remove that part of the ceiling, in the belief that even if it did fall, the plaster or mortar would remain on the ceiling of the lavatory. Unfortunately the plaster has rebounded and a piece of about two inches square struck the appellant.

In these circumstances I find it is true that there has been some negligence or fault on the part of the company, but not a negligence sufficient to constitute an inexcusable fault. There has been no refusal to act on the part of the company. The only thing is that the repairs were not sufficient and more was not done because they thought that any threatening danger had been removed.

That was the decision of the Court of first instance, and I would not feel justified in reversing the judgment rendered by it. This is a question of fact with which we must not interfere except in the case of an evident and manifest error.

I am, therefore, of opinion that the judgment should be confirmed with costs in favour of the respondent.

Judgment affirmed.

SASK.

S. C.

MONTREAL TRUST CO. v. BOGGS.

Saskatchewan Supreme Court, Lamont, J. July 23, 1915.

1. MORTGAGE (§ III—48)—TRANSFER OF MORTGAGED PREMISES—ASSUMPTION OF DEBT—GRANTEE'S LIABILITY TO MORTGAGEE.

Where a mortgagor sells the mortgaged premises and the purchaser assumes the mortgage, or retains in his possession an amount of purchase money equivalent thereto, the purchaser is compelled by sec. 63 of the Land Titles Act, ch. 41 (Sask.), to appropriate that money to the mortgage, just as formerly he was compelled in equity to hand it over to the mortgagor if the mortgagor was compelled to pay the mortgage.

2. MORTGAGE (§ III—45)—TRANSFER OF INTEREST IN MORTGAGED PREMISES —ASSUMPTION OF DEBT—IMPLIED COVENANT.

Sec. 63 of the Land Titles Act, ch. 41, (Sask.) which implies a covenant to pay the mortgage debt by a purchaser of the mortgaged premises has no application to the purchase of only an interest in the mortgaged premises.

[*Short* v. *Graham*, 7 W.L.R. 787, followed.]

Statement

ACTION for foreclosure of mortgage.

Munro, for plaintiff.

McLean, for defendants.

Lamont, J.

LAMONT, J.:—The facts of this case are practically undisputed.

By a mortgage dated December 5, 1911, the defendant Boggs, who was the registered owner of the east half of section 9-37-5, W. 3rd., mortgaged the same to the plaintiff company to secure the repayment of $150,000 loaned to him by it. In said mortgage Boggs covenanted to pay the said sum as follows: $30,000 on April 1, in each of the years 1913, 1914, 1915, 1916, and the balance on April 1, 1917, with interest at 7%. The mortgage also contained a clause that, in case the mortgagor made default in payment of principal or interest, the whole moneys secured by the mortgage should become due and payable.

Boggs transferred to the defendant Beresford an undivided five-fourteenth interest in the said lands, which transfer was registered, and Beresford thus became the registered owner of said interest. The instalment of principal and interest which fell due April 1, 1913, was not paid, and the plaintiff company brought this action to enforce payment thereof, and they ask for personal judgment against Boggs on his covenant to pay, and also against Beresford on the ground that, by sec. 63 of the Land Titles Act, there is an implied covenant between Beresford and the plaintiff company that he will pay the mortgage and interest. That section reads as follows:—

63. In every instrument transferring land for which a certificate of title has been granted subject to mortgage or incumbrance, there shall be implied a covenant by the transferee with the transferor, and so long as

such transferee shall remain the registered owner with the mortgagee or incumbrancee that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance at the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor.

Prior to this statutory provision, as was pointed out by Mr. Justice Stuart in *Short* v. *Graham*, 7 W.L.R. 787, a purchaser of mortgaged property was, in equity, held bound to indemnify the vendor against his personal liability to the mortgagee under the covenant to pay contained in the mortgage. This was because the purchaser assumed the mortgage and retained in his possession the amount of purchase money represented by it, and equity compelled him to appropriate such purchase money to the mortgage, or to hand it over to the mortgagor if he had to pay under his covenant. But it was always open to the purchaser to shew, by parol evidence or otherwise, that, on the facts of his particular case, no implication arose that he would indemnify the vendor: *Beatty* v. *Fitzsimmons*, 23 O.R. 245.

A presumption to indemnify would be rebutted where the purchaser paid the full purchase price to the vendor on the understanding that the vendor would have the mortgage discharged; also where he took title as transferee for the real purchaser.

It was only where the mortgage formed part of the purchase price of land that equity fastened upon the purchaser's conscience the obligation of indemnifying the vendor. Even when the purchaser was bound to make good the purchase money, the mortgagee could not sue him direct, as there was no privity of contract between them. But if the mortgagee obtained an assignment from the mortgagor of his right of indemnity, he could then sue the purchaser direct: *Maloney* v. *Campbell*, 28 Can. S.C.R. 228.

Sec. 63 of the Land Titles Act, as originally passed, did not contain the words "with the transferor and so long as such transferee shall remain the registered owner with the mortgagee or incumbrancee." These words were added by sec. 5 of ch. 20 of the statutes of 1909. The object of adding these words, in my opinion, was to give the mortgagee the right to proceed against the purchaser directly, and thus avoid the necessity of

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getting an assignment of his right of indemnity from the mortgagor, who might be dead or out of the country at the time the mortgagee desired to commence proceedings in respect of the mortgage. The statute was not, in my opinion, in any way intended to compel a transferee of mortgaged land to pay off the the mortgage where, apart from the statute, equity would not have compelled him to indemnify his vendor. A mortgagee, in advancing money upon a mortgage, looks for his security to the mortgaged land and the covenant of the mortgagor. The statute was not intended to increase that security, but, where the mortgagor has sold the mortgaged premises and the purchaser has assumed the mortgage, or retained in his possession an amount of purchase money equivalent thereto, he is now, by statute, compelled to appropriate that purchase money to the mortgage; just as formerly he was compelled, in equity, to hand it over to the mortgagor if the mortgagor was compelled to pay the mortgagee.

The question then arises: Has the section any application where the purchaser acquires only a portion of the mortgagor's interest in the mortgaged premises? I agree with the conclusion reached by Mr. Justice Stuart in *Short* v. *Graham*, *supra*, where he says:—

> I am very strongly of opinion that the application of the statute should therefore be restricted entirely to the case where there has been a real purchase by the transferee and a complete parting with all this interest on the part of the transferor.

As the covenant implied is that the transferee will pay the principal money and interest secured by the mortgage, it would seem to clearly contemplate being applied only where the purchaser would have, prior to the statute, been liable in equity to indemnify the vendor for the whole amount. This he would not have been called upon to do on the purchase of an interest merely.

As against the defendant Beresford, therefore, the action will be dismissed with costs. As against the other defendants the plaintiff company is entitled to succeed upon proof that such defendants are not within the protection of the Order in Council of October 21, 1914, relating to volunteers and reservists.

Judgment accordingly.

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Annotation

Annotation—Mortgage—Assumption of debt upon a transfer of the mortgaged premises.

A collection of the authorities on the equitable rights on sale subject to mortgage, and the assumption of the mortgage debt upon a transfer of the mortgaged premises, is contained in the annotation to the case of *Ross* v. *Schmitz*, 14 D.L.R. 648, at 652.

At common law, when property was sold subject to mortgage, the purchaser was held in equity bound to indemnify the vendor against his personal liability to the mortgagee under the covenant to pay contained in the mortgage. Hence, until the passage of the statutes enabling the mortgagee to proceed directly against the transferee of the mortgaged property, unless the mortgagee was fortunate enough to be able to obtain an assignment of the vendor's equitable right of indemnity, he could not sue the purchaser for the money due on the mortgage. *Short* v. *Graham* (Alta.), 7 W.L.R. at 790.

The application of the statute is restricted entirely to the case where there has been a *real* purchase by the transferee and a complete parting with all his interest on the part of the transferor, and not to a conveyance intended by way of security although absolute in form: *Short* v. *Graham*, *supra*.

A similar view was taken in the recent Ontario case of *Campbell* v. *Douglas*, *infra*, p. 436, that the equitable obligation of the purchaser to indemnify the vendor when the amount of the mortgage is deducted from the purchase price arises only when the purchaser is actually one in fact and not when he is the mere nominee or agent of another. Furthermore, parol evidence is admissible in such case, where the deed fails to set out with precision, to explain the full extent and nature of the transaction.

In order to entitle the mortgagee to a personal judgment against the transferee of the land subject to the mortgage, the statement of claim must expressly allege that the transferee is liable by virtue of the implied statutory covenant under sec. 63 of the Land Titles Act (Sask.). He is entitled to be distinctly informed by what authority he is charged with personal liability: *Colonial Investment* v. *Foisie* (Sask.), 19 W.L.R. 748.

But such judgment is recoverable where the statement of claim sufficiently sets forth all facts necessary to entitle the plaintiff to judgment, and the prayer for relief distinctly states that the relief against the defendant is sought under the implied covenant contained in the Land Titles Act: *Assiniboia Land Co.* v. *Acres*, *infra*, p. 439.

The implied covenant to pay the mortgage debt takes effect notwithstanding that the mortgage or incumbrance is not noted upon the transfer; and the obligation thereunder is assignable by the implied covenantee to the original mortgagor: *Glenn* v. *Scott*, 2 Terr. L.R. 339.

Where land is conveyed subject to a mortgage, and the grantee assumes and covenants to pay and to indemnify the grantor against the mortgage, the grantor, if sued upon his covenant in the mortgage, is entitled, in third party proceedings against the grantee, to immediate judgment and execution for the amount of the judgment obtained against him by the mortgagee: *McMurtry* v. *Leushner* (Ont.), 3 D.L.R. 549.

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Annotation

Annotation (*continued*)—**Mortgage—Assumption of debt upon a transfer of the mortgaged premises.**

Under secs. 114 and 126 of the Real Property Act, R.S.M. 1902, ch. 148, as they stood prior to the amendments of the Act 1 Geo. V. ch. 49, a mortgagee, even after foreclosure under the Act, may, if he still retains the property, sue the mortgagor on his covenant for payment; and, therefore, in such a case, a mortgagor who has transferred the property may call upon his purchaser to pay the mortgage money under the implied covenant to indemnify him under sec. 89 of the Act. And payment by the mortgagor in such case is not a condition precedent to his right of action on the purchaser's obligation to indemnify. However, protection may be afforded to the purchaser by payment into Court for the proper application of the money: *Noble* v. *Campbell*, 21 Man. L.R. 597.

It was also held, that in the absence of anything to the contrary in the agreement of sale, no liability is imposed upon a purchaser who assumes the payment of a mortgage upon the land, for interest accruing on the assumed mortgage prior to the time fixed for the completion of the deferred payments to the vendor: *Miner* v. *Hinch*, 15 D.L.R. 1.

A mortgagor who is compelled to pay a mortgage debt after its assumption by an assignee of the equity of the redemption, either by express agreement or by virtue of statutory liability, is entitled to an assignment of the mortgage: *Ross* v. *Schmitz*, 14 D.L.R. 648, [Annotated].

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CAMPBELL v. DOUGLAS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. November 9, 1915.

1. EVIDENCE (§ VI G—553)—CONSIDERATION OF DEED—EXCHANGE OF LANDS—ASSUMPTION OF MORTGAGES—ADMISSIBILITY OF PAROL EVIDENCE.

A deed of conveyance setting forth the consideration as "an exchange of lands and one dollar," subject to certain mortgages, "the assumption of which is part of the consideration herein," without further description of the incumbrances in the habendum, and no express covenant assuming the payment of them, is not a case of such precise expression of consideration as would preclude the admission of parol evidence to explain the full extent and nature of the transaction.

[*Mills* v. *United, etc, Bank*, [1912] 1 Ch. 231; *Rex* v. *Inhabitants*, 2 B. & Ad. 616, referred to.]

2. MORTGAGE (§ III—47)—TRANSFER OF MORTGAGED PREMISES—ASSUMPTION OF DEBT—GRANTEE'S LIABILITY TO GRANTOR.

The equitable obligation of the purchaser to indemnify the vendor when the amount of the mortgage is deducted from the purchase price, and is in that sense retained by the purchaser, arises only when the purchaser is actually one in fact, and not when he is the mere nominee or agent of another.

[*Corby* v. *Gray*, 15 O.R. 1; *Walker* v. *Dickson*, 20 App. R. (Ont.) 96, followed; *Small* v. *Thompson*, 28 Can. S.C.R. 219, distinguished.]

Statement

APPEAL from the judgment of Lennox, J., in favour of plaintiff in an action to recover $4,911.74 and interest as damages for the breach by the defendant of a covenant or obligation to pay off and discharge the plaintiff's liability under certain mort-

gages, as part of the consideration moving from the defendant upon an exchange of properties between the plaintiff and defendant.

W. D. Hogg, K.C., for appellant.

J. R. Osborne, for plaintiff, respondent.

HODGINS, J.A.:—If in this action regard was had only to the form of the deed between the parties, the judgment would have been unimpeachable. But the deed in question is not the whole transaction. Evidence was admitted, and properly so, to shew the circumstances out of which the giving of the deed arose, and effect should be given to it: *Mills* v. *United Counties Bank Limited*, [1912] 1 Ch. 231. The date of the deed is the 15th January, 1913, and the consideration stated in it is "an exchange of lands and one dollar." It conveys lands on Lisgar street in Ottawa, subject to certain mortgages, the description of which is followed by the words, "the assumption of which mortgages is part of the consideration herein." The habendum does not mention these incumbrances, and there is no express covenant by the appellant to assume and pay them, nor did he sign the deed. The assumption of these mortgages as "part of the consideration" evidently refers to the exchange of lands, which is the only portion of the named consideration set forth, in which the assumption of the mortgages could be comprehended. This is not a case of such precise expression of a consideration as would preclude the admission of parol evidence to explain the full extent and nature thereof arising out of the transaction called "an exchange of lands:" Norton on Deeds, 2nd ed., pp. 201, 205; *Rex* v. *Inhabitants of Llangunnor* (1831), 2 B. & Ad. 616.

When the evidence is considered, it is clear that the deed was made to the appellant, not as a purchaser, but as the nominee of the purchaser, and that the mortgages were, by virtue of the contract between Power, the real owner of the lands in question, and the respondent, to be assumed by Power as part of the consideration for the exchange of lands owned by the respondent. This satisfies the terms of the deed and is not contradictory of it. There is no covenant by the appellant to pay these mortgages, nor to indemnify the respondent against them, but the respondent stands upon the deed as containing a contract with the appellant that the latter would "assume, pay, and discharge" the said

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mortgages. This is not the true effect of the agreement referred to nor of the deed in question as explained thereby.

Unless there be an express agreement, any liability would, *primâ facie*, be upon an equitable obligation which arises from the relationship of vendor and purchaser—a position which is not established here.

The cases of *Corby* v. *Gray*, 15 O.R. 1, and *Walker* v. *Dickson*, 20 A.R. 96, are not in real conflict with *Small* v. *Thompson*, 28 S.C.R. 219. In that case there was an express covenant to pay the mortgage and to indemnify, and it was recited as part of the consideration that Mrs. Thompson was to assume the obligation to pay the mortgage-debt. She did not execute the deed, but took possession of the lands and enjoyed the profits therefrom until the mortgagees entered. The Court held that Mrs. Thompson, with knowledge, adopted the deed, and, in assenting to take under it, bound herself by the undertakings expressed in it, to be performed by her. The decision, in my judgment, means that Mrs. Thompson was in fact the purchaser, and, being so, she, though not signing the deed, adopted it, and thereby became liable upon the covenant contained therein to the extent of her separate estate. Here, before action, the appellant treated the conveyance to him, not as vesting the estate in him for his own benefit, but as vesting it in him as mortgagee, subject to Power's interest. He never entered into possession, except as agent for Power, and in his defence he disclaims any interest as owner, a fact which removes from this case an element deemed decisive in *Small* v. *Thompson*, where the pleadings were viewed as adopting the conveyance of the property to the defendant.

While, in this Province, the equitable obligation of the purchaser to indemnify the vendor when the amount of the mortgage is deducted from the purchase-price, and is in that sense retained by the purchaser, is clearly recognised, it is well settled by the cases first cited that that obligation arises only when the purchaser is actually one in fact. It is of course true that in some cases the frame of the deed may be such as to preclude the reception of evidence to contradict the consideration as expressed therein, but this is not, in my opinion, such a case.

Upon the argument it was urged that the contract between Power and the appellant was a conditional sale, and not a mortgage, and some cases were cited upon that point.

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These depend entirely upon the various transactions therein set out, one important element being a dealing by the conditional purchaser with the property and the possession thereof such as precluded the Court from holding that the relation of mortgagor and mortgagee ever subsisted. Here the genesis of the dealing was an advance of money, so designated, and possession was not proved to have been taken by the appellant. He collected the rents and profits after the 1st October, 1914, but only at Power's request, and applied them upon moneys due by Power to a company of which the appellant was manager. The forfeiture of Power's interest in the property in question, if the transaction was in reality a mortgage, would not be effective. The appellant expressly disclaims taking advantage of it, and on the 1st October, 1913, a re-arrangement of the indebtedness covered by the original agreement was made, which recognised the right of Power to one of the properties affected by the so-called forfeiture.

I think the appeal should be allowed and the judgment reversed with costs throughout.

MEREDITH, C.J.O., and GARROW and MACLAREN, JJ.A., concurred.

Meredith, C.J.O.
Garrow, J.A.
Maclaren, J.A.

MAGEE, J.A., dissented. *Appeal allowed.*

Magee, J.A. (dissenting)

ASSINIBOIA LAND CO. v. ACRES.

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Saskatchewan Supreme Court, Elwood, J. October 25, 1915.

1. FIXTURES (§ IV—22)—MACHINERY—RIGHTS OF LANDLORD AND MORTGAGEE.

An emulser in a boiler room, a cream separator, an ice chopper, fastened to the building by bolts imbedded in the cement floor, also a phase motor fastened by coach screws to a frame bracket, which is nailed to the wall, and the supports of the brackets embedded in the cement floor, are fixtures permanently annexed to the freehold and forming part thereof, and are not distrainable for rent as against the right of a mortgagee of the realty; but that does not apply to a vat used in connection with the same business which is not fastened to anything.

[*Hobson* v. *Gorringe*, 12 Rul. Cas. 217; *Stack* v. *Eaton*, 4 O.L.R. 335, 338; *Seeley* v. *Caldwell*, 18 O.L.R. 472, applied.]

2. MORTGAGE (§ III—18)—TRANSFER OF MORTGAGED PREMISES—IMPLIED COVENANT OF TRANSFEREE TO PAY MORTGAGE DEBT—PERSONAL JUDGMENT AGAINST.

A personal judgment may be properly recovered against the transferee of mortgaged premises, when the statement of claim sufficiently sets forth all facts necessary to entitle the plaintiff to such judgment, and the prayer for relief distinctly states that the relief against the defendant is sought under the implied covenant contained in the Land Titles Act (Sask.).

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Elwood, J.

ACTION for foreclosure of mortgage and for personal judgment.

H. V. Bigelow, K.C., for plaintiff.

T. J. Blain, for defendant.

ELWOOD, J.:—On June 10, 1913, the defendants Robert E. Stewart and William Herman Acres, who were then the registered owners of the land therein described, mortgaged to the Merchants Bank of Canada certain land for security of payment of certain money and interest. By a succession of assignments the mortgage became the property of the plaintiffs. Subsequent to the giving of the mortgage, the defendants Robert E. Stewart and Acres transferred the land mortgaged to the defendant Etheland Acres, and thereafter, until the assignment hereafter mentioned, occupied the land as tenants of the said Etheland Acres. Subsequently, the defendants Robert E. Stewart and William Herman Acres, who appear at some time to have become incorporated as a limited liability company, assigned their stock in the company to one McRae. This action is brought for judgment and foreclosure under the mortgage, including a personal judgment against the defendant Etheland Acres on the implied covenant contained in the Land Titles Act, and also asking for an injunction restraining the removal from the mortgaged premises of certain articles hereinafter referred to. A number of articles were mentioned in the statement of claim, but at the trial it was admitted that the contest is solely with respect to the following articles, namely, (1) one emulser in boiler room; (2) one 5 h.p. phase motor; (3) one Delaval cream separator, and vat; (4) one ice chopper. Another article, one Tyson ice-cream freezer, it was admitted the defendants had no claim on. All of the above are used in connection with the dairy and ice-cream business, which was carried on by the defendants Robert E. Stewart and Acres, and afterwards by McRae.

Article No. 1 is fastened to the building by bolts imbedded in the cement floor. The head of the bolt is bedded in the cement floor and the machine attached to it by a nut. Nos. 3 and 4 are fastened in the same way. No. 2 is fastened by coach screws to a frame bracket, which is nailed to a wall, and the

supports of the bracket are embedded in the cement floor. The vat, part of No. 3, was not fastened to anything. I have no information as to how it is constructed. Apparently it is on a rack, which is loose. No. 1 was placed in the building by McRae, and the balance of the machinery was placed there by R. E. Stewart and Acres. No. 4 was loose in the building and was afterwards fixed by McRae. The defendant Etheland Acres caused the various articles claimed to be distrained for rent. Apparently at the time of the distress the premises were vacant, and the articles distrained were never removed from the building, and so far as the evidence goes are all exactly as they were when being used in the building. It was contended that the defendant Etheland Acres is entitled to hold these various articles as against the mortgagee, by virtue of the distress. So far as the vat is concerned there is no evidence to shew whether it is part of the separator, whether it is connected with anything, or how it is used, and I am of opinion that it did not become part of the freehold, and therefore, is not covered by the mortgage on the land. So far as the items 2 and 3, with the exception of the vat, are concerned, those were affixed to the building by the owners of the land, and clearly, in my opinion, became part of the land. *Walmsley* v. *Milne*, 29 L.J.C.P. 97. No. 1, as stated above, was placed on the premises and affixed thereto by the tenant McRae. No. 4 was on the premises when he went there, but was affixed to the premises by McRae. It is contended that that article passed to him with the assignment of the stock of the limited liability company. Things which are annexed to the freehold are absolutely privileged at common law from seizure. See *Simpson* v. *Hartopp*, 1 Smith's Leading Cases, 11th ed., p. 437, and notes thereto. In the notes to the above case, at p. 442, the case of *Darby* v. *Harris*, 1 Q.B. 895, was cited as authority for the above proposition, and in the latter case it was held that fixtures, as kitchen ranges, stoves, coppers and grates, which a tenant may sever from the freehold and take away during his term, are not distrainable for rent. I am quite aware that in *Hellawell* v. *Eastwood*, 20 L.J. Ex. 154, it was held that certain cotton-spinning machines which were fixed by screws, some into a wooden floor and some into

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lead which had been poured in a melted state into holes in the stone for the purpose of receiving the screws, never became part of the freehold and were distrainable. In the note to *Simpson* v. *Hartopp*, on p. 443, while it is stated that the law laid down in *Hellawell* is correct, it is suggested that it was misapplied to the facts of that case; and in the case of *Haggert* v. *Town of Brampton*, 28 Can. S.C.R. 174, 181, I find the following in reference to the above case of *Hellawell* v. *Eastwood*:—

> In recent cases it is questioned whether the principles of law laid down in this case were correctly applied to the facts.
>
> See *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, 12 Rul. Cas. 217. *Stack* v. *Eaton*, 4 O.L.R. 335, 338:—
>
> I take it to be settled law: (1) that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land; (2) that articles affixed to the land, even slightly, are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels; (5) that even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to the right of the tenant.

And for these propositions the Chief Justice refers to the cases of *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; *Haggert* v. *Town of Brampton*, 28 Can. S.C.R. 174; *Bain* v. *Brand*, 1 App. Cas. 762-772; *Holland* v. *Hodgson*, L.R. 7 C.P. 328. In *Seeley* v. *Caldwell*, 18 O.L.R. 472, certain articles of machinery were leased by the plaintiff for one year to a manufacturing company and placed upon the company's premises. There was no agreement for purchase. Previous to this the company had mortgaged to the defendant their lands, including these premises, with all the machinery thereon or which should be brought thereon during the continuance of the mortgage. The plaintiff's articles of machinery were in some degree attached to the buildings, but could be detached at a trifling cost, and without doing substantial damage to the inheritance. It was held that the articles were so annexed to the freehold as *primâ facie* to constitute them as between the company and the defendant fixtures, and, the defendant not being a party to the agreement, between

the plaintiff and the company, that agreement, though it was merely one of hiring, and not the usual hire purchase agreement, afforded no evidence to alter the *primâ facie* character of the annexed property, and that the plaintiff was not entitled to the articles as against the defendant.

It seems to me that the result of all of the above cases is that articles 1 and 4, to use the language in *Hobson* v. *Gorringe*, *supra*, "became a part of the freehold, and that their personal character ceased when they were affixed to the freehold and could not be revived as long as they continued annexed to the freehold," that they were exempt from seizure, and that, at any rate as against the plaintiff, the defendant Etheland Acres cannot succeed in respect to them.

It was also contended that so far as the defendant Etheland Acres is concerned there could be no personal judgment against her; and the case of *Colonial* v. *Foisie*, 19 W.L.R. 748, was cited as an authority for that proposition. I am of the opinion that the statement of claim in the case at bar sets forth all facts necessary to entitle the plaintiff to judgment against the defendant Etheland Acres, and the prayer for relief distinctly states that relief against her is sought under the implied covenant contained in the Land Titles Act. In this respect the case at bar is distinguishable from *Colonial* v. *Foisie*, *supra*, and I am of opinion that the plaintiffs are entitled to judgment against the defendant Etheland Acres.

There will be a reference to the local registrar to ascertain the amount due under the mortgage in question, and judgment for the plaintiffs against the defendants for the amount so found due on such reference, together with costs. The defendants will have six months to redeem, and in default there will be the usual order for foreclosure; the plaintiffs to have immediate possession of the mortgaged premises and an injunction restraining the defendants or any or either of them, or any person claiming by, through or under them or either of them, from removing from the mortgaged premises the above-mentioned articles with the exception of the vat.

Judgment accordingly.

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REX v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., and Riddell, Latchford, and Kelly, JJ. March 9, 1915.

1. MUNICIPAL CORPORATIONS (§ II C 3—104)—NUISANCES—SMOKE REGULATION—RAILWAY ROUNDHOUSE.

The smoke stack of a locomotive engine is not a flue stack or chimney within clause 45 of sec. 400 of the Municipal Act, R.S.O. 1914, ch. 192, which empowers municipal councils to pass by-laws for smoke regulation; and a railway company is not liable to conviction under clause 45 for the discharge of smoke from its locomotives while in the roundhouse.

[*Rex* v. *C.P.R. Co.*, 23 Can. Cr. Cas. 487, affirmed on a different ground.]

Statement

APPEAL by the prosecution from the judgment of Middleton, J.

F. B. Proctor, for appellant.

I. F. Hellmuth, K.C., for defendant company.

The judgment of the Court was delivered by

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—Without expressing any opinion as to the reasons given by the learned Judge for his judgment in this case, so elaborately argued before us, we all think that the case falls to be disposed of on the construction of sec. 400, sub-sec. 45, of the Municipal Act, R.S.O. 1914, ch. 192, under which the council assumed to pass the by-law in question. Section 400 provides that "by-laws may be passed by the councils of urban municipalities. . . . 45. For requiring the owner, lessee, tenant, agent, manager or occupant of any premises in, or of a steam boiler in connection with which a fire is burning and every person who operates, uses or causes or permits to be used any furnace or fire, to prevent the emission to the atmosphere from such fire of opaque or dense smoke for a period of more than six minutes in any one hour, or at any other point than the opening to the atmosphere of the flue, stack or chimney."

We think that this sub-section does not apply to a locomotive engine; the opening to the atmosphere is from the top of the smoke-stack of the engine, which is not, in our opinion, a flue, stack or chimney, within the meaning of the section.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

HOLT TIMBER CO v. McCALLUM. IMP.

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Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Parker of Waddington, Lord Sumner, and Lord Parmoor. October 20, 1915.

1. APPEAL (§ VII L 3—485)—REVIEW OF FINDINGS OF COURT—ACCEPTANCE OF OFFER FOR DRIVING LOGS—STORM BOOMS.

The findings of a trial judge that an offer to drive logs from a certain point, and to deliver them from that point in storm booms at a smaller price, was only accepted as to the driving and not as to the storm booms, based on sufficient and relevant evidence to support his conclusion, will not be reviewed on appeal.

Statement

APPEAL from the Supreme Court of Ontario, Appellate Division.

The judgment of their Lordships was delivered by

Viscount Haldane, L.C.

VISCOUNT HALDANE, L.C.:—The appellants in this case are a timber company, who hold timber licenses from the Province of Ontario, in the District of Parry Sound, and the respondent is a lumberman, who, during the season of 1912 and 1913, carried out logging operations for the appellants.

The territory covered by the timber licenses is traversed by a river, known as the Maganetawan river, which flows into the Georgian Bay; and, in the spring of 1913, the appellants were making arrangements for the carriage down this river of the logs that had been cut in the previous winter. Two distinct processes were required for the purpose of completing the operations. The one consisted in putting the logs into the river and allowing them to be carried by the stream down to a point known as Byng Inlet Station, where the river is crossed by the C.P.R. bridge. The other is described as "putting the logs into storm booms," and this second operation would begin at a point below the railway bridge, where the first ceased.

It appears that in the early part of March, 1913, interviews took place in the woods between the representatives of the appellants and the respondent, at which there was discussion as to the terms upon which the respondent would carry out one or both of these processes, and they culminated in a final interview on or about March 21. There is no doubt that at these interviews the respondent offered to take the logs down to the Byng Inlet Station at the price of $1 for 1,000 cubic ft.; he also

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offered to put them into storm booms for a further sum of 25 cents per 1,000 ft. The first proposal was accepted by the appellants on either March 20 or 21, but the second was not.

The work proceeded under the bargain so made, and in the early part of June was still in progress. The appellants then called upon the respondent to perform the further branch of the work at the rate that had been mentioned, and this he declined to do. The contract work having been performed and the appellants, not having paid all the money due under the contract, the respondent sued them for the balance, and they set up in answer a counterclaim for damages for breach of an alleged contract to put the logs into storm booms at 25 cents per 1,000.

The whole question in this case is whether or not such a contract was made. Now, from beginning to end of the story, there is not a single scrap of writing to assist in clearing up the controversy. The determination of the dispute depends entirely upon what took place in the woods at the interviews which ended on March 20 or 21. This is essentially a question of fact, and if it has been properly determined by the Judge, who saw and heard the witnesses, it would be impossible to advise that his finding should be reviewed; if, on the other hand, the facts that he found were either facts not relevant and appropriate to the determination of the dispute, or facts that were unsupported by the evidence before him, the appellants would be entitled to have the decision questioned.

In their Lordships' view, however, the learned Judge's judgment, though it might have been expressed in clearer language, shews plainly that he placed before himself the right question for determination; and the shorthand notes of the evidence afford abundant proof that there was material to support the conclusion at which he arrived.

There are three possible views of the matter. The first is, that two proposals were put forward—the one to do the work down to Byng Inlet Station for $1 a 1,000; the other, to take them the whole distance for an extra 25 cents. The second, that the offer was to take the logs down to Byng Inlet Station for

$1 per 1,000, and, if requested, to take them on for a further 25 cents. The third, which is a variant of the second, that, as a consideration for the payment of $1 per 1,000 logs for the first part of the operation, an option was reserved to the appellants to require the respondent to do the last part of the work at the price named.

Now, the learned Judge states his view of the matter in the following words:—

I find from the evidence in this case that plaintiff offered to drive the logs of the defendants to the bridge over the Maganetawan river for the sum of $1 per 1,000 ft.; and, further, for twenty-five cents per 1,000 ft. to the storm booms further down the river. The first offer was accepted, and the driving done upon the terms of the contract.

This is a clear statement of the first of the three possible views of the situation above referred to. He then continues:—

The second offer, spoken of as an option, although I do not think it was more than an offer, was not accepted, and it was never a complete offer, as Mr. Holt in his evidence says if sorting was to be done defendant would allow an additional amount.

The latter branch of this sentence was unnecessary. It was sufficient to state that when the two independent proposals were put forward in March, one only was accepted, as this would, by implication, negative the other. The Judge then deliberately rejects the third hypothesis; and though he does not appear to have placed before himself the second of the three heads, this was unnecessary when he had found in favour of the first. That there was evidence to support the finding is clear. The respondent frequently referred to his proposal as an option. Their Lordships regard this merely as the misuse of a conventional phrase, and it was so regarded by the Judge who saw the witnesses. It was not an option in any sense, excepting that it was an offer which the appellants could have accepted or rejected when the bargain was made. Now the evidence in support of the decision of the Judge is ample, and to shew that this is so it is only necessary to refer to a few of the questions and answers. The following sentences are taken from the evidence of the respondent in cross-examination:—

84. When was that option given? A. It must have been about 10 days before they accepted the offer to drive—some time before.

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85. You gave them the option to have the logs driven from the bridge to the storm booms for 25 cents extra? A. Yes. They didn't accept.

86. You do not deny that the option was given? A. No. I gave them an option, but they didn't accept it. It was a verbal option.

The defendant's manager, Mr. Flanders, gave evidence to the same effect, as will be seen from questions 410 to 413, which are in these terms:—

410. Then I want your account of the making of this contract with McCallum. I understand that you and Mr. Holt had an interview with McCallum about the 20th of March; is that correct? A. Yes, there was an interview about the 20th of March, but prior to that I had an offer from McCallum to the Holt Timber Co., through me, to do this work.

411. Did McCallum come to you or did you go to him? A. He came to me. The matter came to a head on the 20th and 21st of March, when Mr. Holt was at Deer Lake, and at McCallum's camp in the woods.

412. What was said? A. McCallum was to go ahead with the driving of these logs to below the railway bridge at one dollar a thousand, with Holt Timber Co. having the option for him to deliver them in storm booms for 25 cents.

HIS HONOUR:—Was the option in writing? A. No, it was verbal. The option was in this way, that the delivered price was $1.25 in storm booms.

HIS HONOUR:—Was that said? A. Not in so many words.

413. What was said? A. The conversation was about as I have stated, it was the essence of it. Perhaps not the exact words.

There is undoubtedly plenty of evidence to support the view put forward by the appellants, but that evidence is definitely rejected by the learned Judge; and it becomes unnecessary to consider what the reasons were that led the respondent to refuse to renew in June the proposal that had not been accepted in March.

In their Lordships' view, no question of law arises for decision in this case at all; the proper facts have been selected and determined by the Judge who tried the case, and there is no reason to question his judgment. They will humbly advise His Majesty that the appeal be dismissed with costs.

Appeal dismissed.

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CASES REPORTED, VOL. XXV., PART 3.

CLOWES v. EDMONTON SCHOOL BOARD.

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Alberta Supreme Court, Harvey, C.J., and Scott, Stuart, Beck, and Simmons, JJ. November 6, 1915.

1. SCHOOLS (§ I C—16)—HEALTH REQUIREMENTS—VACCINATION — POWERS OF HEALTH BOARD.

A regulation by a Provincial Board of Health prohibiting, under the Public Health Act (Alta.), admittance of a pupil to any school unless he produces evidence of successful vaccination is, as respecting the mode of enforcement, in conflict with the Truancy Act providing for compulsory attendance, nor within the excusable exceptions enumerated therein, and, therefore, *ultra vires*.

MANDAMUS to compel admittance of child to school. Statement

A. M. Sinclair, for plaintiff.

H. H. Parlee, K.C., for defendants.

Frank Ford, K.C., for Board of Health.

HARVEY, C.J.:—After the most careful consideration, and with the utmost desire to uphold the regulation in question, I have been unable to satisfy myself that it is not in excess of the jurisdiction of the board of health. Harvey, C.J.

I find no difficulty on the ground of discrimination, for it seems to me a regulation applying to all school children, who, under our law, comprise all children of a certain age, with certain specified exceptions, is quite as free from a charge of special regulation as one which applies to all children of a certain age, and certainly more free from such a charge than a regulation which excepts persons having conscientious or other objections to vaccination.

I appreciate no difficulty either in considering the regulation as one primarily intended for the prevention of disease rather than one for the regulation of attendance at school as its form indicates, for since the time of Jenner it has been public and general knowledge that vaccination is recognized as a great preventive of smallpox—and the effect of the regulation undoubtedly is to compel every child of school age to become vaccinated upon pain of being deprived of his right of public education.

When we consider that for the last half of the 19th century, by the law of England, the parent or other custodian of every child was required to have such child vaccinated before it reached the age of 3 months without any exceptions except of a temporary character, and that was the law of England in 1870

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when the English law was introduced into this country, and therefore became the law of the North-West Territories, unless it could be held to be unsuitable to the conditions or otherwise inapplicable, it is impossible to suggest that the regulation in question is unreasonable, and I should have been glad to uphold it as being much less rigorous and imposing much less inconvenience and hardship than the English law which was enforced in England for half a century, or in some respects the present English law, for within recent years the law there has been modified by increasing the age to 6 months, and by making exceptions in the case of conscientious objections on the ground of health, if certain steps are taken before the child is 4 months old.

It may be that if this regulation is *ultra vires* thus leaving no law as to vaccination under the authority of the provincial legislature; then the law of England as it was in 1870 is the law of this province. I express no opinion upon that, however, because it was not raised in argument, and I have not considered it with the object of determining whether it is so.

The real difficulty that presents itself to me regarding this regulation, however, is that I find no way of reconciling it with the provisions of the Truancy Act. That Act provides that every child of school age, with certain specified exceptions, shall attend school—the regulation in terms provides that the child shall not attend school, unless on certain conditions—conditions not imposed by the Truancy Act.

The Provincial Board of Health is not given power to repeal or otherwise render ineffective any statutory provision, and I am unable to see that if this regulation is enforced it may not have that effect. I have no doubt that a regulation might be passed requiring every child before reaching school age and before attending school to be vaccinated, and I see no reason why he could not be required to produce the certificate of such vaccination when presenting himself at school, or why failure should not subject the parent or other guardian responsible to a prescribed penalty. It seems reasonable that, when such a simple method as the regulation proposes can be adopted to make the regulation effective, it should be adopted, but the answer appears to be that the method is to prohibit something which a statute

orders to be done, and which, therefore, would be beyond the power of anybody except the legislature itself.

Notwithstanding the Truancy Act, one would hesitate to say that a child of school age could not be refused admittance if he persistently misconducted himself in school, though that is not an exception recognized by the Truancy Act, and if it were, would put it in the power of any child himself, to render the Act ineffective, and it does not seem a great step to say that he may be refused admittance if he, or the person responsible for him, wilfully and persistently disobeys the law.

In *State* v. *Zimmerman*, 58 L.R.A. 78, the Supreme Court of Minnesota held, that in an emergency, a regulation similar to the one in question should be upheld, though there was a law compelling children to attend school. At p. 81, in the reasons for judgment, it is stated:—

> It is very true that the statutes of our State provide that admission to the public schools shall be free to all persons of a defined age and residence, and that every parent having control of any child of school age is expressly required to send such child to school, and that all teachers are required to receive them, and that, if any child of school age is denied admission or suspended or expelled without sufficient cause, the board or other officers may be fined. But all these statutory provisions must be construed in connection with, and subordinate to, the statutes on the subject of the preservation of the public health and the prevention of the spread of contagious diseases. The welfare of the many is superior to that of the few, and, as the regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the rights of any pupil to attend the public schools.

This reasoning seems to be wide enough to support the regulation in question here, though it was being applied only to an emergency regulation, and perhaps it has less force as applied to a general regulation. It does not, however, satisfy me that the regulation in question conflicting, as it does, with the provisions of the Truancy Act can be supported, and, though by no means free from doubt and not without hesitation, I have come to the conclusion that the regulation is *ultra vires*, and that, in consequence, the plaintiff is entitled to the relief he asks. The School Board should not, however, I think, be required to pay the costs of the action since they have simply acted in good faith upon a regulation which had not before been questioned.

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SCOTT, J., concurred with Beck, J.

STUART, J.:—This is an action wherein the plaintiff, who is a ratepayer of the city of Edmonton, claims a mandamus to compel the defendants to admit his son, Robert Gordon Clowes, a child 7 years of age, to attend a public school in the city. The defendant McKnight is the principal of the school which the child would ordinarily attend. There was no dispute of fact between the parties, and by arrangement, a motion was made to the Appellate Division that the order of mandamus issue. Our decision will, therefore, determine the result of the action.

The defence is, that the child had not been vaccinated, in compliance with sec. 68 of the regulations issued under the Public Health Act by the Provincial Board of Health constituted by that Act, which regulations were approved by the Lieutenant-Governor in Council on June 9, 1911, pursuant to sec. 8 of the Act.

Sec. 68 reads as follows:—

> On and after the first day of January, 1912, no pupil shall be admitted to any school unless and until he produces evidence of successful vaccination,

with a proviso for relief in case of hardship in rural districts. This regulation, it is contended by the defendants and denied by the plaintiffs is authorized by sec. 7 of the Public Health Act, which reads as follows:—

> The Provincial Board may, subject to the approval and with the consent of the Lieutenant-Governor in Council, make and issue such orders, rules and regulations as the said Board may deem necessary for the prevention, mitigation, and suppression of disease, and the Provincial Board may, with like consent and approval, make orders, rules and regulations as to the following matters and things. . . .
>
> 11. The vaccination of all children residing within the province.

The first enquiry which arises in my mind is, whether regulation 68 can properly be called a regulation as to "the vaccination of all children residing within the province," or whether it should not rather be looked upon as a regulation as to what pupils shall or shall not attend school. There is not a word in regulation 68 which positively requires all children residing in the province, or all such children of a certain age or class, to be vaccinated. It is true that by regulation 69, sub-sec. 2, it is required that,

the parent or guardian of any pupil who has been refused admittance to any school for non-compliance with regulation 68 shall cause said pupil to be vaccinated within 15 days after said refusal, and the parent or guardian who fails to comply with this regulation shall be guilty of an offence under these regulations.

But even this does not amount to a regulation that all children of a certain class shall be vaccinated, because the penalty may be escaped by simply failing to present the child at school, and the avoidance of any rejection for non-vaccination.

I am of opinion, therefore, that regulations 68 and 69 do not "provide for the vaccination of all children residing in the province, nor of any class of such children, and do not fall within the power given by section 11. There is nothing in either of them which, by itself, imposes a duty of vaccination, and it seems very clear to me that the meaning of sub-section 11 is that the Board may make orders declaring directly that children shall be vaccinated, and make regulations in regard thereto. Instead of doing this, the Board proceeded to make an order as to who should be allowed to attend a school; that is, in my opinion, a regulation as to the attendance at school, not a regulation "*providing for vaccination.*" This, of course, does not touch the question of the wider power given to make rules and regulations for the prevention, mitigation and suppression of disease, but I think it is not necessary to examine that part of the statute, because, in my view of the matter, it cannot in any case help the defendants.

It seems to me that, in spite of the possibilities for subtlety and ingenuity in considering this case, we really must, in the end, come back to the following plain propositions:—

A superior legislative authority (the provincial legislature), enacts a statute commanding a person to do a certain act. "A" (attend school), unless (b), (c), (d), (e), (f), (g), or (h) occur. A subordinate legislative authority (the Board of Health), with only delegated powers, enacts that a certain administrative authority (a school board or principal of a school), shall not permit that person to do the act "A," unless he previously has done the act "X" (submit to vaccination). There is here, quite obviously, a conflict of legislation, and if, as one would think,

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the subordinate delegated authority must yield before the superior authority—*cadit quæstio.*

It may be quite true that the administrative authority, the school board or principal of the school, notwithstanding the command that the person must do the act "A"—(attend school)—may, in the exercise of its power to enforce decency, cleanliness, and obedience to the reasonable rules of the school, refuse to permit the attendance until these conditions are complied with. The Truancy Act must, of course, be read subject to the implied condition that there is a disciplinary authority in the school board and the principal. But, in my view, this cannot properly be extended to include the right or power to expel, not on account of some presently existing deficiency, in decency, cleanliness or obedience, but on account of the absence of a mere precautionary act, which involves the submission of the person of the child to a physical surgical operation, whose enforcement is only for the general benefit of the community. It is for the general benefit of the community, not for the particular benefit of children attending school, that the power to make regulations is given.

For the enforcement of that operation on the person of the child I think distinct and unequivocal legislative authority must appear. The only authority appearing are the indirect, roundabout, and very equivocal provisions of regulations 68 and 69. Inasmuch as these are, therefore, in conflict with sec. 3 of the Truancy Act, and go quite far beyond any condition necessarily implied in that section, such as I have referred to, I think they must give way before the direct enactment of that section. The very terms of sec. 25 of the Public Health Act shew that it was not the intention of the legislature that a regulation made under the Act should have a force equal or superior to that of the provisions of a statute, but should be considered as subordinate and as yielding to a conflicting statute.

The whole trouble has apparently arisen from a hesitation on the part of the legislature to face itself the issue on the vaccination question squarely as was done in England.

I think the mandamus asked for should be granted, but without costs.

BECK, J.:—The question we have to decide is that of the validity of a regulation made by the Provincial Board of Health purporting to act under the authority of the Public Health Act (ch. 17 of 1910, second session). That Act constitutes a Provincial Board of Health. Section 7 of the Act says:—

The Provincial Board may, subject to the approval and with the consent of the Lieutenant-Governor in Council, make and issue such orders, rules and regulations as the said Board may deem necessary for the prevention, mitigation, and suppression of disease, and . . . with like consent and approval make orders, rules and regulations as to the following matters and things, the enumeration of which shall not be taken to curtail or limit the general power to make orders, rules and regulations herein contained. . . .

11. The vaccination of all children residing in the province.

12. The vaccination of all persons entering or residing in the province not already vaccinated or not sufficiently protected by previous vaccination. . . .

22. Generally, all such matters, acts and things as may be necessary for the protection of the public health, and for ensuring the full and complete enforcement of every provision of this Act.

Sec. 25 is as follows:—

For the prevention, mitigation and suppression of disease and for the better controlling and safeguarding of the public health of the province, should any Act in force within the province conflict with this Act, then, and in every such case, this Act shall prevail, and should any order, rule or regulation made by the provincial board, in respect to any matter over which the provincial board has jurisdiction under this Act, conflict with any by-law, order, rule, or regulation made under authority of any other Act or Ordinance in force in the province, then and in every such case, the order, rule or regulation of the provincial board shall prevail.

(2) Nothing herein contained shall apply to any such by-law, order, rule or regulation made under the authority of any other Act or Ordinance as aforesaid, if the same has been approved by the provincial board.

Sec. 27 is as follows:—

Any person who neglects or refuses to obey an order given to him by any executive officer in pursuance of the provisions of this Act or of the *regulations made thereunder* shall be guilty of an offence under this Act.

Sec. 29:—

Where no other or different provision is made herein, every person guilty of violating any of the provisions of this Act shall be liable to a penalty of not more than $50 and costs.

The regulation of the Board which is now in question is as follows:—

68. On and after January 1, 1912, no pupil shall be admitted to any school unless and until he produces evidence of successful vaccination; provided that in rural districts this regulation shall not apply where, by

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reason of distance from medical attendance, the enforcement would work a hardship.

69. Regulation 68 shall not apply to any pupil who produces a certificate according to schedule I, from a medical practitioner, that vaccination may be injurious to the health of the pupil or a certificate, according to schedule M, that said pupil is not susceptible to vaccine innoculation. The certificate mentioned in schedule I shall be valid only for 3 months from date of issue. The certificate mentioned in schedule M shall be valid only for 12 months from date of issue.

(2) The parent or guardian of any pupil who has been refused admittance to any school for non-compliance with regulation 68, shall cause said pupil to be vaccinated within 15 days after said refusal, and the parent or guardian who fails to comply with this regulation shall be guilty of an offence under those regulations.

Provided that no such parent or guardian shall be liable to punishment if he produces the certificate mentioned in regulation 69.

Delegated legislation by means of by-laws of local government boards, regulations of public boards and orders in council made in pursuance of statutes, has assumed large proportions under our system of government.

In *Hodge* v. *The Queen*, 9 A.C. 117, it is held that within the limits of sec. 92, provincial legislatures can delegate to a municipal institution or other body of their own creation authority to make by-laws and regulations as to subjects specified in the enactment, with the object of carrying the enactment into operation and effect.—

It is obvious (the Judicial Committee say), that such an object is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out may become oppressive or absolutely fail.

The reasons for judgment of the Court of Appeal of Ontario whose decision was affirmed by the Judicial Committee, are very instructive: *Reg.* v. *Hodge*, 7 A.R. (Ont.) 246. The question is dealt with at length in Dillon on Municipal Corporations (5th ed.), sec. 570 *et seq.*, and at sec. 589, it is said:—

In England the subjects upon which by-laws may be made were not usually specified in the King's charter, and it became an established doctrine of the Courts that every corporation had the implied or incidental right to pass by-laws; but this power was accompanied with these limitations, namely, that every by-law must be reasonable and not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property.

For this proposition a number of English authorities are cited, including Bacon's Abridgment (under title By-law), from which it is evident that the word "by-law" is a generic term for by-laws, ordinances, resolutions, regulations, etc. Numerous decisions make it quite clear that the rule laid down applies to the by-laws or regulations not merely of private and public corporations, and municipal corporations, but to all kinds of local government bodies. See the numerous cases cited in Hardcastle on Statutes, 5th ed., p. 481.

The case of *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, is an illuminating one. The headnote is:—

In determining the validity of by-laws made by public representative bodies, such as county councils, the Court ought to be slow to hold that a by-law is void for unreasonableness. A by-law so made ought to be supported unless it is manifestly partial or unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it.

It is to be observed that it is of representative bodies that the Court in the foregoing case is speaking, and it is of similar bodies that the Judicial Committee speaks in the case of *Slattery* v. *Naylor*, 13 A.C. 446, there cited.

The regulations passed under the Public Health Act require to be consented to and approved by the Lieutenant-Governor in Council. This, in my opinion, though necessary for their validity, raises them to no higher plane of authority. Indeed, in my opinion, if they were direct orders of the Lieutenant-Governor in Council they would be subject to the same rules as to their validity and construction as the regulations, not of a representative body, but of any other non-representative public authority acting under statutory authority.

I adopt the opinion expressed in Lowell's Government of England, where it is said (vol. i., p. 20):—

It is only necessary here to point out that in making such orders the Crown acts by virtue of a purely delegated authority and stands in the same position as a town council—("at best," I would add).

The orders are a species of subordinate legislation, and can be enacted only in strict conformity with the statutes by which the power is granted, and, being delegated, not inherent in the Crown, a power of this kind does not fall within the prerogative in its narrower and more appropriate sense.

This view seems to be assumed in *R.* v. *Harris*, 4 Term Rep.

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205, and *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347.

It is clear, therefore, that regulations made by the Provincial Board of Health, not a representative body, are on a different plane from an Act of the Legislature. For one thing, they are ineffective if in conflict or inconsistent with statutory enactments. Sec. 25, already quoted, does not raise them to any higher plane; it merely enacts that the Public Health Act shall prevail over any Act in conflict with it, and that regulations under it shall prevail over regulations in conflict with them, made under any other Act.

In the present case it is contended on behalf of the plaintiff that regulation 68 is in conflict with the School Ordinance (ch. 75 of Office Consolidation, 1915), and with the Truancy Act (ch. 8, 1910, second sess.).

By virtue of the School Ordinance the plaintiff undoubtedly had *primâ facie* the right to send his child to the school free of charge. Sec. 95, sub-sec. 24, authorizes expulsion under certain circumstances; and sec. 25 imposes on the school trustees the obligation of seeing that the law with reference to compulsory education and truancy is observed. I do not see anything else in the School Ordinance which has any bearing on the question before us.

Some provisions of the Truancy Act require consideration. Sec. 3 says that every child between the age of 7 and 14 shall attend school for the full term during which the school of the district in which he resides is open each year unless *excused* for the reasons hereinafter mentioned.

The excuses stated in the Act, where there exists a school to which the child is entitled and bound to go are:—

1. That the child is under efficient instruction at home or elsewhere;

(2) That the child is unable to attend school by reason of sickness or other unavoidable cause;

(3) That there is not sufficient accommodation;

(4) Where a justice of the peace, police magistrate, or principal of the school certifies that the services of the child are required in husbandry or in urgent necessary household duties, or for the necessary maintenance of such child, or of some person dependent upon him;

(5) Where the child has passed the public school leaving examination or has equivalent standing.

The parent is subject to penalty for breach of the provisions of the Act.

We have then the statutory right and the statutory duty under statutory penalty of a parent to send his child to school; and a regulation which has for its intention, to prevent the parent from exercising his statutory right and performing his statutory duty.

The Board, by other paragraphs in the regulations, deals with vaccination in the case of emergency, and these are of general application. These regulations, I have no doubt, are within the competence of the Board. The paragraphs of the regulations 63-69 are directed exclusively to schools. I think even if there were no conflict with the statutes these regulations would be invalid as being discriminatory.

In my opinion, the jurisdiction of public bodies to make regulations should be very carefully scrutinized and restricted to what is quite clearly contemplated by the legislature. In England, in the case of vaccination, parliament has itself taken the responsibility of dealing with the question. There, compulsory vaccination appears to have been introduced in 1853; a right of exemption under certain conditions was later introduced, and finally by the Vaccination Act, 1907, it was enacted that a parent should be exempted from the penalty of the Act if, within certain limits as to time, he made and filed a statutory declaration that he himself conscientiously believes that vaccination would be prejudicial to the health of the child.

My opinion, therefore, is that regulation 68 in any sense in which it may be taken is *ultra vires* of the Provincial Board of Health, on the ground that it is inconsistent with the School Act and the Truancy Act, and is discriminatory; and I would therefore grant the mandamus which the plaintiff asks for, without costs.

SIMMONS, J.:—The defendants plead, as justification for refusal to admit the plaintiff's son, certain of the regulations issued by the Provincial Board of Health, which require the defendant's son to produce a certificate of successful vaccination before he shall be admitted to any school, and that such regulation was authorized by the Public Health Act, ch. 17, Alberta,

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1910, 2nd sess., and that the same was binding upon the defendants. The issues raised involve the consideration of 3 provincial Acts, namely, the Public Health Act, ch. 17, Alberta, 1910, the Truancy Act, ch. 8, Alberta, 1910, 2nd sess., and the School Ordinance, ch. 75, N.W.T.

The last-named Act provides that there shall be a Department of Education (sec. 3) which shall have the control and management of all kindergarten schools, public and separate schools, normal schools, etc., the Act provides for the creation of school districts, administered by school boards. School boards have, at their discretion, the power to employ a health officer and prescribe his duties: (95*a*).

One of the duties of a teacher is to notify the board whenever he has reason to believe that any pupil attending school is affected with or exposed to certain contagious diseases and to prevent the attendance of such pupil until the production of a certificate from a physician or chairman of the board of the non-existence of the contagious disease or the absence of danger of infection.

The Truancy Act provides for compulsory attendance at school of all children between the ages of 7 and 14 years, subject to certain exceptions which have no bearing upon the issue raised in this action. A parent or guardian neglecting or refusing to cause a child under his care who comes within the ages above mentioned to attend school, unless excused under the Act, is liable to a penalty of not more than $10.

The Public Health Act provides for the creation of a Provincial Board of Health. Sec. 7 of the Act authorizes the board, with the approval of a Lieutenant-Governor in Council, to

> make and issue such orders, rules and regulations as the said Board may deem necessary for the prevention, mitigation, and suppression of disease . . . and to make orders, rules and regulations for the following matters and things, the enumeration of which shall not be taken to curtail or limit the general power to make orders, rules and regulations herein contained.

One of the items enumerated is: "The vaccination of all children in the province:" (Sub-sec. 11 of sec. 7). Sub-sec. 17 of said 7, provides for:—

> The imposition, levying, and recovery of penalties upon and from any person who shall violate any rules, orders, or regulations made hereunder.

Section 29 provides that

where no other or different provision is made herein, every person guilty of violating any of the provisions of the Act shall be liable to a penalty of not more than fifty dollars ($50) with costs.

Section 25, provides:—

For the prevention, mitigation and suppression of disease, and for the better controlling and safeguarding of the public health of the province, should any Act in force within the province conflict with this Act, then, and in every such case, this Act shall prevail, and should any order, rule, or regulaion made by the provincial board in respect to any matter over which the provincial board has jurisdiction under this Act, conflict with any by-law, order, rule, or regulation made under authority of any other Act or Ordinance in force in the province, then and in every such case the order, rule, or regulation of the provincial board shall prevail.

The above citations indicate that the School Act and Truancy Act cover the field of legislation in regard to the control and regulation of schools, and the compulsory attendance of children at school between the ages prescribed.

The legislature has, in these Acts, recognized the principle that it is necessary for the state that every child should obtain a common school education, and has further provided very complete machinery for enforcing the same. It is, however, apparent that, notwithstanding this complete legislation in this field by the two Acts above mentioned, sec. 25 of the Public Health Act will have this effect, that where any provision of the Public Health Act conflicts with any provision of any other Act, the former shall prevail, and the same will apply to any order or regulation under the Public Health Act and any order, rule, or regulation made under another Act. Counsel for the Board of Health suggests that the effect of sec. 25 is much wider, and that any order, rule or regulation made by the Board of Health shall have the same priority pursuant to sec. 25 as any provision in the Act itself, with the result that any order or rule issued by the Board of Health within the powers conferred by the Act which conflicted with any other statute should override the latter statute. This would clearly give to sec. 25 a wider meaning than the ordinary reading of the section will sustain. There is a clear enunciation that one statute shall override another, and a regulation made under one statute shall override a regulation made under another statute. A presumption exists that the legislature does not intend to make any substantial alteration

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Simmons, J.

in the law beyond what it explicitly declares: *Rossi* v. *Edinburgh Corp.*, [1905] A.C. 21 at 29:—

> And it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness.

Maxwell on Statutes, 5th ed., 132.

I conclude then that the Order 68 requiring children to be vaccinated before they can be admitted to the school in question is *ultra vires* of the powers of the Board, as it conflicts with the Truancy Act, which latter Act has legislated upon the subject and has provided penalties for the breach thereof. I am also of the opinion that the regulation in question is *ultra vires* on another ground. Reg. 69 of the board provides a penalty for failure to have a child vaccinated within 15 days after having been refused admittance to a school. The effect of the two sections is to render the parent or guardian liable to a dual penalty, namely, the one provided in order 69 and the penalty provided by the Truancy Act.

> 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.

Maxwell on Statutes, 5th ed., p. 653; *Kirk* v. *Nowill*, 1 Term Rep. 118, 99 E.R. 1008.

The plaintiff is entitled to the relief asked for and the costs of the action. *Mandamus granted.*

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ROBINSON v. MOFFATT.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. November 26, 1915.

1. INFANTS (§ I—25)—PURCHASE OF LAND—REPUDIATION—VENDOR'S REFUSAL TO ACCEPT INFANT'S MORTGAGE—POTENTIAL OWNERSHIP BY INFANT.

An infant, who enters into a contract for the purchase of land of a vendor who is unaware of his infancy, can not compel the vendor to accept a mortgage, under the terms of the contract, for the balance of unpaid purchase price which has been executed by the infant; nor may infancy be set up as a ground for the repudiation of the contract to recover the moneys paid thereon by the infant after the latter has assumed potential ownership of the sold premises.

[*Short* v. *Field*, 32 O.L.R. 395, followed.]

2. VENDOR AND PURCHASER (§ I E—25)—FAILURE TO MAKE TITLE—RESCISSION OF CONTRACT—DELAY—KNOWLEDGE OF DEFECTS.

A vendor must be in the position to make a good conveyance at the date fixed for completion; if he fails to do so, the purchaser may, on discovering the vendor's lack of title, repudiate the contract, but he

must do so forthwith or with reasonable promptness; but where the purchaser knew of the defect, and thereafter himself tried to sell the land, made payments and tendered his mortgage upon it, and in all things acted as though the contract was valid, it is not open to him to repudiate on that ground alone.

[*Murrell* v. *Goodyear*, 1 D. F. & J. 432; *Re Bryant*, 44 Ch. D. 218; *Re Head's Trustees*, 45 Ch. D. 310; *Re Thompson*, 44 Ch. D. 492, applied.]

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APPEAL from judgment of Sutherland, J., dismissing an action to recover $390 paid upon a contract for the purchase of land, and for rescission of the contract; or, in the alternative, for specific performance. Statement

J. J. Gray, for plaintiff, appellant.

W. E. Raney, K.C., for defendant, respondent.

RIDDELL, J.:—The plaintiff, then and at the time of the teste of the writ herein, an infant, on June 2, 1913, entered into a contract with the defendant, who was not aware of such infancy, for the purchase of a certain lot in Weston. Riddell, J.

He employed a solicitor to search the title, and was informed that the defendant did not own the lot, but that his rights were under an agreement; and therefore the plaintiff should protect himself by seeing to it that the defendant kept up his payments under his agreement. The plaintiff paid $250 shortly after the making of the contract, and thereafter made other payments amounting to about $140, all with knowledge of the state of the defendant's title. Finding that the defendant was in arrears in his payments, the plaintiff went to the defendant, and the following took place, according to the plaintiff's account:—

"I came up to Mr. Moffatt, I says to him, 'Here now, Mr. Moffatt, if you can give me a clear deed, I will pay you all the money that I owe you on the property.' And he says, 'Well now, Robinson, I have a sale, there is a lady in, and I have a sale on, and if I come in this sale I will get you your deed, and I will let you know,' he said. Time went on, and I never got any letter or any word of any kind, and I called at Mr. Moffatt's house, and he says to me, 'Robinson, I can't get you that deed,' he says: 'this sale hasn't went through;' and he says, 'You will just have to wait.' And that is all that was said at the house to my recollection."

Then he went to his solicitor, Mr. Gray; and it was determined to take advantage of a clause in the contract of sale which reads:

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Riddell, J.

"Provided also that if no default has been made in the payments under this agreement and if the purchaser shall have paid to the vendor fifty per cent. of the purchase-price, he shall then be entitled to a deed of the said property on giving to the vendor a mortgage for the balance of the said purchase-price on the terms of this agreement." A mortgage was drawn up for $275, the plaintiff made an affidavit that he was over 21 years of age, and procured a witness to swear to the same—he knew at the time that he could not make a valid or legal mortgage. Apparently a tender was made of the remainder of the fifty per cent. of the purchase-price and of the mortgage, but it was not accepted. No further tender was made, but the plaintiff, on the 12th November, 1914, signed and caused to be sent to the defendant a repudiation of his contract, declaring the same to be void, as he was under the age of twenty-one years—he was born, it appears, on the 20th February, 1894.

The writ of summons in this action was issued on the 19th November, 1914, claiming the return of moneys paid under "a purported agreement . . . void, the plaintiff being under the age of twenty-one years and having repudiated same, or, in the alternative, for rescission . . . on the ground that the defendant is unable to make title . . . or, in the alternative, for specific performance . . ."

The statement of claim alleges the contract, the defect in the defendant's title, a tender on the 10th November of the difference between fifty per cent. and the amount then already paid and of the mortgage, refusal by the defendant, and that the defendant held under onerous building restrictions—the claim is for return of the money paid, etc., and, in the alternative, for specific performance. The defence is in substance an offer of specific performance and objection to the mortgage offered.

There was some argument on the hearing of the appeal that there had been something in the way of a tender or offer to pay the defendant the full amount due, but this is not pleaded, nor, as I think, proved.

After the writ was served, the defendant offered specific performance and to pay the costs so far incurred; but this offer was refused—land had gone down, and the plaintiff desired to take advantage of his infancy.

Mr. Justice Sutherland dismissed the action.

To deal first with the want of title—it is well established that a purchaser may, on discovering the vendor's lack of title, repudiate the contract, but he must do this with reasonable promptness—"forthwith" is the word sometimes used—Dart on Vendor and Purchaser, 7th ed., vol. 2, p. 1067. Here the plaintiff knew of the defect, and thereafter himself tried to sell the land, made payments on it, tendered a mortgage made by himself upon it, and in all things acted as though the contract was valid—it is not open to him to repudiate on that ground alone.

As to the failure to convey, the vendor must be in a position to make a good conveyance at the date fixed for completion: *Murrell* v. *Goodyear* (1860), 1 D.F. & J. 432; and a conveyance by himself and not another: *In re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218, and other cases in the same and the next volume—*In re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310: *In re Thompson and Holt* (1890), 44 Ch. D. 492.

If, therefore, the purchaser was entitled to a deed on tender of the balance of the fifty per cent. and the mortgage, he became entitled to rescission.

We have had occasion recently to consider a case not wholly dissimilar: in *Pioneer Bank* v. *Canadian Bank of Commerce* (1915), 25 D.L.R. 385, we held that a certain document which might for some purposes be called a bill of lading was not a bill of lading for the purposes of a contract which plainly imported that what was intended was a document giving security on the goods to the promisors. In the present case it is plain that what was contracted for by the defendant was a document which would give him security on the land; and this the plaintiff's mortgage did not.

It is no answer to say that the plaintiff could not give a valid and registrable mortgage; he was unable to perform a condition precedent, and that is fatal. Had the defendant, indeed, been aware at the time of the contract that the plaintiff was under age all the time, it might be plausibly—perhaps successfully—argued that what was meant by "mortgage" was what the plaintiff could give—but that is not proved.

The whole question then is as to the effect of the plaintiff's infancy—nauseating as it is to see a plea of infancy set up by a real estate speculator who has had some experience, the plaintiff is entitled to the benefit of the law, however we may find it.

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I think that we are bound by the case *Short* v. *Field*, 32 O.L.R. 395, in this Court (when otherwise constituted), to hold that the plaintiff cannot recover back the moneys already paid by him—he became the "potential owner of the place," listed it for sale, tried to sell it, and acted much more as the owner than did the infant in *Wilson* v. *Kearse*, Peake Add. Cas. 196.

The appeal should be dismissed with costs—with the same right to specific performance as is given by my learned brother Sutherland, on payment of all costs, including the costs of this appeal.

I may add that I think this young man just beginning life is extremely lucky if he escapes a prosecution for perjury; moreover, on his own shewing, he attempted to put off on the defendant as a mortgage what he knew not to be a legal mortgage, which looks like another crime.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B., concurred.

Latchford, J. Kelly, J.

LATCHFORD and KELLY, JJ., agreed in the result.

Appeal dismissed.

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C. R.

DUFF v. UPTON.

Quebec Court of Review, Demers, Greenshields, and Panneton, JJ. September 30, 1915.

1. SOLICITORS (§ II C—30)—TARIFF OF FEES—PRESUMPTION AS TO—VALUE OF ADVOCATE'S SERVICES—RIGHT TO COMPENSATION FOR.

The advocates' tariff of fees is a reasonable estimation of the value of the services of an advocate, and there is a presumption that it shall apply in ordinary cases, but this presumption may be rebutted by shewing that the case was one of unusual or unexpected importance or duration, requiring special knowledge and preparation, and the advocate is entitled to recover the value of his services, taking into consideration the amount involved.

2. ACTION (§ I B—5)—FEES—ACTION PENDING IN HIGHER COURT—PREMATURITY.

An advocate is entitled to sue for his fees and disbursements while the case is still pending in a higher Court where the case has been taken out of his hands and inscribed before the higher Court by another attorney.

Statement

THE judgment of the Superior Court has been rendered by the Acting Chief Justice Archibald, on April 10, 1915. It is modified as to the amount granted.

The plaintiffs, attorneys practising in the City of Montreal, entered an action against the defendant for professional services. They claim $447.65 as balance due for disbursements and fee comprising various attendances, taxed costs, opinions, letters and money advanced.

The defendant pleads that all services rendered by plaintiffs

are provided for by the tariff of advocates' fees; that he had entered into no agreement with them to pay any extra fees; and that, as for the larger amount in the account, it is for costs in an action of *Hutchison, Wood and Miller*, which case was still pending in Review, and no final judgment had been yet rendered.

Statement

Plaintiffs answered that this last case had been inscribed in Review by another firm of lawyers, and that, then, they had severed their connection with defendant, and, therefore, were entitled to their costs without waiting for the final judgment.

The Superior Court maintained the action for the full amount:

Considering that, by the judgment of the Superior Court in said case of *Hutchison, Wood* and *Miller*, the mandate of defendant's attorneys in that case was terminated, and no subsequent mandate was given to them as regards proceedings in the Court of Review;

Considering, therefore, that plaintiffs have the right to recover the value of their services in the Superior Court against the defendant, although the case is still pending in the Court of Review:

Considering that, as between advocate and client, the tariff of fees is not binding, and the advocate has a right to recover from his client the value of his services;

Considering that, in the present case, a large part of the services rendered was not such as would form part of the work of an advocate in making the procedure in said case of *Hutchison, Wood* and *Miller* against defendant, before the Court;

Considering that plaintiffs have sufficiently proved the value of their services in the said case, and that the defendant is indebted to plaintiffs in the sum claimed, with the exception of the sum of $20 for stenographer's charges to be deducted from plaintiff's account;

Considering that defendant has not proved that he was entitled to any deduction by reason of an erroneous over-payment in the case of Hughes against himself in the Circuit Court;

Doth dismiss the defendant's plea and doth maintain the plaintiffs' action and condemn defendant to pay plaintiffs the sum of $427.65.

In Review;

Duff & Merrill, for plaintiffs.

M. J. Morrison, K.C., for defendant.

Panneton, J.

PANNETON, J.:—A particular case was the principal bone of contention between the parties as the issue is now before us.

The case in question was that of *Hutchison Wood and Miller* v. *Upton*, wherein the plaintiffs acted for the defendant. In that case the action was for $1,089, and judgment was against the defendant for $427.65.

The plaintiff's account, in the present case, is made as if no tariff whatever existed. It is composed of a large number of items detailing what was done every day, interviews and corres-

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pondences with the clients, with the attorneys of the other party, attempts at settlement, attendances in Court, a charge of $40 per day at enquêtes and $25 for attendance at arguments of the case. The enquête lasted five days, this item amounting to $200.

The defence that the cause is premature I cannot entertain. The defendant, after judgment rendered against him, in the *Hutchison et al.* case, took it from the plaintiff's hand and transferred it to other attorneys. Plaintiffs are entitled to their costs without waiting for anything posterior to occur.

The other ground of defence is the most important.

Applying the tariff to what is properly the case of *Hutchison* v. *Upton*, the plaintiff's fee would amount to $330.65; they claim § 525 in that case alone.

The present suit is for $447.65, balance of the total of the plaintiffs' account, amounting to $654.25, after crediting the defendant with $206.60, moneys which he paid them.

If the plaintiffs had made their account in the case of *Hutchison et al.*, applying the tariff to everything, it could be applied, and then had made extra charges for what is not properly covered by it, their claim could have been dealt with more easily. But they entirely ignored it.

The tariff, according to the jurisprudence following *Christie* v. *Lacoste*, 2 Q.B. 142, does not apply legally to relations between advocates and clients. The holding in that case was, "*In the absence of a special agreement between advocate and client, there is a presumption* that the tariff shall govern as to the advocate's remuneration, but this presumption may be rebutted by evidence as to the unusual or unexpected importance or duration of the litigation.

I understand this to mean that the tariff is a reasonable estimation of the value of services of an advocate to which it is safe to resort in ordinary cases, and I believe that it covers the ordinary reviews which must necessarily take place before the issue of the writ or the giving of the defence and during the instance in cases which require no extraordinary loss of time.

But this would not do justice to the advocates when by the nature of the case, a special preparation has to be made necessitated by technical and special knowledge which the advocate has to acquire for the proper conduct of this case, such as medical, art, industrial, commercial knowledge, or when the numerous

or very important matters to be submitted to the Court oblige the advocate to devote to the case more than the time he is expected to give in ordinary cases. The advocate is entitled to compensation in all such cases.

A good deal of friction between attorneys and clients would be avoided if the attorneys in these cases would advise their clients, whenever it can be properly done, that such extra charges would be made.

In this case, a question of work done by an architect which the defendant claims resulted in damages to him, the work of the attorneys to prepare the defence and to prepare an enquête, which lasted five days, justifies special charges for services, which are valued at over $100 in excess of the tariff. But the enquête itself before the Court required the ordinary work of a case. I do not see any sufficient reason to double the enquête fee, which is $20 per day, according to the tariff. If, for example, an advocate had to leave his domicile to make an enquête outside of the place where he practises, a larger fee would be allowed to him. In the *Christin and Lacoste* case, the tariff at that date was $10 fee for enquêtes, no matter how many days it lasted, but now the fee provided for is for every day of enquêtes.

Under the circumstances I am of opinion that the plaintiff's bill of costs must be reduced for the five days of enquête from $200 to $100.

The judgment being so modified, the costs of Review are to be borne by plaintiffs.

DEMERS, J., concurred. Demers, J.

GREENSHIELDS, J., dissented. *Judgment varied.* Greenshields, J. (dissenting)

KALBFLEISCH v. HURLEY.

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Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Kelly, J. July 12 1915.

1. MECHANICS' LIENS (§ VIII—66)—TIME OF FILING—HOW COMPUTED — LAST DELIVERY OF MATERIALS.

A mechanic's lien is enforceable under sec. 22 of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1914, ch. 140, if registered within the statutory period from the last delivery of materials, even though the materials last delivered may never have been used in the construction of the building, if they were furnished for the purpose of being used therein.

[*Brooks-Sanford Co.* v. *Theodore, etc., Co.*, 22 O.L.R. 176, distinguished; *Bunting* v. *Bell*, 23 Gr. 584, overruled; *Larkin* v. *Larkin*, 32 O.R. 80, approved.]

APPEAL by defendants from judgment of a Local Master. Statement

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Hodgins, J.A.

R. S. Robertson, for appellants.

F. R. Blewett, K.C., for plaintiffs, respondents.

The judgment of the Court was delivered by

HODGINS, J.A.:—Appeal by the defendants the owners against the allowance by the Local Master at Stratford of mechanics' liens in favour of the plaintiffs and of two other lienholders.

The appeal turns on two points: first, was the Local Master right or wrong in holding that the last delivery of material was on the 21st September, 1914; and second, was that material furnished or used in such a manner as to entitle the respondents to a lien upon the appellants' land?

The items said to have been delivered on the 21st September, 1914, were 20 pieces of pine lumber of the value of $4.55. If there is any case in which the decision of the Master should be upheld, it should be here. The contest revolved around the delivery and use of these pieces of lumber, and the Local Master took evidence at great length, there being 275 pages of type-written evidence filed on the appeal. The attack by the appellants' counsel involved the question of the reliability of the contractor, Coughlin, and the improbability or inconclusiveness of the evidence of other witnesses; so that it is a case in which an appellate Court should not reverse the Local Master on a question of fact, unless convinced that he arrived at a wrong conclusion. The argument of counsel and the evidence cited and discussed shew beyond any question that the point in dispute was, while very small, one that required a careful analysis of the evidence. The learned Master's judgment seems to leave nothing lacking in that respect.

It must be taken as established that the delivery of the pine lumber was upon the 21st September, 1914, and therefore that the mechanic's lien registered on the 21st October, 1914, was within the 30 days prescribed by the statute.

Upon the second point reliance was placed on the case of *Brooks-Sanford Co.* v. *Theodore Telier Construction Co.*, 22 O.L.R. 176. The learned Master finds that, although the delivery upon the lands now charged with the lien was completed

on the 21st September, 1914, there was no evidence that the lumber in question was ever used in the construction of the building. His finding upon the other branch of the case, however, involved the fact that the delivery was for the purpose of the materials being used in the building. The statute, R.S.O. 1914, ch. 140, sec. 6, provides that "any person who . . . furnishes any materials to be used in the making, constructing, (or) erecting . . . of any . . . building . . . shall by virtue thereof have a lien for the price of such . . . materials upon the erection, building, . . . land . . . upon which such materials are placed or furnished to be used." The *Brooks-Sanford* case is clearly distinguishable when the exact ground upon which it is decided is examined. Moss, C.J.O., in discussing the items in that case, valued at 84 cents, described them as 4 coach-screws or expansion balls and 4 expansion shields, the use of which was suggested by the contractor with a view to settle a dispute as to whether the contract called for safety-gates to the elevator. He then proceeds (p. 179): "The articles in question were procured by the construction company for the purpose of making the experiments, but, as the assistant-manager of the construction company testified, they were never intended to be used except for the purpose of experimenting. . . . Their (i.e., the owners') only connection with them was that they were brought to their premises for the purpose of a demonstration, which came to naught. So far as they were concerned, these articles stood in no higher position than tools or implements used by workmen in their trades." Mr. Justice Riddell says as follows (p. 183): "Whatever may have been the intention of the respondents, it cannot be said that the materials were furnished for any other than the experimental purpose already spoken of—and this is not, in my opinion, within the Act."

The experiment which has been referred to in the two passages I have quoted was a trial of the screws and shields to see if they would answer as a substitute for safety-gates of the elevator; the contractors disputing their liability, meanwhile, to provide either the gates or the substitute. It is manifest, therefore, that these articles were not, as the statute requires,

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supplied or furnished to be used in the building, but were intended to be used only for the purpose of making an experiment, and not intended for use in the building, even if experimentally successful. It is true that in that case the learned Chief Justice (with whom my brothers Garrow and Maclaren agreed) expresses (p. 180) his assent to the view taken by the late Vice-Chancellor Proudfoot in *Bunting* v. *Bell*, 23 Gr. 584, that the statute did not and does not go far enough to compel the owner to pay his contractor's indebtedness for that which does not go into or benefit his property. But this opinion was not necessary for the decision of the case, and is therefore not binding upon this Court; nor, if it was, does this case go so far as to offend against the principle then acquiesced in.

The difficulty in accepting *Bunting* v. *Bell* as a satsfactory exposition of the then Mechanics Lien Act is, that it depends upon the suggestion that otherwise the owner would be compelled to pay his contractor's indebtedness for material which had not in any way enhanced the value of his land. This is met by the clause in the Act, not alluded to in the judgment, limiting the owner's responsibility to the amount payable to his contractor (1874, 38 Vict. ch. 20, sec. 3), and with that limitation the apparent injustice cannot exist.

In *Larkin* v. *Larkin*, 32 O.R. 80, a Divisional Court consisting of Meredith, C.J., Rose and MacMahon, JJ., discussed the question as to whether a lien could arise upon the materials themselves, when delivered upon the land, but without being affixed thereto. The Chief Justice expressed the opinion (p. 89) that sec. 4 "gives the benefit of the lien upon the erection, building, etc., and the lands occupied thereby or enjoyed therewith . . . upon which the materials are placed or furnished to be used." He further says (p. 89): "The effect of this section is no doubt to give to the material-man who places or furnishes materials to be used in the erection of a building, a lien, although the materials are not in fact used for the purpose for which they are supplied; but the lien is upon the building and the land occupied or enjoyed with it, or the land upon which the materials are placed or furnished to be used, and only on the building or the land, as the case may be, and not

on the materials, unless they have become part of the building or land." And at p. 90: "The purpose of the Act was to give a lien upon land which at common law did not exist, and the sections giving the lien standing alone, beyond question confine the lien to the land and its appurtenances—and that cardinal principle of the Act is not in my opinion to be departed from, unless the language which is relied on to extend the lien to something that is not land, is plain and unambiguous." Rose, J., at p. 94, says: "The effect of these provisions seems to me to be that when materials are placed or furnished, to be used upon land incumbered by a prior mortgage, as such material may not be removed, it is to be taken to be incorporated with the land for the purposes of the lien to the same extent as if it were placed in the building erected or in course of erection; and that the person furnishing the material has, as against the mortgagee, a prior lien upon the value of the land to the extent of the increase of such value by the placing or furnishing of such materials." MacMahon, J., also says, at p. 98: "If no lien existed in favour of the material-man, unless the material was incorporated into the building on the land, the provision seemingly made in his favour by this section would be wholly illusory if not meaningless."

In *Ludlam-Ainslie Lumber Co.* v. *Fallis*, 19 O.L.R. 419, another Divisional Court, consisting of Mulock, C.J., Clute and Latchford, JJ., dealt with the question of whether a lien attached on delivery to the contractor of material which never reached the land of the owner. Clute, J., in delivering the judgment of the Court, says (p. 424): "Is the sub-contractor entitled to his lien as soon as he delivers the material to the contractor, no matter whether it be placed upon the land or incorporated in the building or not? I cannot think that this is the true construction of the Act, the meaning of which I take to be that where the owner of the land receives the benefit of the labour or material a lien attaches, not to the material furnished, but to the land, because the owner is benefited thereby, and it may be that such lien attaches if the material is furnished upon the land to which the lien may attach, even although not incorporated in the building, if the same is under the control of the

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owner. This, I think, is apparent, having regard to the various sections of the Act." And at p. 427: "Under the Act as it now stands, I am of opinion that it is essential before the lien can arise that the material should be furnished and placed upon the land upon which the lien is claimed."

It seems to me, with respect, that Mr. Justice MacMahon's remark in the *Larkin* case is well-founded. The lien for furnishing cannot, without seriously detracting from the value of the Act, be restricted to goods supplied to the owner direct, and to the person immediately furnishing to him.

The language of the present Act (sec. 6) is very wide—"any person who . . . furnishes any materials to be used . . . for any owner, contractor or sub-contractor, shall by virtue thereof have a lien." If, as suggested by Moss, C.J.O., in the *Brooks-Sanford* case, these words are to be read distributively, it is difficult to see just how that can be done consistently with the language used or the other provisions of the Act.

The lien arises immediately upon the furnishing (secs. 6, 8), and it must be registered, under sec. 22, within 30 days after the furnishing or placing of the last material. This is not consistent with the exposition of sec. 6 given by the Chief Justice when he says (22 O.L.R. at p. 181): "His land may and in general ought to be subject to a lien for materials furnished or supplied to a contractor to be used in the construction of a building *when actually used.*"

If he is right, the lien would not arise until actual user, and the time for registration might then be entirely gone. Nor could a lien for material be registered as provided, during the furnishing, if it did not arise till the supplies were built into the structure.

Then again, the owner is bound to retain 20 per cent. of the value of the material furnished, on the basis of the contract price or its actual value, a provision which is shorn of much of its usefulness if limited to the material supplied only by the contractor himself and not by sub-contractors.

As I do not think that the views expressed in the *Brooks-Sanford* case were the basis of the judgment or were necessary to its decision, I think the Court should lean to the view that

the statute is wide enough to cover the case in hand, and that any other construction would result in the greatest confusion in registering and realising the liens of material-men.

I think the appeal should be dismissed with costs.

Appeal dismissed.

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KALBFLEISCH v. HURLEY.

Hodgins, J.A.

TURGEON v. THE KING.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. June 24, 1915.

1. MASTER AND SERVANT (§ II D—206)—INJURY TO SERVANT BOARDING TRAIN IN MOTION—VIOLATION OF RULE OF CROWN RAILWAY—PREMATURE STARTING OF TRAIN—PROXIMATE CAUSE.

The premature starting of a train without ascertaining that all the train-crew were aboard will not render the Crown liable for injuries sustained by an employee on its railway, where the accident resulted from an attempt to board the train while in motion in violation of a Crown regulation.

Statement

APPEAL from the judgment of the Exchequer Court of Canada, 15 Can. Ex. 331.

J. A. Lane, K.C., for appellant.

P. J. Jolicœur, for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J., agreed in the judgment dismissing the appeal with costs.

Idington, J.

IDINGTON, J.:—I think this appeal must be dismissed with costs.

Duff, J.

DUFF, J.:—Rule No. 48 enacts (*inter alia*): "No person shall be allowed to get into or upon or quit any car after the car has been put in motion or until it stops." To this extent at all events the rule is within the rule-making authority conferred, by the R.S.C., 1906, ch. 36, sec. 49, upon the Governor-in-Council; and it must be given effect to as a legislative enactment as well as one of the rules of the appellants' employment. The injury suffered by the appellant was the direct and immediate consequence of a violation of this rule; but he alleges that the act done in violation of it was done at the invitation of the conductor and upon that allegation he bases his contention which is the ground of his appeal that this is a case of *faute commune*.

There are 3 answers to that. 1. If what the conductor did was an invitation to commit a breach of this rule, it was, in so far, an act for which the Government is not responsible. 2. The forbidden act was the act of the appellant; and it could

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only be in very special circumstances, if ever, that conduct such as that of the conductor which is relied upon as constituting the fault upon which the claim is based could be so connected with the forbidden act as to bring it within the category of fault *dans locum injuria*. In this case it is clear that the fault relied upon is in its relation to the injury too remote to be regarded as in the legal sense one of the *causes* of it. 3. The rule is plainly framed with the object of avoiding just such accidents as that which happened. The observance of it is one of the duties which the law imposes upon the employee for that purpose. The violation of it cannot give him a right of action merely because other fellow servants equally bound to observe it concurred with him in that violation.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—There can be no doubt that the direct and immediate cause of the injuries sustained by the appellant was his violation of r. No. 48, which was intended for the safety of persons in the position of the appellant. While the conductor was, no doubt, most blameworthy for having signalled the train to start when he knew, or should have known, that if the appellant was to board it he must do so while it was in motion, that does not excuse the plaintiff's breach of the explicit prohibition of r. 48. I agree with the trial Judge that on this account alone this petition of right must fail.

Brodeur, J.

BRODEUR, J., for reasons given in writing was also of opinion that the appeal should be dismissed.

Appeal dismissed.

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REX v. JAMES.

Alberta Supreme Court, Harvey, C.J., Scott and Beck, JJ. October 19, 1915.

1. INDICTMENT, INFORMATION, AND COMPLAINT (§ I—2)—SUMMARY TRIAL BEFORE TWO JUSTICES UNDER PART XVI OF CODE.

A conviction by two Justices sitting together and having the powers of a magistrate for summary trial without the consent of the accused for an offence under Cr. Code, sec. 773, is not invalid because the information was taken before one only of the two Justices, as by Cr. Code, sec. 796, one Justice has power to remand before two Justices for the purposes of a summary trial under Part XVI of the Cr. Code.

2. CRIMINAL LAW (§ II C—51)—SUFFICIENCY OF WARRANT OF COMMITMENT—SUMMARY TRIAL—CR. CODE, SEC. 1130.

Where there is a good and valid conviction by two Justices sitting together as a summary trial Court under Part XVI of the Cr. Code, a warrant of commitment thereunder is validated under Cr. Code, sec. 1130, although signed and sealed by one of such Justices only and although

it recites that the accused was convicted before the signing Justice and makes no mention of the other having participated in the trial.

3. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL UNDER PART XVI—CHARGE IN WRITING.

Where there is already a written information in respect of the charge of an indictable offence, which a magistrate is about to try under Part XVI of the Criminal Code, such information may be adopted as a "charge in writing," which he shall read to the accused, and it is not in such case necessary for the magistrate to again reduce the charge to writing; but if the accused were before the magistrate without any preliminary information having been laid for the offence which is to be the subject of the summary trial, it would then be the magistrate's duty to write out the charge.

4. INDICTMENT, INFORMATION, AND COMPLAINT (§ II E—26)—BEING INMATE OF BAWDY HOUSE—STATING LOCATION OF HOUSE.

A charge of being an inmate of a common bawdy house under Cr. Code, sec. 229 A, which is tried by a magistrate under Cr. Code, sec. 774, without the consent of the accused, is not invalid because the precise locality of the house is not designated in addition to the town or territory over which the magistrate had jurisdiction, but the magistrate may order the prosecution to give particulars.

[*R.* v. *Crawford*, 6 D.L.R. 380, 20 Can. Cr. Cas. 49; and *R.* v. *Mickleham*, 10 Can. Cr. Cas. 382, applied.]

Statement

APPEAL from an order of Stuart, J., refusing to quash a conviction of the defendant for being an inmate of a common bawdy house. The motion before the Judge of first instance was by way of a certiorari to quash the conviction and the warrant and to discharge the prisoner from custody as on habeas corpus.

McKinley Cameron, for appellant.

H. H. Parlee, K.C., contra.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—Our new rules are Crown rules 17 *et seq.* The section of the Criminal Code constituting the offence is sec. 229A, introduced by the Criminal Code Amendment Act, 1915 (ch. 12, sec. 5), which reads:—

"229A. Every one is guilty of an indictable offence and liable to a penalty not exceeding $100 and costs and, in default of payment, to imprisonment for a term not exceeding two months or to imprisonment for a term not exceeding twelve months, who is an inmate of a common bawdy house."

The same Act by secs. 7 and 8 replaced paragraph (*f*) of sec. 773 of the Criminal Code with the words: "(*f*) With keeping a disorderly house under sec. 228 or with being an inmate of a common bawdy house."

Sec. 773 is one of the provisions of Part XVI relating to the summary trial of indictable offences.

That section, as so amended, provides *inter alia* that whenever any person is charged before a magistrate with being an inmate

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of a common bawdy house under sec. 229A, the magistrate may, subject to the subsequent provisions of this part, hear and determine the charge in a summary way.

Sec. 774 provides that the jurisdiction of the magistrate is absolute and not dependent upon the consent of the accused in the case of (*inter alia*) a person being an inmate of a common bawdy house.

The fact that sec. 774 relating to procedure, still, evidently by an oversight, contains the words, "or habitual frequenter," while sub-clause (*f*) of sec. 238, substantively constituting the offence, (*f*) "Is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself," has been repealed by sec. 7 of the Criminal Code Amendment Act 1915, cannot affect the application of sec. 774 to such substantive offences mentioned in it as still exist.

The two justices—being within the definition of "Magistrate" under this part—had clearly therefore absolute jurisdiction to try the charge of being an inmate of a common bawdy house, that is, without the consent of the accused.

Sec. 778 (3) provides that . . . if the power of the magistrate to try it does not depend on the consent of the accused, the magistrate shall *reduce the charge to writing and read the same to such person* and shall then ask him whether he is guilty or not of such charge.

Objection is taken that the proceedings returned by the magistrate do not disclose that this provision was complied with.

It is obvious that accused persons may in cases in which the magistrate's jurisdiction is absolute be brought before the magistrate without previous written information or warrant. In such a case it is of course proper, and on the ground of natural justice obligatory, upon the magistrate to formulate the charge and state the nature of it to the accused; but where a written information has already been laid there seems to be no reason for again writing out the charge; but if the information is read to the accused or the substance of it is read or stated to him, the demands of justice are complied with, and therefore it seems to be proper to read the provisions in question as if the words appeared therein:—"If the same has not already been reduced to writing,"—or to take the adoption by the magistrate of the information as a reduction of the charge to writing, and therefore as a compliance with the Act.

I can find no decision touching the point, notwithstanding that the same words appear in an Imperial Statute, the Summary Jurisdiction Act 1879, sec. 10 (2), sec. 11 (2), and sec. 12.

The proceedings returned by the magistrate show the depositions to be preceded by the following statements: "Hearing on August 24th, 1915, at Drumeller, Alberta, before C. H. King and A. E. Sibbald, on a charge of being an inmate of a common bawdy house. Information laid by Corporal C. H. Paris against Martha James. The information and complaint being read to the accused she pleaded 'Not guilty.'"

For the reasons indicated I think there is nothing in the objection.

It is also objected that the conviction is affected because no precise place is mentioned in the village or town stated in the information as the locality of the offence. I see no reason for requiring such precision; to do so would, I think, be to create an exception in this class of case. I doubt if any more precision is necessary for the validity of the charge than what is necessary to show that the offence was committed within the territory over which the Justice had jurisdiction, though in a particular case it would be proper for the magistrate to insist upon the prosecution giving particulars. See *R.* v. *Mickleham*, 10 Can. Cr. Cas. 382 at 389; *R.* v. *McGregor*, 26 O.R. 115, 2 Can. Cr. Cas. 410; *R.* v. *C. P. R.*, 14 Can. Cr. Cas. 1, 1 A.L.R. 341. This Court has already decided that this objection is not tenable. *R.* v. *Crawford*, 6 D.L.R. 380, 20 Can. Cr. Cas. 49 at 51, 22 W.L.R. 107.

The greatest emphasis was placed upon the objection that the evidence disclosed no offence. [The learned Judge here quoted at length from the depositions.]

The evidence shows that between nine and ten o'clock at night when the tailor shop building was in darkness except for a dim light at the back, first one man, then another, entered the building by the front door; that later, between eleven and twelve, a third man knocked at the front door, whereupon the accused put her head out of the window and then came down apparently to let in this third man, who apparently, for some reason (perhaps the interference of the detective) did not wait, but gave place to the detective, who was admitted. There is no evidence that the accused made any comment on the change in the applicant for admission, a fair inference is that she was equally ready to receive

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either of them for the same purpose, and that purpose is put beyond question by the conversation between the witness [the detective] and the accused. This is, in my opinion, a fair view of the evidence; I think it could not unfairly be put somewhat more strongly. This view of the evidence meets the contention that the evidence shows by way of confession nothing more than a case equivalent to a place being used on a single and isolated occasion for the purpose of illicit intercourse between one man and one woman, which would not constitute the place a common bawdy house as defined by sec. 225 in view of our decision in the case of *R.* v. *Cardell*, 19 D.L.R. 411, 23 Can. Cr. Cas. 271, 7 A.L.R. 404.

The information was taken before one only of two Justices who heard the case. The warrant of commitment is also that of one only of the two justices, and it stated the accused to have been convicted before "the undersigned justice of the peace." Exception is taken on this ground. Sec. 708, which provides (*inter alia*) that one justice may receive the information and do all other acts preliminary to the hearing, although the case must be heard before two or more justices, and that after a case has been heard and determined, one justice may issue all warrants of distress or commitment thereon, forms part of Part XV (Summary Conviction); and by sec. 798 the provisions of Part XV. are not to apply to proceedings under Part XVI (Summary Trials of Indictable Offences) except as specially provided by secs. 796 and 797. The latter section refers to appeal. The former provides that where any person is charged before any justice with any offence mentioned in sec. 773 the justice may remand the person for trial before a magistrate. This seems to meet the exception to the information and the proceedings founded upon it.

As to the warrant it is undoubtedly defective by reason of its being issued by only one of the two justices, but sec. 1130 provides that no conviction, sentence, or proceedings under Part XVI shall be quashed for want of form and no warrant of commitment upon a conviction under the said part shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted and there is a good and valid conviction to sustain the same. I think this section is sufficient in its terms to cover even so serious a defect as the absence of the

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signature and seal of one of the two justices. The thing all essential is a valid conviction, and this is made a condition of disregarding defects in the warrant of commitment. The fact too that sec. 708, though not applicable to proceedings under Part XVI, expressly dispenses with the necessity of both justices issuing the warrant shows that Parliament considers the omission of little moment.

I think I have dealt with all the grounds of exception taken to either the conviction or the warrant of commitment, and in the result the appeal should be dismissed with costs.

Conviction affirmed.

DOUGLAS v. THE EASTERN CAR CO.

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Nova Scotia Supreme Court, Graham, C.J., and Russell and Drysdale, JJ. July 5, 1915.

1. CORPORATIONS AND COMPANIES (§ IV G2—116)—POWERS OF SECRETARY-TREASURER—INSURANCE CONTRACT—DEFINITENESS.
Where a contract for insurance is not authorized by the board of directors, the promise of the secretary-treasurer to recommend to the corporation the acceptance of certain insurance proposals is not of itself sufficiently definite to create a binding contract as will render the corporation liable thereon.

2. CORPORATIONS AND COMPANIES (§ IV G5—134)—LIABILITY OF SECRETARY-TREASURER—MISREPRESENTATION OF AUTHORITY—INSURANCE CONTRACT.
The secretary-treasurer of a corporation cannot be held personally liable in damages for a misrepresentation of his authority because of a refusal by the corporation to accept insurance proposals submitted to him, the acceptance of which he promised to recommend.

APPEAL from the judgment of Ritchie, J.

W. A. Henry, K.C., for appellant.

C. J. Burchell, K.C., and *J. L. Ralston*, K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—The plaintiff is a fire insurance broker or agent, and he obtained his remuneration in the form of a commission from the companies for which he is the agent and a share of the commission from other agents of insurance companies for the risks he brings to them to share with them. On October 2, 1913, at a meeting of the directors of the defendant manufacturing company, a resolution of the directors was passed to increase the insurance on the plant to $1,000,000. Under this resolution the president of the company, by the authority of the directors, applied to Rainnie & Keator, a firm of fire insurance brokers at Halifax, to place this insurance, and through their means insurance was placed to the extent of $1,004,250 on the company's plant at a premium of 1½%. On October 28, 1913,

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the effecting of this insurance was reported to the board of directors and was approved. It had been in force for upwards of 50 days, when the plaintiff approached Mr. McColl, the sec.-treas. of the company, with a proposal to cancel these policies, and having him obtain, for the most part from other companies, a like amount of insurance. The inducement the plaintiff offered was that he could arrange the policies over the property in such a way as to effect a saving to the company on premiums of 25%. Some of the property of the company would not be as hazardous as other portions, and a company could afford to insure them, although they represented larger proportions of the $1,000,000 insurance than others, at a lower rate. The rates on the policies then on were uniform and each covered the whole property, affording greater security.

Mr. McColl, being sec.-treas. only, had no power, and he told him so, to bind the defendant company by such a contract, and the plaintiff knew he had not, and the trial Judge so finds, but apparently he was willing to take a promise from him that he would recommend this scheme to the directors, his recommendation being worth much to make the proposal go through . . .

This brings me to the conflict in the testimony of the two men. Mr. McColl denies that he said "We accept your proposition," but says, "What I told him was that I was prepared to go into the proposition with him. I was prepared myself to recommend it." Later, "I told him I was prepared to recommend his insurance." The Judge finds in favour of the plaintiff's version, and he thinks that settles the case. He says:—

> The proposition of 25% saving was made at this interview, and I think that McColl then made up his mind *to recommend it*, and that the man to whom he intended to make the recommendation was Cantley.

Later, passing a telephone conversation in the evening which has no importance, the Judge continues:—

> The next and most important conversation was over the telephone on the morning of November 20. *It is here, if at all, that the contract is to be found.* It is clear that the plaintiff's offer has been made. Mr. McColl was taken over the conversation several times in cross-examination. He gives what he said in different language, but not, I think substantially different. It is to be noted that McColl speaks as if the conversation was on the evening of the first day. I think it is clear that he is mistaken as to this. As a matter of fact, it was on the morning of the second day. I quote his language.
>
> He says he was prepared to consider his proposition if he would come down

and submit it, but the proposition had been submitted. The plaintiff's version is as follows:

"Mr. Douglas, we accept your proposal. I will meet you at eleven o'clock in my office." If this was said, and I find that it was, then it was an acceptance of the plaintiff's offer, and not a mere intimation that McColl would make the recommendation.

With deference I propose to review this finding, and the Judge, in his judgment, rather invites that course. He says that this is a case in which the Court of Appeal "is in as good a position to come to a correct conclusion as to the facts as I am." And he says he gives his reasons, so that, if they are not satisfactory, "the Court will have a free hand in dealing with the findings." Also there is nothing in the manner or demeanour of the witnesses in giving their evidence which "would lead me to discredit any of them." Which of these two things was it likely that McColl said?

Now, after reading what the plaintiff, in his cross-examination, says as to his stipulating for McColl's recommendation, one would expect the utterance over the telephone to be what McColl says it was rather than what the plaintiff says. The Judge finds that McColl had made up his mind to recommend at that interview, "We accept your proposal," does not really fit into the conversation of the day before. There is a want of connection. There was no need of a hasty closing of a bargain before the interview could take place. The persistent plaintiff was not likely to withdraw forever from the negotiations, if not instantly closed.

If the "contract is to be found, if at all, in the conversation over the telephone," then I think it is clear that there was not a contract even from the plaintiff's standpoint. For one thing, the plaintiff had not then the materials on which to make such a proposal as McColl could accept.

The plaintiff and McColl had not then obtained the information required. The readjustment over the premises of the insurance had not been made, and, most important, the scheme of placing the power house, the most valuable thing of all and the best risk under a single policy of $300,000, had not then matured. Surely McColl would not make a contract without seeing how that was to be adjusted.

The plaintiff himself says, "When he went down at 11 o'clock, we commenced to get our final figures to finish up the business

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we wanted—approximately final figures to make a general arrangement as to terms."

Mr. Beer, in the course of his cross-examination, has attempted to shift to the interview of the first day some things which took place on the second day, but his own evidence and that of the plaintiff mainly shew what the information was which they had on the first day and what they acquired on the first day. They really both give the impression that it was according to their deduction on the second day, at the interview, that the alleged contract was closed and not over the telephone, and that tends very much to displace the answer given by the plaintiff, "We accept your proposal," and the view of the trial Judge. They resort to phraseology in connection with the interview of the second day as getting an order for the insurance at that time, although the plaintiff, not then being in a position to bind anything, was hardly taking an order. The plaintiff, in that interview, when it came to dealing with another item, the insurance of the office building, also says, "In the meantime we had closed. I considered we had closed that business, and we were asking about the office building."

The plaintiff asked, until December 1, to make arrangements with other companies for placing this insurance, but he returned to New Glasgow earlier than that, namely, on November 24, and produced policies to cover the amount of the proposed insurance. McColl, no doubt, was not expecting him so soon, and had not then put the matter before the president or directors or even Mr. Cantley. But he thought, no doubt, that his recommendation to the president or Cantley would be sufficient, and he directed a cheque for the premiums to be prepared. . . .

Then he told the plaintiff he would have to go to the president, and he did go to the president. But the latter did not approve of the transaction, and, apparently from what he says, Mr. Cantley did not either.

That is what the president says, and no one questions his good faith or the credit to be given to his testimony. . . .

The president's view was very disappointing to McColl and very annoying to the plaintiff, who appears to regard presidents as mere figure-heads and Mr. Cantley as the whole company, although the law, in dealing with directors, does not regard only

the able ones. The plaintiff went off without any cheque, and was later informed by wire that the president would not consent. The plaintiff by December 1 then took the position that notwithstanding the president's attitude, there had been a contract between him and McColl. He knew that there could not possibly have been a meeting of directors, but he claimed that McColl had authority, and that the evening before the telephone message of the 20th McColl had seen Mr. Cantley, although, in fact, he had not seen him.

This is the way he put it in the letter.

Your telegram surely cannot have been seriously intended, for, notwithstanding your president's attitude, our arrangements are binding and must be completed, as we entered into a definite contract. *There can be no question of your authority to do so*, more particularly *as you closed with me only after consultation with Mr. Cantley*, and the fact that I delivered what was agreed upon was never questioned.

I scarcely know what to say, but your president's action has placed me in an exceedingly difficult position, apart from the time and money expended, and I am at a loss to explain matters to my principals.

Our correspondence and arrangements were clear and conclusive. You had $1,000,000 insurance on the Eastern Car plant. After correspondence, I went to see you about it, as I felt I could make you an attractive proposition. At the opening of our first interview, you stated, to begin with, you were not in a position to make a deal, and, although matters were not just *as you would like to see them, still you felt nothing could be done at the moment.* I then told you I would put my time against yours; that I proposed to shew you a saving of 25%, and that, in the face of this, I did not see how you could refuse to accept, especially as I stated that, if I would not make good, I was willing to pay you 25% for your lost time.

You were to consult Mr. Cantley, and advise me next morning, which you did, accepting my proposals and giving Mr. Beer and myself full particulars. This was definitely closed and only needed the delivery of policies.

The Judge relies on the fact that, after the president refused to sanction the proposal of the plaintiff, the plaintiff wrote this letter, in which he recounted his argument that the matter had been closed between him and Mr. McColl, and that this letter had not been answered by McColl.

That letter does not, however, put forward the view that there was a proposal, which was accepted over the telephone, as the Judge finds. What he did say in the letter shews clearly that he was also relying on the interview of the second day.

The Judge treats the non-reply to that letter as an admission. There are some letters which do not require an answer, and, after what had taken place between them, the parties being

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at arms' length, I think it was not required that he should answer the plaintiff's argument.

Then the Judge relies on the fact that, after the plaintiff came back with the policies, the defendant McColl prepared the cheque for the premiums. There is no doubt about it that McColl thought that the president would take his recommendation, and he prepared the cheque. But the preparation of the cheque is quite as consistent with the view that McColl had agreed to recommend the proposal as that he had said, "We accept your proposal."

It is clear that McColl was quite sure that his recommendation would be sufficient to ensure its approval. The plaintiff had relied on that, but it turned out not to be sufficient.

The Judge cites *Lefeunteum* v. *Beaudoin*, 28 Can. S.C.R. 89, 93, for support of a view that there is a legal presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative. I think that case does not help very much here. One testifies that he said we accept your proposition; the other that what he said was he would recommend it. Who has the affirmative and who has the negative?

But there is a long-established principle in English jurisprudence that, when two equally reputable business men are in conflict, as was the case here, and the burden being on the plaintiff, as was the case here, then the person upon whom the burden of proof rests must fail.

Instead of completing a contract, the parties were really discussing a scheme for the insurance of the premises in a different way, which the plaintiff said would effect a saving of 25%, and the defendant McColl was so far convinced of it the plaintiff even bet him that he could do it, that he assured the plaintiff that he would recommend it.

It is not likely that McColl, when the original insurance had been left to the president by resolution of the Board, directly he was *functus*, would try to bind the company by an agreement after it was effected, not merely to effect other insurance, but to cancel that insurance which was already placed, and that is a much more serious thing: *Xenos* v. *Wickham*, L.R. 2 H. L. 296.

The amount payable for premium to the original companies on cancellation would be a considerable item.

The plaintiff, in his haste, advised him not to pay anything. One of the companies, the Ontario company, was apparently insolvent, and that would justify a cancellation of nearly $1,000,000 worth of insurance by other companies, to let them bring actions. There was also the view that these companies might let them off with a *pro rata* rate which would be less than the stipulation, that a special rate fixed upon cancellations would be charged. But that was all unsettled, if you take the view that he was binding the defendant company to cancel the policies. And then would not the first brokers, Rainnie & Keator, have the same right of action as is now put forward against this defendant company in respect to the loss of their commissions? I think it involved great responsibility to have the insurance readjusted in the way the plaintiff proposed.

If the plaintiff really thought that the telephone message closed the contract, would he not, as he knew that McColl had not the power to close it, have asked, out of mere curiosity, if nothing else, what did Mr. Cantley say about it?

The unwritten contracts of such companies must be made by some one having at least implied authority to bind the company. One would think he would have taken an interest in what Mr. Cantley said, since he relied on him to get the proposal through. This brings me to the question of the defendant company being bound by what took place between the secretary-treasurer McColl and the plaintiff. The Judge says:—

I find that McColl had not actual authority to make the contract, but that, in making the contract, he was acting within the apparent scope of his authority; notwithstanding this, he could not bind the defendant if the plaintiff had notice of the lack of authority. He did get such notice at the first interview, but McColl told him he would consult with Cantley, and then, when he rang up the next day and said "We accept," I think the plaintiff then had the right to assume that he had authority and that he was then acting within the apparent scope of his authority. The result is that the defendant company is liable in damages.

In dealing with the question of *apparent scope of authority of McColl, I have* to consider the evidence *and that he was the man in charge in the company's office.* Take, for instance, the remarks of Lord Esher in *Barnett* v. *South London Tramway*, 18 Q.B.D. 815. Speaking of a secretary of a company, he says: "No person can assume that he has authority to represent anything at all."

I am very sure that Lord Esher would not have said this, speaking of McColl's authority under the evidence in this case. If I am wrong as to the making of a contract being within the apparent scope of McColl's autho-

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rity, then he is liable, because an agent, making a contract, in so doing by his conduct represents and impliedly warrants that he has authority.

I do not know what right he had to assume that Mr. McColl then had authority. There is a burden on plaintiff, and he was notified that there was no authority.

When the plaintiff had notice that McColl had not authority to bind the company, I do not understand why his having charge of the company's office would help the matter. Or, if he had not authority on the 19th, how, by a consultation with Mr. Cantley, he could get apparent authority over night? Mr. Cantley was only one of the directors of the company—not even a managing director. It would only be by some act of the directors, a holding-out of Mr. McColl as authorized to contract or knowingly permitting him to assume that character, which would estop the company now from saying that McColl had not authority to bind the company by such a contract: *Cartmells Case*, L.R. 9 Ch. 691, at 696.

By the by-law of this company the directors could only delegate their powers to one of their number. That would not cover McColl. Then suppose it would cover Mr. Cantley under the doctrine of *Biggerstaff* v. *Rowat's Wharf*, [1896] 2 Ch. 93, relied upon at the hearing, Mr. Cantley could not delegate that authority to Mr. McColl: *Cartmells Case*, L.R. 9 Ch. 696; Bowstead on Agency 410.

The fact is, the plaintiff relied upon two influential men being able to carry it with the directors, and he hoped Mr. Cantley would be influenced by Mr. McColl. But he was not misled by anyone—or any apparent authority. The plaintiff sets out, in his letter, everything he relied on to constitute this a binding contract on the company, and, in law, I say that there is not sufficient stated in that letter to constitute authority, either actual or by way of estoppel, to make such an agreement for the company.

Lastly, it was contended for the plaintiff that, if the company is not liable because McColl had no authority to bind the company, that the other defendant, McColl himself, would be liable in damages for warranting that he had authority. Accepting, as I do, his version that he would only recommend the scheme, I find there was no such representation or warranty that he had

authority to bind the company to cancel the policies then on the property and to take the insurance that the plaintiff offered.

I think the appeal must be allowed and the action dismissed with costs.

RUSSELL, J., concurred.

DRYSDALE, J. (after stating the facts and reviewing the evidence):—It will be noticed plaintiff was only dealing with the secretary of defendant company; that he was at this first interview, that he now treats as a definite proposal suggesting various proposed methods of covering the plant in order to work a saving of premiums; that he explained lines of insurance plaintiff had effected in reference to other companies. Says he was explaining forms in a general way, and that he did not want to tell the secretary too much. Plaintiff says they did some figuring, and left it at that—this is the plaintiff's own version of a definite proposal whereby defendant company was to cancel a million of insurance and take policies with or through plaintiff. It strikes me as absurd to call this any definite proposal respecting insurance that could be accepted over the 'phone by a message to the effect that "We accept your proposal"—in fact, plaintiff's own version of what he did, after he got McColl's telephone message, is, I think, conclusive against any idea that at that time he considered there was a contract. He says that, after getting the message, "We accept your proposal," "we commenced to get over final figures to finish up the business; we wanted approximately final figures to make a general arrangement as to terms." I think this shews he was at least not then in any position to say he had concluded any contract with defendants. Beyond this there is a difficulty in plaintiff's way that I think conclusive. The secretary had no power or authority to cancel insurance deliberately put on by the Board of Directors to the extent of a million, and attempt to deal with plaintiff. When the transaction, as far as it went with the secretary, became known to the Board, the president turned the proposal down, and adhered to their former position. I think the whole case savours of sharp practice on the part of the plaintiff. He failed to get the directors to accept his proposed new insurance or to cancel their ten existing policies. He has not proved any contract under which he was employed for any purpose, and, as to him, the defendant

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company is in no way in default, in so far as a careful perusal of the evidence discloses the position to me. I would allow the appeal and dismiss the plaintiff's action. *Appeal allowed.*

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REX v. HRYCZIUK.

Saskatchewan Supreme Court, Newlands, Lamont, Elwood and McKay, JJ. July 15, 1915.

1. THEFT (§ I—1)—GOODS UNDER SEIZURE BY SHERIFF—BOND TAKEN FROM DEBTOR—CR. CODE, SECS. 347, 386.

A sheriff who has seized under a writ of execution for debt a number of hogs in possession of the execution debtor and who at the latter's request takes a bond from the debtor and his surety for the purpose of continuing the seizure without the expense of leaving a man in possession has a special property or interest in the hogs sufficient to make the selling of the same by the accused while under such bond a theft thereof under Cr. Code, secs. 347 and 386; the seizure was valid as against those who had notice of it and the accused could not justify by setting up the alleged title of another and the latter's authorization to sell on his behalf.

[*Dodd* v. *Vail*, 9 D.L.R. 534, 6 S.L.R. 22, affirmed in *Dodd* v. *Vail* (No. 2), 10 D.L.R. 694, 23 W.L.R. 903, applied; *Dixon* v. *McKay*, 21 Man. L.R. 762, and *R.* v. *Knight*, 1 Cr. App. R. 186, referred to.]

Statement

APPEAL by defendant on a Crown case reserved by HAULTAIN, C.J., before whom the accused was tried at Humboldt with a jury, and found guilty on the following charge:—

"Hrye Hrycziuk stands charged by John M. Crerar, agent for the Attorney-General, Judicial District of Humboldt, for that he, the said Hrye Hrycziuk, on or about the 16th day of November, 1914, at near Cudworth in the Judicial District of Humboldt, in the Province of Saskatchewan, did steal and convert to his own use certain hogs, about seventy-two (72) in number, which at the time of such theft and conversion the sheriff of the Judicial District of Humboldt had a special property or interest therein with the intent to deprive such sheriff of such interest contrary to the provisions of the Criminal Code of Canada, sec. 386."

E. Gardner, for accused.

E. T. Bucke, Acting Deputy Attorney-General, for Crown.

The following are the facts as disclosed in the stated case.

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ELWOOD, J.:—On October 29, 1914, one William G. Currie, the bailiff at Vonda for E. T. Wallace, the sheriff for the Humboldt Judicial District, seized a number of hogs on the farm of the accused, under a writ of execution duly issued against the goods of the accused. The hogs were not taken away by the bailiff, nor was a man left in possession. After some discussion with the

accused and his son, the bailiff Currie left the farm of the accused on the understanding that the accused would give a bond for the delivery of the hogs. Some time later, whether on the same day or on a subsequent day it is not quite clear, the accused and his son went to Currie's office and signed the following bond:—

"Know all men by these presents, that we, Hryc Hrycziuk of the Post Office of Cudworth, Iwan Hrycziuk of the Post Office of Cudworth, are held and firmly bound unto E. T. Wallace, Esquire, Sheriff of the Judicial District of Humboldt in the Province of Saskatchewan, in the penal sum of Four Hundred Dollars lawful money of Canada, to be paid to the said E. T. Wallace, Sheriff as aforesaid, or his certain Attorney, Executors, Administrators, or Assigns, for which payment, well and truly to be made, we bind ourselves and each of us by himself, and each of our Heirs, Executors, & Administrators, for the whole and every part thereof firmly by these presents.—Sealed with our Seals.—Dated this Twenty-ninth day of October in the year of our Lord, one thousand nine hundred and fourteen.

Whereas under and by virtue of a Writ of Execution issued out of the Supreme Court of Saskatchewan, Judicial District of Humboldt, at the suit of George Braden against the goods and chattels of the said Hryc Hrycziuk to the said Sheriff directed, he, the said Sheriff, hath seized and taken in execution the following goods and chattels as the property of the said Hryc Hrycziuk, namely: One hundred and sixty-four hogs now on the N.E. $\frac{1}{4}$ of Section 28, Township 40–26, W. 2nd.

Therefore the condition of this obligation is such that if the said Hryc Hrycziuk do and shall deliver or cause to be delivered to the said E. T. Wallace, as such Sheriff as aforesaid, or his lawful Deputy or Bailiff in that behalf, the said goods and chattels so seized, and taken in Execution as aforesaid, and every part and parcel thereof, upon the day appointed, or to be appointed for the sale thereof, and also upon every adjournment of such day of sale, and at any other time that the said E. T. Wallace, such Sheriff, or his Deputy or Bailiff shall desire to enter upon the premises of the said Hryc Hrycziuk . . . as well before as after the return day of the said Execution, and permit and allow them, any or either of them to retake and carry away the said goods, without let, hindrance, interruption or molestation, and keep harmless and indemnified the said Sheriff from any

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action or actions in respect thereof in any wise whatsoever; then this obligation to be null and void otherwise to be and remain in full force and virtue.

Signed, sealed and delivered in the presence of (Sgd) Peter C. Currie.	his Hryc (x) Hrycziuk. mark (Sgd) Iwan Hrycziuk.

From the day of the seizure (29th October) until the 2nd December the hogs were left in the uncontrolled possession of the accused. On the 2nd December, Currie, the bailiff, went back to the farm of the accused and found that a number of the hogs had disappeared, owing to the fact, as disclosed by the evidence, that they had been sold by the accused to one Yull, without any authority from the sheriff or his bailiff.

The following question was referred to the Court for its opinion, namely:—

"Had the sheriff any special property or interest in the hogs sufficient to make the selling of the same by the accused a criminal offence?"

The condition of the bond, and the reference therein to the delivery to the sheriff of the hogs on the day appointed for the sale, seems quite clearly to indicate that the sheriff still continued the seizure.

The evidence of the bailiff was that the hogs were left with the judgment debtor because the bailiff had told him that he was going to take the hogs away and going to place some person in charge of them; the accused then asked him to leave them there for about a month, so that he could get them in better shape and that the market would be better for them. The bailiff then said he was not anxious to sell them now, but that, if the accused could give a satisfactory bond, he would leave them for a short time, and this was agreed to by the accused.

While this evidence is partly contradicted on behalf of the accused, yet it seems to me quite clear that some such conversation took place, and I am satisfied from the whole evidence that it was never the intention of the sheriff to abandon the seizure, and that the bond was taken for the purpose of continuing the seizure without putting the accused to the expense of a man in possession.

In *Dodd* v. *Vail*, 9 D.L.R. 534, 6 S.L.R. 22, 23 W.L.R. 62, my brother LAMONT says as follows:—

"As to the wheat, there can be no question but that it was validly seized. An entry upon premises on which goods are situated, together with an intimation of an intention to seize the goods, will constitute a valid seizure: Halsbury's Laws of England, vol. 14, p. 54; *Swan* v. *Falmouth*, 108 E.R. 1112. Then, did he abandon that seizure? The question whether or not a sheriff abandons possession of goods seized is always a question of fact: *Lumsden* v. *Barnett* [1898], 2 Q.B. 177. The taking of a bond on the 8th October is strong evidence that neither the sheriff nor the defendant considered that there had been an abandonment. On the material filed I am satisfied that there was not the slightest intention of abandoning the seizure. It is not necessary for the sheriff to put a man in possession in order to hold goods of which he has made a valid seizure, as against those who have notice of the seizure: *Dixon* v. *McKay*, 21 Man. L.R. 762.

This judgment was affirmed by the Court en banc, *Dodd* v. *Vail* (No. 2), 10 D.L.R. 694, 23 W.L.R. 903, the Chief Justice, in delivering the judgment in Court, said as follows:—"It will not be necessary to relate the facts of the case, as they are fully set out in the decision appealed from. I fully concur in the reasoning and decision of my brother LAMONT, from whose decision this appeal has been taken."

The above case, and the authorities therein referred to, seems to be directly in point, and I am of the opinion, therefore, that there was no abandonment by the sheriff of the seizure, and that the above question referred to the Court should be answered in the affirmative.

Since writing the above I have had an opportunity of perusing the judgment herein of my brother LAMONT.

The copy of the proceedings at the trial does not show that any objection was made to the charge of the Chief Justice on the question whether or not the evidence, apart from the bond, showed an abandonment of the seizure. And the sole question reserved, and apparently raised at the trial, was: Whether or not the taking of the bond itself, apart from any other evidence, constituted an abandonment.

The whole argument before us was directed to the effect of the taking of the bond, and no question was raised as to the charge

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of the Chief Justice in any other respect, and I therefore cannot agree with my brother LAMONT in holding that there should be a new trial.

NEWLANDS, J., concurred with ELWOOD, J.

LAMONT, J.:—The accused was indicted for stealing and converting to his own use 72 hogs, "which at the time of such theft and conversion the sheriff of the Judicial District of Humboldt had a special property or interest therein with intent to deprive such sheriff of such interest."

The evidence disclosed that under a writ of execution against the goods of the accused, the sheriff, by his bailiff Currie, had gone to the accused's farm and seized some 200 hogs. The hogs were not taken away, nor was a man left in possession. The bailiff left the place on the understanding that the accused would give him a bond for the delivery of the hogs. Some time later, whether on the same day or on a subsequent day is not quite clear, the accused and his son went to Currie's office and executed the bond, in the sum of $400.00, which bond contained the following condition:—

"Therefore the condition of this obligation is such that if the said Hryc Hrycziuk do and shall deliver or cause to be delivered to the said E. T. Wallace, as such sheriff as aforesaid, or his lawful deputy or bailiff in that behalf, the said goods and chattels so seized, and taken in execution as aforesaid, and every part and parcel thereof, upon the day appointed, or to be appointed for the sale thereof, and also upon every adjournment of such day of sale, and at any other time that the said E. T. Wallace, such sheriff, or his deputy or bailiff shall desire to enter upon the premises of the said Hryc Hrycziuk . . . as well before as after the return day of the said execution, and permit and allow them, any or either of them, to retake and carry away the said goods, without let, hindrance, interruption or molestation, and keep harmless and indemnified the said sheriff from any action or actions in respect thereof in any wise whatsoever; then this obligation to be null and void, otherwise to be and remain in full force and virtue.

From the day of the seizure (October 29th, 1914) until December 2nd, so far as the sheriff was concerned, were left at the farm of the accused. On December 2nd Currie returned and discovered that 72 of the hogs had been sold to one Yull. The

evidence shows that the sale was negotiated by the accused and that he received a deposit thereof of $5.00, while the balance of the purchase money—some $350.00—was paid to the son. The defence was that the hogs were the property of the son, John Hrycziuk. The son swore that the hogs were his; that he had purchased 26 breeders, and he gave the names of the men from whom they were purchased. He stated that the balance of the pigs were the increase from these twenty-six, and that he left all the pigs at his father's so that his father could feed them while he was away. It appeared that the son was working several farms, not close together, and his work necessitated his being at different places from time to time. The son also testified that after the seizure he told his father if a butcher came to the place to ascertain what he would give for the hogs.

The father swore that it was by virtue of instructions from the son that he made the sale to Yull, and that he himself had only seven hogs.

The jury found the accused guilty, and the learned Chief Justice, before whom the case was tried, reserved for the Court the following question:

"Had the sheriff any special property or interest in the hogs sufficient to make the selling of the same by the accused a criminal offence?"

The answer to this question depends upon the answers to be given to two other questions:—

1. Did the sheriff by virtue of the seizure made acquire any special property in the hogs? And—

2. If so, did he afterwards, by abandonment of the seizure or otherwise, lose that property?

A seizure of goods under a writ of execution places them in *custodia legis;* the general property in the goods remains in the execution debtor, but by virtue of the writ of execution a special property in them vests in the sheriff, so that he can maintain actions for trespass or trover against any person who takes them away, 14 Halsbury 55. But the goods seized must be the goods of the execution debtor and not of any other person, 14 Halsbury 49.

If the goods of a third person are seized, such seizure is an act of trespass on the part of the sheriff for which an action will lie against him. *Jelks* v. *Hayward* [1905], 2 K.B. 460.

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The sheriff in the present case, therefore, acquired no property or interest in the hogs in question unless they were the property of the accused. Whether or not they were his property is a question of fact to be found by the jury.

Upon this question the jury did not pass. Just before the close of the case for the defence, while counsel for the accused was examining the son as to whether or not the hogs belonged to him, the learned Chief Justice referred to the point as to whether or not it would make any difference in the position of the accused if the goods belonged to the son. Counsel for the accused stated that it would not justify the accused in selling them, that there was a proper course to adopt, namely, interpleader proceedings. To this the learned Chief Justice observed that if they were in fact the son's hogs it might make a lot of difference as to his right to sell them. In charging the jury, however, he evidently adopted the view expressed by counsel for the accused, for he expressly told the jury that they had nothing to do with the question whether the hogs were the property of the son or of the accused; that even if they did belong to the son that neither he nor anyone else had a right to sell them, so long as they were under seizure; that the proper course was for the son to claim the goods and have the sheriff interplead.

In the case of *Rex* v. *Knight* (1898), 1 Cr. App. R. 186, the facts were very similar to the case at bar. In that case a married woman was carrying on business. An execution was issued against her and the sheriff's officer made a seizure of her goods. On the premises were seven live fowls, which the woman's husband claimed as his own and he took them away. He was indicted for stealing seven live fowls, the property of the sheriff. The Chairman of the Quarter Sessions instructed the jury precisely as the learned Chief Justice did in this case that, once the goods were seized, whether they were the accused's property or not, he could not take them out of the custody of the law except by the means prescribed by law. He left to the jury the following questions: Were the fowls the accused's property? If so, were they seized by the sheriff as the woman's goods? And he directed them that if they answered both questions in the affirmative it would be a verdict of "Guilty." He later put this further question: "Do you find the prisoner took away the goods from the place?" The jury answered all questions in the affirmative.

and the accused was convicted. The conviction was appealed and on appeal it was quashed. The effect of the judgment of the Court of Criminal Appeals as stated in the head note of the report is:—

"If goods have been seized by the sheriff under an execution levied on the property of some person other than the owner of the goods, the owner, by taking possession of them, cannot be guilty of larceny."

The only authority which a sheriff has to seize goods is the authority of his writ, and that only authorizes him to seize the goods of the execution debtor. The jury should have been instructed that, if they found as a fact that the hogs seized were the property of the son they should bring in a verdict of "Not guilty"; as, in that case, the sheriff could not have any property or interest in them which could be the subject of a theft.

Then, as to the second point:—

Assuming the hogs to be the property of the accused, so that the seizure would give the sheriff a special property in them, did he abandon the seizure?

To constitute an abandonment of a seizure, there must be a giving up of possession of the goods seized, coupled with an intention on the part of the sheriff, or officer seizing, to forego the right obtained by virtue of the seizure. Both these essentials are questions of fact, which, unless admitted, must be determined by the jury.

In *Barnet* v. *Lumsden* [1898], 2 Q.B. 177, A. L. SMITH, L.J., said:—

"We held in this Court not long since, in the case of *Bradshaw's, Ltd.*, v. *Deacon* [1898], 2 Q.B. 173, that where a sheriff goes out of possession and the point arises as to whether he has abandoned possession or not, the question is always one of fact."

That the sheriff in this case went out of possession is admitted.

Counsel, both for the Crown and the accused, referred to the language of the bond as conclusively showing:—For the Crown, that there was no intention to abandon the seizure; and, for the accused, that such intention was there manifest.

All parties at the trial, and both counsel on the appeal, were evidently under the impression that the question of intention was to be decided by an interpretation of the language of the bond. This, in my opinion, is erroneous. In determining the

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intention with which Currie gave up possession, the jury are entitled to consider not only the language of the bond, but all surrounding circumstances, including the object of taking the bond if it was not to work a relinquishment of the seizure.

In my opinion the language of the bond does not indicate with any degree of certainty what the intention was. Had it contained an express stipulation that, notwithstanding the taking of the bond, the goods were still to be under seizure, it would be *prima facie* evidence of intention. But, even in that case, it would be *prima facie* evidence only, and it would still be open to the accused to establish, if he could, that, notwithstanding the express language of the bond, the intention was to abandon seizure.

In *Dodd* v. *Vail*, 9 D.L.R. 534, 6 S.L.R. 22, 23 W.L.R. 62, having to find the facts, I held that the giving of a bond by an execution debtor, under the circumstances of that case, was strong evidence that there had been no intention to abandon the seizure. In that case the sheriff had made a seizure of one hundred acres of wheat, and he had gone out of possession without any arrangement or understanding with the debtor. Six days later the execution debtor came to the sheriff's office and stated that he had had the oats now cut. The sheriff said he would send a man to make a seizure, whereupon the debtor asked him not to incur that expense, that he would admit the seizure of the grain. The sheriff then took a bond from him which recited the seizure of both wheat and oats, and conditioned upon the delivery of the grain when required. Under these circumstances, the giving of the bond six days after the sheriff had gone out of possession in my opinion precluded the debtor from saying that the sheriff had gone out of possession with an intention to abandon the seizure. This finding was upheld by the Court en banc: *Dodd* v. *Vail*, 10 D.L.R.694, 23 W.L.R. 903.

Whether there was an abandonment or not is a question of fact, to be determined in each case by the tribunal charged with the duty of finding the facts.

I am therefore of opinion that the question submitted, involving as it does questions of fact, cannot be answered by this Court, beyond stating that the sheriff could only have a special property or interest in the goods seized sufficient to make the selling of same by the accused a criminal offence, if: 1st, the goods seized

were the property of the execution debtor; and, 2nd, that there had been no abandonment of the seizure by the sheriff.

There should be a new trial to enable the jury to determine these questions of fact.

McKAY, J., concurred with LAMONT, J.

The Court being equally divided, the appeal stood dismissed.

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New Brunswick Supreme Court, McLeod, C.J., McKeown and Grimmer, JJ. May 6, 1915.

1. BOUNDARIES (§ II A—5)—MODE OF LOCATION—REFERENCE TO SUBSEQUENT GRANTS.

For the purpose of ascertaining the location of the lines of a Crown grant it is proper to refer to subsequent grants and plans of adjoining lands.

2. BOUNDARIES (§ II A—5)—CONVENTIONAL LINE—EFFECT ON SUCCESSORS IN TITLE.

A division line agreed upon and occupied as a common boundary by adjoining occupants of land, fully cognizant of the dispute as to the location of the line dividing their properties, is binding upon their successors in title regardless whether it be the true boundary line or not.

3. NEW TRIAL (§ II—8)—GROUNDS FOR—NON-DIRECTION—WANT OF SPECIFICNESS—FAILURE TO BRING TO COURT'S ATTENTION.

A new trial will not be granted on the ground of non-direction where counsel was afforded an opportunity at the trial to call the judge's attention to a more specific direction and failed to do so.

MOTION for new trial for mis-direction and non-direction by Court. Statement

J. C. Hartley, K.C., for defendants.

W. P. Jones, K.C., contra.

McKEOWN, J.:—This suit is brought to recover damages for a trespass to plaintiff's land, for throwing down and removing plaintiff's fence and cutting and carrying away his hay. The cause was tried at the October sitting of the Carleton Circuit Court before Barry, J., and a jury, and upon answers to questions submitted to them, the learned Judge directed the entry of a verdict for the plaintiff for $25, with leave reserved for defendants to move for a verdict upon the answers to certain of the questions. All the questions and answers are hereinafter set out in full. McKeown, J.

The issue involved concerns the ownership of the land upon which the alleged trespasses were committed. The defendants admit the acts complained of, but assert that the land which

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plaintiff claims, and which is in dispute between them is contained within the boundaries of a certain grant issued by the Crown to one Martha J. Stickney, which land by *mesne* conveyances is now defendant Montgomery's property.

At the trial certain questions were submitted to the jury by the Judge and they were answered as follows:—

1. Which do you find to be the true line between the plaintiff and the defendant Mongomery? The Hanson line or the Hoyt line? A. Unanimous for the Hoyt line.

2. Did John Drake, the then owner of the Stickney lot and David Phillips, in 1905, fix, agree upon and establish a division line between their respective properties? A. We unanimously believe they did.

3. If you answer the last preceding question in the affirmative, then on which line do you say the said line was established? A. Hanson line.

4. Had the defendant William Montgomery, and his predecessors in title, acquired a title to the western portion of lots 22 and 23 between the Hanson and the Hoyt lines by an exclusive, continuous, adverse, open and notorious possession for a period of 20 years prior to 1903? A. We believe he had.

5. Was the plaintiff in the actual possession of the land in question, at the time the defendants shifted the fence eastward to the Hoyt line? A. He was in possession.

6. Did the defendant move the fence and cut the hay on the land in question as asserted by the plaintiff? A. He did.

7. At what sum do you assess the damages, whether you find the plaintiff entitled to any or not, for shifting the fence and plowing the land in question? A. We would assess the damages at $25. . . .

The grounds of appeal consist of objections made to certain instructions given by the trial Judge in his charge to the jury. These directions are classified as misdirection and non-direction. Inasmuch as defendants' counsel did not ask the Judge for specific directions corresponding to the non-direction complained of, it is not open to him to complain here upon that ground. In this particular case, however, it does not seem to be of consequence, because defendants' full contention as to non-direction is involved in consideration of the misdirection alleged.

1. Misdirection: The objections to the Judge's charge are as follows:—

(*a*) In telling the jury that "the real question in controversy is where the dividing line between them, or, as I interpret the documents, where is the true base line running down to the western end of lots 1, 3, and 22 and 23. I may as well say right here, because it is a question for legal interpretation of the grants and plans attached to the grants, that the rear end or western line of lots 2 and 23 coincides with lots 1 and 3.

(*b*) In telling the jury that "the question has been raised by the counsel for the defendant Mr. Montgomery, that although lots numbers 1 and 3—the western lines of lot 1 and 3—make a direct extension perfectly each with the other, it does not necessarily follow that the western line of lots 22 and 23, which form such northerly one-half, that each should be continuous with the other. But as a matter of law and interpretation of documents, wherever you find that line to be, you will find the rear lines of 22 and 23 to be a direct extension of and in direct alignment with the rear of lots numbers 1 and 3.

(*c*) In telling the jury that Mr. Blair established two corners, a corner at the northwest of lot 3, and a corner at the southwest of lot 1. Now the lines between these points is the line, in my judgment, between the Stickney grant and lots 22 and 23 and this is the line that the parties to this suit ask you to find.

(*d*) In telling the jury what is the real question for you to determine? What is the western boundary of 1 and 3 and 22 and 23 as established by Mr. Blair in the original survey? You may look at the plans in evidence. Every plan and every grant put in evidence here treat of the westerly boundary of lots 22 and 23 as being in direct alignment with the rear of lots 1 and 2.

Of the four instances of alleged misdirection above cited, three of them, viz., (*a*), (*b*) and (*d*), seem to be identical, and the question raised by them is: Was the Judge right in instructing the jury that the western line of lots 22 and 23 is identical with the western line of lots 1 and 3?

Reference to *Metropolitan Railway Company* v. *Wright* (1886) 11 A.C. 152.

While it was argued on appeal that there was no evidence to support this finding of the jury, yet the defendants' notice contains no such ground. When owners of adjoining lands, fully cognizant of the dispute as to the location of the line dividing their properties, jointly agree upon a certain line as a division line between them, jointly put up or continue a fence along such chosen line as the common boundary of their respective holdings, and for years limit their respective occupation and cultivation of said properties by such fence, I think in the absence of fraud, each successor in title is bound by the line so agreed upon. See *Perry* v. *Patterson*, 40 N.B.R. 591; *McIntyre* v. *White*, 15 N.B.R. 367, also on the question of a conventional line see *Inch* v. *Flewelling*, 30 N.B.R. 19.

As to the misdirection complained of in (*c*), which is, in effect, a statement on the part of the trial Judge that a line

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between the northwest corner of lot 3 and the southwest corner of lot 1, is the true line between the Stickney lot and lots 22 and 23, I think that as it affects this case the instruction was correct enough. Such line was, and is, the western line of lots 22 and 23. Whether it is the eastern boundary of the Stickney grant does not appear, but on the point at issue there was no misdirection.

I think the motion should be dismissed with costs.

Grimmer, J.

GRIMMER, J.:—This is an action of trespass to land, tried before Barry, J., and a jury, at the Carleton Circuit in October, 1914, when a verdict was, upon the findings of the jury, entered for the plaintiff and damages assessed at $25.

From this verdict the defendant now appeals and moves for a new trial upon the grounds of misdirection and non-direction on the part of the Judge on the trial.

From an examination of the evidence and a study of the grants and plans used upon the trial, I am of the opinion there was no misdirection on the part of the Judge, but on the contrary he was quite right in directing the jury. The real question in controversy was the location of the dividing line between the parties; that Deputy Blair had established two corners, one at the northwest of lot number 3, and one at the southwest of lot number 1, and that the rear line of lots number 22 and 23 is a direct extension of, and in direct alignment with, the rear of lots number 1 and 3.

By the return it appears that at the conclusion of the charge the Judge asked counsel if they had any other questions they would like submitted to the jury, which could only mean he was prepared to submit the same if they had any, and to give such directions or instructions as the questions suggested or required, but no further questions were proposed by counsel, nor was the Court asked to give any special instructions.

Under these circumstances I am of opinion counsel for the defendants cannot now complain of non-direction.

Order 39, r. 6, of the Judicature Act provides:—

A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not

asked to leave to them, unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned on the trial.

It has also been held that when no-direction is complained of, and an opportunity was given to have the matter complained of asked, which was not taken advantage of, that no Court will grant a new trial, for the reason as stated, that if the defendant thought he had got enough, he would not be permitted to stand aside, and let all the expense be incurred, and a new trial ordered because of his own neglect: *Nevill* v. *Fine Art and General Insurance Company*, [1897] A.C. 68, Halsbury, L.C., at p. 76.

This was later confirmed by the same eminent authority in *Seaton* v. *Burnard*, [1900] A.C. 135, 145, in which case it was also remarked by Morris, L.J.:—

> If counsel thought that the learned Judge had not called attention to any particular point, in my opinion it was their duty to call his attention to it at the time and ask him to submit it to the jury. Are counsel to stand by and say, you overlooked that point, and though I had already put it myself to the jury till they were quite tired of it, I think the Judge ought also to have laboured it. That would in my opinion be throwing a duty upon the Judge of a most extraordinary character.

In view of these authorities, and the failure or neglect of the defendants when the opportunity was offered them to avail themselves of the privilege given, I am of the opinion they have put themselves out of Court in respect to the matter of non-direction complained of. The application must be dismissed with costs.

McLEOD, C.J., agreed with McKEOWN, J.

Application refused.

REX v. O'MEARA.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A., and Kelly, J. October 12, 1915.

1. GAMING (§ I—6)—AUTOMATIC GUM VENDING MACHINE—FREE TRADE CHECKS WITH PURCHASES.

An automatic vending machine is properly held to be a contrivance for unlawful gaming where in addition to the chewing gum or other article obtainable from the machine on deposit of a coin there is issued in some cases along with the article purchased one or more trade checks redeemable in goods at the store where the machine is kept and which may at the customer's option be re-played into the machine on the chance of more trade checks or a blank; the element of gaming remains notwithstanding the fact that the number of trade checks, if any, at the next operation of the machine is indicated in advance to the person using it as in addition to the fixed quantity of chewing gum given for the five cent coin the operator obtains the opportunity of winning the trade checks indicated and the benefits incident thereto or in case of drawing a blank with his purchase he received the benefit of a fresh turn of the indicator and the chance that the machine would indicate trade checks

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along with the next purchase were he to repeat the operation with another coin.

[*R.* v. *Langlois* (1914), 23 Can. Cr. Cas. 43; *R.* v. *Stubbs* (No. 2) (1915), 25 D.L.R. 424, 24 Can. Cr. Cas. 303, disapproved; *R.* v. *Stubbs* (No. 1), 21 D.L.R. 541, approved.]

2. GAMING (§ I—15)—KEEPING COMMON GAMING HOUSE—AUTOMATIC VENDING MACHINE WITH GAMING FEATURE.

A charge of keeping a common gaming house is maintainable against the proprietor of a cigar store who keeps in the store an automatic gum vending machine operated as a nickel-in-the-slot device where the machine issues trade checks along with certain purchases and not with others, in such a manner as to constitute a contrivance for unlawful gaming, if the keeper of the store was entitled to a share of the profits from the operation of the machine although the machine belonged to another who alone had the keys with which to open it.

3. GAMING (§ I—15)—COMMON GAMING HOUSE—STATUTORY PRESUMPTION—CONTRIVANCE FOR GAMING FOUND ON PREMISES.

Semble, that the Criminal Code, sec. 986, as amended 1913, has the effect of making it prima facie evidence that a room or place is a common gaming house if it is found fitted or provided with any means or contrivance for unlawful gaming, by a constable who enters by consent of the proprietor and without any search warrant or order under Cr. Code, sec. 641, as amended 1913; and it is not necessary for the prosecutor to prove there was any resorting to the place (Cr. Code, sec. 226(*a*)) as part of their prima facie case where the provisions of Cr. Code, sec. 986, apply.

Statement

CASE stated by the Deputy Police Magistrate for the City of Ottawa, on a conviction of the defendant for unlawfully keeping a disorderly house, that is to say, a common gaming-house.

E. F. B. Johnston, K.C., for defendant.

J. R. Cartwright, K.C., and *Edward Bayly*, K.C., for the Crown.

The judgment of the Court was delivered by

Magee, J.A.

MAGEE, J.A.:—Reserved case stated by the Deputy Police Magistrate for Ottawa, on a conviction for unlawfully keeping a disorderly house, that is to say, a common gaming-house, *contra formam statuti*. He asks whether there was any evidence that the offence charged had been committed.

The accused, a tobacconist, kept in his shop a machine known as "Mills Counter O.K. Vendor." Any one depositing an American nickel 5-cent coin in a slot therein, would, on pulling a lever, receive out of the machine a package of chewing-gum and also so many, if any, brass tokens called premium-checks as were indicated upon the machine before he deposited the coin. Each token would entitle him to get goods in the shop to the extent of 5 cents. The indicator might shew that he would not receive any token, or it might shew any one of the 19 numbers from 2 to 20 inclusive.

So far there would be certainty and no gaming, but that was not all. The indication was made by means of designs upon the edges of three wheels inside the machine passing close to a narrow opening or slit which allowed one design on each wheel to be seen at a time, thus making a combination of three designs. The combinations would change with the turning of the wheels, which did not all turn in the same direction. A chart shewed the value of each combination in tokens, whether none or 2 or more up to 20. It is not clear whether the values of the combinations remained the same or were liable to change with the contemporaneous turning of a fourth wheel opposite to an opening in the chart. By the pulling of the lever after depositing the coin the wheels were set in motion, and on their stopping a new combination would be shewn with its value in tokens to be received by the depositor of the next coin or token. Instead of a coin, one of the tokens might be deposited with the like results except that no gum would be received.

What this next combination would be the depositor had no means of knowing beforehand. But, so far as appears, he was not limited to one or any number of operations. The very object of the tokens was that he could not be so limited. He being at the machine, no one other than the proprietor, and ordinarily not even he, would have a right to make him stand aside and take from him the opportunity to receive, for another coin or token, the value of the combination which his pulling of the lever had caused to appear. Hence for his previous deposit of 5 cents he would, in addition to the gum and tokens, if any, which he knew himself entitled to, have the chance of getting, for another 5 cents or its equivalent token, goods to the value of 10 cents or more up to $1, with other successive chances from new combinations. In other words, he would by his original coin purchase the opportunity of winning one of 19 prizes, worth from 5 up to 95 cents, or one of an unknown number of blanks, with such further opportunities as the new turns of the indicator might again disclose.

It needs only to state the transaction to realise that each depositor was taking part in a game of chance. It is true that he need not again pull the lever nor avail himself of good fortune

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if it offered, but that may be said of the winner of any gaming stake or lottery prize. It may also be that the proprietor of the machine, knows exactly how many blanks there are to the prizes, or how often, or even in what order, the different combinations will or can appear, or it may be that there is a fixed order. But, even if that were shewn to be so, the whole operation is still one of pure chance, so far as the depositors are concerned, with no element of skill.

There is no evidence as to the value of the gum (which in *Rex* v. *Stubbs*, 21 D.L.R. 541, 25 D.L.R. 424, was stated to be one cent); but, if there was no profit on supplying a package for 5 cents, then the amount of the prizes must have been supplied at a loss to those controlling the machine. If there was a profit, then the prizes were really contributed by the depositors. In either case, there was a loss to counterbalance the winning—and both brought about by chance.

The accused had admitted to one witness that he had given tobacco for the premium checks or tokens, and to the same witness "the lady in charge of the shop and a barber in the shop there" explained the working of the machine. Another witness sent by the police had been furnished in the shop with a "nickel" in change for his money, and had put it in the slot and obtained gum, but did not look to see nor did he understand what the next combination indicated. The accused, on being asked for the keys of the machine, said that one "Fisher, the agent of the machine," had them, and he also said that "there was money in the machine, part of which he was entitled to, and that this money was to even him up for the goods which he gave in exchange for the trading-checks won by the player." In the machine were found "a number of American nickels, packets of gum, and trade-checks," meaning apparently premium-checks.

Section 986 of the Criminal Code, 1906 (as enacted in 1913 by 3 & 4 Geo. V. ch. 13, sec. 29), makes the keeping of any means or contrivance for unlawful gaming *primâ facie* evidence of a disorderly house, in prosecutions under sec. 228, which, in sub-sec. 1, fixes the punishment for keeping a disorderly house, that is to say, *inter alia*, a common gaming-house as defined by sec. 226, and in sub-sec. 2 (as enacted in 1913 by ch. 13, sec. 10)

declares who shall be deemed a keeper. There was, therefore, sufficient evidence that the accused was the keeper of the premises, and indeed interested in the operation of the machine.

This machine is said and would appear to be the same sort as those which were in question in *Rex* v. *Langlois*, 23 Can. Crim. Cas. 43, and *Rex* v. *Stubbs*, 21 D.L.R. 541, 25 D.L.R. 424, in both of which cases it was held not to be a breach of the statute.

In *Rex* v. *Langlois*, an application for leave to present a bill to the grand jury at the Sessions of the Peace, after dismissal of the charge on a preliminary inquiry, was refused by the presiding Judge, who did not believe that such a thing was what the law had qualified as gambling, and said that the player could not lose more than the profits he had realised, and might play day and night without being at a loss, and that gambling was in no way the source of profit, and the only profits came from the sale of the gum, which were divided between the company and the tobacconist. Apparently, he must have been satisfied that there were no profits on tobacco given for the checks, and he said that by what had been proved the chances were equal, and to justify the law to interfere there must have been an evident fraud, a game of hazard or chance which did not exist there. I should have thought it clear from the facts stated in that case that there was a game of chance; and, it being proved that the profit was made upon the gum, the machine was kept for gain, and so came clearly within sec. 226 (*a*) of the Criminal Code.

In *Rex* v. *Stubbs*, the Appellate Division, the Chief Justice dissenting, overruled (25 D.L.R. 424), the decision of Stuart, J., 21 D.L.R. 541, refusing to quash a conviction for keeping a common gaming-house. The majority of the Court thought that these machines differed from all the slot machines and devices which had been held to be games of chance, in one important particular, that they plainly informed the persons proposing to operate them, before depositing their nickels, what the result of the operation would be, that is, whether they would receive a package of chewing-gum alone, or, in addition thereto, a certain number of trade-checks, that information being given by a notice appearing on the face of the machines—while strongly

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inclined to the view that the machines were not designed or used merely for the purpose of vending chewing-gum, and that they were also intended as an incentive and a lure to induce persons to continue to operate them with the hope that upon some future operation they might receive something more than a package of chewing-gum. With much respect, I am unable to agree with this conclusion, as I consider that the fact was overlooked that there was not the element of certainty, except as to the minimum to be received; there was no certainty as to the maximum, as, it seems clear to me, the statement of the working of the machine at once discloses. The reasoning of Harvey, C.J., [*R.* v. *Stubbs*, 25 D.L.R. 424, 24 Can. Cr. Cas. 303], and that of Stuart, J. [*R.* v. *Stubbs*, 21 D.L.R. 541, 24 Can. Cr. Cas. 60], appear to me to be much more consistent with the plain facts.

In my opinion, therefore, the conviction should be affirmed.

Conviction affirmed.

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C. A.

DANA & FULLERTON v. THE VANCOUVER BREWERIES, Ltd.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. January 13, 1915.

1. LANDLORD AND TENANT (§ II D—30)—BREACH OF COVENANT BY LESSOR—FAILURE TO IMPROVE ACCORDING TO MUNICIPAL REGULATION—FORFEITURE OF LIQUOR LICENSE—EFFECT ON TENANCY.

The forfeiture of a liquor license resulting from the failure of a lessor to improve the leased premises in accordance with a municipal regulation, as required by a covenant in the lease, does not, in the absence of a provision to that effect express or implied, put an end to the lease so as to relieve the lessee from liability for rent thereunder.

Statement

APPEAL by defendant from the judgment of Morrison, J., in an action tried by him at Vancouver for rent of a hotel and licensed premises. The following is a statement of the facts:—

On November 15, 1905, the then owner leased the premises to the defendant company for a term of 10 years. He subsequently sold subject to the lease, the plaintiffs eventually becoming the owners on February 2, 1912. There was a covenant in the lease that the lessor should make such enlargements, additions and improvements to the premises as might be required from time to time by the city by-laws to hold the license. In the forepart of 1913 the law governing licensed houses was materially changed, requiring many important improvements and enlargements of such premises. The necessary changes were not made on the premises by the plaintiffs and the license was not renewed in

July, 1913. The defendant company then refused to pay rent and the plaintiffs brought this action. The defence put forward was that the plaintiffs not having complied with the law as to enlarging and improving the premises, and the license not having been renewed in consequence, the rent set out in the lease was not payable. The learned trial Judge was of opinion that the parties did not contract on the basis of the continued existence of a liquor license for the premises, and the rent was due and payable. The defendant company appealed on the ground that the evidence established that the parties contracted on the basis of the continued existence of the liquor license for the premises in question and that the learned Judge erred in finding that the lease did not in terms nor by implication provide against the contingency of the license being cancelled.

Statement

The judgment appealed from is as follows:—

MORRISON, J.:—I do not think the parties herein contracted on the basis of the continued existence of a liquor license for the premises in question: *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 at p. 838. The lease does not in terms nor by implication provide against the contingency of the license being cancelled: *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740 at 747. The case advanced by the defence is not in my opinion a sufficient answer to the claim for rent.

Morrison, J.

There will be judgment for the plaintiffs with costs on the Supreme Court scale.

Harvey, K.C., for appellant.

C. B. Macneill, K.C., for respondents.

MACDONALD, C.J.A.:—I think the appeal should be dismissed.

Macdonald, C.J.A.

IRVING, J.A.:—I agree. The case of *Herne Bay Steamboat Company* v. *Hutton*, one of the Coronation cases, reported in [1903], 2 K.B. 683, seems to me more like this than the case of *Krell* v. *Henry*, *ib.* 740, on which Mr. Harvey relies. In the *Steamboat* case the ship and crew were engaged for the purpose of attending the naval review, at which the King was to appear, and also for a day's cruise about the fleet. On an action brought to recover the balance that was due, the plaintiffs were held entitled to recover, because the attending of the naval review was not the sole reason for the contract, there had not been a total failure of consideration, or a total destruction of the lease.

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MARTIN, J.A.:—I think the Judge below has rightly relied on the *Grimsdick* case, [1909] 2 K.B. 740, which cannot be distinguished in principle from this. The question of compensation for loss of license does not alter the principle.

GALLIHER, J.A.:—I agree that the appeal should be dismissed.

McPHILLIPS, J.A.:—I entirely agree with the judgment of the Judge in the Court below and in my opinion the case is clear beyond controversy. If it was intended there should be any warranty of the continuance of a license that covenant should be contained in the lease.

The only provision for the abatement of rent is the one with regard to fire. With regard to the covenant to do certain work, if that was not done by the lessor when it should have been done, there would be the right of action for damages, but because there may be a right of action for damages that in no way puts an end to the lease.

An interesting case upon the question here argued that we should import an implied condition is *Erskine* v. *Adeane*, (1873) 8 Ch. 756. Sir G. Mellish, L.J., at pp. 763-4, said:—"The common law of England is distinguished from the law of almost all other countries by the fact that it does not imply contracts and agreements to anything like the same extent, but generally obliges those who make contracts to insert in those contracts all the stipulations by which they intend to be bound. No doubt there are cases in which obligations may be implied, but as a general rule the man who wishes to have a particular stipulation for his benefit must take care to have that stipulation inserted in the contract. I see no reason why this particular obligation should be excepted from what I consider to be the general law."

In the language of Lord Justice Mellish, "I see no reason why this particular obligation should be excepted from what I consider to be the general law." The rent is clearly payable. The appeal should be dismissed. *Appeal dismissed.*

[Appeal to Supreme Court of Canada dismissed, Nov. 2, 1915.]

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REX v. COHEN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. March 15, 1915.

1. FALSE PRETENCES (§ I—5)—OBTAINING CREDIT—FALSE STATEMENT BY DIRECTOR RESPECTING HIS PRIVATE AFFAIRS ON BECOMING THE COMPANY'S SURETY—CR. CODE SECS. 405A, 407A, 414.

The "prospectus, statement or account," the fraudulent issue of which by a director is made indictable under Cr. Code sec. 414, where

done, *inter alia*, with intent to induce any person to advance any money to the company, does not include a statement made to a bank of his private affairs by a director offered by the company as its surety on obtaining a line of credit for the company, where the statement did not concern the financial standing or affairs of the company itself; but if the defendant obtained a credit for himself on his guaranty, although the money was actually paid to the company and he benefited by it, a charge may be laid under Cr. Code sec. 405A, for obtaining such credit under false pretences, and, *semble*, that since the enactment of Code sec. 407A (Code Amendment of 1913), it is an indictable offence for a person knowingly to make any false statement in writing, with intent that it shall be relied upon, respecting his financial condition for the purpose of procuring a loan or credit for a company in which he is interested.

[*R.* v. *Campbell*, 5 D.L.R. 370, 19 Can. Cr. Cas. 407, and *R.* v. *Boyd*, 4 Can. Cr. Cas. 219, considered.]

Statement

CASE stated by one of the Junior Judges of the County Court of the County of York, presiding at the General Sessions for that county.

The defendant was tried at the Sessions upon two indictments.

The first was that he, "being a director of the National Matzo and Biscuit Company Limited, did make, circulate, or publish, or did concur in making, circulating, or publishing, statements or accounts which he knew to be false in a material particular, with intent to deceive or defraud the Northern Crown Bank to entrust or advance property, to wit, a large sum of money, to such National Matzo and Biscuit Company Limited, contrary to the Criminal Code."

The second indictment contained three counts. By the first count, the defendant was charged, under sec. 405 of the Criminal Code, with having in February, 1909, knowingly and fraudulently, by false pretences, obtained from the Northern Crown Bank $5,000 with intent to defraud the said bank. By the second count, it was charged that the defendant, "in incurring a debt or liability to the Northern Crown Bank, did obtain credit under false pretences from the said bank. And, by the third count, the defendant was charged, under sec. 405 of the Code, with having, knowingly and fraudulently, by false pretences, procured the said bank to pay and deliver to the National Matzo Company various sums of money aggregating $5,000.

The Judge presiding at the Sessions, at the close of the case for the Crown, directed the jury to acquit the defendant upon

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both indictments; and, at the request of the Crown, reserved for the Court the question: "Was there any evidence upon which the jury could find the accused guilty on either of the indictments or any of the counts thereof?"

J. R. Cartwright, K.C., for Crown.

T. C. Robinette, K.C., for defendant.

Maclaren, J.A.

MACLAREN, J.A.:—This is a case reserved by the Junior County Court Judge of York, on the application of the Crown.

The accused was tried at the General Sessions on two indictments. At the close of the case for the Crown the Judge directed the jury to acquit in each case, on the ground that there was no evidence of the offences charged, and reserved for this Court the following question: "Was there any evidence upon which a jury could find the accused guilty on either of the indictments or any of the counts thereof?"

The first indictment charged that the accused, "being a director of the National Matzo and Biscuit Company Limited, did make, circulate, or publish, or did concur in making, circulating, or publishing, statements or accounts which he knew to be false in a material particular, with intent to deceive or defraud the Northern Crown Bank to entrust or advance property, to wit, a large sum of money, to such National Matzo and Biscuit Company Limited, contrary to the Criminal Code."

Section 414 of the Criminal Code, under which this indictment is laid, reads as follows: "Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, public officer or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates, or publishes, or concurs in making, circulating or publishing any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons, whether ascertained or not, to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them, whether ascertained or not, of such body corporate or public company, or with intent to induce any person to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof."

This section of the Code was based upon sec. 85 of the Canadian Larceny Act of 1869 (32 & 33 Vict. ch. 21), which was substantially copied from the Imperial Larceny Act 24 & 25 Vict. ch. 96, sec. 84; which latter embodied sec. 8 of the Act 20 & 21 Vict. ch. 54. The only new matter in the Code was the insertion of the words "promoter" and "prospectus."

The evidence shewed that the accused had given a guaranty to the bank to the extent of $10,000; also that he gave a statement of his own affairs to the bank which, to his knowledge, was untrue, as it omitted a liability of his to one Simon Cohen. The Judge held that sec. 414 applied only to statements of the affairs of the company, and directed the jury to acquit.

There is no doubt that the introduction of the word "prospectus" in sec. 414 has a tendency to strengthen the impression that the "statement of account" in the section has reference to the affairs of the company, and not to the personal affairs of the officer making the same, and to suggest that the maxim *noscitur a sociis* might possibly be applicable.

I have not been able to find a single reported case either in England or Canada where the prosecution was based upon a statement of the personal affairs of the officer accused, notwithstanding that this law has been in force in these countries for a period of 57 and 45 years respectively.

In the circumstances, there is, in my opinion, sufficient doubt as to the proper interpretation of the section to require us to give a negative answer to the question reserved for us by the trial Judge as to this indictment, inasmuch as the law ought to be clear to justify a conviction, and "the Court must see that the thing charged as an offence is within the plain meaning of the words used:" *Dyke* v. *Elliott* (1872), L.R. 4 P.C. 184, at p. 191.

Usually a reserved case is asked for by the Crown in case of an acquittal in order to settle the law for the future. This is not necessary in the present case, as Parliament has, by sec. 16 of ch. 13 of the statutes of 1913, 3 & 4 Geo. V., added a new section, 407A., to the Criminal Code, expressly providing for a case like the present. That section, however, is not applicable to the present case, as it was passed only on the 6th June, 1913,

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and the statement now complained of was made in February, 1909.

The second indictment referred to in the reserved case contained three counts. The first count charged the accused, under sec. 405 of the Code, with having in February, 1909, knowingly and fraudulently, by false pretences, obtained from the Northern Crown Bank $5,000 with intent to defraud the said bank.

The third count charged the accused, under sec. 405, with having knowingly and fraudulently, by false pretences, procured the said bank to pay and deliver to the National Matzo Company Limited various sums of money aggregating $5,000.

The County Crown Attorney, who represented the Crown at the General Sessions, informed the presiding Judge that as to these charges, which were laid under sec. 405 of the Code, the Crown would offer no evidence; and counsel for the Crown before us did not press for an affirmative answer as to these two counts.

The second count of the indictment charged that the accused, "in incurring a debt or liability to the Northern Crown Bank, did obtain credit under false pretences from the said bank." This count was laid under sec. 405A., which was added to the Code by sec. 6 of ch. 18 of the statutes of 1908, 7 & 8 Edw. VII., and which reads as follows: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud."

This section was introduced to overcome the defect in our law pointed out by the Quebec Court of Appeal in *Regina* v. *Boyd*, 4 Can. Crim. Cas. 219, viz., that sec. 405 applied only to the obtaining by false pretences of something capable of being stolen, and not to the obtaining of credit. The new section 405A., above quoted, was copied from the Imperial Debtors Act, 1869, 32 & 33 Vict. ch. 62, sec. 13 (1), which was considered in the case of *Regina* v. *Bryant*, 63 J.P. 376, and it was held by the Common Serjeant that the Act did not apply where credit was given to some person other than the party making the application for it.

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The facts of the present case are, however, different. The accused in fact incurred a liability for himself, if not a debt, and obtained a credit for himself on his guaranty, although the money was actually paid to the company of which he was a director and shareholder; and he benefited by it.

This section was considered by the Quebec Court of Appeal in *Rex* v. *Campbell*, 5 D.L.R. 370, 19 Can. Cr. Cas. 407, and it was there unanimously held to be applicable to a case where the president of a company had fraudulently obtained credit for the company.

Maclaren, J.A.

I am of opinion that the question as to this count should be answered in the affirmative.

Upon the whole, I am of opinion that our answer to the question reserved should be in the negative as regards the first indictment and the first and third counts of the second indictment; and in the affirmative as regards the second count in the second indictment.

GARROW, J.A.:—I agree.

Garrow, J.A.

MEREDITH, C.J.O.:—I agree with the opinion of my brother Maclaren that there was evidence for the jury of an offence against sec. 405A. of the Criminal Code.

Meredith, C.J.O.

In enacting the section, Parliament had in view, not only the contracting of a debt, but the incurring of a liability; and the accused certainly incurred a liability on his guaranty to the bank, and, I think, in incurring it, obtained credit, within the meaning of the section, on the faith of the statement which he made as to his financial position.

"The credit of an individual is the trust reposed in him by those who deal with him that he is of ability to meet his engagements:" Abbott's Law Dictionary, p. 321; and, as was said by Gardiner, J., in *Drydock Bank* v. *American Life Insurance and Trust Co.* (1850), 3 N.Y. (Comstock's Reports) 344, 356, "credit is the 'capacity of being trusted.'" See also *Mumford* v. *American Life Insurance and Trust Co.* (1851), 4 N.Y. (Comstock's Reports) 463, 472.

The inducing by false pretences the bank to accept the guaranty of the accused, and on the faith of it to agree to make advances to the company, was as much within the mischief against

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which the section is directed as if, by means of false pretences, the accused had himself obtained advances from the bank on his promissory note.

It is unnecessary to express any opinion as to whether, if there had been no guaranty by the accused, but only the statement which he made, by which the bank had been induced to give credit to the company, the accused would have come within the section. The representation, no doubt, induced the bank to give credit to the company, but that was not all; it also induced the bank to give credit to the accused on his guaranty.

I am unable to say that the learned Junior Judge erred in ruling that there was no case for the jury on the first indictment. When the history of sec. 414, which my brother Maclaren mentions, is considered, it is reasonably clear, I think, that what the accused did, did not constitute the offence mentioned in the section. The Imperial Act 20 & 21 Vict. ch. 54 is intituled "An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with Property," and it contains the following preamble: "Whereas it is expedient to make better provision for the punishment of fraud committed by trustees, bankers, and other persons intrusted with property."

The Imperial Act 24 & 25 Vict. ch. 96 was "An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences," and the provisions of the earlier Act are found in it in a group of sections headed, "As to Frauds by Agents, Bankers, or Factors."

When the provisions of sec. 8 of the earlier and sec. 84 of the later of these Imperial Acts were embodied in legislation of the Parliament of Canada, by 32 & 33 Vict. ch. 21, which was intituled "An Act respecting Larceny and other similar Offences," they formed part of a group of sections headed "As to frauds by agents, bankers, or factors."

In the Revised Statutes of Canada, 1886, these provisions were re-enacted in the Larceny Act (ch. 164), which is intituled "An Act respecting Larceny and similar Offences," and they form part of a group of sections headed, "Frauds by Agents, Bankers or Factors." These sections were re-enacted by the

Criminal Code, 1892 (55 & 56 Vict. ch. 29), where they appear as part of a group of sections headed "Fraud," and for the first time the word "prospectus" appears in sec. 365, which is now sec. 414 of R.S.C. 1906, ch. 146, and is one of a group of sections headed "Fraud and Fraudulent Dealing with Property."

In view of the history of sec. 414, and having regard to the introduction of the word "prospectus," I am of opinion that what the section deals with is a prospectus, statement, or account made, circulated, or published by a promoter, director, public officer, or manager, in that capacity, and that it does not apply to a statement such as was made by the accused, which related to his own financial standing, and had no relation to the company of which he was director or to its business or affairs or to its assets or liabilities.

MAGEE, J.A., dissented.

Magee, J.A. (dissenting)

HODGINS, J.A.:—I am in agreement with the judgment of my brother Maclaren, which I have perused, except the answer which it proposes to give regarding the second count in the second indictment. In *Regina* v. *Boyd*, 4 Can. Crim. Cas. 219, the credit was obtained directly by the accused, whose note was discounted and placed to their credit; and, if the present section was intended to put "credit" in the same category as "anything capable of being stolen," there is not in that circumstance anything suggesting an enlargement of the scope of the offence.

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The only cases touching the point at issue are at variance. *Regina* v. *Bryant*, 63 J.P. 376, is against the view that credit given to a third party is within the section. *Rex* v. *Campbell*, 5 D.L.R. 370, 19 Can. Crim. Cas. 407, is, to my mind, an unsatisfactory case. The facts as stated include this: "Campbell admitted having himself signed this report, and he declared that the goods thus obtained were for the company of which he was the president. Campbell admitted that he was the largest shareholder of the company, and that consequently he benefited by the delivery of the goods made by Langlois." The charge to the jury emphasised the fact that

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the accused had himself made the report, though signing as president of the company. The decision of the Court is thus expressed by Lavergne, J.: "I am inclined to find the proof sufficient to justify the verdict, because the accused is the largest shareholder of the company, and because he benefited by the credit obtained under false pretences, and because he became indebted himself as shareholder of the company, by obtaining this credit under false pretences."

None of these facts, except that Cohen was a director and shareholder, if they have anything to do with the case, are present here. At all events, they are not proved nor before us.

The section, as I read it, makes the obtaining of credit by any person to be the offence, if it is got, (1) by means of false pretences or fraud, and (2) in incurring a liability—*i.e.*, the offence must be committed by the one who incurs the liability and in incurring it.

The simplest illustration of what I think the meaning of the section is will be found in *Regina* v. *Jones* (1898), 19 Cox C.C. 87.

I do not see that even if the making of the guaranty can be considered as the incurring of a liability, the accused can be said to have got credit thereon, within the meaning of the statute. The guaranty would be unenforceable until the expiry of the credit given to the company, but that was not because the accused got credit, but rather because the company got it. In another view, the credit to the company was not actually obtained until the guaranty was signed, and therefore arose in a different transaction, and was intended to be subsequent to the receipt and acceptance by the bank of the guaranty. Having incurred that liability, if that is its proper description, the accused does not obtain the credit alleged. The company obtains it. I do not think the case comes within the statute referred to

Judgment as stated by MACLAREN, J.A.

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Alberta Supreme Court, Harvey, C.J., and Scott, Stuart and Beck, JJ. November 4, 1915.

1. PRINCIPAL AND SURETY (§ II—15)—INDEMNIFYING PURCHASER'S DEFAULTS—NOTICE OF DEFAULT TO SURETY—NECESSITY OF.

The assignor of an agreement for the sale of land who covenants to indemnify the assignee for any default made by the purchaser is not discharged from liability under the covenant for want of notice of the default.

[*Massey Harris* v. *Baptiste*, 24 D.L.R. 753, followed.]

2. JUDICIAL SALE (§ III A—29)—FORECLOSURE SALE—VALIDITY—UNPAID VENDOR PURCHASING AT SALE—EFFECT ON DEFICIENCY JUDGMENT.

A deficiency judgment obtained in a foreclosure proceeding invalidly conducted by permitting the unpaid vendor to bid at the sale, and upon whose bid the sale of the property is confirmed at an upset price, is invalid and unenforceable against the guarantor of the defaulting purchaser.

Statement

APPEAL from an order of Simmons, J.

James Ross, for defendant, appellant.

George B. O'Connor, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The defendant was the owner of land which he sold in January, 1913, to one Lendrum, under an agreement for sale for $3,700, of which $1,800 was paid in cash, the remainder being payable in two equal instalments in 6 and 12 months. In the following month, the defendant transferred the lands to the plaintiff, together with all his interest in the agreement, and covenanted that, in case of default by the purchaser, he would forthwith, on demand, pay the sums in default, with interest.

The purchaser made default in respect to both instalments of principal, and paid only 6 months' interest.

Before the second instalment was due, the plaintiff brought an action against Lendrum, under which, in due course, it obtained an order for sale of the lands, and obtained leave to bid at the sale at an upset price of $1,800. There was no appearance in the action, and apparently there was no other bid than the plaintiff's at the sale, and it was declared the purchaser's. The sale took place on June 8, 1914, and on the 10th of the same month the plaintiff's solicitors wrote to the defendant in this action advising him of the default under the agreement and of the sale, and stating that unless he wished to take over the pro-

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perty and pay the amounts due, they would be compelled to take action for the deficiency, about $700.

This was the first notice the defendant had of the default or of the proceedings.

The order confirming the sale was not taken out until September 24, 1914, and, on October 24, the action was begun against the present defendant upon his covenant of guarantee.

The statement of claim simply alleges the agreement and assignment, with covenant of guarantee, default by Lendrum and demand on defendant, and claims the $1,900 with interest. It also alleges that Lendrum had notice of the original agreement. It is absurd to allege that he had notice of the agreement under which he took his interest as purchaser, and which he executed, and I presume what is intended is to allege that he had notice of the assignment, to shew compliance with par. 14 of sec. 10 of the Judicature Ordinance, which says that an assignment of a legal chose in action is effective from the date of notice. The defendant, by his defence, puts the plaintiff to the proof of notice to Lendrum, and alleges that he received "no notice of any action particularly in the nature of a foreclosure or suit for specific performance against Lendrum," and claims to be discharged from his liability by reason of his not receiving notice of the default or of the action, and not being made a party to the action. He also denies the correctness of the amount claimed.

In reply, the plaintiff sets up that the defendant was not prejudiced by want of notice as the result of the action was simply to put the plaintiff in a position to transfer the land to the defendant, which it is prepared to do upon payment of the $1,900 with interest and costs of the action against Lendrum. The action came on for trial before Simmons, J., when the only evidence given on behalf of the plaintiff was admissions in defendant's examination for discovery, proving the agreement and assignment. By consent, an affidavit was put in, in which the defendant swore that the amount due under the agreement was $1,900 with interest except for 6 months. The letter of the solicitors to the defendant, to which I have referred, was also put in evidence as well as the final order made in the action

against Lendrum. Plaintiff's counsel also admitted the dates of the proceedings in the action against Lendrum and that the statement of claim and order *nisi* were served substitutionally. That was all of the plaintiff's testimony, there being no evidence whatever that notice of the assignment had been given to Lendrum or of the amount of the judgment for costs. The discussion between counsel, however, in the course of the admissions, indicated that they were accepting the proceedings in the Lendrum action for proof of what they disclosed, and I have therefore felt it proper to look at those proceedings even when not put in evidence in this action, and some of the facts I have stated I have learned from them rather than from the appeal book, though they are of no consequence except for the purpose of shewing the sequence of events. I do find, however, that counsel was in error in admitting that the statement of claim in the Lendrum action was served substitutionally.

From the evidence for the defence it appeared that Lendrum had left the jurisdiction and was somewhere in California, and the defendant called a witness, conversant with Lendrum's financial condition, in order to shew that he had been prejudiced by the delay, but in this he failed as the witness stated in effect that Lendrum's financial position was practically unchanged. At the close of the evidence, plaintiff's counsel repeated the offer made in the reply to transfer the lands on payment by defendant of the $1,900, with interest and costs, or in the alternative, to take judgment for the difference between that sum and the $1,800, the purchase price. The judgment of the trial Judge was that, if the defendant did not accept the alternative of taking the land, the plaintiff should have judgment for the deficiency after crediting $1,800 as the value of the land, and for this latter, judgment was taken out. In the formal judgment the amount of the costs of the Lendrum action appears for the first time, and it must have been ascertained by reference to the proceedings in that action. I find, however, that, no doubt by inadvertence, it is $10 more than it should be, and the final judgment is therefore for $10 more than it should be.

No exception is taken to the judgment on the ground that notice of the assignment to Lendrum is not proved, or that there

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is no evidence to shew what the costs of the Lendrum action were, which latter is another reason for thinking that both sides considered that all the proceedings in that action were proper to be referred to, and unless these proceedings can be looked at, the plaintiff's judgment cannot stand since without them there is no evidence upon this point.

The chief defence set up is want of notice and prejudice.

The question of notice has been dealt with already at this sittings in *Massey-Harris* v. *Baptiste*, 24 D.L.R. 753, in which we held that a surety is not discharged by want of notice. As indicated, the defendant failed to shew that he was prejudiced by the want of notice. The defendant, however, maintains that he should have been a party to the action against Lendrum. In answer to this contention we are referred to authority holding that a surety is not a necessary party to an action against the principal debtor: see *Gedge* v. *Matson*, 25 Beav. 310, 316. It does not appear to me to decide the somewhat difficult question whether this defendant either as surety or as assignor ought to have been a party to that action or if he should be, whether anyone but the defendant Lendrum could take any objection to the plaintiff's failure to make him a party. If he had been a party he would have been bound by the judgment obtained in that action, but it appears clear from authority. See *Ex parte Young, In re Kitchen* (1881), 17 Ch.D. 668, that a judgment obtained against the principal debtor as in this case is not binding on the surety, and this seems clear in principle also for otherwise a surety would be at the mercy of an impecunious or negligent or dishonest debtor.

It becomes necessary then to consider this judgment against Lendrum upon which it is sought to fix liability upon the present defendant.

The judgment appears to be simply in the form of an order made by the Master dated September 24, 1914, which recites an order for sale, conditions, etc., "certificate of purchase of Arthur Murphy, agent for the plaintiff company, and it appearing that the land in question herein was sold to the plaintiff company for $1,800," affidavits, etc., and then orders that the defendant's interest in this land, which is described, be fore-

closed. It further orders "that the plaintiff do recover from the defendant judgment for the sum of $357.57 and the costs of this action, to be taxed, and that payment into Court of the purchase money be dispensed with." The order is somewhat unusual in its terms, and it was argued on behalf of appellant that it is a foreclosure order, and the plaintiff having accepted foreclosure must take it in full satisfaction. I am of the opinion, however, that the real intention and effect of the order is to confirm the sale to the plaintiff for $1,800, and to give him judgment for the deficiency in respect of his claim, and the term foreclosure is used because the plaintiff is the registered owner of the land.

I will refer to some of the proceedings in that action upon which that order was based, for the purpose of emphasizing my argument, though they are in no way material to the conclusion I have reached.

The order for sale was made on May 22, 1914, a part of the material referred to in it being an affidavit of John Hall, who swears that, in his opinion, the property is "of the value of $2,500, and should bring this amount at sale on long terms of payment," but that it would not realize more than $1,800 at a forced, cash, auction sale.

The order contains a clause giving the plaintiff and defendant leave to bid at the sale. It may be observed that the defendant had entered no appearance to the action.

In the conditions and directions it is provided that "the land is to be offered for sale subject to an upset price of $1,800."

The plaintiff's solicitors had filed a signed statement shewing the amount of the claim including estimated costs as $2,217.22, and asking for a reserve bid high enough to cover it. I find nothing to indicate why this request was not complied with, but I assume that the course that was adopted met with their approval. I find that this is not the only case in which the Master has given the plaintiff, conducting the sale, leave to bid and that he has justified the practice: see *Griesbach* v. *Hogan*, 8 W.W.R. 356, though whether it is his usual practice I cannot say. It is quite clear, however, that it is not in accordance with the former practice of the Court, and I think it should

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not be considered proper practice. In 1908, prior to the creation of the office of Master, the Judges of the Court promulgated rules of procedure for mortgage actions, and those rules were, as far as applicable, adopted in actions for the enforcement of vendors' or other liens against real property. It is there stated that, "a party obtaining leave to bid cannot, as a rule, be allowed to have the conduct of the sale." In Coote on Mortgages (8th ed.), at pp. 1075-6, it is stated: "when the mortgagee has leave to bid, a reserve bidding is fixed; he will not be given the conduct of the sale."

In *Dixon* v. *Pyner*, 19 L.J. Ch. 402, Wigram, V.-C., at 403, says:—

> The plaintiff, I am inclined to think, has waived his right to have the conduct of the sale by obtaining liberty to bid. It appears quite right, of course, that the trustees, and not a person having liberty to bid, should have the conduct of the sale.

In *Pruden* v. *Squarebriggs* (1896), 2 Terr. L.R. 200, my brother Scott refused to confirm a sale to the plaintiff who had no leave to bid. At p. 202, he said:—

> I have always understood the practice to be that, when the person having the conduct of the sale desires to bid at it, he must obtain leave to do so, and that when such leave is granted, the conduct of the sale is usually given to another party to the suit.

The general rule is clearly stated by Giffard, L.J., in *Guest* v. *Smythe*, L.R. 5 Ch. 551, as follows:—

> As regards the rules of this Court, of course it is very well known that a vendor who has conduct of the sale himself cannot bid. . . . It is equally well known that parties to the suit cannot buy without special leave of the Court. . . . There are other well-known rules also, such as that a trustee for sale cannot buy . . . and generally speaking, that where a man's duty and interest in respect of the purchase conflict, he cannot become a purchaser.

In the present case, plaintiff's duty and interest clearly conflicted, his duty being to endeavour to secure the best possible price for the property and his interest being to secure it for himself at the lowest possible price."

In *Re Laycock, McGillivray* v. *Johnson*, 8 Pr. (Ont.) 548, after an abortive sale the plaintiff in an administration action obtained leave to bid from the local Master, and at the solicitation of all parties purchased the property at what was shewn to be a good price. Blake, V.-C., refused to confirm the Master's report. He said:—

One of the most stringent and zealously guarded rules of Court is, that a party's *primâ facie* interest will not be permitted to conflict with his duty. The vendor's duty is to get as high a price as possible—his interest, if allowed to bid, to pay a low one. The jurisdiction in such cases rests with the Court, and the local Masters cannot invade the Court's prerogative and expect to have that invasion confirmed by *nunc pro tunc* orders.

It may be noted that it is the local Master in Chancery here referred to, but the judgment shews how important the matter really is. We find, therefore, that not only by the express rules of the Judges of this Court, but by the practice in vogue in England, in Ontario, and under our Territorial Court, a party having the conduct of the sale is not to be given leave to bid. I do not say that there may be no circumstances under which an exception to the rule might be made, but if so, the circumstances ought to be very special, and there were no special circumstances in the present case.

The Irish cases, shewing a different practice, cited by the Master in *Gricsbach* v. *Hogan*, *ante*, are of little value, as they give no reasons justifying them. There is also another reason besides that mentioned in the cases referred to why, in most cases, leave to bid should not be given to a mortgagee or other person selling land to realize the lien and that is, that the competition between him and a stranger would not be a fair one. The usual terms are cash within a comparatively short time. The stranger must find the money while the mortgagee or other lien holder has his already in the land, and either is not required to pay according to the general conditions, as in the present case, or if compelled to pay would have it paid back forthwith in satisfaction of his lien. The affidavit of value in the present case shews clearly this difference. It is stated that the land is worth $2,500, but that at a forced cash sale it would not bring more than $1,800. Now, it was not a cash sale to the plaintiff. He had no money to raise, but he takes the land at a price which will enable him to realize a profit of $700 by selling it at its real value and giving easy terms of payment.

It is apparent, therefore, that if the lien holder is given liberty to purchase when the amount of the lien approximates the value of the land he ought not to be considered as a cash

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purchaser, and generally speaking, ought not to be put in the same class with persons purchasing for cash, and that he ought not, even after an abortive sale, to be allowed to become the purchaser unless at a price which would be considered a fair price on terms as against a cash sale. In the *Griesbach case* the Master stated that the objection to the plaintiff being given leave to bid disappears when an upset price is fixed instead of a reserved bid, but I am at a loss to see how that meets the two objections to which I have referred, however much it may meet other objections. It is doubtful, too, whether a better price would not be more likely to be obtained by a reserve bid than by an upset price. It is apparent that there must be competition to obtain a good price, and while the knowledge that the lien holder himself would be a bidder would have a tendency to keep people from participating, knowing the advantage he had in not being required to procure the money for the purchase, so the knowledge gained by an upset price may have a tendency to keep people away from a sale, who, if present, might participate in a bidding which, though starting at a lower price than the reserve bid, might often go beyond it. Under the rules laid down by the Judges in the case of a reserve bid, if the highest bid does not reach the reserve bid, which is secret until the highest bid is received, then, upon the reserve bid being made known, the property is to be offered at that as an upset price. The reserve bid, therefore, has the advantages of the upset price as well as some others, and for the ordinary case would appear to be preferable.

As the sale in this case was not conducted according to the proper practice, the order confirming it should not be considered binding upon this defendant and the plaintiff therefore fails to shew that the defendant is indebted to him for the amount of the judgment against Lendrum. The plaintiff may then say if that is the case, then he is indebted to it for the full amount of $1,900 which is the amount sued for, but the answer to that is that the plaintiff cannot have judgment for that amount because this defendant cannot in any way recover that amount from Lendrum the primary debtor. The plaintiff has changed the form of the security and instead of an agreement by Len-

drum to pay $1,900, he has a judgment for approximately $700 and is the owner of some land, for it is only as against the defendant that the judgment against Lendrum is not binding. If the plaintiff could get rid of that judgment as against Lendrum and restore his original liability, and I offer no opinion as to whether that can be done, it might perhaps then have a right to compel the present defendant to pay it the full amount and this judgment ought not to be a bar, under such circumstances, but if it cannot, it apparently is not suffering much, for it has become the owner of land which, by its own shewing, at a fair value is worth the full amount of its claim.

It is true that the plaintiff has offered the defendant the land if he will pay the full amount claimed, but the defendant does not wish to accept this offer, and if he did he certainly could recover nothing more from Lendrum than the amount of the plaintiff's judgment.

I would, therefore, allow the appeal and dismiss the plaintiff's action, but inasmuch as the grounds directly raised by the defendant both on the appeal and at the trial are untenable and the ground upon which I base my conclusion was not directly raised in argument, and is only raised in a general way in the defence and the notice of appeal, I would allow no costs either of the action or of the appeal. *Appeal allowed.*

REX v. PAWLISKI.

Manitoba King's Bench, Howell, C.J.M. June 28, 1915.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ III—65)—ADDED COUNTS FOR CHARGES NOT BEFORE MAGISTRATE—RIGHT TO SUMMARY TRIAL. Where the indictment has been preferred at the direction of the Attorney-General (Cr. Code sec. 873) in a form which includes counts for other offences as well as the offence charged in the information before the magistrate, and for which he committed the accused, the latter cannot object to plead on the ground that he elects trial before the magistrate on such of the charges as are subjects of summary trial if the magistrate had no jurisdiction of summary trial on the information before him, at least where the defence does not shew that the magistrate was one of the class acquiring jurisdiction under Code sec. 777, sub-sec. (2) as amended 1909.

2. INDICTMENT, INFORMATION AND COMPLAINT (§ III—66)—COUNT NOT IN ORIGINAL CHARGE—DIRECTION OF ATTORNEY-GENERAL. The inclusion in the indictment of a count which is not supported by the depositions taken on the preliminary enquiry is validated by obtaining the direction of the Attorney-General to the preferring of the indictment in that form.

Statement

MOTION to quash an indictment or certain counts thereof

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and to remit the case to the magistrate on the ground that the accused had been deprived of his right to elect summary trial on at least one of the counts of the indictment and had signified his wish to be tried by the magistrate when before him on the principal charge of rape to which other counts had been added when an indictment was preferred by direction of the Attorney-General.

A. C. Campbell, for the Crown.

Lindsay, for the accused.

Howell, C.J.M.

HOWELL, C.J.M.:—The information was laid against the prisoner before John Kernstead, who describes himself as Police Magistrate for the said province (that is, the Province of Manitoba), charging him with having committed rape. The summons was issued against him on the same charge. The accused appeared before him on the 3rd of April at Winnipeg Beach and witnesses were called. In the beginning of the depositions taken by the magistrate the following appears: "The accused, warned, wants the magistrate to try his case." The case then proceeded and many witnesses were called. In the depositions the following is shewn: "The accused's statement. Andrew Pawliski, sworn." And then follows a long statement which is signed by him. The magistrate, apparently, referred the matter to the Attorney-General's Department, and the accused was let out on bail, and on the back of the depositions the following appears: "Set on bail for higher Court."

The accused came up before me to plead to the indictment and his counsel urges that the magistrate really attempted to try this case and that the accused should not be called upon to plead, but the matter be sent back to the magistrate to be disposed of.

The accused has been indicted on three counts. First: rape. Second: having carnal knowledge of a girl under 14 years. Third: Unlawful connection with a girl under 16 years of age of hitherto chaste character.

My attention is called to the fact that under the third count the matter might have been tried by the magistrate under sec. 211 of the Code, together with sec. 777, as modified by 8 and 9 Edw. VII. ch. 9. The matter came up before the magistrate at

Winnipeg Beach and I cannot shut my eyes to the fact that Winnipeg Beach, it seems to me, could not be considered a town of 2,500 inhabitants, and there is nothing to shew me that the magistrate who heard the matter is one authorised under sec. 777 to take up this matter. If the accused was indicted only for rape, I would have no difficulty in holding whether the magistrate had power to try him or not. He comes up properly for indictment here, because the indictment is really preferred at the direction of the Attorney-General. I shall hold that the accused must plead to the indictment in the ordinary way. Perhaps, at the trial, counsel for defence might prove that the magistrate has the powers set forth in sec. 777 of the Code and the amendment, and then, perhaps, a question might arise upon the points here raised.

I think the accused must plead to the indictment.

Mr. Lindsay: Your Lordship holds, then, that the second count must be pleaded to, as well.

HOWELL, C.J.M.:—There is nothing in the second count. The magistrate would have no power to try a case on the second count.

Mr. Lindsay: The indictment should not include a count which is not supported by the evidence in the depositions.

HOWELL, C.J.M.:—That is met by the fact that the Attorney-General directed the indictment. *Objection overruled.*

LAST WEST LUMBER CO. v. HADDAD.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. November 20, 1915.

1. PRINCIPAL AND AGENT (§ II A—7*a*)—AUTHORITY OF LOCAL MANAGER—SETTLEMENT OF ACCOUNTS.

The settlement of a disputed account for a smaller amount by a local manager having the authority to do so is binding upon the principal, notwithstanding a regulation that "managers must obtain authority in writing from superintendent or home office before making *discounts* on any account."

2. INTEREST (§ I A—1)—WHEN RECOVERABLE IN GENERAL.

In all cases where, in the opinion of the court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the court to allow interest for such time and such rate as the court may think right.

[*Toronto R. Co.* v. *Toronto*, [1906] A.C. 117, applied.]

3. INTEREST (§ I B—22)—ON ACCOUNTS—WHEN ALLOWED.

Under secs. 36 and 37 (2), R.S.S. ch. 52, interest upon a stated

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account may be allowed from the time when a demand for payment thereof is made.

APPEAL from judgment for plaintiff in an action for balance due on an account.

H. J. Schull, for defendant, appellant.

F. W. Torney, for plaintiff, respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an action for a balance claimed to be due and owing for lumber sold by the plaintiffs to the defendant. The defendant purchased lumber from the plaintiffs through their local manager at Meyronne, one McKee. The first lumber purchased was on November 28, 1913. On December 6, the defendant paid into the plaintiffs' office the sum of $300. On December 29, McKee called upon the defendant with his account to that date. The account was put in evidence by the defendant. When added up it totals $891.23. The defendant says the price per thousand was not stated in the account, and he disputed its correctness. He claimed that the prices charged were more than the prices agreed upon. After McKee and the defendant had some dispute as to the amounts charged, McKee said, "Give me $500 more to settle in full." On December 31, the defendant gave him a cheque for $300, and wrote on the cheque, "Balance will be $200." McKee said he would have to charge the full amount if the account was not settled that night. The defendant then gave him a further cheque for $200, which McKee accepted in full. In January, 1914, the defendant purchased additional lumber from the plaintiffs. This appears to have amounted to $117, although the defendant stated that the plaintiffs' representative Stranahan told him the amount was $112. McKee seems to have disappeared. The defendant tendered $112 to the plaintiffs in settlement. The plaintiffs refused the tender, claiming that there was still a balance of $272.95 due on the account up to December 21, 1913. This account the defendant claimed to have settled with McKee and refused to pay it. The plaintiffs sued in the district Court for this amount, and also for the subsequent account of $117. The defendant paid $112 and costs into Court. The District Court Judge before whom the matter came gave judgment for the

plaintiffs for the full amount. In his reasons for judgment he found as follows:—

I find that the statement of account as produced by the plaintiff was a correct statement of the lumber received by the defendant, and that the prices charged were correct. The defendant claims that on December 29, he settled the account, which was then more than $500, for the sum of $500, with McKee, the plaintiff's agent at Meyronne. I find as a fact that the conversation detailed by the defendant took place on December 29, and that he then paid $500 by the two cheques produced as exhibits, and that the agent McKee accepted the $500 as payment in full to that date. I find also that McKee had no authority from the plaintiff company to accept any smaller amount than the amount due in settlement of any claim, and in fact that his instructions were to the contrary, that is that he had no right to compound any account. I find also that these instructions were posted on the wall of the company's office, and I also find that the defendant did not see these instructions and had no knowledge of them.

From the judgment thus given the defendant now appeals.

On his behalf it is urged that the settlement of December 31, is binding, first, because the local manager had express authority to settle the defendant's account, and, secondly, that even if he had no express authority the settlement was within the apparent scope of his authority as local manager at Meyronne. At the trial the plaintiffs put in evidence a regulation of the plaintiff company which reads as follows: "Managers must obtain authority in writing from superintendent or home office before making discounts on any account." In his evidence the plaintiffs' representative Stranahan testified that local managers had power to settle accounts in cases of dispute. Having authority to settle disputed accounts, the only question here is, was the defendant's account a disputed one? It clearly was. He testified that he disputed the correctness of the account on the ground that the prices charged in the account were in excess of the prices agreed upon with McKee. What took place between McKee and the defendant was not, in my opinion, the allowing of a discount on an undisputed account within the meaning of the regulations, but was a settlement of a disputed account within the local manager's authority. McKee having express authority to settle the account, the settlement is binding upon the plaintiffs unless it was so unreasonable that an ordinarily prudent man would doubt its *bona fides*, and would thus be put upon inquiry as to the manager's right to make it.

SASK.

S. C.

LAST WEST LUMBER CO. v. HADDAD.

Lamont, J.

The onus of shewing such unreasonableness is on the plaintiffs. They claim that at the date of the settlement the account stood at $1,072.97, less $300 paid, leaving $772.97 still due, and that to settle that amount by taking $500 was unreasonable. It is true that the trial Judge found the acceptance of the $500 was a settlement of the defendant's account to that date, but that is not the account which McKee settled. The account which he rendered and which he settled was an account totalling $891.23, on which $300 had been paid. This leaves a balance of $591.23, which he settled for $500. There is no evidence to shew the amount which the defendant claimed he had been overcharged, and therefore nothing to shew that the settlement was not a fair and reasonable one. I am therefore of opinion that the settlement is binding upon the plaintiffs.

It is, however, only a binding settlement of the account rendered. The difference between the account which the plaintiffs now claim was due at the date of the settlement and that presented by McKee is explained by the fact that in the account claimed to be due by the plaintiffs there are the following items not found in the bill as rendered by McKee:—

Nov. 28, '13. 3,000 ft. common, $93; 2,100 ft. shiplap, $63; 2,000 ft. shiplap $60; making a total of $216, while in McKee's bill there are items totalling $34.25 which do not appear in the account as now furnished by the plaintiffs. The trial Judge having found that this lumber was delivered to the defendant, and it not being included in the bill settled by McKee, the plaintiffs are entitled to be paid for it. They have sued for $390.67 and interest thereon from April 1, 1914. The defendant is entitled to be credited with the difference between the account rendered by McKee and the amount at which that bill was settled, namely, $91.23.

In his judgment, the trial Judge allowed interest at the rate of 10 per cent. on the claim from April 1, 1914. This is objected to, and certain English authorities were cited to shew that a notice on a tradesman's account that interest would be charged on overdue accounts was not a sufficient demand to entitle the plaintiff to interest. The English cases, in my opinion, have no application, because the Statute in England

does not contain the same provision that is found in ours. Our statute, ch. 52 R.S.S., secs. 36 and 37, is the same as that of Ontario, and reads as follows:—

36. Interest shall be payable in all cases in which it is now payable by law *or in which it has been usual for a jury to allow it.*

37. (2). If such debt or sum is payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of the demand.

The italicised words of sec. 36 are not in the English Act. The effect of the Ontario statute, identical with ours, was laid down by the Privy Council in *Toronto R. Co.* v. *Toronto*, [1906] A.C. 117, at 121, in the following words:—

The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

See also *McCullough* v. *Clemow*, 26 O.R. 467, and *McCullough* v. *Newlove*, 27 O.R. 627.

The defendant admits that the plaintiffs demanded payment of the account. As the trial Judge allowed interest from April 1, I take it that he found it had been demanded on that date. As to the rate, I think 8 per cent. reasonable.

The appeal will therefore be allowed with costs and the judgment of the Court below reduced to $299.44, with interest thereon from April 1, 1914, to the date of judgment at 8 per cent. The costs of the appeal may be set off *pro tanto* against the plaintiffs' judgment. *Appeal allowed.*

CUT-RATE PLATE GLASS CO. v. SOLODINSKI.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. November 11, 1915.

1. MECHANICS' LIENS (§ II—8)—INTEREST OF "OWNER"—VENDOR AND PURCHASER—REQUEST.

The lien given by sec. 6 of the Mechanics Lien Act, R.S.O. 1914, ch. 140, attaches to the estate or interest of the "owner," as defined by sec. 2 (*c*) of the Act, and does not include a purchaser of land whereon improvements were made prior to his taking possession without his request express or implied.

[*Orr* v. *Robertson*, 23 D.L.R. 17, distinguished.]

2. MECHANICS' LIENS (§ III—13)—PRIORITY OVER MORTGAGEE—WHEN.

In the absence of evidence that the selling value of the land incumbered by a mortgage has increased by the work or materials, no lien attaches under sec. 8 of the Mechanics Lien Act, R.S.O. 1914, ch. 140, upon such increased value, in priority to the interest of a mortgagee;

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CUT-RATE PLATE GLASS CO. v. SOLODINSKI.

Statement

nor will it warrant a sale of the mortgage to satisfy the statutory lien, even though subject to a first charge in favour of the mortgagee for advances made prior to the registration of the lien.

APPEALS from the judgment of Official Referee, in proceedings under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

G. W. Mason, for appellant.

W. H. Ford, for respondent.

E. G. Long, for mortgagee, appellant.

The judgment of the Court was delivered by

Latchford, J.

LATCHFORD, J.:—In proceedings under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, R. S. Neville, K.C., Official Referee at Toronto, dismissed with costs the action of the T. Eaton Company Limited for $422 and interest as against the defendant Walter F. Blanchard. He, however, adjudged that the company was entitled to a lien on the interest of Mrs. Margaret I. Hyslop, under certain mortgages upon the land, subject to a first charge in her favour for $11,275.10—the amount advanced by her prior to the registration of the company's lien. He directed that the mortgages be sold and the proceeds applied, first, in satisfaction of her claim under the mortgages, and, secondly, in or towards the payment of the company's lien.

The company appeals against the judgment dismissing its claim against Blanchard, and Mrs. Hyslop appeals against the order declaring the company entitled to a lien upon her interest in the land and directing a sale of her securities.

On the 14th March, 1914, Blanchard agreed in writing to purchase from the defendant Solodinski certain lots on High Park avenue, Toronto, upon which Solodinski was erecting three houses. The lots were to be taken subject to certain mortgages, then charged thereon, amounting in all to $17,000. Possession was to be given on the 1st May, by which date the houses were to be completely finished. A conveyance of the lands is in evidence, dated the 17th March, 1914. The date of delivery is not established, but it must have been subsequent to the 21st April, when the affidavit of execution was made. The conveyance was registered on the 27th April.

There is some conflict as to the date when Blanchard took possession; Solodinski says at the beginning, and Blanchard about the end, of May. The exact date is not material. Very little

remained to be done to the houses after May-day, but that little Solodinski did, either personally or through contractors like the T. Eaton Company. It appears that, while the company completed its contract with Solodinski about the 13th June, some little additional work is sworn to have been done on the 6th and 7th July. On the 4th or 5th August, the final adjustments were made between the vendor and the purchaser—the vendor making a statutory declaration, which he knew to be false, to the effect that he had paid for all labour and material. On the 6th August, the T. Eaton Company registered its claim for lien.

Between the time he assumed possession and the beginning of August, Blanchard, who resided near Newmarket, visited the houses once or twice a week. The keys were in the hands of persons whom he employed to decorate the interiors. The T. Eaton Company had no communication, direct or indirect, with him in regard to work or materials. What the company did was not done at Blanchard's request, express or implied, nor upon his credit, nor on his behalf, nor with his privity or consent, nor for his direct benefit.

After the 7th July, he complained to the company that the work which he learned the company had done was not well done, and an inspector was sent out, who disclaimed responsibility on the part of the company for the unsatisfactory conditions, and the company did nothing further.

The lien given by sec. 6 of the Act attaches to the estate or interest of the owner, as "owner" is defined by sec. 2, sub-sec. (*c*), and Blanchard does not fall within that definition.

In *Orr* v. *Robertson*, 23 D.L.R. 17, relied on by the appellant, the facts were quite different. There the work was held to have been done in furtherance of a request implied from the fact that Tyrrell had made it a term of a contract that a building acceptable to him should be erected, and then had signed the plan forming part of the contract and taken out the building permit. He had thus constituted himself an owner within the meaning given to that term by the statute.

I think the appeal of the T. Eaton Company fails and should be dismissed with costs.

Mrs. Hyslop's appeal against the judgment so far as it directs a sale of her mortgages, must be allowed—the statute gives no such remedy.

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CUT-RATE PLATE GLASS CO. v. SOLODINSKI.

Latchford, J.

The mortgagee does not, in the circumstances of the case, fall within the definition of "owner," nor is there any finding or evidence that the selling value of the land incumbered by the mortgages to Mrs. Hyslop was increased by the work or materials of the T. Eaton Company—a prerequisite to the attachment of a lien under sec. 8 upon such increased value, in priority to the interest of a mortgagee.

I think that Mrs. Hyslop's appeal on this ground also should be allowed, with costs to be paid by the T. Eaton Company.

Judgment varied.

B. C.

C. A.

Re LAND REGISTRY ACT AND CLANCY.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. January 5, 1915.

1. RECORD AND REGISTRY LAWS (§ III A—10)—DISCRETION OF REGISTRAR—FOREIGN POWER OF ATTORNEY—VALIDITY OF EXECUTION.

The court will not interfere with the registrar's exercise of discretion under sec. 80(1) of the Land Registry Act in refusing to register a certified copy of a power of attorney executed in another jurisdiction not in conformity, as to acknowledgment and proof of execution, with the requirements of the Land Registry Act and the Power of Attorney Act.

Statement

APPEAL by the Registrar-General of Titles from an order of Morrison, J., at Victoria on December 8, 1914, directing the registration of a conveyance from one Margaret Quinn, with a certified copy of power of attorney from Margaret Quinn to W. J. Clancy. This power of attorney was prepared in Port Arthur, Ontario, and sent to the State of Michigan, U.S.A., where it was executed by Margaret Quinn, the affidavit of the witness to the execution being taken before a notary public for the County of Wayne in that State. The power of attorney was subsequently registered in the registry office at Port Arthur. A copy of the power of attorney, certified by the deputy registrar at Port Arthur, who stated that the original was registered in the registry office there, was then sent with the conveyance to Victoria, British Columbia, for registration. The application to register was refused by the registrar, under the power vested in him by sec. 24 of the Land Registry Act Amendment Act, 1914, on the ground that no acknowledgment or proof of the execution of the original power of attorney by Margaret Quinn, who was a married woman, was submitted, as required by secs.

77, 80, 81 and 84 of the Land Registry Act, and sec. 6 of the Power of Attorney Act, also that the applicant had failed to comply with the requirements of sec. 84 of the Land Registry Act as amended by sec. 17, sub-sec. (*b*), B.C. Stat., 1912, ch. 15, as the original power of attorney was registered in a country other than that in which it had been executed.

B. C.

C. A.

RE LAND REGISTRY ACT AND CLANCY.

H. C. Hanington, for appellant.

F. C. Elliott, for respondent.

MACDONALD, C.J.A.:—The only case in which a Judge would review the action of the registrar would be that of the registrar refusing to exercise, or not in fact exercising, his discretion, which is not this case. I think, therefore, the appeal should be allowed.

Macdonald, C.J.A.

It is quite clear that the provisions of the Land Registry Act have not been complied with, and that the registrar was right in refusing registration.

IRVING, J.A.:—I agree.

Irving, J.

MARTIN, J.A.:—I agree. It is quite apparent to me that the laws of this province demand that all instruments which are offered for registration in its land registries must conform to the requirements, and it is particularly desirable that this should be so, we having a system of indefeasible title. I do not think the case was made out with regard to the right to review the registrar's exercise of discretion under sec. 80(7). But if it were, and if it were open to the Judge to have reviewed it, then I think the Judge with all respect wrongly reversed the decision of the registrar and it should be restored.

Martin, J.A.

GALLIHER, J.A.:—I agree.

Galliher, J.A.

MCPHILLIPS, J.A.:—I agree. *Appeal allowed.*

McPhillips, J.A.

Re SCHOOLEY AND LAKE ERIE AND NORTHERN R. CO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. July 12, 1915.

1. DAMAGES (§ III L 2—250)—EXPROPRIATION OF LAND BORDERING RIVER—SPECIAL VALUE—ADAPTIBILITY FOR ICE BUSINESS.

The special value attributable to land bordering a river on account of its special adaptibility for the ice business carried on by the owners, as estimated from the extra cost of harvesting the ice elsewhere, may be allowed in fixing the amount of compensation for the expropriation of such lands for railway purposes; but the cost of sawdust used for covering the ice, the owners still carrying on the business on the same premises, must be disallowed.

[*Pastoral Finance Assn.* v. *The Minister*, [1914] A.C. 1083, applied.]

ONT.

S. C.

RE SCHOOLEY AND LAKE ERIE AND NORTHERN R.W. CO.

Hodgins, J.A.

APPEAL from an award of arbitrators fixing compensation to be paid for lands taken for railway.

W. S. Brewster, K.C., for appellants.

M. K. Cowan, K.C., and *J. W. Pickup*, for the claimants, respondents.

The judgment of the Court, dismissing appeal, was delivered by

HODGINS, J.A.:—The amount fixed as the compensation is $49,000, made up as follows:—

Machinery (valued by consent)	$ 675.00
Water street lands	4,620.00
Water street buildings	3,500.00
Greenwich street lands	10,560.00
Greenwich street buildings	8,400.00
Sawdust in walls	445.00
Sawdust in ice-house for covering ice	800.00
Total of above	$29,000.00
Then in addition also for the extra cost of harvesting ice in any other place in the city of Brantford, or what may be termed special adaptability interest in the lands expropriated by the railway company	20,000.00
Making a grand total of	$49,000.00

The only serious appeal is as to the items of $800 for sawdust and $20,000 for "extra cost of harvesting ice in any other place in the city of Brantford, or what may be termed special adaptability interest in the lands expropriated."

The award is concurred in by all three arbitrators, but the railway company's appointee has given some reasons which explain what he calls his "paradoxical position."

The point of difference appears to be as to the method of arriving at the special value attributable to the property on account of its suitability for the business of the ice company, carried on by the respondents there; the fact of suitability being agreed upon by all.

The majority of the arbitrators have dealt with the question thus: "We found also that these lands were especially adapted

for the ice business, reducing the handling and storing of ice to a minimum of expense, and making it much less expensive than it can be done for at the premises to which the claimants propose removing, or indeed in any other premises in the city of Brantford that was mentioned or pointed out to us, as we find and believe. . . . This property being now taken away, it cannot be duplicated, as we find, in the city of Brantford. In any other place there will be the extra cost of loading, hauling, unloading, and planing. The evidence as to the cost of this is to some extent problematic, but we believe and find it will be very considerable. Evidence was given to shew that the extra expense of procuring, handling, and hauling the ice to what is known as the King property, which the claimants propose procuring, would be an additional $4,000 a year—that is to say: to procure the present supply obtained by the company for the city of Brantford, increasing of course with any increase in consumption and business. We are not prepared to hold that these figures are correct, but we do find that that extra expense would be at the very least $2,000 a year, and probably more, increasing in the same way with any future increase of business, if any. This would necessarily result in large diminution of profits, and perhaps a total extinction of the business. We were strongly urged that it would be just to the claimants to capitalise this extra expense and give them the benefit of the whole capitalisation. This we considered, but thought it unfair, there being so many contingent and uncertain elements in the future to be taken into our consideration. For this element of future cost, the increase of cost of carrying on the business, or, as we choose to call it, the 'exceptional adaptability' of the present premises for its purpose, we have awarded the claimants the sum of $20,000, in addition to the intrinsic value of the properties as above set out."

The third arbitrator treats the matter in this way: "While I agreed with the other arbitrators that the Greenwich street property was especially adapted for the cutting and harvesting of ice from the Grand river, as stated in the reasons given by my co-arbitrators, yet on the other hand I contended that the true measure of damages for which the owner should be compen-

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S. C.

RE SCHOOLEY AND LAKE ERIE AND NORTHERN R.W. CO.

Hodgins, J.A.

sated is not necessarily the increased cost to him of carrying on business of the same capacity or equal to any future demand at any other site in the city of Brantford, but that the railway company had the option of either compensating him for such increased cost, as set forth in the award, or compensating him for the extinguishment or obliteration of the business so far as such business was incidental to the land expropriated. The owner gave a great deal of evidence to prove that it would cost $4,000 more to carry on business at the Grand Trunk or King site in the city of Brantford, which site the owner had selected as his new site, as compared with the cost of carrying on business at the Greenwich street site. . . . Here, the arbitrators had the benefit of Mr. Magee's practical knowledge, and he placed the figure of such extra cost, after making due allowance, at $2,000 a year, which is the figure mentioned in the award; and, if this is the proper method of arriving at the compensation to which the owner is entitled, then I agree that this figure is correct. Taking into consideration the uncertainties and exigencies of the ice business, the arbitrators unanimously arrived at a 10-years' basis, or, in other words, $20,000, as a fair and reasonable allowance to the owner to cover the increased cost of carrying on business at the King or Grand Trunk Railway site. In agreeing with this figure, I expressly reserved my right to contend that the proper allowance would be an allowance based on the damage sustained by the owner, arising from the extinguishment or obliteration of the business as incidental to the land. In dealing with the case from this standpoint, I endeavoured to ascertain the proper yearly profits of the business."

The arbitrator then proceeds to ascertain the yearly profits, and concludes that they do not amount to more than $1,000 per annum after making the deductions he sets out. He then continues: "Taking this on the same basis as allowed in connection with the $2,000 item, being the increased cost of carrying on business elsewhere, being a ten-year basis; this would make the allowance to which Mr. Schooley is entitled in connection with the total extinguishment or obliteration of the business as $10,000 as against $20,000 mentioned in the award."

It is perhaps to be regretted that the arbitrators did not

adopt the much simpler and clearer method followed by the Official Arbitrator in Toronto in the case of *Re Meyer and City of Toronto*, 19 D.L.R. 785. This was to arrive at the value of the land, including in that the element of fitness for the business carried on upon it, and then to allow for disturbance. But it is impossible to read the reasons I have quoted without feeling sure that the $20,000 allowed was intended to cover this special value as well as business disturbance. For the sake of clearness it may be mentioned that "special value" refers to the present use of land, and means its added worth to the owners for the actual and particular use to which it is being put, and for which it is specially fit; while "special or exceptional adaptability" refers to an apparent but future use to which the property may be, but is not now, put, and for which it is particularly adapted. The amount allowed by the arbitrators should be dealt with, as it is obviously intended to be treated, *i.e.*, as allowed for special value, due to its suitability for the ice business, to which it is being devoted, and damages for disturbance to that business, and not necessarily as it is expressed in the award. See remarks of Lord Watson in *Commissioners of Inland Revenue* v. *Glasgow and South-Western R.W. Co.* (1887), 12 App. Cas. 315, 323.

It is impossible to say that the added cost of handling business elsewhere is not a proper element in, and in some cases the only way of, estimating the additional amount which a man would give rather than lose the property as a site for his business. Indeed, if the arbitrators had considered this, and added their computation of the result to the ordinary value of the land, there could be no objection to the award on principle. It is the apparent allowance of the annual loss of doing business elsewhere for an arbitrary period of ten years that has created the difficulty, and it is only by treating the amount as including special value as well as business disturbance that the amount can be supported. But the arbitrators have avoided the error pointed out by Lord Moulton in *Pastoral Finance Association Limited* v. *The Minister*, [1914] A.C. 1083, and have not capitalised the loss. The principle of that case seems entirely applicable. There the prospective savings and additional profits, while not to be capitalised,

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RE SCHOOLEY AND LAKE ERIE AND NORTHERN R.W. CO.

Hodgins, J.A.

were not excluded as an element in arriving at the special value, but were treated as proper material to be considered. The estimated loss or extra expense by reason of operating on other premises stands in exactly the same relation to the present problem as the possible additional savings and profits upon the contemplated property in the case just cited.

In regard to the reasoning of the third arbitrator, I am unable to understand how the exact net profits of the present ice business carried on by the respondents have anything to do with this question. Whether those yearly profits average $5,853, as stated by the respondents, or only $1,000, as brought out by the third arbitrator, makes little difference. Whether one set of figures or the other is adopted, the loss of operating elsewhere would remain constant and would represent an element of value to be added to the present premises, and it is of no consequence whether the respondents carry on their business at a profit or at a loss, if that profit is reduced or the loss is increased by the compulsory removal. This is pointed out in the *Burrow* case,* cited in the case of *Re Brantford Golf and Country Club and Lake Erie and Northern R.W. Co.* (1914), 32 O.L.R. 141.

The amount of $20,000 seems large, having regard to the figures awarded for the land and buildings in this case. But there seems to be no basis on which it can fairly be reduced, if, as I think was intended, it represents the special value of the land expropriated and damages for disturbance to business. The third arbitrator bears testimony to the technical knowledge, experience, and fairness of Mr. Magee, one of the arbitrators, and the amount fixed is apparently due to his influence with his brother arbitrators. Besides this, the third arbitrator is satisfied with the amount unless a different principle can be adopted. As the matters dealt with by the arbitrators were proper to be considered, and there is no discoverable error in principle, the award should stand, although the method of calculation may not be the most usual or best to be adopted. The cases of *Chertsey Union Assessment Commission* v. *Metropolitan Water Board* (1914), 78 J.P. 436, and *New River Co.* v. *Hertford Union*,

*The *Queen* v. *Burrow*, *Metropolitan R.W. Co.* v. *Burrow* (1884), London *Times*, 24th January and 22nd November, 1884, Boyle and Waghorn on Compensation, p. 1052, Hudson on Compensation, p. 1521.

[1902] 2 K.B. 597, may be looked at as examples of similar special value.

The item of $800 for sawdust cannot be supported and should be disallowed. It was faintly defended, and if, as stated, the respondents are still carrying on the business on the same premises, the ice there on the expropriation date should have long ago disappeared. With this deduction, the award should be affirmed and the appeal dismissed with costs.

GARROW, J.A., concurred.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., agreed in the result. *Appeal dismissed.*

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RE SCHOOLEY AND LAKE ERIE AND NORTHERN R.W. CO.
Hodgins, J.A.
Garrow, J.A.
Meredith, C.J.O.
Maclaren, J.A.
Magee, J.A.

GREEN v. B.C. ELECTRIC R. CO.

British Columbia Supreme Court, Clement, J. September 15, 1915.

B. C.
S. C.

1. STREET RAILWAYS (§ III B—27)—SPUR TRACK—LIABILITY FOR INJURIES CAUSED BY CARS RELEASED BY CHILDREN—COLLISION.

A street railway company, which is supplying material for a street construction company, and has for that purpose a spur line connecting with the main track by a knife switch, which allows cars upon the spur line to run down the grade and out on to the main line, is responsible for injuries caused by boys releasing the cars on the spur line, thus causing a collision with the car on the main line on which the plaintiff was travelling.

[*McDowall* v. *Great Western R. Co.*, [1903] 2 K.B. 331, distinguished.]

Statement

ACTION for injuries while travelling on street car.

Farris & Emerson, for plaintiff.

McPhillips, K.C., and *Duncan*, for defendant.

R. L. Reid, K.C., and *Ladner*, for Dominion Creosoting Co.

Clement, J.

CLEMENT, J.:—The plaintiff in this case was injured while travelling in a passenger car owned by the defendant railway company and operated by them on their line in South Vancouver. Another car owned by the same company ran into the car upon which the plaintiff was travelling. She being in doubt as to where the fault lay, exercised the right given her by our rules, and brought her action against both the railway company and the Dominion Creosoting Co. This latter company was engaged in laying a block pavement upon Main street, north of the place where the accident happened, at a point on the street where there was a rather steep grade—somewhere about 2 per cent. While the work was in progress, the railway company had deflected its line to the eastward. The

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blocks were being laid between the rails on what was intended to be the main line after the work was done. The railway company delivered blocks to the creosoting company, using as a spur for that purpose the stretch of line upon which the work was being done. At the foot of the grade this spur line connected with the line actually in use, by what is known as a "knife" switch. This switch is so constructed that cars coming down the grade on the spur line—or what I have called the spur line—would run through the switch and out on to the regular travelled line of the defendant railway company. The Creosoting company had, or at least exercised, some measure of control over the cars in which blocks were delivered to them, and as against this company, the plaintiff claimed that they had been careless in seeing to the braking and blocking of the cars of the grade. What, admittedly, happened was that some boys loosened the brake on one of the cars in the neighbourhood of 46th avenue, with the result that the car ran down the grade, through the knife switch, and out on to the travelled line, colliding, as already intimated, with the car in which the plaintiff was riding.

The action was tried before me with a jury, and, by their verdict, the jury entirely exonerated the Dominion Creosoting Co. from all blame and fastened it upon the defendant railway company. Upon this verdict, I directed judgment to be entered against the defendant railway company for the amount of damages as assessed by the jury, with costs, and dismissed the action with costs as against the defendant Dominion Creosoting Co. Mr. Farris, for the plaintiff, then asked that I should order the defendant railway company to pay to the plaintiff her costs of the action as against the Dominion Creosoting Co. and also the costs she was ordered to pay to that company. Mr. McPhillips for the defendant railway company had, at the conclusion of the plaintiff's case, moved for a nonsuit, and, in directing judgment to be entered upon the jury's verdict, I intimated that his motion should be denied. I also intimated that I could not accede to Mr. Farris' application in regard to costs. Afterwards, counsel agreed between themselves that

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these two matters had not been sufficiently argued, and, at their request, I allowed the matter to be re-opened.

Dealing first with Mr. McPhillips' motion for nonsuit. It resolves itself now into the contention that there was no evidence upon which the jury could reasonably find in answer to the first question left to them, that the possibility of the cars being meddled with by boys was a danger which the defendants should have anticipated and guarded against. In support of this contention strong reliance was placed upon the views expressed by the Court of Appeal in England in *McDowall* v. *Great Western R. Co.*, [1903] 2 K.B. 331, in which that Court reversed the judgment of Kennedy, J., as reported in [1902] 1 K.B. 608. Superficially, that case strongly resembles the one before me, but after all, the question is one of fact, and, even if—which is an impossible supposition—the facts were exactly the same, I do not think I would, strictly speaking, be bound to follow the views expressed in the Court of Appeal if they did not commend themselves to my own mind. In the very recent case in the House of Lords, *Woods* v. *Wilson*, [1915] W.N. 109, 84 L.J.K.B. 1067, Earl Loreburn used this language:—

> I know from experience that there is nothing upon which judicial opinion is more apt to be divided than the question whether or not there is evidence which will support a County Court Judge's decision in cases of this kind—that case was one under the Workmen's Compensation Act. The test is simple enough—what a reasonable man could find. But who is to find the standard reasonable man? I desire, therefore, to speak with reserve, but I must say what I think myself, with all respect to those who take a different view.

A striking example of the difference of opinion which is possible in such cases is afforded by *Cooke* v. *Midland G.W. R. Co.*, [1909] A.C. 229, in which the judgment, as finally pronounced in the House of Lords had the support of a bare majority—6 to 5—of the eleven Judges who, at different stages had sat upon the case. I must confess that my own judgment approves of the view taken by Kennedy, J., and the jury in the *McDowall* case. But, however that may be, the facts of the case before me are, in some respects, very different from the facts of that case. The car there with which the boys meddled was upon the railway company's own property, which, at that point, was

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apparently well fenced. Here, the car was left standing on Main street, a well travelled thoroughfare, with schools in the neighbourhood, and there was evidence that boys were in the habit of congregating around where the work was going on and climbing over the cars and, generally, having what they considered a good time. Moreover, in the *McDowall* case, stress was laid upon the number of wrongful acts the boys would have to go through before the car could be set in motion. They had to trespass upon the railway company's land. They had to provide themselves with keys to get into the van which did the mischief in that case, or else break into it. They had to loosen the brake, which, in an English car, is apparently operated from the inside of the van. Then they had to uncouple screw fastenings between the van and the trucks. It was the opinion of the Judges of the Court of Appeal that the jury were not justified in finding that the railway company should have anticipated and guarded against such a chain of wrongdoing. In the case before me the car, as I have said, was on a public street and it is in evidence that the act of loosening the brake was the simplest sort of operation for a sturdy boy. Furthermore, it was pointed out that in the *McDowall* case the past conduct of the boys rather pointed to the unlikelihood of their meddling with the brake. There was nothing in the case before me to lull the railway company to any such feeling of security. Frankly, I would have answered the first question just as the jury did.

The law as laid down in the *McDowall* case has been approved of in subsequent cases, notably by Lord Macnaghten in *Cooke* v. *Midland Railway Co.*, above referred to. He referred particularly to what has been said by Romer, and Stirling, L.JJ. Lord Romer had indicated that the question was, whether

> the railway company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would or might have done what they in fact did do, or that there was any such risk at the time known to the company of the particular acts of the boys which caused the accident as called upon the company to take further precautions against those particular acts.

Lord Atkinson in the *Cooke* case speaks of "the authorities from *Lynch* v. *Nurdin*, 1 Q.B. 29, downwards," as establishing

certain propositions. These I need not repeat, but I may be allowed to say that, so far as they express views as to what common knowledge and common sense should teach a reasonable man as to the probable conduct of boys, both in congregating and in meddling, under such circumstances as we have here, they entirely fall in with my own judgment. In the *Cooke* case, one of the meddling boys was injured. The propositions would be *a fortiori* in the case of an innocent third party such as the plaintiff in the case before me. For these reasons I am still of opinion that I could not have done otherwise than leave the case to the jury, and, upon their answer to question one, enter judgment against the defendant railway company.

I should mention, perhaps, that Mr. McPhillips also relied upon the *McDowall* case in support of the contention that the finding of the jury that the negligence of the railway company consisted in not providing a proper derailing or blocking device at or above the point where the two lines joined, should be disregarded, as the absence of such a device was not the effective cause of the plaintiff's injury. Vaughan Williams, L.J., was the only Judge in the Court of Appeal who expressed a view which can be said to support this contention. The contention there was that the van should have been left beyond the switch and the Lord Justice met this contention by saying that it could not reasonably be held that this would have prevented the accident as it was a very simple matter for the boys to keep the switch open or closed as the case might be. In the case before me there was, it seems to me, ample evidence on which the jury might say that the device suggested would have been effective to prevent the accident; and there is nothing to suggest that the boys could or would have meddled effectively with such a device. Moreover, it would have been at a point several streets away from where the boys loosed the brake.

As to the question of costs—sec. 5 of the English Judicature Act of 1890, contains the provision that "the Court or a Judge shall have full power to determine by whom and to what extent such costs are to be paid," and it is clear that the English cases in which Orders such as Mr. Farris now asks for have been made are founded upon this provision. There is no such clause

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in our Act. When the first Judicature Act was passed in England care was taken to continue the old Chancery practice as to costs. Order LXV., r. 27, reg. No. 37, expressly provided that that practice should continue as to the "same or analogous proceedings." This provision has not been carried into our rules. Nevertheless, I have no doubt that, under sec. 4 of our Supreme Court Act, this Court has now the same jurisdiction with regard to costs in cases falling within its equity jurisdiction as it had before our present rules were passed. That, however, does not affect the case before me, which is in no sense one presenting equitable considerations. We have here a joinder of causes of action which would not formerly have been permissible either at law or in equity. Mr. Farris recognized this difficulty, but contended that regulations Nos. 29 and 63 of r. 27, O. LXV., should be given the same effect as the more express provision of sec. 5 of the English Act 1890. He contends that, under reg. No. 29, the taxing officer should, in taxing the plaintiff's costs against the railway company, tax, as reasonable disbursements, the plaintiff's costs of prosecuting her case against the Dominion Creosoting Co., and also the costs she has been ordered to pay to that company. I do not think reg. No. 29 is capable of any such construction. I think it has reference to costs incurred in prosecuting the action as against the party against whom such costs were being taxed. The costs incurred as against the Dominion Creosoting Co., were not incurred in any sense in prosecuting her action against the railway company and the same remark, of course, applies to the costs which she has been ordered to pay to the Dominion Creosoting Co. Mr. Farris realized that, if the construction for which he contended should be given to reg. No. 29, it was unnecessary for me to pass upon the question at this stage. He therefore invoked reg. No. 63, which provides:—

> When the costs of one defendant ought to be paid by another defendant the Court may order payment to be made by the one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff.

He asks me to order the railway to pay directly to the Dominion Creosoting Co. the costs to which this latter company is entitled as against the plaintiff. In order to do so, I must hold

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that these are "costs of one defendant which ought to be paid by another defendant." "Ought," I think, means "ought according to law." In my opinion, this provision does not confer a jurisdiction not given by the Act or any other rule. If there were no cases to which it could apply other than a case such as the present, the argument might merit serious consideration, but it is quite apparent that it is applicable in cases involving equitable consideration—cases such as the old Court of Chancery in England was in the habit of trying—and it was simply passed to get over a technical difficulty in such cases. On the whole, I remain of opinion that I have no jurisdiction to make the order for which Mr. Farris asks.

In the result, therefore, judgment will be entered against the railway company for the amount found by the jury with costs and the action will be dismissed as against the Dominion Creosoting Co. with costs. *Judgment for plaintiff.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A., and Britton, J. March 15, 1915.

1. FRAUDULENT CONVEYANCES (§ VI—30)—CONVEYANCE BY HUSBAND TO WIFE—RE-CONVEYANCE—RIGHTS OF WIFE'S CREDITORS.
A voluntary conveyance of land by a husband to his wife in anticipation of death, to be re-conveyed to him upon his recovery from his illness, a re-conveyance of the land in pursuance of such arrangement does not render the re-conveyance fraudulent against the execution creditors of the wife.

2. ESTOPPEL (§ III H—112)—TITLE TO LAND—REPRESENTATIONS AS TO BY WIFE—RELIANCE BY WIFE'S CREDITORS—PROPERTY OF HUSBAND.
Representations made by a wife in respect of her title to land, and acted upon by her creditors, but which is in fact only held by her as trustee for her husband to be re-conveyed to him upon his recovery from an illness, will not create an estoppel against the husband not being himself a party to the representations.

Statement

APPEAL from judgment of Latchford, J., in favour of defendant in an action to set aside, as fraudulent and void against creditors, a conveyance of land.

The judgment appealed from which was affirmed, was as follows:—

Latchford, J.

LATCHFORD, J.:—The plaintiffs' judgment is wholly unsatisfied, or was so at the time of the trial. The automobile, for the price of which the judgment was obtained, was under seizure by the Sheriff of Essex, but had not been sold. Although its cost was

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$1,875, it is not probable that the car would sell for more than $800, and Mrs. Martin appears to have no other property liable to seizure.

In March, 1914, the defendants began to look about for a motor car. Mr. Martin was in failing health. It was thought that he would be benefited by frequent airings; and, as he could walk but little, if at all, it was suggested to him that the best means of taking the air was from the seat of an automobile. Mrs. Martin, at first alone and subsequently accompanied by her husband, visited the plaintiffs' garage, and on the 18th April ordered a car costing $1,375. This was subsequently—about the 6th May—exchanged for another car, and $500 additional was agreed to be paid to the plaintiffs.

On the 13th April, 1914, Joseph Martin had conveyed to his wife his lands in the city of Windsor and the township of Maidstone.

I find that this conveyance was made to her on the express understanding that, should the husband recover from the illness he was then suffering from, she was bound, upon his request, to reconvey the lands to him. The deed was to become absolute only in the event of his death.

Martin was childless, but he had many relatives. His illness at the time was serious, and might soon result in death. Both he and his wife thought a will would in that event be more open to attack by his next of kin than a deed. Then there was the possibility that he might recover. He was known to own considerable property; during a long and active life, he had occupied important municipal and other public positions; and he wished, should his illness pass away, to resume his place in the community.

I have no reason whatever to think that their agreement was anything but what the defendants say it was.

Martin did recover his health—not indeed fully, but to a very great extent—and asked for and obtained the reconveyance now the subject of attack.

On the 21st July, 1914, the plaintiffs brought their action for the price of the automobile. The action was against both husband and wife. Their main defence was that the sale was

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upon a condition which had not been observed. It failed; but judgment was given against Mrs. Martin alone, and the action dismissed as against her husband.

The conveyance of the 30th June was not, I find, made with any fraudulent intent on the part of either defendant. It was not a voluntary conveyance. Under the agreement made between Martin and his wife, prior to the execution by him of the conveyance of the 13th April, she was, at his request, bound to reconvey. In the circumstances, she was merely a trustee for him of the lands included in the conveyance.

An execution against her, in the interval between the 13th April and the 30th June, could not bind the lands which were subject to the equity and trust in her husband's favour. See *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282, especially the judgment of Strong, C.J., at p. 289, and the cases there cited as conclusively establishing the principle that an execution creditor can only sell the property of his debtor subject to all such liens, charges, and equities as the same was subject to in the hands of his debtor.

The plaintiffs would, therefore, fail to recover against the lands in question, even had the conveyance they impeach not been made.

I find nothing which operates against Mrs. Martin by way of estoppel. It was with her husband's consent that she authorised the plaintiffs to sell the farm in Maidstone for $10,000—a price at which both defendants were quite willing the farm should be sold.

The action fails, and is dismissed with costs.

J. H. Rodd, for appellants.

T. Mercer Morton, for defendants, respondents.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment, dated the 19th December, 1914, which was directed to be entered by Latchford, J., after the trial before him, sitting without a jury at Sandwich, on the 3rd December, 1914.

The appellants are execution creditors of the respondent Elizabeth Martin for $1,917.30 and costs, and bring their action to set aside, as fraudulent and void as against them and her

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other creditors, a conveyance made on the 30th June, 1914, by her to her husband, Joseph Martin, the other respondent.

The judgment upon which the execution was issued was recovered on the 10th October, 1914, on promissory notes given by the wife in respect of the purchase-price of an automobile bought by her from the appellants. On the 18th April, 1914, she gave an order to the appellants for an automobile, for which she agreed to pay $1,375. The automobile was ready for delivery on the 6th May following, and on that day she gave to the appellants the joint promissory note of her husband and herself, payable in one month, for the whole of the purchase-price, with interest at seven per cent. This note was not paid at maturity, and, on the 11th June following, a new note of the wife alone for $1,384.35, payable in eight days, with interest at the same rate, was given. This note also was not paid at maturity, and a new note for $1,387.30, payable on the 1st July following, with interest at the same rate, was given by the wife on the 22nd June, 1914. In the meantime, the automobile had been exchanged for a higher-priced one, and a note at one month, with interest at the same rate, was given by the wife on the 17th June, 1914, for $500, which represented the difference in price on the exchange; and it was upon this note and the note for $1,387.30 that the judgment was recovered.

The appellants, besides being agents for the sale of automobiles, were agents for the sale of land, and on the 18th April, 1914, and at the same time that the order for the first automobile was given, the wife placed in their hands for sale lot No. 12 in the 9th concession of the township of Maidstone, one of the parcels of land in question in this action, and discussed with them the question of obtaining a loan on mortgage of the lots in Windsor that are in question.

The respondents allege that the impeached conveyance was executed in pursuance of an arrangement made between them when the lands which were reconveyed were conveyed by the husband to the wife on the 13th April, 1914. The consideration expressed in the conveyance is natural love and affection and one dollar.

The circumstances under which the property was conveyed to

the wife, as she and her husband testified and the learned trial Judge found, were these. The husband had been an active business man, but had fallen into bad health, and was advised by his physician that he might not recover, and that he had better put his wordly affairs in order. A will was made devising the property to the wife, but on account of the fears of the wife that the will might be attacked by the husband's next of kin, it was decided that a deed should be made to the wife, on the understanding and agreement that, if the husband recovered his health sufficiently to attend to his business, the wife should reconvey the property to him, and upon that understanding and agreement the conveyance to the wife was made. The husband did recover sufficiently to be able to attend to his business, and the reconveyance was then made to him in pursuance of the understanding and agreement upon which the property had been conveyed by him to his wife.

The question of the intent with which the reconveyance was made was a question of fact, and the learned Judge who saw and heard the witnesses was in a much better position to judge as to their credibility than an appellate Court can be; he has given credit to their testimony, and his finding of fact, especially as it is a finding which acquits the respondents of the fraud with which they are charged, ought not, in my opinion, to be disturbed. While it is true that the absence of evidence corroborating the testimony of the parties to a transaction impeached as fraudulent against creditors is a circumstance, and an important one, to be considered in determining as to the intent with which the transaction was entered into, there is no rule of law that I am aware of which renders it impossible to uphold such a transaction because of the absence of such corroborative evidence.

Such an arrangement as the respondents testified was made was not an improbable one in the circumstances. I doubt very much whether the wife could successfully have resisted an action by the husband to set aside the conveyance to her on the ground of its improvidence, if the effect of it was entirely to divest him of any interest in the property. As I understand the evid-

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ence, the conveyance covered everything he possessed, and there are frequent instances in which such conveyances, made without consideration, have been set aside as improvident.

The circumstance that the reconveyance was made after the wife had become indebted to the appellants may be a suspicious circumstance; but mere suspicion as to its *bona fides* does not warrant the setting of it aside; still less does it warrant the setting aside of a finding by an experienced Judge that it was made in good faith and without any fraudulent intent.

The fact that the wife placed the farm property in the hands of the appellants for sale, and that she expressed her intention of borrowing money on a mortgage of the city property, although it was part of the agreement upon which the property was conveyed to her that she should not sell or mortgage it, is, in my opinion, not inconsistent with the existence of the agreement which the respondents testified was made as to the reconveyance of the property to the husband, because he was an assenting party to what his wife did and proposed to do.

The doctrine of estoppel was much relied on by the learned counsel for the appellants, but the evidence does not warrant the application of it, even if in any case it would be applicable to prevent parties from resisting an attack by a creditor upon a conveyance by his debtor of property on the ground that it was made with intent to defraud creditors.

There was, no doubt, evidence that the wife represented to the appellants that she was the owner of the property. I doubt very much whether she did so in words, but the fact of her placing the farm in the hands of the appellants for sale, and expressing her intention to borrow upon mortgage of the city property, may well have led the appellants to believe that she was the owner of both properties, and is probably the only ground the witnesses had for saying that she represented that she was the owner of them. However that may be, and assuming that the representation was made, there was no satisfactory evidence that the husband was a party to it or was present when it was made.

The appellant Burnes testified that the representation was made by the wife, but declined to say that the husband was pre-

sent when it was made. The witness Welch does say that the wife told him, before the order for the automobile was given, that the property was hers. He also testified that this was said in the presence of "everybody," but who "everybody" was he did not say. He also testified that the wife, addressing her husband, said in French: "Now, Joe, are you satisfied with this? You know everything belongs to me, but I want you to be satisfied." I cannot understand what there was to call for any such remark from her; and that such a thing was said seems to me most improbable.

If, as I think, there was no satisfactory evidence that the husband was a party to the alleged representation of his wife, or present when it was made, there is an end to all question of estoppel, because the person to be estopped, if estoppel is to help the appellants, is the husband, and not the wife.

It may seem a hard case, if the appellants sold the automobile to the wife under the belief induced by her conduct or by her representation in words that she was the owner of the property, that they should not have the right to look to it for payment of their judgment, but if, as was stated upon the argument, the respondents were willing and offered to return the automobile, which is valued at $800, and pay $1,000 besides in satisfaction of the judgment, and that offer was refused, the appellants have not much to complain of; and, in any case, we should resist the inclination on account of the hardship of the case to make bad law or establish a vicious precedent, which, in my opinion, we should do if we were to reverse the judgment of my brother Latchford.

I would dismiss the appeal with costs.

MACLAREN, J.A.:—I agree. Maclaren, J.A.

MAGEE, J.A.:—As between the defendants, there seems no sufficient reason to question the conclusion of the trial Judge that the husband was entitled to have a reconveyance of the property from his wife. The only right in the plaintiffs to prevent that must be based upon the ground of some estoppel. As the husband originally joined with the wife in making the promissory notes to the plaintiffs, no estoppel could arise, for the plaintiffs did not act to their prejudice upon the faith of any re- Magee, J.A.

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presentation that the property belonged to the wife. No one then had in contemplation that the plaintiffs would release the husband and accept subsequently notes signed by the wife alone. Any representation by the husband, even if proven, was therefore only casual and collateral to the transaction, and not one which should entitle the plaintiffs to prevent the husband from insisting upon his right to the land, as it could make no difference to them. That they subsequently accepted the note of the wife alone is not shewn to have been brought about by any subsequent request, course of action, or statement or representation by the husband; and no case for estoppel arises out of an alleged representation made previously, upon which the plaintiffs did not act at the time, and not made with a view to such transaction as subsequently occurred between the wife and the plaintiffs.

Whether the plaintiffs could now hold the husband to the liability from which he was released under a mistake of the facts is another matter, and not in question here.

I think the appeal should be dismissed.

Britton, J.

BRITTON, J.:—I agree in the result with the judgment of the Chief Justice of Ontario for the following reasons:—

(1) The impeached conveyance cannot be set aside in the absence of fraud on the part of the defendant judgment debtor. The trial Judge has found that there was no fraud. Any fraud that might otherwise be implied from the fact that the conveyance was voluntary, and that the effect of it might be to defeat or delay the creditors, is rebutted by the facts in this case. The property which the creditors seek to make liable for their debt was unquestionably the property of the husband, and, only a short time before the plaintiffs' judgment, it became the property of the wife, by a voluntary conveyance, for a perfectly proper purpose; and, when there was no longer need for the purpose named, the wife by a voluntary conveyance returned the property to her husband. That, in my opinion, might be a proper and an honest transaction, not necessarily tainted to the smallest extent.

(2) The doctrine of estoppel has no application in this case. The husband, of course, would be estopped from claiming as against a *bonâ fide* purchaser from the wife, and as against any

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person dealing with the wife in regard to the property conveyed, while she held it. No matter what the wife asserted as to the title—as to the real ownership—she could deal with the property as between herself and her husband, and, if without fraud, no creditor of hers can complain. A statement by the wife cannot be used to the prejudice of the husband in some subsequent transaction, unless that subsequent transaction is in itself fraudulent so as to give a creditor the right to complain of the act alleged to be fraudulent.

GARROW, J.A., dissented. *Appeal dismissed.*

Garrow, J.A. (dissenting)

KING v. DOLL.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. October 5, 1915.

1. ASSIGNMENTS FOR CREDITORS (§ III C—30)—DUTIES OF ASSIGNEE—FAILURE TO MAKE PAYMENTS ON SPECULATIVE CLAIMS — RIGHTS OF ASSIGNOR.

Where a debtor, not in fact insolvent and having a large surplus of assets, makes an assignment for the benefit of creditors, no breach of trust arises on the part of the assignee for his failure to make payments, in order to preserve the interests of creditors, upon speculative coal claims upon which large arrears were due the government, though such appears to be detrimental to the interests of the assignor.

Statement

APPEAL from the judgment at the trial of Simmons, J., without a jury.

O. M. Biggar, K.C., for plaintiff.

Lougheed, Bennett & Co., for defendant.

Beck, J.

BECK, J.:—The defendant, Louis H. Doll, carried on a jewellery business in the city of Calgary for some years, and during the course of carrying on this business engaged in a number of transactions entirely outside the scope of that business.

On June 15, 1908, Louis H. Doll, being unable to meet his obligations to his creditors as they matured, though having assets largely in excess of his liabilities, obtained an extension of time from his trade creditors, under which he and his wife, Mary Christina Doll (also a defendant), agreed to execute mortgages upon certain lands. Concurrently with this agreement there was executed a mortgage by Mr. and Mrs. Doll on certain lands, and subsequently, on May 19, 1909, Mrs. Doll executed another mortgage upon other lands. Both these mortgages were made to the plaintiff King.

On December 5, 1908, Louis H. Doll made an assignment for

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the benefit of his creditors to the plaintiff Robinson. The action is to enforce these two mortgages.

The defendants, Louis H. Doll and his wife, put in a counterclaim against the plaintiffs, King and Robinson, and also against A. B. Cushing, an inspector of Doll's estates, appointed in pursuance of the Assignments Act, and one B. T. Hutton, who appears to have subsequently become manager of the Northern Bank, the bank having also apparently been appointed an inspector. King is sought to be made liable on the ground that the assignee Robinson was really King's agent.

The counterclaim, amongst other things, by way of reference to the statement of defence, sets up the following:—

6. Among the assets of the defendants were certain coal lands, namely, sections 7, 21, the north half of 9, the north half of 19, the north half of 22, the south half of 17, the north-east quarter of 17, legal subdivisions 11, 12, and 13 of section 17, all in township 29, range 23, west of the fourth meridian, which the defendants had purchased from the Government of the Dominion of Canada, pursuant to the provisions of the Orders-in-council with respect to coal lands from time to time in force, at the price of $10 per acre, and the defendants had paid in respect of the total purchase price of $25,520 the sum of $8,459.28, leaving a balance of $17,062.72, which was, under the provisions of the said Orders-in-council, required to be made by certain instalments from time to time accruing due.

7. The value of the said coal lands was at least $50 an acre, less the amount of unpaid purchase money as aforesaid, as the plaintiffs and each of them well knew.

8. The defendants requested the plaintiffs to make the payments upon the purchase money of the said lands from time to time as the same fell due, but the plaintiffs refused and neglected to make such payments or any part thereof.

9. By reason of the default of the plaintiffs, the Government of the Dominion of Canada, pursuant to the provisions of the Orders-in-council aforesaid, reduced the area of the coal lands so purchased to 552 acres, upon which said number of acres the purchase money paid by the defendants before December 5, 1908, was applied in full satisfaction of the purchase price at the rate aforesaid.

10. The defendants have thereby lost 2,000 acres of coal lands and have suffered damage to the amount of $83,000, being the value of the said lands at $50 per acre as aforesaid, less the amount of purchase money unpaid thereon.

This claim is the only one which is in question in this appeal and, subject to a reference, the only question ultimately in issue at the trial; see a note made at the trial and appearing at p. 19 of the Appeal Book.

Application for the coal lands in question was made in 1906 to the Dominion Government through the instrumentality of Doll, in the names of himself, his wife, two of his children and three of his employees, eight parcels in all. The coal lands are listed in ex. 8, on p. 162 of the Appeal Book, and it there appears that Doll obtained assignments from one of his children (Ethel Estelle Willard), and the three employees (Sutherland, Young, and Campbell). The land comprised 2,552 acres. In respect of some of the parcels the surface was also included. The purchase price was apparently $10 an acre.

The lands were all in township 29, range 23, west of the 4th meridian, and were as follows: N. ½ of 7 (Mary C. Doll), surface and mining rights, S. ½ of 7 (Florence M. Doll), surface and mining rights, S. ½ of 17 (L. H. Doll), surface and mining rights, S. ½ of 21 (D. A. Sutherland), surface and mining rights, N. ½ of 21 (H. Young) surface and mining rights, N. ½ of 19 (L. H. Doll), mining rights only, N. ½ of 9 (E. E. Willard), mining rights only, N. ½ of 22 (A. B. Campbell), mining rights only; (See pages 139, 160, 162).

On p. 133 is a statement dated May 11, 1910, shewing:—

Total purchase price of	$25,520.00
Total amount received on account of purchase price	8,459.28
Unpaid principal	17,060.72
Interest on unpaid purchase price to date	2,510.00
	$19,570.72

A number of questions were raised before us upon which I do not propose to express a considered opinion. I, however, indicate them, and the inclination of my mind regarding them.

I am inclined to the opinion first, that the plaintiffs, by counterclaim, in no event can have any remedy, except as against the assignee Robinson; secondly, that none of the coal lands became vested in the assignee, and this notwithstanding the estoppel alleged by reason of an Order of Stuart, J., that Order being merely an interlocutory one, made in an action which never proceeded to final judgment; and thirdly, that if any of the land did vest in the assignee some of them did not, because at the date of the assignment, Doll had no legal or equitable title to them.

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Beck, J.

I do not deal with these questions because, in my opinion, assuming them to be answered in favour of the plaintiffs by counterclaim, they are still not entitled to succeed. The extension agreement was entered into on June 15, 1908, between Doll of the first part, his creditors, who should sign the agreement, of the second part, Mrs. Doll, of the third part, and King, as a trustee for the creditors, of the fourth part. Doll and his wife agreed to execute mortgages to King to secure the creditors, the lands to be mortgaged being set out in a schedule to the agreement differentiating between those of Doll and those of Mrs. Doll. Doll's lands are stated to be three parcels, the first two of which are put at $6,500, and the third—coal lands, 3,000 acres, have been valued by the Northern Bank valuator at $50 an acre. It will be two years before Doll can get title to same. There is $20,000 owing the Government on same. Lands are said to be worth $15 an acre for agricultural purposes. (ex. 1, sch. A, p. 117.)

Mortgages were taken from Mrs. Doll; but so far as appears, none was given by Doll. The lands, listed as Mrs. Doll's, total a value of $183,250. The mortgages taken from her to King to secure the creditors are for $39,841.42. This was, Doll says (p. 73), $10,000 in excess of the claims of creditors and was to cover further advances to be made by the creditors to enable the business to be carried on profitably. King (p. 105), says with reference to the negotiation leading to the extension agreement: "When he" (Doll) "first came down, to produce the statement (practically the statement which is attached to the agreement), including the coal lands, all the creditors in discussing that, said that they were not in the mining business and that they did not intend to assume any responsibility for the amount which was due. Mr. Doll had told us that he had made applications in the names of nominees of himself for these coal lands, and they were exceedingly valuable; and the experience of some of us was quite to the contrary; and inasmuch as they were in the jewellery business they intended to insist that he should confine his attention to the jewellery business and sell his real estate," and, as appears in his evidence immediately

following, King insisted on this view both at the time of the assignment and subsequently throughout.

Doll was asked (p. 50), "At the time of the assignment, had you any communication with Mr. Robertson regarding the coal land?" A. "Yes, I was continually calling his attention to the fact that the government was asking for payment and threatening cancellation if we did not make the payment." Again (p. 70), he says: "He" (Robinson) "said he was instructed not to pay, and they did not want to have anything to do with it," (the coal lands). This was shortly after the assignment. And from that time forward Doll endeavoured to make arrangements with outsiders so as to enable him to satisfy the government (p. 75). Robinson, refusing to have anything to do with the coal lands, Doll himself endeavoured to do the best he could with them (p. 83).

Again (p. 54), with reference to the time of making the assignments Doll says: "All these people" (creditors) "were claiming for was a receiver, speculation was rife at that time and they were afraid that I was using money for speculative purposes that they thought they should have been getting, and for that purpose they asked me to have a receiver. Mr. King and Mr. Allison assured me it was an assignee I should have, because I would be in the hands of moneyed people, and my credit would be very largely extended."

By the end of 1908, it appears that sufficient moneys had been realized from the business to pay the mercantile creditors 25 per cent. on their claims (p. 57, l. 12). This was paid and was not objected to by Doll (p. 63, l. 16), and by June, 1910, a total of 65 per cent. (ex. 17, p. 176, referred to by counsel at p. 60), was paid. Payment of dividends after the first 25 per cent. Doll says he objected to on the ground that payments should be made to the Government on account of the coal lands (p. 63).

Doll received an offer of $40,000 for the coal lands from one Newton which he refused, although advised by Robinson to accept it. This would have left him a margin on the sale of approximately $20,000, which would have been sufficient to

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have paid off the balance owing to his creditors and entitled him to a reconveyance of his properties and business (p. 76).

It appears too (pp. 87, 88), that for a payment of $1,000, Doll could have made an arrangement to borrow $10,000 for the purpose of payment on account of the coal lands, thus undoubtedly putting them in such standing that the department would not have troubled him for a long time.

It also appears that Doll had an offer in 1909 of $65,000 for property standing in his wife's name (p. 70), and comprised in her mortgage to King as trustee for the creditors. This would have paid all his creditors and the whole amount owing to the government, yet he refused it. This property was a pure gift to his wife, over which he admits he retained control (pp. 84, 86, 89, 92).

We have then this condition of affairs. The assignee for the creditors, rightly or wrongly, from, and even prior to, the date of the assignment persistently refused to have anything to do with the coal lands. If there was a breach of duty on his part in doing so, that was the date of it. Doll knew it and acted accordingly. He took steps to preserve the property.

It had cost him $25,520. There remained owing about $19,500. This was a time sale. So far as its value depended on the coal the coal had not been "proved." Both as to the surface and the coal its value was a matter of great speculation. First, he got an offer of $40,000 which would have given him a very large profit on his original investment, and would have left him, after the balance owing to the government had been paid, sufficient to satisfy all his creditors and get his business and the residue of his property back, and yet he refused it, against the view of the assignee. Secondly, by the sale of property which was in reality his own and which in any case was available for the creditors by reason of Mrs. Doll having mortgaged it as security to them, he could likewise have been able to pay all his creditors and preserve the coal lands. Thirdly, for an expenditure of $1,000 he could have preserved the property for himself.

He did none of these things, any one of which a prudent business man undoubtedly would have done. Having neglected

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to take advantage of these very favourable opportunities, he ultimately made an arrangement with the government whereby the moneys already paid on account of all the several parcels of coal land were applied in payment in full for some of them. What this arrangement resulted in, appears on p. 139. A surplus of $167.94 remained, a cheque for which was forwarded to Doll and appropriated to his personal use (p. 72, l. 10).

There can be no doubt that an assignee for the benefit of creditors is a trustee, not only for the creditors, but also for the assignor; perhaps it can be said that he is equally a trustee for the one as the other; perhaps, too, it cannot be said without distinction that he is primarily trustee for the body of creditors, and secondarily, for the assignor, but it seems to me that, at all events, the duties of the assignee to the one may be modified by, and by reason of, his duties to the other; and if this is so, as seems unquestionable, then where, as in the present case, a debtor, who is not in fact insolvent, but, on the other hand, shews a very large surplus of assets, makes an assignment, it seems to me that the assignee, who, by the exigencies of the case, must pay the creditors first, would not be justified, having regard to his duties to the creditors, in using funds of the estate in nursing the speculative assets, so as to have the result that the creditors will be forced to wait an unreasonable length of time for payment of their claims. That would clearly have been the result here if Doll's contention were sustained.

If, on the other hand, the view of the assignee, the inspectors, and the whole body of creditors is the right one, as I think it is, Doll has sustained no damages for which anyone else than himself is responsible, because, in this view, Doll himself accomplished what was the only obligation of the assignee; for, in view of the speculative character of the coal lands, the large amount of arrears owing to the government, the imminent danger of the sales being cancelled, the assignee's duties to the creditors, it is, to my mind, clear that the assignee would have been well advised to do nothing more than to make such an arrangement with the government as would preserve the value of the money already paid.

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The assignee can be made liable only for a clearly established breach of trust. In my opinion, the evidence falls far short of establishing this; and it is on this ground that, in my opinion, the appeal of the plaintiffs in the counterclaim should be dismissed with costs.

HARVEY, C.J.:—For the reasons stated by my brother Beck for his conclusion, but without expressing any opinion on any of the points not material to the conclusion, I would dismiss the appeal with costs.

Scott, J.
Stuart, J.

SCOTT and STUART, JJ., concurred. *Appeal dismissed.*

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Re BERANEK.

Ontario Supreme Court, Meredith, C.J.C.P. January 15, 1915.

1. HABEAS CORPUS (§ I A—2)—PARTIAL SUSPENSION OF REMEDY—WAR MEASURES ACT, 1914—MILITARY CUSTODY.

A prisoner held in military custody as an alien enemy must have the consent of the Minister of Justice before he can claim to be released in *habeas corpus* proceedings in support of which he adduces proof that he is a British subject by naturalization; he cannot be released upon bail or otherwise discharged or tried without the consent of the Minister of Justice under the War Measures Act, 1914, 5 Geo. V., Can. ch. 2.

Statement

APPLICATION, upon the return of a writ of *habeas corpus*, for an order for the release of Rudolf Beranek, a military prisoner.

W. A. Henderson, for prisoner.

Lieutenant Boulter, the custodian of the prisoner, appeared in person in answer to the writ.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The writ, in this case, was obtained on the assertion that the prisoner is held in military custody as an alien enemy, although, in fact, a British subject by naturalization.

Assuming that to have been an accurate statement of the facts of the case, it by no means follows that the prisoner is entitled to be released from custody, nor indeed that the writ should have been issued, although the lawful power of the military, at the present time, may be to detain an alien enemy only.

In extraordinary times, extraordinary laws have been passed "for the security, defence, peace, order, and welfare of Canada;" and the power of the military authorities, and the rights of the prisoner, depend upon those laws, and that which

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has been rightly done under them; I mean, especially, the War Measures Act, 1914, 5 Geo. V. ch. 2 (D.), and the orders in council and proclamations made under it.

Under that enactment great authority has been conferred not only upon the Governor in Council but also upon the Minister of Justice.

The 6th section of the Act gives to the Governor in Council power to do and to authorise such acts and things, and to make from time to time such orders and regulations, as he may, by reason of the existence of actual or apprehended war, invasion, or insurrection, deem necessary or advisable for the security, defence, peace, order, and welfare of Canada, including expressly, among other things, "arrest, detention, exclusion, and deportation."

And, under the 11th section, no person who is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, shall be released upon bail, or otherwise discharged or tried, without the consent of the Minister of Justice.

So that, in the very case made for the prisoner, upon the application for the writ, there is not only a prohibition against release, but a prohibition against even a trial—a trial, for instance, of the question whether he is or is not an alien enemy—without that which he has not only not obtained but not applied for, the consent of the Minister of Justice.

In these circumstances, after conferring with the learned Judge who granted the writ, I am unable to change, or modify, the views expressed by me upon the argument of this motion, for the discharge of the prisoner from custody, that the motion should be refused.

It is quite true that soldier and sailor as well as civilian, Cabinet Minister as well as cabman, all are amenable to the process of this Court; but it is equally true that, where the law of the land confers upon Court or person any power, this Court has no right to interfere with the exercise, in good faith, of that power; it is only when the power so conferred is exceeded that this Court can interfere; unless some right of appeal to it is also conferred.

It is also, as a matter of law, quite immaterial what the opinion of any Judge, or other person, may be respecting the wis-

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dom or unwisdom of conferring such powers, or of the wisdom or unwisdom of the way in which the power is exercised, provided it is exercised in good faith; but it should be plain to every one that in the stress and danger to the life of any nation in war, the Courts should be exceeding careful not to hamper the action of those especially charged with the safety of the nation; careful, among other things, not to take up the time and attention of those who should be fighting the enemy in the field, in fighting law suits in the law Courts over private rights. It is not a time when the prisoner is to have the benefit of the doubt; it is a time when, in all things great and small, the country must have every possible advantage; a time when it must be the general safety first in all things always; until the final victory is won; even though individuals may suffer meanwhile. Private wrongs can be righted then: while final defeat would not only prevent that but bring untold disasters to all.

It may be that the prisoner is a British subject, and if so, under the law as it now stands, his imprisonment is unlawful; but, being detained, as he alleges he is, "as an alien enemy, or upon suspicion that he is an alien enemy," he cannot "be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice:" the Parliament of Canada has so decreed in its War Measures' enactment, and decreed it "for the security, defence, peace, order, and welfare of Canada:" and it is the duty of the Courts to give full effect to that enactment: to attempt to whittle it down, or to evade its provisions in any respect, would be inexcusable, even in a hard case; which I feel bound to say this case does not appear to me to be: the prisoner, according to his own statement made, at his own urgent request, in open Court, is an Austrian—Viennese—by birth; a resident in Canada for about eight years; the husband of a Canadian wife, and the father of several children by her, all born in Canada, where his marriage took place; a British subject since the year 1910, when he became naturalised through proceedings in one of the Courts of General Sessions of this Province; arrested recently when seeking work at his trade of bricklayer, on, as he knew, forbidden grounds; and held as a prisoner of war ever since.

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Whether he is in law a British subject may depend upon several questions of law and fact—for instance: whether the certificate of naturalisation, on which he relies, is a genuine one: whether it was obtained by fraud or is for any other reason invalid: whether naturalisation under the former laws of Canada, as distinguished from those passed last year, take the man out of the category of an alien enemy, or are confined to property and civil rights in Canada other than that in question: whether, in short, he can be, for war purposes, a British subject in Canada and an alien enemy on all other British soil.

Upon the man's own statement, to which I have referred, a strong suspicion was caused in my mind that he would not have been wrongly arrested if he could have been and had been arrested for spying out the land, though probably not in connection with any organised system, but only on his own account, to be made use of should there be opportunity. In these circumstances, and having regard to the fact that under one of the orders of the Governor in Council, made under the War Measures Act, 1914, the family of the prisoner may go with him, I cannot perceive any justification for these proceedings without first applying to the Minister of Justice, even if there had been some power here to deal with the case, in the first instance.

These observations do not, of course, affect the prisoner's rights: if he be a British subject, he ought not to be detained as an alien enemy, whatever other charge might be laid against him: but all that is for the consideration of the Minister of Justice first.

The application for the prisoner's discharge is dismissed; and his conditional remand is made absolute.

Motion dismissed.

MACDONALD v. BANK OF VANCOUVER.

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British Columbia Supreme Court, Macdonald, J. August 14, 1915.

1. ESTOPPEL (§ III E—74)—INDORSEMENT OF SHARE CERTIFICATE IN BLANK —ACQUISITION BY BANK IN GOOD FAITH—FORBEARANCE OF OWNER TO CLAIM IT.

Where the owner of a share certificate endorses it in blank and deposits it with a company as security for an advance, and such company hypothecates it with a bank as collateral security for its own benefit, such hypothecation is a fraud on the owner, and upon payment of his debt to the company he is entitled to a return of the certificate; but where the bank has in good faith made advances to the company on the strength of such security, and the owner, upon

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learning that the certificate is in the hands of the bank, takes no steps to recover it, he is estopped by conduct from claiming delivery of the certificate free from encumbrances which he, by his own neglect, has allowed to be created.

[*Colonial Bank* v. *Cady*, 15 App. Cas. 267, followed; *France* v. *Clark*, 26 Ch.D. 257, distinguished.]

ACTION for return of share certificate.

D. E. McTaggart, for plaintiff.

E. A. Grant, for defendant.

Macdonald, J.

MACDONALD, J.:—Plaintiff is the owner of 37 shares in the capital stock of the Jenekes Machine Co. Ltd., of the par value of $100 each, represented by a certificate for that amount. To secure an advance he deposited the share certificate with the Traders Bank at Vancouver, B.C., and subsequently, in order to repay the loan from such bank, obtained the assistance of A. G. Brown-Jamieson Co. Ltd. He received the certificate and delivered it to such company as security for the accommodation afforded. This transaction took place about March 4, 1911. On March 24, 1911, the certificate came into the possession of the defendant bank, and, according to its books, was deposited as collateral security for the benefit of the said A. G. Brown-Jamieson Co. Ltd. Gillies, the secretary of such company, says that the certificate was not deposited as a security, but came into the possession of the defendant bank through his taking it to the bank for the purpose of making enquiry as to the value of the shares, and that the bank on subsequent demand refused to re-deliver the certificate. He did not disclose such state of affairs to the plaintiff and could not give any reasonable excuse why he did not do so. It was not to be expected that Ronald, the accountant of the bank, who verified the entry in the bank book as being in his handwriting, would be able to recollect the particular circumstances under which this security was received. He apparently had no doubt as to his having honestly made the entry and that it was a correct record of the transaction. Ronald was in much the same position as the witness, who gave evidence which was held sufficient, in *Maugham* v. *Hubbard*, 8 B. & C. p. 14, on seeing his initials affixed to the entry of payment he said:—

> The entry of £20 in the plaintiff's book is my initials, written at the time; I have no recollection that I received the money; I know nothing

but by the book; but seeing my initials, I have no doubt that I received the money.

I cannot accept the story as told by Gillies. I am strengthened in this conclusion, not only by the improbability of the occurrence as related by Gillies, but also by his failure to tell the truth when inquiry was made as to the share certificate, when the plaintiff became entitled to its return. If the bank had retained such certificate in the manner indicated, there was every incentive for him to inform the plaintiff to that effect, so that he might take immediate steps to recover possession of his property. According to his account of the delivery of the certificate to the bank, he was in no way to blame and should have had no reluctance in giving the plaintiff a correct account of what had taken place. There was also some discrepancy as to the dates, between the evidence on the part of the plaintiff and that afforded by the bank book. I am satisfied as to the correctness of the latter. When the action was launched, it was alleged in the statement of claim that the share certificate was

in fraud of the plaintiff and without his knowledge or consent deposited by the said A. G. Brown-Jamieson & Co. Ltd., with the defendant.

I believe that the bank received this certificate as security in due course from the A. G. Brown-Jamieson Co. Ltd. as its customer, and held same at first under a general hypothecation and then under a specific hypothecation, limiting the security to the amount of $2,000. Such deposit was made in fraud of the plaintiff.

When plaintiff retired the notes at the Traders Bank, he was entitled to receive the certificate. This was in July, 1911, but he was satisfied as to the honesty of the officials of the company with which he was then connected and accepted the statement of Gillies that the certificate was then in the company's safe. The fact was, that some time previous, it had been fraudulently delivered to the defendant bank. Plaintiff had endorsed this share certificate in blank, previous to depositing it as security with the Traders Bank, and it remained in this condition when delivered by him to the Brown-Jamieson Company, and also when received by the defendant. He was content to allow this indicia of property to remain out of his possession in this condition.

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A. R. Fuller was examined at Seattle on behalf of the defendant, and it is contended that a portion of his evidence, if accepted, showed the plaintiff was willing to have such shares, represented by said certificate held by defendant bank as security for an indebtedness by him to the A. G. Brown-Jamieson Co. Ltd. and its successors. I had the opportunity of considering the demeanour of the plaintiff as a witness, and forming an opinion as to his credibility. It was a favourable one. I accept his evidence and believe that he did not consent to these shares being held by the bank in any way as a security. He may have been guilty of laches in not asserting his position at an earlier date. As to this phase of the matter I shall deal later.

The question then arises whether the defendant is entitled to retain this share certificate under the circumstances.

In *France* v. *Clark*, 26 Ch.D. p. 257, the Earl of Selborne says:—

> The defence of purchaser for valuable consideration without notice, by any one who takes from another without inquiry an instrument signed in blank by a third party and then himself fills up the blank, appears to us to be altogether untenable. The observations of Bramwell, B., in *Hogarth* v. *Latham*, 3 Q.B.D. 643-647, and of Stuart, V.-C., in *Hatch* v. *Searles*, 2 Sm. & G. 147, 152, both cases of negotiable instruments, and also of Turner, L.J., in *Taylor* v. *Great Indian Peninsula R. Co.*, 4 DeG. & J. 559, 574, are opposed to any such notions, and so are plain and clear principles of justice and reason . . . and a man who, after taking it in blank, has himself filled up the blanks in his own favour without the consent or knowledge of the person to be bound, has never been treated in English Courts as entitled to the benefit of that doctrine. . . . He must necessarily have had notice, that the documents required to be other than they were when he received them, in order to pass any other or larger right or interest, as against the person whose name was subscribed to them, than the person from whom he received them might then actually and *bonâ fide* be entitled to transfer or to create; and if he makes no inquiry, he must at the most take that right (whatever it may happen to be) and nothing more. . . . This, in our opinion, renders it unnecessary to consider whether, before the registration was completed, the company and the appellant had notice of the plaintiff's claim; for registration in the name of a transferee only gives a complete effect to a prior valid transfer; registration does not make effectual a document which was, as between the alleged transferor and transferee, inoperative and of no effect.

> It was said that when a man, in a transaction for value, does what this plaintiff did, and delivers a blank form of transfer to a creditor by

way of security, together with the certificates of shares, his meaning must necessarily be that the creditor may complete his security by obtaining registration of the shares, either in his own or (possibly) in some other name; and that he, therefore intrusts him with the requisite authority for that purpose. Granting this, what follows? Only that the creditor to whom such an authority is given may execute it or not, for the purpose of giving effect to the contract in his own favour, as he pleases; but not that, if he does not execute it, he can delegate the like authority to a stranger for purposes foreign to and possible (as in this case) in fraud of that contract.

The facts in *France* v. *Clark, supra,* were very similar to those in the present case. France had deposited with Clark certain certificates of shares as security for an advance and had also at the same time delivered to him an instrument in the form of a deed of transfer, leaving the date, consideration and name of the transferee in blank. Then Clark, without the knowledge of France, handed the certificates in the same state in which he had received them to Quihampton as security for money due him by Clark.

Aside from whatever effect the conduct of the plaintiff, after he became aware of the change in possession of the certificate, may have had, his right to recover the share certificate should exist, or, at any rate, his ownership in the shares would be unimpaired, if the decision in *France* v. *Clark, supra,* has not been affected by subsequent cases.

In *Colonial Bank* v. *Cady,* 15 App. Cas., p. 267, *France* v. *Clark,* was cited, but is not referred to specifically in the judgment of the House of Lords. Lord Halsbury, referring to the effect of endorsement of a share certificate, says:—

Undoubtedly a document may, by usage, become so well understood in a particular sense that a person may be well estopped from denying that when he issues it to the world it must bear the sense which usage has attached to it, and that brings me to inquire whether it is true that the issue of this document to the world in this form would shew that the person signing it intended to give a complete title to anyone into whose hands it should come.

In that case the endorsement in blank on the certificate was defective, and thus was not "in order," so as to operate and give title to the holder, even under American decisions. Lord Watson, in the same case, says:—

In so far as the law of America is concerned, your Lordships have the aid of three experts, two of whom were examined by the appellants and

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one by the respondents. As I understand their evidence, the principles of American law do not differ in any way, or at least in any material respect from those by which an English Court would be guided in similar circumstances. When the endorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares, both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders, and obtaining a new certificate in his own favour. Such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself without risk of his right being defeated by any other person deriving title from the registered owner. . . . According to the custom of bankers and stockholders, both in this country and America, a certificate, with the indorsed transfer executed in the manner already described, is regarded as being "in order;" and its delivery, in exchange for value received, is understood to be sufficient to pass the full title of the registered owner. Even when the delivery has been fraudulent, as in the present case, the Supreme Court of New York has held that the registered owner cannot reclaim the document from a holder who has given valuable consideration in good faith and without notice of the fraud. But it is necessary to observe that the decision of the Court did not attribute to the instrument any privilege or negotiability in the legal sense of that term.

Lord Watson, after referring to the evidence of Mr. Carter, one of the legal experts, that the decisions were founded on the principle of estoppel adds that the principles of America appear to be in harmony with principles of English law, and the true owner of such documents of title is not held to have parted with his interest in them, except where he so intended, or where, "by reason of some act or omission he has estopped himself from saying that he did not intend to pass it." In that case it was held that, as the transfer was executed by executors, it could not be regarded as "either in law or by custom equivalent to a certificate and transfer executed by the registered owner himself." It is, however, quite clear that in this case, if the certificates of shares had been signed by J. M. Williams, the registered owner, and not by his executors, that the banks would have obtained a good title to them. This is evident from the following portion of the judgment of Lord Herschell, who, after

referring to the certificates with blank transfer not being negotiable instruments, then says:—

If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it and who has received it in good faith and for value—and this doctrine has been held by the Court of Appeals of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently or in excess of his authority sells or pledges them. The banks, or other persons taking them for value, without notice, have been declared to hold them as against the owner. As at present advised, I do not see any difference between the law of the State of New York and the law of England in this respect. If, in the present case, the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them.

In *Fry* v. *Smellie*, [1912] 3 K.B. 282, an agent, who had received certificates of shares pledged them with defendant in violation of his instructions. The case of *France* v. *Clark*, *supra*, was distinguished, and that of *Brocklesby* v. *Temperance, etc., Soc.*, [1895] A.C. 173, applied. It was held that the defendant Smellie could retain the shares thus improperly placed in his possession. *Colonial Bank* v. *Cady*, 15 App. Cas. 267, was referred to and portions of the judgments cited at length as shewing the state of the law as opposed to *France* v. *Clark*, which had been followed by the trial Judge.

In *Fuller* v. *Glyn, Mills*, [1914] 2 K.B. 168, Pickford, J., discussed the authorities without referring to *France* v. *Clark*, *supra*, though cited by counsel. He decided that where stockbrokers holding certificates of shares for a customer had, in breach of trust deposited such certificates with their bankers, the customer could not recover the certificates as there was nothing to put the defendants, as bankers, on inquiry, and that they had been received in good faith. The case of *Colonial Bank* v. *Cady*, *supra*, was applied, and its effect stated to be as follows:—

If they took the shares in good faith and without notice of the plaintiff's title, I think the case is concluded by authority. It is true that the exact point has not been decided. The same doctrine which would apply to the shares in that case (*Colonial Bank* v. *Cady*), would apply

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to those in the present case. The act of signing the form of transfer on the back of the certificate does not make that document a negotiable instrument in the strict sense, but anyone who signs the transfer and then hands the document to another person, knows that he is putting into the power and disposition of that person a document which carries with it an apparent authority to that person to deal with it.

The Judge considered that *Colonial Bank* v. *Cady* would apply unless there was some difference between the facts in that case and the one that he was then deciding. It appeared that the plaintiff had not signed the transfer himself. If he had done so, such authority would apparently have been immediately applied without discussing at length the reasons why it should be followed. This is clear from a portion of such judgment of Pickford, J.:—

In my view the plaintiff, though he did not actually sign the transfer himself, gave rise to just the same mischief as if he had affixed his signature himself. The present case is, therefore, covered by the principle of the cases I have mentioned and there must be judgment for the defendants.

The defendant bank received this certificate of shares in the ordinary course of its business, and the custom of accepting securities of this nature is thus referred to by Lord Watson in *Colonial Bank* v. *Cady*:—

According to the custom of bankers and stockbrokers, both in this country and America, a certificate with the indorsed transfer executed in the manner already described is regarded as being "in order," and its delivery, in exchange for value received, is understood to be sufficient to pass the full title of the registered owner.

Kekewich, J., in his judgment in the same case (*Williams* v. *Colonial Bank*), 36 Ch. Div. 659, at p. 670, refers to the manner in which such a custom is to be ascertained and established as follows:—

The question is not as to the custom or usage in a particular place, but what is the custom or usage of the monetary world. For that purpose proof of the usage of a large capital, such as London, is sufficient to shew that of the whole world, unless it is contradicted. . . . Therefore, I think I am bound to hold that, according to the usage of the monetary world, these documents have, for a long time past, been accepted as securities to bearer on which bankers make advances.

On this point, if evidence were required to prove that this custom prevails amongst bankers in Canada, it was supplied to my satisfaction by Mr. H. H. Morris, superintendent of the Bank of Commerce in this province. The defendant bank in thus accepting the certificate in question as security followed

a usage in vogue amongst banks. There is no evidence on the part of defendant as to any conversation when the security was deposited in March, 1911, but I do not think that, under the later decided cases, it was incumbent upon the bank to prove that it made at that time any inquiries. I might add that it is to be presumed that the bank was aware that its customer was dealing in the goods of Jenckes Machine Company, and it would not seem unreasonable for shares of such company to be offered as security.

While the defendant bank may not, at the time of the receipt of the certificate, have made any loan on the strength of such security, still I am satisfied that later on it gave further advances, and felt entitled to do so, relying upon the worth of these shares which had a face, if not actual value, of $3,700. The situation then is as between two innocent parties. Who is to bear the loss occasioned by the fraud of Brown-Jamieson & Co. Ltd.? In the light of subsequent decisions, I do not think that the judgment in *France* v. *Clark*, *supra*, prevents the defendant bank from successfully contending that such loss should, under the circumstances, be borne by the plaintiff. It follows that he is not entitled to a return of the certificate except upon payment of the claim of defendant thereon.

There is, to my mind, a further defence to plaintiff's claim for a return of the certificates of shares. His conduct, after discovering that this property was in the hands of the bank, was such as to estop him from now setting up a right to its return, free from any encumbrance that he, by his neglect, had allowed to be created in the meantime. It was his duty when he found that the certificate was not in the safe, where it had been represented to be, but had come into the possession of the bank, to find the cause of the change and how it was held. He should not have been satisfied with the statement of anyone connected with a company which had thus failed to retain custody of the document. Arthur G. Brown, president of the Brown-Jamieson Co. Ltd., gave evidence that, prior to August, 1912, he had conversations with the officials of the defendant bank as to the certificate of shares and the retention of same by the bank. He fully understood that the bank was holding

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the certificate as security, and he so informed the plaintiff prior to August, 1912. This statement in effect is contradicted by the plaintiff who states that in February, 1912, when he was leaving the Brown-Jamieson Co. Ltd., he suggested the shares should be returned to him. He was asked where he supposed it was at the time, and answered, "Well, I never gave it a thought; I naturally supposed it was in the safe still." Mr. Brown then informed him, "it was up at the bank," and plaintiff presumably having some knowledge of the business of the company naturally inquired, "if it had been hypothecated," and he (Brown) stated "no, it was just there, the bank had it." The plaintiff then added, "that is all there was to it." "They hung on to it." He then started to work for the Jenckes Machine Co. on a salary basis and is still so employed. He did not at the time take any steps to recover his property. He talked the matter over with Brown who said they would get the certificate some day and give it to him, and Brown further stated that the certificate "was not hypothecated, it was in care of the bank." He seemed satisfied with this state of affairs, and it was not until March, 1914, that a letter was written the defendant demanding the return of the shares, and this action was commenced in February, 1915. He was so careless of his rights and displayed such negligence as might almost lead one to the conclusion that he had actual knowledge as to the bank holding the certificate as security. Adopting the remarks of Lord Blackburn, in the course of the argument in *Reg.* v. *Williams*, 9 App. Cas. 418 at 419: "Negligent ignorance, is it not as bad as knowledge?" No matter how the defendant became possessed of the shares could it not subsequently assume that the right to deposit them had been properly exercised? In the meantime the defendant had emphasized its right to treat the shares as security by a specific hypothecation limited in amount to $2,000. Still, there was no objection from the plaintiff, and it was not until the time mentioned that he saw fit to declare his intentions and take steps to recover his property. I think he lay on his oars too long, and cannot now contend that the bank is not entitled to hold the certificate as security. Action is dismissed with costs.

Action dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. July 12, 1915.

1. LIMITATION OF ACTIONS (§ III I—145)—EXECUTION UPON JUDGMENT—WHEN BARRED.

Execution upon a judgment is barred if application for leave to issue execution is not commenced within the period prescribed in the Limitations Act, R.S.O. 1914, ch. 75, sec. 49 (1).

[*Poucher* v. *Wilkins*, 21 D.L.R. 444, distinguished.]

APPEAL from a judgment of Middleton, J. Statement

The judgment appealed from is as follows:—

MIDDLETON, J.:—Appeal from an order of the Master in Chambers setting aside an execution—argued also as a motion for leave to issue execution. Middleton, J.

The action was dismissed with costs on the 20th December, 1883; the costs were taxed at $371.78 on the 5th January, 1884; and an execution was issued on the 25th January, 1884; and this was from time to time renewed, but finally allowed to expire. In 1891, another execution was issued, and kept renewed until November, 1905, when it was allowed to expire. This writ was issued upon præcipe and without leave.

The period of 20 years from the date of the judgment expired on the 20th December, 1903; and the real question is, whether the judgment creditor can, after the lapse of 20 years, in any way enforce his judgment. I have come to the conclusion that he cannot.

The Statute of Limitations, R.S.O. 1914, ch. 75, sec. 49 (1) (*b*), fixes the period at 20 years from the time the cause of action arose, and the only extension recognised by the statute is that found in sec. 54, where there is an acknowledgment or part payment.

What is prohibited is the bringing of an "action" after the lapse of the statutory period, and "action" is defined as including "any civil proceeding:" sec. 2 (*a*).

The Appellate Division in *Poucher* v. *Wilkins*, 21 D.L.R. 444, has held that a renewal of an execution in force at the expiration of the 20 years is not within the prohibition of the statute, as it "was a mere ministerial act on the part of the officer of the Court by whom it was renewed."

The appellants here contend that this application is not an

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"action" within the statute, and that the renewal of the execution from time to time during the 20 years gives a new starting-point.

The decision in *Farran* v. *Beresford* (1843), 10 Cl. & F. 319, is against the appellants. A judgment was obtained in 1810, and in 1837 a *sci. fa.* was issued, to which the defendant pleaded the Statute of Limitations. The plaintiff replied setting up an earlier *sci. fa.* within the 20 years. The Court held the plea good and the reply bad as a departure. Tindal, C.J., gave the opinion of the Judges who were called in to advise. In this opinion it is stated that the statute began to run the moment the judgment was recovered, and that there was no warrant for adding to the exceptions provided by the statute, of acknowledgment and payment, a new exception "judgment revived," "more especially as such exception might have the effect of enlarging the time of proceeding for the recovery upon judgments to an indefinite period." "A *scire facias* is neither a payment nor an acknowledgment in writing." The judgment upon the *sci. fa.* in 1817 would have been a new judgment upon which an action might have been brought within 20 years, but the *sci. fa.* then in question was upon the judgment of 1810, and not that of 1817

The history of proceedings to enforce judgments must be understood in order to appreciate some of the cases.

"At the common law a presumption arose from a plaintiff's delay beyond a year, that his judgment either had been satisfied, or from some supervening cause ought not to be allowed to have its effect in execution. After such delay, therefore, he was not allowed to issue execution as a matter of course, but was driven to bring a new action on the judgment. The *scire facias*, which had been in use at the common law, for the purpose of executing judgment in real actions, after a year and day's delay, was therefore adopted by the statute as a less expensive and dilatory course for the plaintiff, and as equally affording protection to the defendant:" *per* Lord Denman in *Hiscocks* v. *Kemp* (1835), 3 A. & E. 676, 679. The statute referred to was the Statute of Westminster 2 (13 Edw. I., stat. 1, ch. 45).

An exception to the rule based upon the presumption was

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where an execution had been issued within the year, but had not been executed. This negatived the presumption: *per* Parke, B., in *Simpson* v. *Heath* (1839), 5 M. & W. 631, 635. To remedy this state of affairs the Common Law Procedure Act of 1852, sec. 128, provided for the issue of an execution at any time within 6 years from the judgment, as between the original parties, and, by sec. 129, for the issue of execution where there had been a change of parties or lapse of this time, either by writ of revivor or upon suggestion entered upon the roll by leave to be obtained upon summons. A writ of revivor was allowed without preliminary rule when the judgment was less than 10 years old, and when more than 15 only on a rule after a summons to shew cause (sec. 134).

The change in procedure was not intended to make any change in the substantive rights of the parties; and, though no time-limit was found in the Common Law Procedure Act, it was always held that the application to enter a suggestion or for a writ of revivor must be made within the statutory period: *Loveless* v. *Richardson* (1856), 2 Jur. N.S. 716; *Williams* v. *Welch* (1846), 3 D. & L. 565.

All this leads me to the conclusion that the present Rules relating to the issue of execution are subject to the statutory limitations, and that the obtaining of leave is a judicial act, and not a mere ministerial act, which may be done after the time limited.

The decision of the Chancellor in *Price* v. *Wade* (1891), 14 P.R. 351, that, apart from any statutory limitation, the judgment is presumed to be satisfied, is left untouched by the decision in *Poucher* v. *Wilkins*, and it, as well as *Farrell* v. *Gleeson* (1844), 11 Cl. & F. 702, justifies the view that the proceedings under the Rule are in effect more than a mere continuation of the former suit—for it must be remembered that the *sci. fa.* there mentioned was not an "original writ" but a judicial writ under the Statute of Westminster.

For these reasons, the motion must be dismissed, and costs should follow.

The three defendants appealed from the order of MIDDLETON, J.

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C. A. Moss, for appellants.

C. C. Ross, for respondent.

The judgment of the Court, affirming judgment of Middleton, J., was delivered by

MEREDITH, C.J.O.:—This is an appeal by three of the defendants from an order of Middleton, J., dated the 27th March, 1915, dismissing their appeal from an order of the Master in Chambers of the previous 15th December, 1914, refusing leave to issue execution on the appellants' judgment against the respondent's testator, the plaintiff in the action.

The judgment was recovered on the 20th December, 1883, and there has been no payment on account of it and no acknowledgment sufficient to make a new starting-point for the running of the Statute of Limitations, if that statute applies.

Executions against goods and lands were issued and placed in the sheriff's hands, and were renewed from time to time. One of them (an alias writ) was issued by leave of the Master in Chambers, granted by an order dated the 17th November, 1905; but it was issued after the expiry of the 20 years; and there was no execution in force at the time of the application to the Master in Chambers which resulted in the making of his order of the 15th December, 1914, and more than 20 years from the date of the recovery of the judgment had then expired.

It was decided by this Court in *Poucher* v. *Wilkins*, 21 D.L.R. 444, that where an execution had been issued within 20 years from the date of the judgment, had been kept alive by renewals, and was in force at the expiration of the 20 years, the right of the execution creditor to renew it and keep it renewed was not barred by the Statute of Limitations or otherwise.

The view of the Court in that case was that, where the execution is in force at or after the expiration of the 20 years, the renewal is but the ministerial act of an officer of the Court, and is not a civil proceeding within the meaning of the Limitations Act, R.S.O. 1914, ch. 75, sec. 49; but the question which has arisen in this case was left open and is untouched by the decision in that case.

I see no reason for differing from the conclusion of my brother Middleton, which seems to be well supported by the cases

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to which he refers, and I can usefully add little to the reasons which he gives for the conclusion to which he came.

It was argued for the appellants that the order giving leave to issue execution is the equivalent of an order of revivor or the entry of a suggestion on the roll under the old practice; but granting this does not help the appellants, for the proceedings to revive or to obtain leave to enter the suggestion, to be effectual, must have been taken within the 20 years; and it follows that the application for leave to issue execution, having been made after the expiry of that period, was too late.

Appeal dismissed.

CRAIG v. PEGG.

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Alberta Supreme Court, Harvey, C.J., and Scott, and Stuart, JJ. May 15, 1915.

1. VENDOR AND PURCHASER (§ II—33)—FORECLOSURE OF AGREEMENT OF SALE—LAND SITUATE OUTSIDE OF PROVINCE—APPLICABILITY OF REMEDY.

The proceedings required to be taken under the Foreclosure and Sale Act, Alta., 1914, ch. 6, for the enforcement of agreements for the sale of land do not apply where the land is situated outside of the province.

APPEAL from judgment of Crawford, J.

Statement

L. T. Barclay, for defendant, appellant.

S. S. Cormack, for plaintiff, respondent.

The judgment of the Court, dismissing appeal, was delivered by

HARVEY, C.J.:—The plaintiff's action is for some intermediate instalments on an agreement for the sale of land situate in Moose Jaw, Saskatchewan.

Harvey, C.J.

A motion was made by the defendant before defence to set aside the proceedings as being contrary to the provisions of the Foreclosure and Sale Act (ch. 6 of 1914). That Act provides by sec. 3 that:—

> All proceedings to secure or enforce any right, remedy or obligation under a mortgage, encumbrance, or agreement for sale or in respect of the lands, moneys, covenants, conditions, stipulations or agreements described or contained therein shall be brought before a Master in Chambers in the Supreme Court of Alberta under the provisions of this Act, and as nearly as may be in accordance with the practice and procedure of the said Court.

The motion was dismissed by Crawford, J., on the ground that the said statute did not apply, the land being outside the province. I am of opinion that in this he was right.

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Sec. 4 of the Act provides that the Master may grant, (*a*) an order for possession of the lands; (*b*) an order of sale of any estate of the mortgagor, encumbrancer or purchaser in the lands in question; (*c*) an order of foreclosure or a vesting order; (*d*) judgment under the formal covenant; (*e*) an order directing an issue. The proceedings are commenced by the filing of a "notice of default" in the form prescribed, which notifies that if the default is not remedied, all applications and proceedings under the Act may be taken. By sec. 7, after notice given, the Master may hear any application.

It seems apparent that the intention is to give the Master jurisdiction when once a notice of default has been given to grant to the applicant all the remedies he may be entitled to. No claim specifying just what the plaintiff desires is required as in an ordinary action, it apparently being assumed that the applicant will want all he is entitled to or at any rate that he may have whatever he does want if he is entitled to it. The order in which his remedies are set out in sec. 4 shew clearly that if not the chief, certainly essential parts of his relief will be the possession and sale of the land or the acquiring of title in himself.

Now, it is quite certain that the legislature of this province has no power to legislate so as to affect titles to or the possession of lands outside of the province. The principle must be the same as if the land were situate in Russia or China. It is also a first principle of construction that this legislature will not be presumed to have intended something which it has no power to do if any other reasonable construction can be given to the legislation. Maxwell on Statutes (5th ed.), p. 230, says:—

> Another general presumption is, that the legislature does not intend to exceed its jurisdiction.

It has been held that Provincial Courts have no power to decree a sale of lands over which they have not territorial jurisdiction. See *Henderson* v. *Bank of Hamilton*, 23 Can. S.C.R. 716; *Gray* v. *M. & N.W. Ry. Co.*, 11 Man. L.R. 42, affirmed in appeal, [1897] A.C. 254.

This presumption as to the general intention is borne out by the provisions of the Act as to the commencement of proceed-

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ings which are applicable only to this province. Sec. 5 provides that:—

> Proceedings under this Act shall be commenced by the filing of a notice of default in the Land Titles office and the office of the Clerk of the Supreme Court for the Judicial District in which the lands described in any instrument are situate.

If the lands are not situate in any judicial district, then these provisions cannot be complied with. I suppose, though "any instrument" is the term here, we must restrict it to "any instrument under which the applicant claims relief," and though in sec. 3 the expression is "agreement for sale," we must restrict this to "agreement for sale of land." It is evident, therefore, that the term, "all proceedings," of sec. 3 is not the only general expression that cannot be given its fullest meaning.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

CLELAND v. BERBERICK.

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S. C.

Ontario Supreme Court, Middleton, J. November 20, 1915.

1. ADJOINING OWNERS (§ I—3)—RIGHTS TO LATERAL AND SUBJACENT SUPPORT—LIABILITY FOR REMOVING SAND FROM ADJOINING LOT.

The rights of adjoining landowners to the free use and enjoyment of the land in its natural condition, not only as regards lateral but also subjacent support, are rights incident to the land itself and not a mere easement; hence the act of such owner in removing sand from a sandy beach of an adjoining lot, thereby facilitating the action of the wind and water in washing away a portion of the land, will render him liable for damages occasioned thereby.

[*Dalton* v. *Angus*, 6 App. Cas. 740; *Jordeson* v. *Sutton, etc. Co.*, [1899] 2 Ch. 217; *Trinidad, etc. Co.* v. *Ambard*, [1899] A.C. 594, applied.]

Statement

ACTION for damages for injury to the plaintiff's lands and premises by the defendant's wrongful acts in removing sand from his adjoining lands and premises.

J. G. Gauld, K.C., and *R. W. Treleaven*, for the plaintiff.

H. S. Robinson, for the defendant.

Middleton, J.

MIDDLETON, J.:—VanWagner's beach, on the shore of Lake Ontario, near Hamilton, is a place where summer residences have been erected. The plaintiff and the defendant are neighbours.

Prior to the spring of the present year, the plaintiff's property sloped down to the water of the lake in such a way as to leave a sandy beach, which afforded much pleasure to him and his family. The defendant drew a large quantity of sand from his adjoining lot, and the defendant's wife, who apparently owns the lot next

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adjoining, also drew sand from her lot. In the result, the storms have washed away a large portion of the plaintiff's sandy beach, and the line of high ground has been carried back some 50 feet towards his house. This year, the water of the lake is much lower than usual, so that about the same distance as had existed theretofore is left from the road on the other side of the plaintiff's property to the actual water-line; but the beach has been made much wider, and, owing to the fact that the sand has been carried away by the action of the water, and the gravel has been left behind, this beach is of comparatively little use; and upon the water rising to its normal level the lot will have been made of somewhat less depth than before.

The photographs filed shew the way in which the shore has been encroached upon by the action of the elements. The plaintiff's case is that this destruction of his property has been brought about by the act of the defendant in removing the sand and bank from his own property, so that the action of wind and water has been greatly facilitated. The defendant denies this, and seeks to minimise the amount of sand taken from his property, and to pass on responsibility for the destruction of the land to his wife and those owning property beyond, where even more serious interference with the natural conditions had taken place.

Upon the evidence, I have come to the conclusion that a great deal more sand has been taken from the defendant's property than he admits, and that the excavation done upon his property is, to a considerable extent, responsible for the inroad upon the plaintiff's land.

The question of the legal responsibility of the defendant for the consequence of his conduct appears to me to be by no means free from difficulty. No cases were cited by either counsel dealing with the precise point in hand, and I have found none; but the general principle involved appears to me to be clear, and is nowhere better expressed than in the classic judgment of Lord Chancellor Selborne in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, at p. 791: "In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below

it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non lædas*." To the same effect is what is said by Lord Blackburn, p. 808: "This right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbour is to use his land."

This principle has been given wide application, and has been applied not only to the case of lateral support but to subjacent support, even to the case of subjacent support by running silt: *Jordeson* v. *Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; and semi-fluid pitch: *Trinidad Asphalt Co.* v. *Ambard*, [1899] A.C. 594.

The latter case is in some respects very like this. There, it is said by a witness, "Pitch bulges out, and they shave it off every morning. That is the plan adopted when you want to dig your neighbour's pitch." Here the plan adopted when you want the benefit of your neighbour's sand is, evidently, to sell your own and trust that the action of nature will fill the void from your neighbour's property.

Broadly speaking, the right of the owner of land is, as I understand it, to have that land left in its natural plight and condition without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the adjoining land. Each land-owner must so use his own land that he shall not interfere with or prevent his neighbour enjoying the land in its natural condition.

The damage done to the plaintiff's property has given me some anxious consideration. In the result, I have concluded to allow $750; and there will be judgment for that sum, with costs.

Judgment for plaintiff.

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REX v. TORONTO R. CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. November 9, 1915.

1. NUISANCE (§ III—56)—ENDANGERING PUBLIC COMFORT—INDICTMENT.
The intention of sec. 223 of the Cr. Code, 1906 (Cr. Code, 1892, sec. 193), which was taken from sec. 152 of the English draft Criminal Code, is to leave untouched the common law right to proceed by indictment or information as a remedy for a public nuisance not involving public safety or public health or occasioning injury to the person of an individual (Cr. Code sec. 222), but which merely endangers the property or comfort of the public (Cr. Code 221); the latter remains a crime, but the remedy is now restricted by Cr. Code sec. 223 to that of abatement.

2. NUISANCE (§ III—55)—OVERCROWDED STREET CARS—INADEQUATE CAR EQUIPMENT—INDICTABLE OFFENCE.
A nuisance maintained by a company which operates a street railway on city streets by the systematic and continued overcrowding of cars through failure to put on a proper equipment is none the less a public or common nuisance and indictable as such, although only a portion of the general public who used the cars had their comfort or property endangered by the overcrowding.
[*R. v. Toronto R. Co.* (No. 1), 18 Can. Cr. Cas. 417, 23 O.L.R. 186, affirmed on appeal; *Macdonald v. Hamilton, etc., Road Co.*, 3 U.C.C.P. 402, referred to.]

3. NUISANCE (§ II C—40)—CONTINUANCE OF—JUDGMENT FOR ABATEMENT.
Judgment for the abatement of it, on a conviction for a public nuisance, cannot be given unless the nuisance continues at the time of the indictment.

Statement

CASE stated by RIDDELL, J., before whom, upon the verdict of a jury, the defendant company was, on the 3rd February, 1911, convicted of a common nuisance: *Rex* v. *Toronto Railway Co.* (No. 1), 18 Can. Cr. Cas. 417, 23 O.L.R. 186.

H. H. Dewart, K.C., and *D. L. McCarthy*, K.C., for defendant company.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for Crown.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is a case stated by Riddell, J., before whom the defendant was convicted at the sittings at Toronto on February 3, 1911, of a common nuisance: *Rex* v. *Toronto Railway Co.* (No. 1), 18 Can. Cr. Cas. 417, 23 O.L.R. 186.

The indictment contains several counts, only one of which, count 6A, is in question, as the defendant was convicted on that count only, the jury having failed to agree upon a verdict as to the other counts.

Count 6A is as follows: "6A. And the jurors aforesaid do further present that the said Toronto Railway Company operating cars as in the preceding count of this indictment set out were under

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a legal duty to carry those subjects of our Lord the King received by the said company as passengers on the said cars in such a manner as to avoid endangering the property and comfort of such passengers, and that the said Toronto Railway Company, at the city of Toronto aforesaid, and during the time in the preceding count set out, without lawful excuse, unlawfully neglected and unlawfully omitted to take reasonable precautions to avoid endangering the property and comfort of such passengers by neglecting and omitting to take any reasonable precautions or care to prevent undue, dangerous, and illegal overcrowding of passengers in such cars, in consequence whereof the property and comfort of the public and of the subjects of our Sovereign Lord the King, passengers on the said cars as aforesaid, were endangered, and the said Toronto Railway Company did thereby commit an indictable offence contrary to the provisions of the Criminal Code and against the peace of our Sovereign Lord the King, his crown and dignity."

Section 221 of the Criminal Code defines what is a common nuisance, and its provision is that "a common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects."

By sec. 222 it is provided that "every one is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual."

By sec. 223 it is provided that "any one convicted upon any indictment or information for any common nuisance other than those mentioned in the last preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right."

All of the objections urged by the learned counsel for the defendant, except perhaps one, were dealt with by the learned trial Judge in an elaborate statement of his reasons for judgment with which I entirely agree and to which I have but little to add.

In addition to the reasons which are given for holding that

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the defendant had omitted to discharge a legal duty, I may refer to the power which the defendant has under what is now sec. 163 of the Ontario Railway Act (R.S.O. 1914, ch. 185). That section confers upon railway companies the power to make by-laws, rules and regulations respecting "the number of passengers to be allowed in cars, their mode of entrance or exit, and the portion of the car or the class of car to be occupied by them" (clause *i*); and by sec. 169 it is provided that, "if the contravention or non-observance of any by-law, rule or regulation is attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, the company may summarily interfere, using reasonable force, if necessary, to prevent such violation, or to enforce observance, without prejudice to any penalty incurred in respect of such violation or non-observance."

It is true that such a by-law requires the approval of the Ontario Railway and Municipal Board before it can take effect; but no such by-law appears to have been passed; and, therefore, no attempt has been made to obtain the power which it would confer. I do not wish, however, to be understood to mean that I think that without such by-law the defendant would not have the powers mentioned in clause (*i*); on the contrary, I entirely agree with the view expressed by the trial Judge.

I am unable to agree with the contention of counsel for the defendant that what is stated in count 6A to have been done is not indictable and punishable as a crime.

Sections 221, 222, and 223 are identical with secs. 150, 151, and 152 of the draft Code prepared by the Royal Commission appointed in 1878 to consider the law relating to indictable offences, and in their report the Commissioners say:—

"With regard to nuisances . . . we have in sections 151 and 152 drawn a line between such nuisances as are and such as are not to be regarded as criminal offences. It seems to us anomalous and objectionable upon all grounds that the law should in any way contenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in good faith. Nuisances which endanger the life, safety or health of the public stand on a different footing.

"By the present law, where a civil right such as a right of way is claimed by one private person and denied by another, the

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mode to try the question is by an action. But, when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information which is in form the same as an indictment or information for a crime. But it was very early determined that, though it was in form a prosecution for a crime, yet that, as it involved a remedy for a civil right, the Crown's pardon could not be pleaded in bar: see 3 Inst. 237; and the Legislature, so recently as in the statute 40 & 41 Vict. ch. 14, again recognised the distinction. The existing remedy in such a case is not convenient, but it is not within our province to suggest any amendment."

"An 'indictment' is a written accusation of crime, made at the suit of the King, against one or more persons, and preferred to, and presented upon oath by, a grand jury: "Archbold's Criminal Pleading, 24th ed., p. 1. An information lies at common law for misdemeanours only, and an information *ex officio* is a "formal written suggestion on behalf of the King of a misdemeanour committed, filed by the King's Attorney-General (or, in the vacancy of that office, by the Solicitor-General):" *ib.*, p. 147. In England an information may also be laid by the Master of the King's Bench, and is a formal written suggestion of a misdemeanour committed, filed in the King's Bench Division of the High Court of Justice at the instance of a private individual, with the leave of the Court, by the Master of the Crown Office (King's coroner and attorney) without the intervention of a grand jury: *ib.*, p. 150.

It is, I think, manifest from all this that it was intended by sec. 152 to leave untouched the common law right to proceed by indictment or information, which are the only modes by which a prosecution for a public nuisance can take place, but to prevent persons convicted of the nuisances to which that section applies from being punished, as they might be according to the common law, by fine or imprisonment, and to limit the proceedings after a conviction to the other remedy which the law provides—the abatement of the nuisance if it continues to exist; and that, in my opinion, is the effect of sec. 223 of our Criminal Code.

This conclusion is strengthened by the provisions of sec. 28 of the Interpretation Act, R.S.C. 1906, ch. 1, which provides that "every Act shall be read and construed as if any offence

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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."

As there can, I think, be no doubt that an "indictable offence," as that term is used in the Canadian Criminal Code, is a criminal offence, I cannot conceive that Parliament would have fallen into the mistake of legislating as to matters which were not intended to be crimes, or of supposing that there could be a conviction upon an indictment for a nuisance unless the committing of it were a crime.

If it had been intended that the common law should be so changed as that only nuisances of the kind described in sec. 222 should be criminal offences, one would have expected that nothing would have been said as to "conviction upon any indictment," but the section would have provided simply that nuisances other than those mentioned in sec. 222 should not be criminal offences.

The question which I have spoken of as perhaps not dealt with by the learned trial Judge, but raised upon the argument before us, was, whether the overcrowding of the cars constituted a public or common nuisance—the contention being that to constitute such a nuisance the act complained of must have affected all of the public; and that, as the overcrowding affected only those who had become passengers in the defendant's cars, the defendant's acts were not *ad commune nocumentum*. I am unable to agree with that contention.

In the case of a nuisance on a public highway it is only those who have occasion to use the highway that are prejudicially affected by the existence of the nuisance, and yet the nuisance is undoubtedly a public one; and so in the case at bar, though it is only those who become passengers in the defendant's cars that are prejudicially affected by what is complained of, the nuisance is a public one. Just as all the public may use the highway, though all may not have occasion to use it, all for whom there is room in the cars have the right to travel in them, though all the public may not desire or have occasion to do so.

The fact that only those of the public who pay the lawful fare to which the defendant is entitled have the right to travel in the cars can make no difference; for, if that were a valid objection in this case, it would be equally so in the case of a turnpike road, which cannot be used by the travelling public except

upon payment of a toll, and in the case of toll-roads owned by road companies and by municipal corporations, of which there were many in earlier days, and yet there can be no doubt that such roads do not differ as respects the consequences of failure to keep them in repair from roads that are not toll-roads. The English Turnpike Act of 1822 assumes that that is the case, for it provides for the apportionment of fines imposed where the inhabitants of a parish . . . are indicted for not repairing any highway, being a turnpike road; and in *Macdonald* v. *Hamilton and Port Dover Plank Road Co.* (1853), 3 U.C.C.P. 402, the Court appears to have been of opinion that want of repair of the defendants' road would have been a "public nuisance as respects the public at large;" and I gather from the report of the case that the contention of the defendants was that they were not liable to an action by an individual who had suffered damage by reason of their failure to keep the road in repair, and that the only remedy was by indictment for a public nuisance.

In *Williams* v. *East India Co.* (1802), 3 East 192, 200, 201, the action was to recover damages for injury to a ship which was chartered by the defendants, caused by a dangerous combustible commodity which the defendants had put on board without due notice to the captain or any person employed in the navigation of the ship of its dangerous nature, and Lord Ellenborough, delivering the judgment of the Court, said "that the declaration, in imputing to the defendants the having wrongfully put on board a ship, without notice to those concerned in the management of the ship, an article of a highly dangerous combustible nature, imputes to the defendants a criminal negligence, cannot well be questioned. In order to make the putting on board wrongful, the defendants must be conusant of the dangerous quality of the article put on board; and if being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanour at least."

I cite this case to shew that, though the danger was caused only to those who were on board the ship the defendants had committed a common nuisance, for that I understand to be the misdemeanour which Lord Ellenborough said they were liable to

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punishment for, and it is so treated in Russell on Crimes, 7th ed., p. 1857, and in Archbold's Criminal Pleading, 24th ed., p. 1311.

The case of *Williams* v. *East India Co.* and what was said by Lord Ellenborough in *Rex* v. *Allen* (1803), 4 Esp. 200, and by Stephen, J., in *The Queen* v. *Price* (1884), 12 Q.B.D. 247, warrant the conclusion that the acts complained of in count 6A constituted a public nuisance, although it was only those of the public who became passengers in the defendant's cars whose property and comfort were endangered.

In *Rex* v. *Allen*, 4 Esp. 200, the prisoner was a tinman and was indicted for a nuisance which consisted of making so much noise in carrying on his business that the prosecutors were disturbed in the occupation of their chambers in Clifford's Inn and from carrying on their lawful professions. Lord Ellenborough, before whom the case was tried, ruled that upon the evidence the indictment could not be sustained, and that it was, if anything, a private nuisance, and said: "It was confined to the inhabitants of three numbers of Clifford's Inn only; it did not even extend to the rest of the Society, and could be avoided by shutting the windows; it was not therefore of sufficient general extent to support an indictment; and he thought this indictment had been already carried on far enough."

In *The Queen* v. *Price*, 12 Q.B.D. 247, the prisoner was indicted for attempting to burn the body of his child instead of burying it, and for attempting to burn the body with intent to prevent the holding of an inquest upon it; and in charging the grand jury Stephen, J., said (p. 256): "A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go is beyond all doubt a nuisance, as nothing more offensive both to sight and to smell can be imagined. The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having been done in such a situation and manner as to be offensive to any considerable number of persons, you should find a true bill." And, true bills having been found, the learned Judge directed the jury in the terms of his charge to the grand jury.

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Applying the test which Stephen, J., directed to be applied, viz., whether what the defendant is alleged to have done was done in such a situation and manner as to be offensive to any considerable number of persons, I can have no doubt that the defendant was charged with and convicted of having committed a public nuisance. What the evidence disclosed was not an isolated case of overcrowding, but a systematic course of conduct persisted in and apparently deliberately adopted by the defendant, and at certain hours of the day and on certain of the defendant's lines affecting all who had become passengers on the cars.

Judgment for the abatement of it on a conviction for a public nuisance cannot be given unless the nuisance continues at the time of the indictment; and at first sight I thought that that might be a fatal objection to the conviction in this case; but, on looking more closely at the indictment, I find that count 6A alleges that the nuisance was continuing at the time of the indictment. The allegation is, that the acts complained of were committed "during the time set out in the preceding count;" and, on referring to count 5, to which the reference is carried by count 6, the time is stated to be "in the year of our Lord one thousand nine hundred and ten and in the year of our Lord one thousand nine hundred and eleven down to the date of the finding of this indictment."

I would affirm the conviction.

In parting with the case I venture to express the hope that our decision may result in putting a stop to overcrowding. It was stated on the argument that the defendant was anxious to get rid of the overcrowding, and had, with that object in view, endeavoured to get the Corporation of Toronto to join in an application to the Ontario Railway and Municipal Board to limit the number of passengers to be carried in a car. If the defendant is of the same mind now, it will have, in the judgment of the Court requiring that the nuisance be abated, as ample authority to grapple with the evil as the proposed order would have given, if such an order were necessary to enable the defendant to grapple with it.

Conviction affirmed.

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PLAINVIEW FARMING CO. v. TRANSCONTINENTAL TOWNSITE CO., Ltd.

Manitoba King's Bench, Galt, J. October 19, 1915.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT—INTERESTS OF SUB-PURCHASERS — RESTITUTION OF BENEFITS — HOW AFFECTED BY OCCUPATION.

The rule as to *restitutio in integrum* is, that a person seeking relief by way of rescission cannot succeed if restitution is prevented by his own act or default; but mere occupation of the land sold, or a portion thereof, is not a bar, so long as the land has not been so wasted that the depreciation in value cannot be met by compensation, nor because of interests acquired by sub-purchasers in the absence of notice of such sub-sales to the vendor.

[*Rees* v. *De Bernardy*, [1896] 2 Ch. 437, referred to.]

2. PARTIES (§ II A 8—106)—DEFENDANTS IN FORECLOSURE OF LAND CONTRACT—UNKNOWN ASSIGNS OR SUB-PURCHASERS.

The plaintiff in an action for foreclosure of an agreement for the sale or exchange of lands is under no obligation to make assignees or sub-purchasers parties to the action or to the motion for rescission, where the defendant fails to disclose in the pleadings or otherwise actual facts relating to any sub-sale or any notice to the plaintiff of any such assignments.

[*M'Creight* v. *Foster*, L.R. 5 Ch. App. 604, L.R. 5 H.L. 321, applied.]

3. COURTS (§ I B 3—33)—TERRITORIAL JURISDICTION—FORECLOSURE OF LAND CONTRACT—PROPERTY SITUATED OUT OF JURISDICTION—DECREE IN PERSONAM.

A court of equity has jurisdiction to grant a decree *in personam* in foreclosure actions respecting lands situated out of the jurisdiction providing the defendant resides within the jurisdiction.

[*Toller* v. *Carteret*, 2 Vern. 494; *Paget* v. *Ede*, L.R. 18 Eq. 118, applied.]

Statement

MOTION for an order rescinding an agreement of sale.

W. H. Curle, for plaintiff.

H. J. Symington, for defendant.

Galt, J.

GALT, J.:—The plaintiff moves for an order to rescind a certain agreement for the sale or exchange of lands made between the parties and dated September 2, 1913. The action was brought for specific performance of said contract.

At the trial on May 12, 1915, before Metcalfe, J., judgment was pronounced in favour of the plaintiff, including costs of action. The judgment as drawn up contains the following provisions:—

2. And it appearing that according to the terms of the said agreement there is owing by the defendant to the plaintiff for purchase money the sum of $2,690.10, with interest thereon at the rate of 6 per cent. per annum from September 2, 1913; it is ordered and adjudged that upon the defendant paying within 2 months from this date to the plaintiff or into Court to the credit of this cause the said sum of $2,690.10, with interest thereon at the rate of 6% per annum from the said September 2,

1913, until the date of payment and delivering to the plaintiff a proper transfer or other conveyance (to be settled by a Judge in case of dispute) of the lands in the said agreement mentioned by the defendant to be conveyed to the plaintiff sufficient to pass the said lands free of all encumbrance, except such as shall have been made or suffered by the plaintiff, the plaintiff shall at the request of the defendant deliver to the defendant a proper transfer or other conveyance (to be settled by a Judge in case of dispute) of the lands in the said agreement mentioned sufficient to pass the lands free of all encumbrances, except such as shall have been made or suffered by the defendant; with liberty to either party hereto to apply in Chambers as it may be advised.

Upon the present application an affidavit by Arthur H. Tasker, president of the plaintiff company, sworn July 19, 1915, was read shewing that the defendant company had failed to comply with the terms of the judgment.

The defendant company, in answer to the motion, filed an affidavit by an employee of the National Trust Co., Ltd., the liquidator of the above-named defendant, stating that he is advised and verily believes that the plaintiffs entered into possession of a portion of the lands in question and broke the said land. The only support to this allegation is a letter from the manager of the Union Bank of Canada at Lawson, Sask., to the National Trust Co., dated September 27, 1915, saying:—

> In reply to your letter of the 21st instant re S.E. ¼ of sec. 9-22-5 W. 3rd, I beg to advise you that this piece of land was broken by the Plainview Farming Co., but was not put under crop this year.

The object of this evidence is to shew that there cannot now be a *restitutio in integrum* by the parties respectively, and, therefore, rescission of the contract should not be granted. The rule as to *restitutio in integrum* is that the person seeking relief by way of rescission cannot succeed if restitution is prevented by his act or default; see *Rees* v. *De Bernardy*, [1896] 2 Ch. 437 at 446. Mere occupation of the land sold, or a portion thereof, is not a bar so long as the land has not been so wasted that the depreciation in value cannot be met by compensation. See Williams on Vendor and Purchaser, 885, and notes. There is no suggestion of such waste in the present case.

Mr. Symington for the defendant argues that a rescission of the contract at the present juncture would work a great hardship upon the defendant company which has re-sold portions of the lands to various purchasers, but is, of course, unable to

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make title. He argues that the interests thus acquired by the sub-purchasers entitle them to be heard upon this application and that such interests cannot be eliminated without making them in some manner parties to the action and motion.

This contention at first sight appears to be substantial, but the learned counsel did not refer me to any authorities elucidating it. The only basis for it which is raised on the pleadings is par. 8 of the statement of defence, which reads as follows:—

8. These defendants further say that the said agreement constituted an agreement to buy and sell land and that subsequent to the said agreement the defendants sold an interest in the said lands to the Grand Trunk Pacific Townsite Co. and the Grand Trunk Pacific Railway, and that the Grand Trunk Pacific Townsite Co. have sold part of their interest in part of said lands to various parties outside the jurisdiction of this Court and this Court has no jurisdiction to enforce a foreclosure order against the lands situate in the Province of Saskatchewan.

It will be observed that the defendants do not allege notice to the plaintiffs of any of the alleged sub-sales.

The extent of the purchasers' right to deal with lands which he holds under an uncompleted contract of sale is dealt with lucidly in *M'Creight* v. *Foster*, L.R. 5 Ch. App. 604.

This case was heard in the House of Lords *sub nomine*, *Shaw* v. *Foster*, and the judgment was affirmed, see L.R. 5 H.L. 321.

The defendants failed to disclose on their pleadings or otherwise the actual facts relating to any sub-sales they have made. They do not allege or prove any notice to the plaintiff of any assignment or assignments which they have made of their agreement with the plaintiff. I, therefore, hold that the plaintiffs were under no obligation whatever to make the assignee or sub-purchasers parties to either the action or this motion.

Lastly, it is argued by counsel for the defendants that inasmuch as some or all of the lands in question are situate in the Province of Saskatchewan, this Court in Manitoba has no jurisdiction to deal with these lands at all. From an early stage in our jurisprudence it has been held that the Court of Chancery in England had jurisdiction to grant a decree of foreclosure in reference to lands situate out of the jurisdiction, provided the defendant resided within the jurisdiction. The judgment operates *in personam*. See *Toller* v. *Carteret*, 2 Vern. 494. Modern

authorities confirm this view; see *Paget* v. *Ede*, L.R. 18 Eq. 118; Fry on Specific Performance, sec. 127.

The defendants have failed, without sufficient excuse, to comply with the terms of the judgment, and, being resident within this province, are subject to the jurisdiction of this Court. If they have placed themselves in any awkward position by re-selling part of the lands in question, that is no fault of the plaintiffs. Under such circumstances the plaintiffs are entitled to rescission of the contract: see Williams on Vendor and Purchaser, pp. 1051 and 1120, and cases cited in the notes, and *Hall* v. *Burnell*, [1911] 2 Ch. 551.

I, therefore, order that the agreement in the judgment mentioned be rescinded, and that the defendants pay the costs of this motion. And I further order that all further proceedings in this action be stayed except as to the recovery of the costs already ordered to be paid by the defendants to the plaintiffs and the costs of this application and such proceedings as may be necessary for carrying this order into effect.

Rescission ordered.

Re TRANSCONTINENTAL TOWNSITE CO.; PLAINVIEW FARMING CO. CASE.

Manitoba King's Bench, Mathers, C.J.K.B. December 21, 1915.

1. COSTS (§ I—16)—JUDGMENT FOR—AGAINST COMPANY IN LIQUIDATION—PREFERRED CLAIM.

An unconditional judgment for costs recovered in an action against a company in liquidation, which was defended by the liquidator on behalf of the estate, is payable in full out of the assets of the estate in the hands of the liquidator and does not rank *pari passu* with general claims.

[*Re Bank of Hindustan (Smith's Case)*, L.R. 3 Ch. 125; *Re Bailey*, L.R. 8 Eq. 94; *Re Wenborn*, [1905] 1 Ch. 413; *Re Home Investment*, 14 Ch. D. 167; *Re Dominion Plumbago Co.*, 27 Ch. D. 34; *Re London Metallurgical Co.*, [1895] 1 Ch. 758; *Re Baden Machinery Co.*, 12 O.L.R. 634, followed.]

Statement

APPEAL from order of Master refusing full payment by liquidator of a judgment for costs.

W. H. Curle, for plaintiff.

H. V. Hudson, for defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—After the order directing the Transcontinental Townsite Co. to be wound up, the Plainview Farming Co., Ltd., obtained an order from the Master on January 27, 1915, giving it liberty to institute an action against the Trans-

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continental Townsite Co. and proceed to trial thereof for specific performance of an agreement, dated September 2, 1912, between the Farming Co. and the Townsite Co. Pursuant to that leave the Farming Co. did begin an action which came on for trial before Metcalfe, J., on May 12, 1915. The liquidator defended the action in the name and on behalf of the Townsite Co. without any order authorizing it to do so.

By the judgment in the action the Transcontinental Co. was ordered to specifically perform the agreement and a time was fixed for the Townsite Co. to pay the amount found to be due from it under the agreement. The judgment disposed of the costs as follows:—

> This Court doth further order and adjudge that the plaintiff recover from the defendant its costs of this action to be taxed, and that the costs of the liquidator of the defendant company of this action be paid out of the assets of the defendant company as they shall come into the said liquidator's hands.

The company did not pay within the time, and on October 19, a final order rescinding the agreement was made by Galt, J. This order directed payment of costs of the application in exactly the same terms as the judgment.

The Townsite Co. applied to the liquidator for payment of these costs, but was informed that under the terms of the judgment these costs were a debt simply of the Townsite Co. and that the Farming Co. could only rank as to them with the other creditors. The Farming Co. then applied to the Master to whom the winding-up proceedings had been referred for an order directing the liquidator to pay the costs out of the assets. This application was refused by the Master on November 25, 1915, and from this order the Farming Co. appeals.

The sole point for decision is whether for the costs awarded by the judgments the Farming Co. must rank with the other creditors of the Townsite Co., or is entitled to receive such costs in full out of the assets now in the hands of the liquidator in priority to the claims of creditors generally. The point is narrow but it is of great practical importance.

The action was instituted against the Townsite Co. with the sanction of the Master, obtained upon notice to the liquidator. The Master might have made it a term of the leave granted that

any costs recovered by the plaintiff in the action should not be paid in full but should be provable only in the usual way: *Re Pearce & Co.* (1873), W.N. 127. But he did not do so.

The liquidator did not obtain leave to defend the action, but it did defend it, not in the liquidator's name, but in the name of the Townsite Co. In doing so the liquidator was acting presumably in the interest of the creditors of the Townsite Co. It was expected, no doubt, that some advantage would accrue to them if the action could be successfully resisted, or that the assets would be in some way diminished if the plaintiff should be successful in the action. Just what disadvantage was to be avoided or what advantage to be reaped by the course pursued I am not concerned to inquire. The liquidator no doubt acted advisedly in what was believed to be in the best interest of the creditors. As it turns out the liquidator was wrong and the Farming Co. was in the right. In order to establish that right the Farming Co. was by the action of the liquidator forced to incur the costs which it now asks the liquidator to pay out of the estate on behalf of which it was acting. The answer of the liquidator is that the judgment is against the company in liquidation and the applicants' only right is to rank for the costs with other creditors. Every principle of justice and fair play is opposed to such a contention. If the Townsite Co. were not in liquidation its assets could be levied upon for the costs, but it is said that because it is in process of being wound up the creditors acting by the liquidator may, with impunity, engage in litigation without the slighest risk of becoming liable to pay costs if they fail. It is admitted that if the judgment had in terms directed that the costs should be paid by the liquidator out of the assets of the company in its hands, there would be no answer to this claim.

Where the liquidator is not a party to the action, as in this case, the direction to pay costs was properly made against the company and not against the liquidator: *Fraser* v. *Brescia Steam Tramways Co.*, 56 L.T. 771. When the liquidator is not a party to the action the Court has no power to order him to pay costs and, therefore, the judgment in this case was in the proper form. It by no means follows, however, that the Court may not

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in the winding-up proceeding order the liquidator to pay the costs personally or out of the assets in his hands. The liquidator is an officer of the Court administering an estate under the supervision of the Court. If it is made to appear to the Court that he has engaged on behalf of the estate in either external or internal litigation solely in the name of the liquidating company, or in his own name, resulting in costs being awarded against the company or the liquidator, the Court has power to order that the successful litigant be paid his costs in full out of the estate. This is a power which has been frequently exercised. In *Re Bank of Hindustan, Smith's Case*, L.R. 3 Ch. App. 125, the facts were these: The liquidator brought an action in the name of the company against Smith, which resulted in a verdict for the defendant for costs, for which judgment was signed against the company. Smith then applied in the winding-up proceedings for a direction that the liquidator pay these costs in full, and an order was made accordingly, notwithstanding that Smith was indebted to the company in a larger amount which the liquidator sought to set off. Although not expressly so stated in the report, it appears that the judgment in that case was a simple judgment against the company for costs without any direction that such costs should be paid by the liquidator. In the *Smith* case the liquidator had sued and failed, but there is no distinction in principle between the costs of an action which fails and the costs of an action which has been unsuccessfully defended. In *Re Bailey & Leetham's Case*, L.R. 8 Eq. 94. In that case Bailey & Leetham were given leave to bring an action against the Trent and Humber Shipping Co., Ltd., then being wound up, and the liquidator obtained leave to defend. The action resulted in a verdict against the company for a large sum for damages with costs afterwards taxed at £516 10s. 10d. The plaintiffs applied in the winding-up proceedings to have their costs paid in full out of the assets of the company. The liquidator opposed the application, contending that the costs should be added to the damages and the plaintiffs rank for the total. In granting the application James, V.-C., said:—

Upon general principles unless the Court is bound by some express enactment or order to the contrary, it appears to me that a company in

winding up ought to be dealt with as a matter of course like any other litigant, and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly or defended fruitlessly then the estate, that is to say, the other creditors, ought like everybody else to be fixed with the costs to which they have improperly and unnecessarily put their opponent.

That case was applied in *Re Wenborn & Co.*, [1905] 1 Ch. 413, to a somewhat different set of circumstances. There at the time the company went into liquidation an action for damages was pending against it. After the winding-up commenced the plaintiff's solicitor wrote to the liquidator's solicitor asking if the liquidator would admit the plaintiff's claim in the action, and was informed that he would not. The action proceeded and the plaintiff obtained judgment for damages and costs. The plaintiff in the action then applied in the winding-up proceedings raising the question whether the costs of the action were to be paid in full out of the company's assets or could only be proved for in the winding up. Buckley, J., to whom the application was made, held that the company by its liquidator having adopted the proceedings on behalf of the estate and failed the estate must pay. He points out that the liquidator should properly have applied to stay the action, in which event leave to proceed might have been given conditionally upon the plaintiff, if he succeeded, adding his costs to his claim. Instead of doing so he resisted the claim altogether and adopted the defence on behalf of the estate, and the estate must pay the cost. In this case the liquidator merely continued the defence of an action already pending, but it was held that his so doing constituted an adoption of the action as a whole and the liquidator was ordered to pay out of the assets in full the costs of the action from its commencement and not merely the costs incurred after the winding up.

When proceedings are taken in the name of the liquidator as some proceedings necessarily are, such as to recover assets of the company in the hands of a third party, as *Re Home Investment Society*, 14 Ch. D. 167, or to fix a contributory upon the list as in *Dominion of Canada Plumbago Co.*, 27 Ch. D. 34; *London Metallurgical Co.*, [1895] 1 Ch. 758, and *Baden Machinery Co.*, 12 O.L.R. 634, and the liquidator is unsuccessful, the usual order

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to make is that the liquidator pay the costs out of the assets in his hands. In the *Plumbago* case it was admitted that if the litigation was external to the winding up and there was a judgment against the company for costs, the judgment creditor would be entitled to be paid his costs in full. It was contended, however, that where the litigation was internal, that is, was a proceeding under the Winding-up Act the case was different. Pearson, J., answers this contention by saying:—

> Under the present system the liquidator is the nominal plaintiff, not the company, and the general form of order has been the form in which this order was made. Does it make any difference? I think not. I cannot imagine that because the Court orders the liquidator to pay out of the assets of the company that that gives the party to the action, who has been successful, any lesser right to be paid his costs than he would have had under the former system.

And he goes on to point out reasons why it would be "monstrously unfair" to so hold. Referring to the *Smith* case, before cited, he says:—

> Now, I consider that to be a positive decision of the Lord Chancellor that when the company is ordered to pay costs those costs are not to be paid *pari passu* with the other creditors, but are to be paid forthwith and that the successful litigant is to be put in the same position as if he had got judgment at law and had been allowed to issue execution.

Both upon principle and upon the authority of these cases I think the learned Master was wrong in dismissing the Farming Co.'s application. The appeal will be allowed and an order made directing the liquidator to forthwith pay to the Farming Co. out of the assets in its hands the sum of $180.22, taxed costs of the said action; $58.65, taxed costs of the final order made by Galt, J.; $15.55, taxed costs of obtaining out of Court the security for costs of said action, together with the costs of the application to the Master and of this appeal to be taxed; such costs when paid to be allowed to the liquidator in his accounts, as also the liquidator's own costs when taxed of the motion to the Master and of this appeal. *Appeal allowed.*

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S. C.

DELDO v. GOUGH SELLERS INVESTMENTS LTD.

Ontario Supreme Court, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. July 12, 1915.

1. MECHANICS' LIENS (§ VIII—66)—TIME OF FILING—LAST DELIVERY OF MATERIAL.

A lien registered within the statutory period of the last delivery of material is a sufficient compliance with the Act as to the time of registration.

2. MECHANICS' LIENS (§ IV—15)—AMOUNT OF LIEN—PAYMENT BY INSTALMENTS—OWNER'S RIGHT OF DEDUCTION.

Under secs. 6 and 10 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, the rights of lien-holders are measured by the amount "justly owing" by the owner to the contractor, and where an agreement provides payment by instalments, with the right to retain an amount as a drawback on the completion of the work, the lien accrues for the full amount of any instalment payable, subject to the owner's right of deduction in the event of the non-completion of the whole contract.

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Statement

APPEAL from the judgment of an Official Referee, dismissing claim to enforce a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

W. Proudfoot, K.C., and *W. H. Grant*, for appellants.

W. R. Cavell, for defendant Lembke, respondent.

The judgment of the Court was delivered by

Hodgins J.A.

HODGINS, J.A.:—On the argument it seemed clear that the lien of the claimants, who are material-men, was filed in time. They were entitled to register it within 30 days from the last delivery of material, and from their account it appears that over 90 per cent. of their material was supplied on the 15th July. This coincides with the evidence as to the duration of the work. The result is that the claimants' lien is established.

The remaining question is, to what amount this lien entitled them as against the owner.

The contract between the owner and the contractor Morris is dated the 22nd June, 1914. It provides for the building of a pair of solid brick houses for $3,850—"the same to be completed in two months from the date of starting." Then follow specifications as to material and quality, winding up with this clause: "All work and material to be first class, the same to be paid for 80 per cent. as work proceeds, and the builder allowed five draws —$300 on completion of stone work, and then $400 when roof is on, $1,600 when plastering is all finished, and $700 when complete, and balance within 30 days, upon shewing all receipts paid and work satisfactory."

The owner in his evidence admits that the stone work is completed and that $100 was paid, apparently as an advance to the contractor, on the 27th June, 1914. The claimants now contend that their rights are not limited to the 20 per cent. drawback on the value of the work done, but include this balance of $200

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to which the contractor became entitled under the contract upon the finishing of the stone work.

Under the Mechanics and Wage-Earners Lien Act, and apart from the 20 per cent. drawback, the rights of lien-holders are measured by the amount "justly owing" by the owner to the contractor, and the owner is not liable for a greater sum than is payable to the contractor.*

The contract here does not make entire completion a condition precedent to payment, but expressly divides the $3,850, the consideration, into five sums, one of which has become "payable" under the terms of the contract.

In *Terry* v. *Duntze* (1795), 2 H. Bl. 389, Buller, J., said (pp. 392-3): "It is a rule long established in the construction of covenants, that if any money is to be paid before the thing is done, the covenants are mutual and independent. . . . The plaintiffs covenant to finish and complete the buildings on or before the 29th of September then next: in consideration of which the defendant covenants to pay £3,800 by instalments, viz., a certain sum when the second floor should be laid, a further sum when the . . . By the terms of the contract then two several sums of money were to be paid, before the thing to be done was done. The plaintiffs, therefore, were clearly entitled to their action for the money without averring performance, and the defendant to his remedy on the covenants."

In that case the action was not for the instalments, as stated in Hudson on Building Contracts,† but for the whole price, and the defence was non-completion within the stipulated time, but the rule of construction laid down is applicable to this case. It was adopted in *Government of Newfoundland* v. *Newfoundland R.W. Co.* (1888), 13 App. Cas. 199, and acted on in *Workman Clark & Co. Limited* v. *Lloyd Brazileño*, [1908] 1 K.B. 968.

The amount payable or justly due is, *primâ facie*, $200, and this is, of course, subject to any deduction which the owner can establish by reason of the non-completion of the whole contract.

*By sec. 6 of the Act (R.S.O. 1914, ch. 140), the lien is "limited . . . in amount to the sum justly due to the person entitled to the lien and to the sum justly owing . . . by the owner." By sec. 10, "the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor."

†4th ed., pp. 258, 279, 310, 316.

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for it contemplates entire performance, although providing for payment in advance of that time.

The head-note in the case of *Sherlock* v. *Powell*, 26 A.R. 407, cited on the argument, is somewhat misleading. That case does not deal at all with the right to recover instalments of the price. The instalments of 80 per cent. provided for in the contract had all been paid, and Lister, J.A., states the point of the case thus (p. 408): "The question is, whether the plaintiff is entitled under the circumstances" (*i.e.*, not having completed the work), "to recover the balance of the contract price or any portion of it." He then adds: "Manifestly, performance is a condition precedent to the right of the plaintiff to enforce payment of the balance of the contract price."

This statement is based upon the fact that the balance was payable only after completion and upon acceptance of the work.

The judgment of the Official Referee should be reversed, and the appellants declared entitled to a lien. The amount payable will be the $200, subject to the owner's right to shew that, by reason of non-completion or otherwise, it is not justly due and owing, or to reduce it. Other lien-holders will be entitled to share if their rights are affected by this judgment. The Referee must ascertain the value of the work done so as to calculate the 20 per cent. drawback. The appellants may add their costs to their lien, subject to the provisions of the Mechanics' and Wage-Earners Lien Act as to the percentage of costs recoverable.

Appeal allowed.

WATERLOO MANUFACTURING CO. v. BARNARD.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. December 20, 1915.

1. RECORD AND REGISTRY LAWS (§ III D—30)—GRANTEE UNDER QUIT CLAIM DEED—BONA FIDE PURCHASER—PRIORITY TO PREVIOUS UNREGISTERED LIEN.

Under the Registry Act a grantee under a registered quit claim deed without notice, who holds the land as trustee for the payment of certain claims, stands in the position of a *bonâ fide* purchaser and has a prior right over a previous agreement by the grantor to give a mortgage and specifically charging the land with a lien inoperative under sec. 7 of the Lien Notes Act, R.S.M. ch. 115.

[*Stark* v. *Stephenson*, 7 Man. L.R. 381, followed.]

Statement

APPEAL from judgment of Macdonald, J., setting aside order of local Master declaring plaintiff entitled to a lien on land.

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WATERLOO MFG. CO. v. BARNARD.

Cameron, J.A.

J. P. Foley, K.C., for appellant, plaintiff.

H. A. Bergman, for defendant, respondent.

The judgment of the Court was delivered by

CAMERON, J.A.:—The plaintiff company sold to the defendants, the Barnards, and Thomas, a traction engine and separator by agreement in writing, dated July 14, 1908, for $2,875, payable as therein set forth. It was provided in the agreement that the purchasers, the above defendants, should deliver to the vendor, the plaintiff, upon demand a mortgage on the lands mentioned therein, in statutory form, with the usual covenants taken by the vendor, and the purchasers also agreed that the vendor should have a charge and a specific lien for the amount of the purchase price and interest less any amount realized. The lands are set forth including the south-west quarter of section 29, township 14, range 18, west, the quarter section owned by the defendant F. C. Barnard. By a second agreement, dated February 18, 1909, made between the same parties, the plaintiff sold additional goods and machinery to the above defendants for the sum of $3,500. A provision as to giving a mortgage and creating a lien similar to that mentioned in the first is found in the second agreement, and the same lands are mentioned.

The statement of claim was issued May 31, 1913, and the certificate of *lis pendens* filed June 2, 1913. Final judgment against F. C. Barnard (the owner of the quarter section in question) June 30, 1915, declaring the plaintiff entitled to a lien in respect of his quarter section.

June 17, 1912, F. C. Barnard and others entered into a trust deed, to which their creditors were parties (not including the plaintiff), by which they agreed to convey to E. O. Denison, as trustee, certain lands, amongst them the south-west quarter mentioned. The words used in the instrument are—

> the debtor will forthwith transfer the following lands . . . subject only to the following encumbrances: (*g*) As to the south-west quarter of twenty-nine (29). The balance of the purchase money due to the Dominion government amounting to $800 and some interest.

The deed provides for an extension of time by the creditors and for a realization of the assets by the trustee in certain contingencies. Upon payment of all claims by the debtors the trustee is to reconvey the lands.

F. C. Barnard executed a quit claim deed in favour of Denison on January 8, 1915, and registered it January 22, 1915.

Denison was made a party in the Master's office. From this he appealed, and on appeal Macdonald, J., set aside and discharged the order of the Master and vacated the registration of the certificate of *lis pendens*. From this order the plaintiff appeals.

Macdonald, J., held that the effect of the quit claim deed was to make the instrument under which the plaintiff claims null and void as against the deed, and that Denison became entitled to all the interest F. C. Barnard had in the lands in question in priority to the plaintiff. He referred to the Lien Notes Act, ch. 115, R.S.M., sec. 7, which provides that

> every lien note, hire receipt, order for chattels or documents or instrument, the registration of which was or is (by sec. 4) prohibited shall be in so far as the same purported or purports to affect land absolutely null and void as against any person claiming an interest or estate under a registered instrument.

The principal question argued before us on the appeal was as to the effect of the quit claim deed. Counsel for the plaintiff company argued that that deed purported to convey and did convey nothing more than what title or interest the grantor had and, therefore, Denison took the lands subject to the lien created by the agreements and declared in the judgment.

The quit claim deed states that Barnard for the consideration of one dollar

> hath granted, released and quitted claim and by these presents doth grant, release and quit claim unto the said party of the second part (his) heirs and assigns forever, all the estate, right, title, interest, claim and demand whatsoever both at law and in equity or otherwise howsoever and whether in possession or expectancy . . . of, in, to or out of all and singular, etc. . . . To have and to hold the aforesaid land and premises with all and singular the appurtenances thereto belonging or appertaining unto and to the use of the said party of the second part, his heirs and assigns forever, subject nevertheless to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown.

In *Stark* v. *Stephenson*, 7 Man. L.R. 381, Killam, J., held expressly that the view apparently entertained by Mowat, V.-C., in *Goff* v. *Lister*, 14 Gr. 451, that a quit claim deed does not by registration defeat a prior unregistered grant of the interest of

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the same grantor was erroneous. That is under our Registry Act, a quit claim deed, when registered, takes priority over previous unregistered transfers by the grantor. "To place it" (the quit claim deed) "outside the Registry Act would leave many transactions without the protection of that enactment."

The subject of quit claim deeds and the effect upon them of Registry Acts is discussed in Cyc. XXXIX., at p. 1693. In earlier cases in the Supreme Court of the United States it was held that the bare facts that the deed set up against the unrecorded conveyance is a quit claim is sufficient in itself to deprive the grantee in it of the character of a purchaser in good faith. But this view has not been entertained in the later cases. In *Moelle* v. *Sherwood*, 148 U.S. 21 (followed in *United States* v. *California Co.*, p. 31 of the same volume), Field, J., holds as follows:—

> The doctrine expressed in many cases that the grantee in a quit claim deed cannot be treated as a *bonâ fide* purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a *bonâ fide* purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. . . . In many parts of the country a quit claim or a simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quit claim and those in the form of grant, bargain and sale. If the grantor in either case at the time of the execution of his deed possesses any claim to or interest in the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quit claim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of

obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a *bonâ fide* purchaser. But in either case if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a *bonâ fide* purchaser, upon shewing that the consideration stipulated has been paid and that such consideration was a fair price for the claim or interest designated.

I have quoted from Field, J.'s, judgment at length as it deals so exhaustively and satisfactorily with the subject. It is to be noted that the quit claim deed before him was in the form of a release and quit claim and he compares it with deeds in the form of grant, bargain and sale. In the case before us the word "grant" is to be found in the deed, not merely the words "remise, release and quit claim" which were formerly frequently used in such conveyances. As to the signification of the word "grant" see Armour on Real Property, p. 341.

The result follows and "it has been held in most jurisdictions of the United States that the rule that a purchaser by a quit claim deed is not to be regarded as a *bonâ fide* purchaser without notice of a prior encumbrance has no application where the registry laws require the recording of such encumbrance in order to make it a lien on lands in the hands of a subsequent purchaser." Cyc., *ib.* 1694. This is precisely what is held in *Moelle* v. *Sherwood*, cited above, and followed in *United States* v. *California Land Co.*, as stated. See also *McDonald* v. *Belding*, 145 U.S. p. 492.

Amongst the large number of cases cited in 39 Cyc. at p. 1695, I refer to *Brown* v. *Banner Coal Co.*, 97 Ill. 215, where a prior decision of the Court that

> a deed of release and quit claim is as effectual, for the purpose of transferring title to land, as a deed of bargain and sale; and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded,

was approved and followed. Precisely the same opinion is expressed by the Court of Appeal of New York State in *Wilhelm* v. *Wilkin*, 149 N.Y. 447, where *Brown* v. *Bonner Coal Co.* is cited with other cases. It is remarked that there is nothing

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especially significant in the use of a quit claim as a mode of conveyance:—

The point is, what is effected by the deed; and where, as in the present case, the subject of the release and quit claim is a certain particularly described property with all the appurtenances, and all the estate, right, title and interest of the grantor wit' *habendum* to the grantee, her heirs and assigns, forever, a conveyance of the estate within the meaning of the Act (the recording statute), is evident.

The language used in the deed there in question is given at p. 448, the words of conveyance being "do remise, release and quit claim," whereas in this present case we have in addition, as already pointed out, the comprehensive word "grant" used in the deed. I refer also to *Stark* v. *Boynton*, 167 Mass. 443.

I can see no reason why we should depart from the considered opinion of Killam, J., in *Stark* v. *Stephenson*, 7 Man. L.R. 381, supported as it is by the high authorities quoted. Apart from the effect of the Lien Notes Act, Denison is entitled to the protection of the Registry Act as a *bonâ fide* purchaser without notice, and is not, therefore, a subsequent encumbrancer or holder of a lien or charge and was not properly made a party in the Master's office. The estate he claims is under a registered instrument, that estate was the whole estate in the lands his grantor could convey, and as against him under sec. 7 of the Lien Notes Act, the agreements of the plaintiff are inoperative and void.

However, it is the fact that Denison is a trustee only, and as he would be bound to convey to the parties of the first part, the debtors named in the trust deed, of whom F. C. Barnard is one, the lands mentioned therein, when the debtors have paid the claims against them, or to hand over to them the surplus (if any) remaining in his hands after a sale of the lands, if he effects a sale under the terms of the deed, then the plaintiff company must be held to have a charge upon this particular quarter section if and when so re-conveyed to F. C. Barnard, or upon the surplus in the hands of the trustee after he has carried out the provisions of the trust deed by a sale of this quarter section. If the quarter section is never re-conveyed as a consequence of the payment of the debts by the debtors, or if there is no surplus so remaining in the hands of the trustee after the sale

of the quarter section and the application of the proceeds under the deed, then all interest the plaintiff company can possibly have in the lands ceases and determines. I think the order made must be modified accordingly, declaring Denison entitled to priority under the quit claim deed to the extent required by the due carrying out of the trusts contained in the trust deed. But in the event of a re-conveyance by him pursuant to the deed, or of a surplus remaining in his hands after the sale of the quarter section and the application of the proceeds, then the land or the surplus, as the case may be, is to be subject to a charge in favour of the plaintiff as declared by the judgment.

Upon consideration of the above and the other questions raised on the argument, I would dismiss the appeal with costs.

Appeal dismissed.

EVANS v. BRADBURN.

Alberta Supreme Court, Harvey, C.J., and Scott, Stuart, and Beck, JJ. October 29, 1915.

1. ASSAULT AND BATTERY (§ II—7)—JUSTIFICATION—OPPROBRIOUS WORDS. A provocation caused by being called an opprobrious and disgraceful name is no legal justification for an assault and battery.

[*Short* v. *Lewis*, 3 U.C.Q.B. (O.S.), 385; *Percy* v. *Glasco*, 22 U.C. C.P. 521, 526; *Murphy* v. *Dundas*, 38 N.B.R. 563; *Slater* v. *Watts*, 16 B.C.R. 36, followed.]

Statement

APPEAL from judgment of Crawford, J., dismissing action for assault and battery.

C. C. McCaul, K.C., for plaintiff, appellant.

H. H. Parlee, K.C., for defendant, respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—Briefly, the facts are, that the defendant and the plaintiff, who was the bookkeeper of the company, of which the defendant was the manager, had some words over a business matter, with the result that the defendant dismissed the plaintiff. A little later the same day the plaintiff was in the company's store in conversation with another employee of the company when the defendant, coming up to them, said to the plaintiff that he had attempted to blackmail the defendant, the plaintiff thereupon called the defendant a liar; whereupon the defendant—first, quickly taking off his coat—committed the assault—a rather serious one.

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The Judge seems to have thought that the provocation given to the defendant by being called a liar was a legal justification of the assault which he found was made practically instantly on the impulse of passion.

The instinct of human nature is to resent insult in many cases by physical force; and, according to the circumstances, this is more or less generally approved or even applauded, but the law, probably wisely, does not recognize any provocation, short of an assault or threats creating a case for self defence, as a justification for an assault, but only takes it into account as a circumstance which may reduce culpable homicide from murder to manslaughter, and in all criminal cases involving an assault as a circumstance going in mitigation of punishment, and in civil cases in mitigation of damages.

In Bacon's Abridgment, 7th ed., tit., "Assault and Battery," it is said:—

> It seems agreed, that at this day, no words whatsoever, be they ever so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary: Hawk, P.C. 263 (110). But if very provoking language is given, without reasonable cause, and the party offended is tempted to strike the other and an action brought and the general issue pleaded, few juries would give damages to carry costs and few (if any) Judges would certify.

In the absence of statute—in some of the United States, there are such statutes—no words, however opprobrious, disgraceful, annoying or vexatious, will justify an assault or battery, though they may mitigate the punishment: 3 Cye., tit., "Assault and Battery," p. 1051, 2 Am. & Eng. Ency. of Law, tit., "Assault and Battery," p. 957; Abbot's Trial Evidence, 2nd ed., p. 821; Addison on Torts, 8th ed., p. 63; *Watson* v. *Christie*, 2 Bos. & Pul. 224; *Short* v. *Lewis*, 3 U.C.Q.B. (O.S.) 385; *Percy* v. *Glasco*, 22 U.C.C.P. 526 (where the English decisions are discussed); *Murphy* v. *Dundas*, 38 N.B.R. 563; *Slater* v. *Watts*, 16 B.C.R. 36.

It is clear, therefore, that the plaintiff is entitled to a judgment for damages. He was paid his wages for all the time he served, together with an additional month's wages. His wages were $75 a month. He was "unable to attend to his usual business" for about fourteen days. His doctor's bill was $15.

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I think the plaintiff is entitled to $37.50 for loss of time. I allow the $37.50, notwithstanding the plaintiff received one month's wages in lieu of notice, because the latter is given to admit of his looking for other employment, and the former on the ground that for the time allowed for, he was incapacitated from doing so; and I think he is also entitled to $15 for his doctor's bill; making $52.50. To this I would add $50 for general damages—not more, because of the provocation; not less, because although an assault was provoked, the assault which was committed was of a character much more violent and was followed by much more serious results than can be thought necessary to vindicate the defendant's honour. This will make the total damages I would allow $102.50, and I would not deprive the plaintiff of his costs. I think the plaintiff should have the costs of the appeal. *Appeal allowed.*

Re ROSS AND HAMILTON, GRIMSBY AND BEAMSVILLE R. CO.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. November 9, 1915.

1. RAILWAY COMMISSION (§ I—2)—JURISDICTION OF PROVINCIAL RAILWAY BOARD—WORK FOR GENERAL ADVANTAGE OF CANADA—WHAT IS.

Sec. 306 of the Dominion Railway Act, 1888, which declares certain named railways to be "works for the general advantage of Canada," only applies to the particular railways enumerated in the section and their branch lines, but does not apply to an electric railway that only crosses one of the railways named therein; consequently such railway is not subject to the exclusive jurisdiction of the Dominion Parliament, but it remains subject to the authority of the legislature of the Province of Ontario by which it was incorporated, and to the orders of the provincial railway board.

Statement

APPEAL by the railway company from an order of the Ontario Railway and Municipal Board, dated the 10th May, 1915, requiring the company to provide certain sanitary conveniences on its cars.

I. F. Hellmuth, K.C., and *G. H. Levy*, for appellant.

J. R. Cartwright, K.C., and *Edward Bayly*, K.C., for the Attorney-General for Ontario and the Ontario Railway and Municipal Board.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—The sole question is as to the jurisdiction of the Board to make any order affecting the company, it being contended by the appellant, which obtained

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its Act of incorporation from the Provincial Legislature, that its railway has been declared to be a work for the general advantage of Canada, and is therefore not subject to the legislative authority of the Legislature of this Province nor to the authority of the Board which it has constituted by its Railway Act.

Two questions only were argued:—

(1) Whether the railway ever came under the legislative authority of the Parliament of Canada by having been declared to be a work for the general advantage of Canada.

(2) Whether, if it had so come, it was competent for the Parliament of Canada to repeal the Act which brought the railway under its exclusive jurisdiction.

As I have come to the conclusion that the first question should be answered in the negative, it will not be necessary to determine the second question.

The contention of the appellant is that, as its line now crosses one of the railways named in sec. 306 of the Railway Act, 51 Vict. ch. 29 (Canada), its railway, although, when that Act was passed, it had not been built and had not even been authorised to be constructed, became, when it crosses, as it does, one of those railways, by force of that section, subject to the exclusive legislative authority of the Parliament of Canada.

It appears to me that it was highly improbable that the Parliament of Canada, by a sweeping declaration such as it is contended sec. 306 contains, would have brought under its provisions every railway which should happen in the future to cross one of the named railways, however local in its nature it might be, and regardless of its character or the objects it was designed to serve; and a construction which would give to the section that effect ought not to be adopted unless the intention is clearly and unmistakably expressed.

It was not unreasonable that branch lines of the named railways, though not then built or projected, should, when constructed, if they crossed the main railway, come under the same legislative jurisdiction as the main railway was under; and, in my opinion, sec. 306 should be read as meaning this and no more.

Section 306 reads as follows: "306. The Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton and North-Western Railway,

the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario and Quebec Railway, and the Canadian Pacific Railway, are hereby declared to be works for the general advantage of Canada, and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada."

In my opinion, the word "branch," which qualifies the word "line" in the latter part of the section, also qualifies the word "railway" which immediately follows. That is the grammatical construction which the language bears, and is a construction which makes the enactment a more reasonable one than it would be if it has the meaning which the appellant contends should be given to it.

It was argued by counsel for the appellant that the opening words of sec. 307—"Every such railway and branch line"—shew that the word "railway" was not used in the limited sense which I think it has; but, instead of helping the appellant's case, they, in my opinion, have the opposite effect, because, as I think, the draftsman, in using the words "such railway," had reference to the railways named in sec. 306, and, so reading them, the use of the words "branch lines" strengthens the view that that sec. 306 was intended to affect only the named railways and their branch lines.

If it were otherwise, I do not understand why sec. 177 was enacted. It provides that "every railway company incorporated by any Act of the Legislature of any Province which crosses, intersects, joins or unites with any railway within the legislative authority of the Parliament of Canada, or which is crossed, or intersected by, or joined or united with any such railway shall, in respect of such crossing, intersection, junction and union, and all matters preliminary or incident thereto, be deemed to be, and be, within the legislative authority of the Parliament of Canada, and subject in respect thereof to the provisions of this Act."

The section was quite unnecessary if the effect for which the appellant contends is given to sec. 306, for in that case the railways with which sec. 177 deals are subject to the exclusive legislative authority of the Parliament of Canada, not merely for crossing purposes but for all purposes; and, reading the two sections to-

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gether, it is, I think, reasonably clear that sec. 306 was not intended to affect any railway but those named in it and their branches.

The amendments which from time to time have been made to sec. 173 do not help the appellant. That section deals with matters as to which the Parliament of Canada has legislative authority, whether or not the intersecting railway has come under its exclusive jurisdiction by being declared to be a work for the general advantage of Canada—the right of the Parliament of Canada to regulate the manner in which railways under its jurisdiction may be crossed by railways over which Parliament has not acquired legislative authority being undoubted.

The addition made to the Act of 51 Vict. by sec. 1 of 63 & 64 Vict. ch. 23, is the only amendment which at all suggests that Parliament intended by sec. 306 to bring within it all railways which cross any of the railways named in the section.

By sec. 1 the following section was added: "6A. Street railways and tramways, while hereby expressly declared to be subject to such of the provisions of this Act as are referred to in section 4, shall not by reason only of the fact of crossing or connecting with one or other of the lines of railway mentioned in section 306 be taken or considered to be works for the general advantage of Canada, nor to be subject to any other of the provisions of this Act.

"(2) The said section 6A shall also apply to all electric railways (as distinguished from electric street railways) passing through or over the Queen Victoria Niagara Falls Park, or through or over the property of the Province of Ontario lying upon or along the Niagara River and known as the Chain Reserve."

For the better understanding of the section it may be well to refer to secs. 3 and 4 of ch. 29 of 51 Vict. They are as follows:—

"3. This Act, subject to any express provisions of the special Act, and to the exception hereinafter mentioned, applies to all persons, companies and railways within the legislative authority of the Parliament of Canada, except Government railways.

"4. In addition, all the provisions of this Act relating to any subject or matter within the legislative authority of the Parliament of Canada, and for greater certainty but not so as to restrict the generality of the foregoing terms, all provisions relating to

railway crossings and junctions, offences and penalties and statistics apply to all persons, companies and railways whether otherwise within the legislative authority of Parliament or not."

It will be observed that the added section, 6A, does not add anything to sec. 306, and may well be taken to have been intended to make it clear that sec. 306 did not apply to street railways and tramways and the electric railways mentioned in sub-sec. 2 of sec. 6A; but, however that may be, I do not think that if, according to its true conception, sec. 306 does not apply to any railway except those named in the section and their branches, sec. 6A can be treated as extending the operation of sec. 306 to railways that are not branches of the railways mentioned in it.

It is somewhat significant that the Dominion Government, though notified of the questions to be raised upon this appeal and entitled to be heard upon it, has not chosen to be represented. The fair inference from this is, I think, that it does not desire to contest the position taken by the provincial authorities that the appellant's railway is not subject to the exclusive legislative authority of the Parliament of Canada, and there is no good reason for forcing upon Parliament an authority which it appears that the Government of Canada has no wish to possess, unless by law that authority has been clearly vested in it.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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RE ROSS AND HAMILTON GRIMSBY AND BEAMSVILLE R. W. Co.

Meredith, C.J.O.

CITY OF VICTORIA v. TRUSTEES OF THE CHURCH OF OUR LORD.

B.C.

S. C.

British Columbia Supreme Court, Macdonald, J. September 16, 1915.

1. TAXES (§ I F 1—75)—EXEMPTIONS—CHURCH PROPERTY—SITES—ADJOINING LANDS.

The effect of sub-sec. 1 of sec. 228 of the Municipal Act, R.S.B.C. 1911, ch. 170, is that not only the land upon which the church buildings are actually situated, but also such adjoining property, within reasonable limits, as may be said to constitute a "site" is intended to be exempt from taxation.

[See B.C. Stat. 1913, ch. 47, sec. 16, amending above sub-sec. by striking out the words "and the site thereof."]

2. TAXES (§ III D—138)—ASSESSMENT OF EXEMPT PROPERTY—CHURCH PREMISES—MODE OF REVISION.

It is not necessary to appeal to the Court of Revision from an assessment of church property, which is exempted by statute, in order to be relieved from liability for such taxes, and it is open to the defendant to refuse payment of the taxes sought to be imposed by such improper assessment.

[*Re Sisters of Charity Assessment*, 15 B.C.R. 344, 44 Can. S.C.R. 29, distinguished.]

ACTION to recover taxes on church property.

Statement

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CITY OF VICTORIA v. TRUSTEES OF THE CHURCH OF OUR LORD.

Macdonald, J.

T. R. Robertson, K.C., for plaintiff.

E. C. Mayers, for defendant.

MACDONALD, J.:—Plaintiff seeks to recover the sum of $504, and interest, being for taxes alleged to be due by the defendant for the year 1912 with respect to a part of lot 1270, section 6, in the City of Victoria. This piece of land, 120 ft. by 155 ft., was conveyed by Sir James Douglas to trustees for church and Sunday school purposes in 1875. It is contended that such property is exempt from taxation for the year 1912, as being one of the exemptions referred to in sub-sec. 1 of sec. 228, ch. 170, R.S.B.C. 1911, as follows:—

> Every building and the site thereof set apart and in use for the public worship of God.

The parties agreed upon certain admissions of fact, and then submitted the question of liability for the opinion of the Court.

It is admitted that for some years there has been erected on this land a church that was "set apart and in use for the public worship of God," and also a building used as a Sunday school house, and which was only for the purpose of holding Sunday school therein on Sunday, and that such Sunday school when held, commenced and closed with prayer. I think both these buildings come within the intent and meaning of the exemption clause above referred to.

The question then remains whether all the land should obtain the benefit of the exemption or only the portion upon which the buildings are actually situated. I find that according to the plan produced the buildings occupied approximately seven-eighths of the land, and the balance I consider is only sufficient for the proper use of the church and Sunday school, in affording reasonable light, air and access. While it is true that exemptions from taxation are construed strictly, still I think the proper construction to be placed upon the statute is that not only the land upon which the buildings are actually situate, but such adjoining property within reasonable limits is to be exempt—in other words, that this property is a "site" intended to be relieved from taxation. It is "a plot of ground suitable or set apart for some specific use"; see definition of "site" in the Standard Dictionary.

This piece of property should not under such circumstances have been assessed and the taxes sought to be imposed being thus without jurisdiction cannot be recovered.

It was submitted that it is now too late for the defendant to object to the assessment, and that it should have appealed to the Court of Revision. The decision *Re Sisters of Charity Assessment*, 15 B.C.R. 344, 44 Can. S.C.R. 29, is cited in support of this contention. That case arose under the Vancouver Incorporation Act, and to my mind does not apply. Under that Act the assessor properly assessed all land, including the parcel in dispute, without regard to exemptions, and then under its special provisions, the Court of Revision decided as to the nature and extent of the exemptions, and such decision was final.

Under the Act giving exemptions to defendant herein there was no similar provision, and I do not think it was incumbent upon the defendant to appeal in order to be relieved from liability. It was still open to the defendant to refuse payment of the taxes sought to be imposed by such improper assessment. While the revision of the assessment roll and the necessary certificate constitutes a finality, this only operates to a limited extent and does not destroy an exemption held by statute.

I might add that even if the construction placed upon the words of the statute were, that only the land actually occupied by a church was to be exempt from taxation, and the municipality then sought to assess the entire parcel of land, ignoring the statutory right of exemption, such assessment would be invalid. Defendant can in this action successfully contend that there was no process of segregation by which it could be determined that an amount even less than the sum claimed could be recovered. The total claim is affected by the invalidity of the assessment. In my opinion the said sum of $504 is not payable by the defendant to the plaintiff. By arrangement there are no costs to either party.

Judgment for defendant.

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C. A.

Re OLYMPIA CO.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. December 28, 1915.

1. CORPORATIONS AND COMPANIES (§ VI F 1—347)—INSOLVENCY—ASSIGNMENT FOR CREDITORS—RIGHT TO WIND UP UNDER DOMINION STATUTE—OPPOSITION BY MAJORITY.

A creditor who consents to the winding up of a provincial company under a Provincial Assignment Act cannot afterwards invoke the Dominion statute to wind up the company under the Winding-up Act, R.S.C. 1906, ch. 144; nor will the court make such order *ex debito justitiæ*, even where insolvency is established, for the purpose of prosecuting claims which would not prove of material benefit and could be as effectively done by the official assignee under the provincial statute, particularly where such order is opposed by a majority of the creditors.

[*Re Strathy Wire Fence Co.*, 8 O.L.R. 186, applied.]

2. ASSIGNMENTS FOR CREDITORS (§ I—1)—WHO MAY MAKE—CORPORATION.

An incorporated company has power to make an assignment for the benefit of creditors, and is therefore subject to the provisions of the Assignment Act.

[*Hovey* v. *Whiting*, 14 Can. S.C.R. 515, followed.]

Statement

APPEAL from judgment of Galt, J., dismissing petition for an order to wind up a company under Winding-up Act, R.S.C. 1906, ch. 144. The following statement of facts and authorities is taken from the judgment appealed from.

The Olympia Co., a body corporate, being in financial difficulties, executed an assignment under the Assignment Act. The assignee thereupon liquidated the tangible assets of the company, and proceeded to distribute the proceeds amongst the creditors. A petition praying for a winding-up of the company under the Dominion Act was filed by a creditor charging misappropriation by some of the directors, in that a cheque in the sum of $25,000, drawn by the company and signed by the president and another director, was deposited to their personal account in another bank. The bank, of course, was not aware of the misappropriation. Galt, J., dismissed the petition, and following *Re Strathy Wire Fence Co.*, 8 O.L.R. 186, held, that the Assignment Act applies to incorporated companies, and no winding-up order will be made after the assignment. That although the misappropriation of the company's funds was a serious charge it was not a new discovery and known to the petitioner before the assignment was executed. Furthermore, the assignee has taken much trouble to investigate it, and has come to the

conclusion that there is no substantial basis for the claims and that litigation would be fruitless, particularly against directors who are hopelessly insolvent. The bank, receiving deposit of the cheque and not having any notice of any irregularity, was protected by the decision in *Bank of New South Wales* v. *Goulburn Butter Co.*, [1902] A.C. 543. That, under the decision in *Re Rubber Trust*, [1915] L.R. 1 Ch. 382, the wishes of the majority creditors must prevail. He further held, referring to *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 24 O.R. 107; *Re Maple Leaf Dairy Co.*, 2 O.L.R. 590; *Re Wm. Lamb Mfg. Co.*, 32 O.R. 243; *Re New Gas Co.*, 5 Ch.D. 705; *Re Strathy Wire Fence Co.*, 8 O.L.R. 186, that as to the costs of the application, the petitioner must pay one set of the costs to the company, or rather to its assignee, and another set of costs to the creditors opposing the petition.

Statement

Hugh Phillipps, for appellant.

A. E. Hoskin, K.C., for assignee.

I. Pitblado, K.C., for Bank of Hamilton.

HOWELL, C.J.M.:—Upon the assignment being made by the insolvent company, Mr. Gallagher was appointed one of the inspectors. He duly proved the claim of his firm and had it filed with the assignee. He acted as inspector and attended meetings of the creditors and apparently approved of the assignment. Then he apparently changed his mind and petitioned under the Dominion Winding-up Act.

Howell, C.J.M.

This petition is opposed by a large number of the creditors and by the company. Apparently all the creditors, and particularly the petitioner, at first approved of the assignment, and I still cannot understand why he changed his mind.

A shareholder of the company has a right to wind up a company if he can come within the statute; but the only real interest a creditor has is to invoke the powers of the Winding-up Act to get payment of his debt. Here a creditor is invoking a Dominion statute to wind up a provincial company, which is subject to the Provincial Winding-up Act. Steps had been taken under provincial laws by the Assignments Act, with the creditors' approval, to realize on the estate, and then he suddenly changes his mind and asks to have the company wiped out.

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Howell, C.J.M.

To my mind, the powers given to a creditor under the Assignments Act are as wide as those under the Winding-up Act, but, even if not quite as drastic, under the circumstances, I see no reason for casting on the estate all the extra costs of winding-up proceedings, and I agree that in refusing the order the Judge exercised a sound discretion.

The appeal should be dismissed with costs.

Perdue, J.A.

PERDUE, J.A.:—The company was incorporated under the Manitoba Joint Stock Companies Act on January 2, 1906. It carried on business as cafe proprietors, grocers, confectioners, tobacconists, etc. For several years its operations were exceedingly profitable, but about December, 1914, the company's financial difficulties commenced. On August 24, 1915, it made an assignment for the benefit of creditors to Mr. Newton, the official assignee, who proceeded to get in and dispose of the assets of the company for the purpose of dividing the proceeds amongst the creditors. It is clear from the evidence that the company is insolvent and that its assets will fall far short of paying its liabilities. Apart from the matters which will be dealt with later, a case was made for winding up the company under the provisions of the statute.

The petitioning creditor, Gallagher, Holman & La France Co. Ltd., has a claim of $2,573 against the insolvent company. At first, the petitioner approved of the assignment, and its president acted as one of the inspectors. The creditors who favour the granting of a winding-up order represent an aggregate of some $15,000 out of a total of over $40,000. The Judge has found that the creditors who oppose winding-up proceedings greatly exceed, both in number and amount of claims, the creditors who support such proceedings. No actual vote of the creditors appears to have been taken upon this question.

Counsel for the petitioner claims that the company has not power to assign for the benefit of creditors and that the provisions of the Assignments Act do not apply to a corporation. The case of *Hovey* v. *Whiting*, 14 Can. S.C.R. 515, completely disposes of that point. The Supreme Court was unanimous in deciding that the directors of a joint stock company have power to make an assignment of the company's estate and property

to trustees for the benefit of creditors, and that their action in so doing does not require the assent of the shareholders.

It was urged by the appellant that, inasmuch as the company was insolvent and had made an assignment of its effects for the benefit of creditors, the petitioner was entitled *ex debito justitiæ* to the winding-up order. The question whether or not the Court has discretion to grant or refuse a winding-up order, where the insolvency of the company is established and the case brought within the requirements of the Act, has been discussed in several Ontario cases. It was finally settled by the Court of Appeal in *Re Strathy Wire Fence Co.*, 8 O.L.R. 186, that the Court has discretion under sec. 14 of the Winding-up Act to grant or refuse the order. The petitioner in the case at bar is opposed by a majority of the creditors, both in number and amount of claims. The official assignee has disposed of practically all the tangible assets of the company, and has the proceeds, about $7,000, in his hands, wherewith to meet debts of over $40,000. The petitioner claims that there are certain alleged causes of action which should be pressed on behalf of the company and its creditors. One of these is against the Bank of Hamilton and the others are claims against two persons who, as it is alleged, are liable as shareholders. The assignee has declined to proceed in these matters, but has offered and still offers to permit the petitioner to make use of his name in any action or actions to be commenced against the parties, pursuant to sec. 48 of the Assignments Act, upon being indemnified in accordance with that section. The petitioner has refused this offer and insists upon a winding-up order being granted so that the liquidator may institute proceedings upon these claims.

The claim against the Bank of Hamilton is, as I understand it, that the bank participated in an alleged breach of trust committed by some of the directors of the Olympia Co., who drew a cheque of the company for $25,000, payable to the bank and that the cheque was delivered to the bank and the proceeds used in reducing an overdraft of another account in which the company was not interested, but for which two of the directors were personally liable. The bank is one of the largest creditors of the company. Mr. Newton, the assignee, is a director of the

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Bank of Hamilton, and it was urged by the petitioner that his interests as a director and shareholder of the bank conflicted with his duty as assignee.

The Court has not material before it which would enable it to form any opinion as to the merits of the above claims. The official assignee, could, it appears to me, bring suits upon these causes of action with quite as good chances of success as a liquidator could under a winding up. Many of the creditors, however, oppose the bringing of suits respecting these matters, and object to the small assets of the estate being imperilled by the assignee embarking in expensive litigation. Upon the other hand, if the petitioner and those of the creditors who take the same views as the petitioners should accept the offer of the assignee and avail themselves of the privileges conferred by sec. 48 of the Assignments Act, they will be enabled to institute suits in the name of the assignee, indemnifying him, and will, in addition, be entitled to the fruits of the litigation without being called upon to share them with the other creditors.

In these circumstances I do not think that this Court would be justified in interfering with the Judge's exercise of discretion.

Cameron, J.A.

CAMERON, J.A.:—The company executed an assignment for the benefit of its creditors under the Assignments Act, August 24, 1915. The petition for winding-up was presented September 23, 1915.

There was a difference of opinion in the Ontario Courts on the question whether there is a discretion in the Court to refuse an application to wind-up when the ground of the application was the making of an assignment for the benefit of creditors. See *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 24 O.R. 107; *Re William Lamb Man. Co.*, 32 O.R. 243, and *Re Maple Leaf Dairy Co.*, 2 O.L.R. 590. But doubts on the point were set at rest in *Re Strathy Wire Fence Co.*, 8 O.L.R. 186, where it was clearly laid down that in such a case the Court has a discretion to refuse the order.

It can now be taken as settled that, on an application for a winding-up order the Court has a wide discretion to grant or withhold the order, and that the Court will examine into the case and, if possible, the wishes

of the creditors will be observed: Parker & Clark on Company Law (1909), p. 373.

See *Re Belding Lumber Co.*, 23 O.L.R. 255, 259, where proceedings were stayed under a winding-up order to permit of liquidation proceedings being taken under an assignment.

I must say that it does seem to me rather peculiar that the very fact of the assignment, which is made by the statute the ground of the application, should also be held to be an answer to it. But while this very ground was urged in *Re Strathy Wire Fence Co., supra*, the Court of Appeal for Ontario held as above stated.

In the present case we have the petition supported by the petitioners and other creditors with claims amounting to about one-third of all the claims against the company. We find opposed to it the Bank of Hamilton, with a claim also amounting to about one-third of all the claims, and also other creditors with claims aggregating about a third. It is true, I think, that the bare fact that a majority of the creditors oppose a winding-up order would not necessarily prevent the order being made. Nevertheless, the wishes of the majority, as expressed in this case, must be given some consideration.

It seems to me that the provisions of the Winding-up Act afford some advantages to creditors that cannot be had in proceedings under the Assignments Act. But, under the latter Act proceedings can be taken by creditors on the refusal of the assignee to act, with resultant advantages to the creditors, if successful, that could not be obtained by them under the Winding-up Act.

The Judge who made the order appealed from exercised his discretion on the material before him. On the application, matters were brought out that might well repay further investigation, but such investigation is by no means precluded by the Assignments Act. Possibly, had I heard the application in the first instance, I might have arrived at a different conclusion from that embodied in the order made dismissing the petition. But I cannot lose sight of the fact that the assignee offered the petitioners the use of his name as plaintiff on receiving a letter of indemnity. On con-

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sideration of the whole matter, I am unable to convince myself that the order appealed from should be reversed.

HAGGART, J.A., concurred. *Appeal dismissed.*

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EX. C.

The KING v. ESTATE OF JOHN MANUEL.

Exchequer Court of Canada, Hon. Mr. Justice Audette. March 29, 1915.

1. DAMAGES (§ III L 2—250)—EXPROPRIATION OF LAND—COMPENSATION—METHOD OF DETERMINING—MARKET AND INTRINSIC VALUES.

Under sec. 3 of the Expropriation Act, R.S. Can., 1906, ch. 143, when land is expropriated for the purposes of the Government, the owner is entitled to have it assessed as of the date of expropriation, at its market value, taking into consideration the best uses to which it can be put, and not on the basis of its intrinsic value.

Statement

ACTION to have the compensation assessed, in regard to certain lands expropriated.

W. D. Hogg, K.C., for plaintiff.

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

Audette, J.

AUDETTE, J.:—This case arose on an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands and buildings belonging to the defendant were taken and expropriated, under the provisions and authority of sec. 3 of the Expropriation Act, for the purposes of a public work of Canada, namely, the erection of Departmental Buildings for the use of His Majesty's Government, at Ottawa, by depositing a plan and description of such lands, on March 9, 1912, in the office of the registrar of deeds for the registration division of the City of Ottawa, in the County of Carleton and Province of Ontario.

At the opening of the trial counsel for both parties declared that the compensation for the lands and real property described in sub-pars. 1 and 4 had been adjusted and settled for the respective sums of $33,000 and $44,000—or a total of $77,000.

The only question now remaining before the Court is the ascertainment of the compensation for the lands and real property described in the sub-pars. 2 and 3, for which the Crown, after the above intimation of the settlement of the lands in sub-pars. 1 and 4, now offers the sum of $100,000.

The defendant, by his counsel, also declared at the opening of the trial, in view of the above adjustment and settlement, that he now claims for the said lands and real property described in said sub-pars. 2 and 3, the sum of $155,000.

The question of title is admitted. It is also admitted that the area taken on the south side of the street is 37,456 square feet and the area on the north, also called the river side, is of 21,000 square feet.

Now this property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, viz.: as a gentleman's residence commanding a good view and located in a fairly desirable portion of the City of Ottawa.

On behalf of the defendant we have the evidence of two real estate business men, who speak in respect of the value of the land and two other witnesses who speak respecting the appraisal of the buildings. It will be noticed that the valuation of the land by these two real estate agents of considerable experience, contrary to the custom in Ontario, is made upon the square foot instead of upon the foot frontage basis, and their opinion is not asked as to the value of the buildings or the property as a whole, although this method of valuation comes within the scope of their daily occupation. We have been deprived of their opinion upon the value of the property as a whole and it naturally comes to one's mind to question whether this double departure from their usual course has not had the effect of inflating the assessment. Taking the figures of witness Rogers—at $1.80 a sq. foot for the south, it would give us in round figures $325 a foot frontage; and the north at 80 cents a sq. foot would give about $120 a foot frontage—shewing figures which cannot be accepted.

On the question of value of the buildings and erections upon the property we are facing a somewhat new and unusual method of arriving at the value of the same. Two witnesses are heard on this subject. One of them takes measurements and reports upon the same and upon the depreciation, and the other places a value before depreciation and a value after making an allowance for such depreciation. From their first evidence and appraisal it appears that the value of the buildings, before the allowance for depreciation, was in 1912 the sum of $78,488.31, and after allowing the depreciation the sum of $64,045.20.

Now this appraisal of the value of the buildings made under

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what is called "the quantity survey method," while it undoubtedly discloses the intrinsic value of the property does not necessarily establish its market value. The compensation under the statute is not to be assessed upon the basis of the intrinsic value, but upon the basis of the market value of the property.

The intrinsic value is the value which does not depend upon any exterior or surrounding circumstances. It is the value embodied in the thing itself. It is the value attaching to objects or things independently of any connection with anything else. For instance, had we to fix a proper compensation for a discarded shipyard, formerly used in the building of wooden ships—we would be facing launch-ways, logs and piers of perhaps great intrinsic value; but if the property were thrown upon the market it would have indeed very little commercial or market value. The same might be said with respect to the numerous wharves and piers on the shores of the St. Lawrence, which were formerly used in connection with the timber trade, when square timber was shipped in wooden bottoms, and that have since become useless and valueless, notwithstanding the fact that they have retained and have their intrinsic value which can be arrived at on this basis of quantity survey method, but which would be no criterion of their market value. Therefore, the intrinsic value of the property is not what is sought here, and it would be proceeding upon a wrong principle to take the "quantity survey method" as a basis to ascertain the compensation as it would give the result of the intrinsic value and not of the market value.

The compensation in the present case should be arrived at upon the basis of the market value of the property, taking into consideration all the circumstances above mentioned, viz.: the location, the advantageous view and its uses as a gentleman's residence.

Although the market for a property of this class is somewhat limited, as is disclosed by the evidence, it has nevertheless a commercial value.

The "quantity survey method" evidence submitted by the defendant—quite proper in valuations for the merger of companies—must be held not to be the proper method to follow in

expropriation matters. This intricate valuation, made by the combination of 2 separate individuals, takes us away from the real market value of the property, as above set forth, which is obviously the proper basis of valuation in assessing compensation for lands expropriated, as decided by the Supreme Court of Canada, in *Dodge* v. *The King*, 38 Can. S.C.R. 149 at 155, and under numerous other authorities. The effect of such a finding in the present case throws the overwhelming weight of the evidence in favour of the Crown. And, indeed, the evidence adduced by the Crown is given by a very credible class of witnesses who have approached the assessment on the proper basis of market value; and among these witnesses we have Mayor Porter, whose high character and good standing in the community, backed as they are by a very large experience of 25 years in this line of business, makes his evidence worthy of weighty consideration.

How is the value of property ascertained and established on the market if not from the prices paid in the mutation of property in the neighbourhood? The McLean property, referred to in the testimony of several witnesses, compared very fairly with the property in question and $200 a foot frontage was allowed. Then one of the defendant's properties, the bowling green, immediately adjoining the present lands to the west was assessed and settled for on a basis of $150 foot frontage. It is true the land is lower and does not command as good a view as the plateau upon which the dwelling house is erected; but the garden which is part of the property to be assessed herein, being lot No. 40, is still on the slope and yet the ratio of $222.50 is extended to cover that part as well as the eastern lots 41 and 42. The valuation on behalf of the Crown for the property as a whole ranges in round figures from $75,000 to $91,000. It would seem that the assessment of the compensation should not be made on the basis of separating and segregating the various factors or component parts of the buildings and the land—although all these elements must be taken into consideration—but the property must be regarded as a whole and its market value as such assessed as of the date of the expropriation. *The King* v. *Kendall*, 8 D.L.R. 900, affirmed on appeal to the

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Supreme Court of Canada; *The King* v. *N.B. R. Co.*, 14 Ex. C.R. 491; and *The King* v. *Loggie*, 15 Ex. C.R. 80. It may be said here that the doctrine of re-instatement which was mentioned in the course of the trial does not obtain in a case like the present one.

I have had the advantage of viewing the premises in question, accompanied by counsel for both parties, and looking at the river lot, and realizing the topography of the same which presents a cliff of very abrupt and precipitous decline, I cannot see it has the value of $65 a foot frontage or $11,000 altogether —the value put upon it by the Crown's witnesses—unless by way of placing upon it a very large additional value it may acquire to the joint owner on the north side opposite, to assure the view and give him an access to the river. It has a very restricted level space which can hardly be called a plateau.

Viewing the property as a whole and taking all the legal elements of compensation into consideration, as above set forth, this property, with its age, the amount of money that would be required to modernize it, would seem to be worth in the neighbourhood of $80,000, thus leaving still the very large margin of $20,000 to reach the sum of $100,000 tendered by the Crown; a margin which would go to cover the usual amount for compulsory taking, for moving and other incidentals of that nature, leaving available a further sum which would go to make the compensation especially liberal and generous. It must, therefore, be found that the amount of $100,000 offered by the Crown at the opening of the trial is just and sufficient under the circumstances.

The property, ever since the date of the expropriation, has remained in the possession of the defendant and there will, therefore, be no interest allowed on the compensation money.

There will be judgment as follows, viz.:—

1. The lands expropriated herein and described in the information in sub-pars. 2 and 3 of par. 2 thereof are declared vested in the Crown since the date of the expropriation.

2. The compensation for the lands and real property, so expropriated, and for all damages resulting therefrom, are

hereby fixed at the sum of $100,000 which the defendant is entitled to recover upon giving to the Crown a good and sufficient title free from all incumbrances whatsoever.

Judgment accordingly.

REX v. JENNIE HAWKES.

Alberta Supreme Court, Harvey, C.J., and Scott, Stuart and Beck, JJ. November 6, 1915.

1. CRIMINAL LAW (§ I B—5)—DEFENCE OF TEMPORARY INSANITY—INDUCING CAUSE—RELEVANCY—EXPERT TESTIMONY ON MENTAL CONDITION.

On a charge of murder and a defence of insanity at the time of the commission of the offence, the onus is upon the accused of proving that she was at the time she committed the act in such a state of mind that she was incapable of appreciating the nature and quality of her act and of knowing that it was wrong; and whether statements made to the accused by her husband as to his acts of infidelity with the deceased and other women would have a tendency to make her temporarily insane is a question of fact as to which expert testimony must first be offered before proof of any such statements by the husband becomes relevant [*R.* v. *Tuckett*, 1 Cox C.C. 103, applied.]

2. DEPOSITIONS (§ I—1*a*)—DE BENE ESSE IN CRIMINAL CASE—OBJECTIONS—CR. CODE, SEC. 995.

It is the duty of the trial Judge at a criminal trial to allow only admissible evidence to go to the jury, and he may exclude testimony taken *de bene esse* before a commissioner for use at the trial subject to all proper exceptions, if the testimony be not properly admissible although no exception was taken before the commissioner and the objection was first raised on the tender of the depositions at the trial.

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CROWN case reserved for the opinion of the Appellate Division by Mr. Justice Ives. The accused was tried at Wetaskiwin on a charge of having murdered one Rosella Stoley on the 13th March, 1915. The jury returned a verdict of guilty and the accused was sentenced to death. The case as stated by the learned trial Judge was as follows:—

"The defence was 'insanity at time the offence occurred.'

"The evidence of the defendant in her own behalf was shortly that on the 3rd of March, by reason of her husband's infidelity, she had left her home and gone to live with her adopted daughter, Mrs. Wm. Rosser, about half a mile away; that she returned to her home for some things on the 13th of March; that the Stoley family occupied the north side of the house and the defendant, her husband, and his mother, Martha Long, occupied the south side; that there was a passageway extending north and south in the house divided by a partition in which there was an opening; that she entered her own side of the house and soon after began a conversation with deceased, each standing in the passageway

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on their respective sides of the house and talking through the opening; that the deceased was facing the defendant and soon after the conversation began she saw deceased looking intently past and behind her (the defendant), at the same time the defendant heard a shot and felt the wind of a bullet passing her head. (This shot did not do any harm.) That she thereupon lost consciousness and knew absolutely nothing more until she found herself lying on the floor of deceased's kitchen (to reach which would require her to go outside and round the west end of the house and through a shed on back kitchen.) That she got up from the floor, went inside, and was driven back to Wm. Rosser's; that she heard that afternoon that Mrs. Stoley had been shot but that it was only some weeks afterward in MacLeod that she learned upon inquiry as to why she was there that she was accused of the shooting. Defendant accuses her husband of improper relations with Mrs. Stoley and other women during a long period of years.

"The evidence of H. E. Stoley, husband of deceased, was that he saw defendant enter his shed door with a revolver in her hand; that he started running for the house; that he heard a number of shots before he reached the kitchen and upon entering that room found defendant with the revolver in front of door of deceased's bedroom; that there were five bullet holes in the door; that he took the revolver away from defendant, entered the bedroom, and found deceased on the floor with three bullet wounds, one of which proved fatal. Deceased was unconscious.

"Counsel for the defence offered evidence of conversations between defendant's husband and witnesses and between defendant and her husband as proof of said husband's improper conduct previous to the offence with women other than deceased, as evidence of the state of mind of the defendant at the time the offence was committed.

"This evidence I refused to admit. (1) Now, therefore, upon the application of counsel for the defence for a case reserved I ask the Appellate Division of this Honourable Court to say if I was right in so refusing the evidence.

"Counsel for defence also tendered the evidence of one John Davidson taken *de bene esse* before a commissioner for use at the trial subject to all proper exceptions, pursuant to order of Mr. Justice Hyndman.

Statement

"The Crown and defendant were represented by counsel at the examination of the witness.

"When tendered at trial, counsel for the Crown objected to such part of the evidence as consisted of conversations taking place subsequent to the offence between defendant's husband and Davidson, and to evidence of the acts of defendant's husband subsequent to the offence.

"No objection was taken by the Crown at the examination before the commissioner. I ruled with the Crown and refused the evidence.

"Now, therefore, upon the application by counsel for the defence for a case reserved, I ask the Appellate Division of this Honourable Court to say—

"Ques. 2. If this evidence was admissible?

"Ques. 3. Could it be rejected at trial after failure to object to it at the examination before the commissioner."

Odell for the Crown.

W. J. Loggie for defendant.

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STUART, J.:—As the accused is a woman it may be not out of place to observe that this Court on such an application as this has nothing to do with the guilt or innocence of the accused, which was a question of fact entirely for the jury, nor with the punishment, which is fixed definitely by the Criminal Code and must in case of a verdict of guilty be imposed by the presiding Judge without any room for discretion. The power of exercising discretion and showing mercy in regard to the punishment to be imposed is a prerogative of the Crown exercisable only by the Governor General on the advice of his responsible ministers. This Court has authority only to deal with the pure questions of law submitted in the reserved case as to whether certain evidence tendered by the defence and rejected by the trial Judge was legally admissible evidence. If it was legally admissible and its rejection prejudiced the accused in her defence so as to constitute by its mere rejection and without any reference to our own views of her guilt or innocence (as to which we are not supposed to entertain any opinion at all) a miscarriage of justice, then we have power to order a new trial. That is the limit of our authority under the law.

It was admitted on the argument by counsel for the accused

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and of course it was abundantly plain, that with respect to the first question reserved we need only consider the rejection of the evidence of statements made by the husband of the accused to the accused herself in regard to his acts of infidelity with women other than the deceased because if the accused succeeded in regard to these statements it would be enough for her purpose and a new trial would follow; while if she failed in regard to these then *a fortiori* she must fail also with regard to his statements to other witnesses regarding such acts of infidelity.

The defence was insanity at the time of the commission of the offence. In order to substantiate this defence the burden lay upon the accused of proving that she was at the time she committed the act in such a state of mind that she was incapable of appreciating the nature and quality of her act and of knowing that it was wrong. The argument on behalf of the accused amounts to this, that the rejected statements having been made to the accused were admissible because they had a tendency to affect the condition of her mind and should therefore have been submitted to the jury in order to enable them to judge of the condition of her mind at the time the offence was committed. The answer to this argument seems to me to be plain. That the statements referred to would have a tendency to affect her condition of mind was a fact which should be proved. In *Reg. v. Ross Tuckett*, 1 Cox C.C. 103, where the defence was insanity, counsel for the accused tendered evidence that the accused's maternal grandfather had been confined in a lunatic asylum. MAULE, J., said: "I know that these questions are generally admitted. It is a matter of fact, and not a matter of law, that insanity is often hereditary in a family, but I think you should prove that *in the first instance*, by the testimony of medical men and *then* your question will be legitimate."

No doubt it may be taken as a matter of general knowledge that any statement made to a person will affect that person's condition of mind at least with respect to the amount of knowledge which his mind contains, but I do not think it can be said that the fact that a statement by a husband to his wife confessing his own infidelity will have a tendency to create a diseased state of mind so that she will be thereby, or partially thereby, rendered incapable of appreciating the nature and quality of her act is a matter of such general knowledge that a jury may act upon it

themselves without the intervention of medical testimony to that effect. The jury were not themselves medical experts. No medical testimony was tendered to prove the fact that such a result might follow from the statements, neither did counsel for the accused, as he admitted on the argument before us, state to the trial Judge that he intended to adduce medical testimony. There is no doubt that in the practice of the Court under some circumstances evidence which at the stage at which it is tendered is inadmissible is nevertheless admitted upon the undertaking of counsel to lay the foundation for it later on. But there was no such undertaking here. It may be contended that it should make no difference in what order the defence adduces its testimony, but the answer is that unless there was some medical testimony to the effect referred, to the statements were irrelevant and therefore inadmissible. In my opinion Mr. Justice Maule in the case above cited was quite correct in insisting upon the introduction of the medical testimony first. The danger of any contrary course is obvious. It would leave it open to the accused to introduce evidence of statements in themselves irrelevant and inadmissible without afterwards supplying the link which would make them relevant and admissible and therefore get before the jury in order to influence them statements which they should not have heard at all.

In Wigmore on Evidence, Can. ed. vol. 1, para. 231, it is said: "Circumstances calculated to induce this mental condition may always be admitted to evidence the probability of such affection; the only limitation is that the circumstance be in itself capable in some degree of producing such an effect, that it came to the person's knowledge, and that some further foundation for probability be laid by other evidence that there was a diseased mental condition."

I think this is a correct statement of the rule. With the first part of the limitation I have already dealt, showing that it was not complied with. In my opinion the last part also of the limitation was not complied with here. There was no attempt to show by witnesses, medical or otherwise, that the accused exhibited signs of a disordered mind. There was nothing but her own statement that she lost consciousness at a certain stage of the affair and remembered nothing until she asked at the barracks

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in MacLeod why she was there. It is somewhat difficult to understand how a person whose defence consists in the allegation that at a certain time his mind was in a disordered state can himself give evidence of that disordered state of mind. *Ex hypothesi* his mind was in such a condition that any memory of his own about it must be unreliable. In any case, however this may be, I think that the accused's mere statement as to having become unconscious is not sufficient to comply with the rule above stated that there must be other evidence that there was a diseased mental condition before circumstances calculated to induce this condition can be admitted in evidence.

I would therefore answer the first question in the affirmative and say that the learned Judge was right in rejecting the evidence.

I would answer the second question in the negative. The nature of the evidence referred to is not very clearly explained in the case because of course it was rejected, but it was stated to us by counsel for the accused that the purpose of the rejected evidence was to attack the credibility of the defendant's husband, Hawkes. But, in fact, Hawkes was not called as a witness by the Crown at all or by anyone. Even if the Crown had called Hawkes in rebuttal the proper time to attack his credibility by evidence of bias or otherwise was after he had given his testimony, which I conceive might in a proper case be allowed even though the impeached witness was called in rebuttal. But in fact he was not called and therefore the accused could not possibly have been prejudiced by the rejection of the evidence.

I should answer the third question in the affirmative. It is the duty of the presiding Judge at a criminal trial to allow only admissible evidence to go to the jury. Where evidence has been taken on commission before the trial the mere fact of an omission to object before the commissioner cannot impair this rule.

The result is that the conviction will be confirmed.

Harvey, C.J.
Scott, J.
Beck, J.

HARVEY, C.J., and SCOTT, J., concurred.

BECK, J.:—I agree with my brother STUART in most respects. The accused personally gave evidence that at the time of the homicide, which *ex hypothesi* she personally could not deny, she had become unconscious of her actions; that she had remained in that condition for some time; that she came to herself only after she had been some days in custody, and then had no

recollection of the affair. However much one may be inclined to doubt the truth of her story, such a thing is not an unheard of happening and is dealt with by medical authorities under some such hearing as hysterical or epileptic amnesia. Women are especially apt to be hysterical. Their emotions are especially apt to be aroused.

A conversation between the accused and her husband on the subject of his unfaithfulness to her by illicit relationship with other women may well be presumed to have been, if not of a violent character, at all events of a character greatly to disturb the accused and highly excite her emotions. The further inference of the inducement of hysteria resulting in unconsciousness of her actions is one which a jury could, in my opinion, not improperly draw. If so, such evidence would be confirmatory of the evidence already given by the accused herself of the fact of her being unconscious of her actions at the time of the homicide.

It is true that the conversation rejected is said to have related to infidelities with women other than the deceased, but I think this is no reason for excluding it for the reason for its introduction was not to show animus against the deceased but to show a disturbed state of mind in the accused, and I think it is a fair inference from the epitome of the evidence that the accused believed that the deceased was one of several women with whom her husband had had illicit intercourse. What I have stated is, I think, so far a matter of general knowledge as to make it not indispensable to call expert medical testimony. See Wigmore on Evidence, pp. 568 *et seq.*

The trial Judge describes what was sought to be given in evidence as "Conversations between defendant and her husband as proof of the said husband's improper conduct previous to the offence with women other than the deceased as evidence of the state of mind of the defendant at the time the offence was committed." It seems to me that there is a confusion here, that is at the basis of the reasoning which rejects the evidence. Ordinarily when there is a question of a conversation in evidence the important thing is the precise words said. Evidently this was not a conversation in that sense—precisely what was said was not important. It was undoubtedly a tempestuous quarrel over a subject most likely to disturb the accused to the highest degree.

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For these reasons I would direct a new trial.

Conviction affirmed.

N.B.—The death sentence was commuted by the Executive at Ottawa to ten years' imprisonment.

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SARGENT v. NICHOLSON.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. December 20, 1915.

1. CONTRACTS (§ I C 2—29)—SUFFICIENCY OF CONSIDERATION—SUBSCRIPTION FOR CHARITABLE PURPOSE.

A written promise to contribute a certain sum of money towards the erection of a building for the Young Men's Christian Association, in reliance of which advances have been made and liabilities incurred, forms a valid and binding contract which cannot thereafter be revoked by the promisor, and is enforceable against him on behalf of the association.

[*Re Hudson*, 54 L.J. Ch. 811, distinguished; *Williams* v. *Hales*, 8 N.Z.L.R. 100; *Hammond* v. *Small*, 16 U.C.Q.B. 371; *Thomas* v. *Grace*, 15 U.C.C.P. 462; *Anderson* v. *Kilborn*, 22 Gr. 385; *Berkeley Church* v. *Stevens*, 37 U.C.Q.B. 9, applied.]

Statement. APPEAL from judgment of County Court in favour of plaintiff in an action to recover money subscribed for a charitable purpose.

F. C. Kennedy, for respondent, plaintiff.

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

Cameron, J.A. CAMERON, J.A.:—This action is brought in the County Court of Winnipeg by the plaintiff, as assignee of the Y.M.C.A. of Winnipeg, and of the treasurer of the building fund of the association, against the defendant, to recover the sum of $200, claimed to be due on an agreement in writing, which is as follows:—

$200. Winnipeg, November 22, 1910.

For the purpose of purchasing sites and erecting and equipping buildings for the Young Men's Christian Association, of the City of Winnipeg, and in consideration of the subscriptions of others, I promise to pay to the treasurer two hundred dollars, payable as follows: One-fourth, February 1, 1911; one-fourth, August 1, 1911; one-fourth, February 1, 1912; one-fourth August 1, 1912. Signed: GEO. H. NICHOLSON,

Address: Clarendon Hotel.

The County Court Judge entered judgment for the plaintiff for the amount claimed and costs, and from his judgment the defendant appeals. No question is raised as to the validity of the assignment.

The evidence shews that the defendant and others were canvassed for their signatures to agreements such as that set forth,

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in pursuance of a plan to raise a large sum of money for the erection and equipment of a building for the purposes of the association. The above agreement, with others, came into the hands of the secretary, who notified the defendant and other subscribers accordingly. The secretary states, in his evidence, that the association, on the strength of these subscriptions, proceeded with the erection of the building and purchased materials and let contracts therefor, necessarily incurring indebtedness. The secretary says he called on the defendant about his subscription and that he admitted the same.

The main contention for the appellant is that the agreement in question is merely a voluntary promise, a promise without consideration, and therefore revocable at any time by the promisor. In support of this *Re Hudson*, 54 L.J. Ch. 811, was referred to, where an attempt was made to hold executors liable in the circumstances set forth in the report. The testator verbally promised to give £20,000 to the jubilee fund of the Congregational Union of England and Wales, and also signed a form, not addressed to anyone, but headed "Congregational Union of England and Wales—jubilee fund" in these words:—

I promise to give the amount entered above (£20,000) in equal annual instalments, and to make the first payment on the 1st October, 1881.

The testator died leaving the amount of £8,000 unpaid on his contribution. The object of the committee having the matter in charge was to raise a special fund to pay off Congregational Church debts, and to this the testator specifically confined his gift. Pearson, J., held that all that there was was an intention on the part of the testator to contribute to the fund, and an intention on the part of the committee in charge to distribute it according to the purposes for which it was given and that there was no consideration that could form a contract between the parties. This case is cited in Pollock on Contracts, p. 177, where it is stated in a footnote that:—

A contract may arise, however, if the subscriber authorizes a definite expenditure which is incurred in reliance upon his making it good.

It was further argued that there was no previous request on the part of the defendant that the association should proceed with the erection of the building, and therefore no consideration. But it is not difficult to hold, in this case, that, while

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there may not have been any express request on the part of the defendant, that the association should proceed with its programme of construction, nevertheless, that request must be taken as implied in the very nature of the transaction. The defendant practically said: "Proceed with your project and I will help you to the extent of $200."

The questions involved are discussed in Cyc. IX., at p. 330. It is pointed out that three views have been taken on the subject of subscriptions for charitable and similar purposes. 1. That the promises of the subscribers mutually support each other, and being for the benefit of a common beneficiary, the latter may sue thereon as one made for his benefit; 2. That the person to whom the subscription is made impliedly promises to appropriate the funds subscribed in conformity with the terms of subscription, and this implied promise forms a sufficient consideration; 3. That a subscription, like any other promise, requires a consideration, either of profit to the party making it or detriment to the party to whom made, and that it is only where some obligation is incurred, or labour or money is expended on the faith of it, that the subscriber is bound, up to which time the promise is revocable; but the subscription is binding so soon as consideration is furnished by incurring obligations or expending money. This last statement of the law is spoken of as "the prevailing view."

In Parsons on Contracts, p. 491, the law is thus stated:—

> Where advances have been made, or expenses or liabilities incurred by others in consequence of such subscriptions, before any notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established.

Parsons regards the argument that one promise forms a good consideration for another as reasoning in a vicious circle. In a long footnote, commencing at p. 489, Mr. Parsons states no less than seven different ways in which Courts of various States have stated the nature of the consideration upon which the promise of one who subscribes for a charitable or religious purpose has been supported. The commonest theory, he states, is that set out above. His opinion is that the promise

of each subscriber cannot be held a consideration for the others, because the subscribers do not promise each other but the common beneficiary, who is usually the one that brings the action. Nor is he inclined to accept the theory of a counter promise on the part of the beneficiary as supporting the consideration inasmuch as the beneficiary only undertakes to deal with the money when it is received—an obligation binding in no greater or different degree from what the law imposes. But this theory was upheld by the Massachusetts Court in *Ladies Collegiate* v. *French*, 82 Mass. 201. I refer also to the numerous authorities on the subject generally, mentioned by Parsons in his notes to pp. 492, 493.

In *Cottage St. H. E. Church* v. *Kendall*, 121 Moss. 528, an action to enforce a subscription, Grey, C.J., says:—

> Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing, upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor.

The suggestion made in *Hanson Trustees* v. *Stetson*, 22 Mass. 508, that others being led to subscribe makes a sufficient consideration, he holds is inconsistent with elementary principles.

In *Martin* v. *Meles*, 60 N.E.R. 397, 179 Mass. 114, the defendants and others agreed to contribute a certain sum to defray expenses of litigation to be incurred by a committee in defending suits arising out of certain letters patent. It was held that the defendants' promise was not void as being without consideration, since either plaintiffs' promise to conduct the litigation, or their subsequent acts, were sufficient to support the defendants' promise. In his opinion, Holmes, C.J., refers to the judgment in *Ladies Institute* v. *French*, *supra*, as holding that the committee's promise forms the consideration, and goes on to say: "In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures, than on the counter promise of the plaintiff," referring to *Cottage St.* v. *Kendall*, *supra*, and *Sherwin* v. *Fletcher*, 168 Mass. 413. In his view, the defendants' promise could be supported on either of the grounds, as above stated.

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He apparently inclines to the view of the counter promise as the basis, but does not deem a "more definite decision" necessary as one way or the other the defendants must pay.

In a New Zealand case, *Williams* v. *Hales*, 8 N.Z.L.R. 100, *Re Hudson, supra*, is referred to as a case where there was nothing beyond the announcement by the testator of a present intention on his part to make an annual contribution. In the New Zealand case the action was brought by the members of the church who accepted the proposal of the defendant and another who offered to contribute £1 for every £1 subscribed by others, and it was held the proposal being accepted, the proposers were bound by their contract, a case similar to an offer by advertisement.

I refer to *Hammond* v. *Small*, 16 U.C.Q.B. 371, and to *Thomas* v. *Grace*, 15 U.C.C.P. 462. In this last case, it was averred that Watson and others would promise the defendant to pay the plaintiff certain specified sums for certain purposes, and that the plaintiff would pay $100 for the same purpose, the defendant promised to pay the plaintiff $100 therefor. The plaintiff's promise was not proved. It was argued that the underlying consideration for each signing was that the others would sign and pay. This view was apparently not accepted, but it was held that the establishment in evidence of the plaintiff's promise to pay would have been sufficient.

In *Anderson* v. *Kilborn*, 22 Gr. 385, a testator told the building committee of a church to collect all they could from other sources and members, and that he would see the building paid for. Proudfoot, V.-C., sustained the payment of a considerable sum by the executors, as in discharge of a debt of the testator. He discusses the question of consideration at p. 396, and says:—

> In the case before me, the testator was interested in having the chapel completed, and tells the committeee to collect all they can from the other members of the church, and he would see the meeting-house paid for. The committee accordingly, relying on this promise, complete the building, incur liability for the expense, collect all they can from the other members of the church, and are out of pocket a large sum. It seems to me to bring the case within the principle contained in the cases cited, and entitled the executors to discharge the debt out of the estate.

In *Berkeley St. Church* v. *Stevens*, 37 U.C.Q.B., 9, an action

to recover on a promise to pay a contribution for rebuilding a church edifice, Richards, C.J., holds, at p. 24:—

> If the trustees, on the faith of the promise, and before it is withdrawn, enter into obligations on the faith of it, incur the expense of plans, and accept proposals to do the work that they were induced to undertake by promised subscriptions, then, it seems to me, that the person making the promise cannot withdraw from it; and when the work is completed, as in this case, if he do not pay he may be sued for the money so promised.

The subject is by no means free from difficulty. That is clearly indicated in the observations of the text writers, and in the judgments of the various Courts where the questions involved have come up for discussion. It must be admitted that some of the *dicta* in *Re Hudson*, 54 L.J. Ch. 811, are of a comprehensive character. But, after all, that case involved nothing more than an announcement of the testator of an intention to make a contribution, as it is put by Richmond, J., in *Williams* v. *Hales*, *supra*, and by Pearson, J., himself. The decision, therefore, held nothing further than that the expression of such an intention was a purely voluntary announcement, and that such a declaration was revocable at any stage.

The weight of opinion seems to be, as I read the authorities, that in the case of a subscription such as this before us, when, in consequence and on the faith of it, advances have been made and liabilities incurred, before revocation, then the promise becomes binding on the subscriber. Other views have been taken of the nature of the underlying consideration in such cases, but, in my judgment, the one I have stated seems to commend itself most strongly.

Here there is no trace, indeed no allegation, of any misrepresentation or mistake. The defendant could not have been surprised that the association proceeded with the construction of the building on his assurance that he would make his promise good for that is the only reason why his subscription and the subscriptions of others were procured. He cannot now have any genuine ground of complaint, if in the circumstances, he be not now allowed to repudiate his promise.

I would dismiss the appeal with costs.

HAGGART, J.A.:—I agree with the reasoning of Cameron, J., and with the conclusion at which he has arrived. Haggart, J.A.

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In addition to the grounds relied upon by him, namely, that, on the faith of the subscription in question and other promised subscriptions, the Y.M.C.A. had erected buildings and incurred obligations which formed a sufficient consideration, I would observe that, in express terms, the document provides that, "in consideration of the subscriptions of others," the defendant promises, etc.

Now, supposing there are 100 subscribers all signing similar documents, then I think the 99 other promises and subsequent payments for the accomplishment of a common object would be a sufficient consideration for each of the individual promises.

The person who drafted the subscription card intended to bind the subscriber with a legal obligation, and I think he has accomplished his object.

I would observe that, by the common consent of all the subscribers, the Y.M.C.A. was made the payee of all the subscriptions. I would dismiss the appeal.

Howell, C.J.M. Perdue, J.A.

HOWELL, C.J.M., and PERDUE, J.A., concurred.

Appeal dismissed.

B. C.

C. A.

ANDERSON v. DAWBER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. November 2, 1915.

1. ATTACHMENT (§ II B—33)—PRIORITIES BETWEEN ATTACHMENT LIENS—SUBSEQUENT EXECUTIONS.

Where there are no other executions in the sheriff's hands at the time, the service of a summons for the attachment of a debt, under sec. 31 of the Creditors Relief Act (B.C.), while not a transfer of the debt itself, creates a charge thereon in favour of the attaching creditor, entitling him to be paid out of the funds the amount of his claim, and is not taken away by the subsequent receipts of other writs of execution by the sheriff.

[*Re Combined Weighing, etc.*, 43 Ch.D. 99; *Norton* v. *Yates*, [1906] 1 K.B. 112; *Cairney* v. *Back*, [1906] 2 K.B. 746, applied; *Ward* v. *Wilson*, 13 B.C.R. 273, disapproved.]

Statement

APPEAL by plaintiff from a judgment of Barker, Co. Ct. J., under Creditors Relief Act.

F. C. Elliott, for appellant, plaintiff.

H. W. R. Moore, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The attaching summons of the appellant, the Hillcrest Lumber Co., was served on the garnishee on January 31, 1914, judgment was recovered against the judg-

ment debtor and the writ of execution delivered to the sheriff on February 20, following.

The other appellants, Murchie & Duncan and Thomas Lazenby, recovered judgment against the judgment debtor on April 14 of the same year, and delivered writs of execution to the sheriff on the following day. Their attaching summonses were served on the garnishee on the 21st of the same month. The respondent served his attaching summons on the garnishee on the 25th of the same month and recovered judgment about a year later, and delivered his writ of execution on April 16, 1915.

No orders absolute were made in any of these suits, but the garnishee paid a sum of money into Court on April 9, 1915. This sum was by the Order appealed from directed to be paid out to the sheriff for distribution under the Creditors Relief Act (ch. 60, R.S.B.C.). If the appellant's contention is right that this money is not distributable under the said Act it will all go to the appellants leaving nothing for the respondent, whereas, under the Order appealed from, appellants and respondent will all share in its distribution.

The decision of the appeal depends on the construction of sec. 31 of the said Act, but the case of the said lumber company must be considered by itself as it differs from those of the other appellants in this, that when that appellant's attaching summons was served, there were no writs of execution in the sheriff's hands, though there were several such in his hands at the time the money was paid into Court by the garnishee.

In my opinion, all the sub-sections of sec. 31 of the said Act are controlled by the opening sentences of sub-sec. (1). The sheriff's interest in moneys attachable arises only when there are executions in his hands, and there are or appear to be insufficient goods of the debtor to satisfy them and his own fees. Clement, J., appears to have given a wider application to this section: *Robert Ward & Co.* v. *Wilson*, 13 B.C.R. 273; but with deference I am not prepared to go as far as that decision goes.

The lumber company says it became entitled to the attached debt from the date of the service of the attaching summons and the receipt by the sheriff after that date of writs of execu-

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tion gave him no right to intervene and did not affect the rights which the lumber company acquired theretofore.

The respondent, on the other hand, contends that sec. 31 (3) makes the fund distributable under the Act, and even if the sheriff had no right to the fund when the lumber company's attaching summons was served, yet the mere service of the summons did not transfer the debt, and when writs of execution subsequently came into the sheriff's hands before the attaching creditor had been paid by the garnishee, all creditors then entitled under the Act were within the purview of sec. 31 (3). I have, therefore, to consider the meaning controlled as aforesaid of these words:—

> Any judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors entitled under this Act.

Now, at the time the debt in question was attached by the lumber company there were no creditors entitled under the Act, that is to say, none who had placed themselves in a position to claim its benefits.

The claim that the service of the summons operated to transfer the debt from the garnishee to the attaching creditor is founded on the language of James, L.J., in *Ex parte Joselyne* (1878), 38 L.T. 661, which seemed so to hold. This language, however, has been explained in the cases of *Re Combined Weighing etc. Co.*, 43 Ch.D. 99; *Norton* v. *Yates*, [1906] 1 K.B. 112; and *Cairney* v. *Back*, [1906] 2 K.B. 746; holding that an attaching Order does not transfer the debt, but that the primary creditor takes, subject to prior equities. It seems to me that the service of the attaching summons, while not a transfer of the debt, creates a charge on it in favour of the attaching creditor which is not taken away by the subsequent receipt of writs of execution by the sheriff. Had there been executions in the sheriff's hands at the time the attaching summons was served, then sec. 31 would have given the sheriff the prior right, *i.e.*, the right himself to attach the debt or to take advantage of the process of judgment creditors commencing their attachment proceedings thereafter.

I think the appellant lumber company is entitled to be paid out of the fund in question the amount of its claim and costs.

As that claim is smaller than the sum of money in Court, the rights of the other appellants have to be considered. With respect to them, following what I have said, I think the sheriff was entitled to the moneys because when their attaching summonses were served the sheriff's right had arisen by reason of his having several writs of execution then in his hands. Their appeal, therefore, fails.

Martin, J.A.

MARTIN, J.A.:—This is a contest under sec. 31 of the Creditors Relief Act between garnishing creditors. The effect of a garnishee order, and the principal cases thereon, have been well considered by Warrington, J., in *Cairney* v. *Back*, [1906] 1 K.B. 746, and it amounts only to a charge upon the debt, and not to a transfer of the property in the debt from the debtor to the garnishor, and an order absolute does not give any further effect to the charge upon the debt which was created by the Order *nisi* which

> is in fact the order which creates the charge once for all, and not merely conditionally. The order absolute which follows is not an order dealing with the charge which has been already created, but is an order on the garnishee to pay the amount of the debt to the garnishor: *per* Walton J., at p. 750.

After giving due regard to the object of the legislature as expressed in secs. 3 and 34, I think the correct view of the expression, "any judgment creditor who attaches a debt" in subsec. (3) of sec. 31, is, that it includes only plaintiff creditors who happen to have judgments at the time they obtain a garnishee order.

Here all the four judgment creditors have executions and three of them are on the same footing in that their garnishing Orders *nisi* were issued after judgment: these three are clearly within sub-sec. (3), and the money must be distributed by the sheriff, but according to my said view of the section, the remaining one (the appellant company) is not, because it got its garnishing order, *i.e.*, attached its debt, before judgment. There is nothing in the Act to justify us in depriving it of the priority that the first attaching creditor has always been held to secure as the result of his diligence—the maxims *vigilantibus non dormientibus jura subveniunt* and *prior tempore, potior jure*, cover the principle, which has been recently recognized in *Slinger* v.

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Davis, 20 B.C.R. 447. I agree that, in any event, "payment of the debt," under sub-sec. (3) should not be made to the sheriff unless "there are in (his) hands several executions and claims, etc., etc.,"—by several, I understand more than one. The position of a garnishing execution creditor in certain circumstances in the working out of the Act is peculiar, for, as was said in *Re Grcer, Napper* v. *Fanshawe*, [1895] 2 Ch. 217, "his right to the money is vested, but liable to be 'divested.'" The appeal should therefore be dismissed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I agree with the Chief Justice.

Appeal allowed in part.

ONT.
S. C.

REX v. MANZI.

Ontario Supreme Court, Lennox, J. June 23, 1915.

1. CRIMINAL LAW (§ II C—51)—CONVICTION WITHOUT JURISDICTION—COMMITMENT FOR TRIAL—ORDER FOR FURTHER DETENTION.

Where a magistrate has proceeded to convict in a case in which he had jurisdiction only to hold a preliminary enquiry and commit for trial, the Court on quashing the conviction may, if the ends of justice require it, direct the further detention of the accused in custody until he can be brought up for the preliminary enquiry although there was no habeas corpus application.

[*R.* v. *Frejd*, 18 Can. Cr. Cas. 110, 22 O.L.R. 566, applied; and see Annotation on "Orders for further detention," at the end of this case.]

Statement

MOTION to quash the conviction of the defendant by a police magistrate for an attempt to commit rape.

E. F. Macdonald, for the defendant.

J. R. Cartwright, K.C., for the Crown.

Lennox, J.

LENNOX, J., said that the magistrate had jurisdiction to hold a preliminary enquiry, and—the prisoner pleading guilty to one of the charges at least—to send him for trial; but the magistrate had no jurisdiction to try the prisoner upon the charge of the indictable offence of attempt to commit rape. The conviction should, therefore, be quashed, and the money paid into Court as security be paid out. There should be no order as to costs.

The motion was as to the conviction only; the prisoner was not brought up on habeas corpus; his discharge was not asked for; and it would not be proper to discharge him, if it were. But it was proper to direct what should be done. The procedure was governed by *Rex* v. *Frejd* (1910), 18 Can. Cr. Cas. 110, 22 O.L.R. 566—the circumstances differing in this respect only,

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that, the prisoner being in gaol, there was no occasion for a remand.

It was suggested that the North Bay gaol was not the gaol to which the prisoner should be sent, the offence having been committed in the district of Temiskaming. But this need not occasion any difficulty, as counsel for the Crown undertook to see that the custody should be proper in this respect.

Order that the prisoner be detained in close custody until he can be brought up for hearing, and that a preliminary hearing of the charge according to law shall be had as speedily as may be, and that peace officers and others concerned shall govern themselves accordingly.

Order for further detention and preliminary enquiry.

Annotation—Criminal law—Orders for further detention on quashing convictions—Cr. Code sec. 1120. Annotation

The case of *Rex* v. *Manzi* above reported brought up the interesting question of the effect on the custody of the accused because of a magistrate's mistake in trying him instead of merely holding a preliminary enquiry where the charge was not the subject of a summary trial by a magistrate limited in his jurisdiction to cases under Cr. Code sec. 773 and not having the extended jurisdiction conferred on "city and town magistrates" under Cr. Code sec. 777. The magistrate in this particular case had no jurisdiction of summary trial under Part XVI. of the Code, as the offence, which was attempted rape, is not one of the indictable offences which a county or district police magistrate may, with the consent of the accused, try summarily under Cr. Code sec. 773 upon a "charge in writing" under sec. 778. There was, of course, no right to take defendant's plea except in so far as a plea may be noted upon a "preliminary inquiry" the procedure for which is governed by Part XIV. of the Code. Under sec. 668, contained in Part XIV., the justice shall "proceed to inquire into the matters charged" in the manner directed by Part XIV. He may summon witnesses (sec. 671), adjourn the inquiry (679c) and admit to bail upon such adjournment (sec. 681).

After the evidence for the prosecution has been taken the accused is to be addressed by the magistrate in the statutory form provided by sec. 684(2) and his answer recorded in Code form 20. The statutory address includes a question to be addressed to the accused followed by what may be termed a "warning" to the accused that he is not bound to answer, and that he is not to expect favour for confessing guilt nor to have any fear from any threat "which may have been held out" to induce a

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Annotation *(continued)*—Criminal law—Orders for further detention on quashing convictions—Cr. Code sec. 1120.

confession. Seemingly Parliament has endeavoured to warn prisoners against confessing through the hope of favour from the authorities for so doing, but the effect of the statutory warning on an accused person who has not been the subject of any threats or promises must be disconcerting because of the suggestion of that possibility. The charge or warning so delivered by the magistrate does not expressly say that no favour is to be given if the accused will now admit to the magistrate the offence indicated by the Crown witnesses' depositions just concluded. He is warned merely against "promises and threats which *may have been* held out . . ," to induce an "admission of guilt." All this takes place *before* he is asked whether he desires to call witnesses (sec. 686), and consequently before he has an opportunity of offering to go in the witness box to give evidence on his own behalf. The question which accompanies the warning is in the following form: "Having heard the evidence, do you wish to say anything in answer to the charge?" (Cr. Code sec. 684.)

It is in answer to this statutory question that the accused, if not represented by counsel, is likely to make a statement in the nature of a plea and either to make admissions or to say that he is not guilty.

When the accused has been duly cautioned by the magistrate, it seems that what he then says by way of confession is admissible on his subsequent trial, although there had been promises or threats held out at some time previous to his appearance before the magistrate. *R.* v. *Bate*, 11 Cox C.C. 686.

The stigma which would bar out his original statements to detectives and others because of unwarranted promises or threats is removed by the statutory warning given by the magistrate. The magistrate may then proceed to re-hear such statements and record them, although their repetition by accused may in truth be under the same compelling cause because of the presence at the magistrate's inquiry of the detective or other person who fraudulently and illegally obtained the first statements. There may, of course, have been a promise of favour or the holding out of threats to induce the accused to make admissions before the magistrate, although he had previously said nothing. Consequently the magistrate's duty is to give the statutory warning, although there had been no suggestion by the Crown of any admissions having been made or of the expectation of such being made to the magistrate himself. *R.* v. *Sansome*, 19 L.J.M.C. 143. In *Manzi's Case*, supra, the magistrate presumably followed the procedure of sec. 778 contained in the "summary trials clauses" (Code

Annotation *(continued)*—Criminal law—Orders for further detention on quashing convictions—Cr. Code sec. 1120. ONT.

Annotation

Part XVI.), and after taking the consent of the accused to summary trial by him, would have reduced the charge to writing in like manner as he would have done for an offence within sec. 773 (ex. gr., theft under $10). He would read the written charge to the accused, whether such consisted of the sworn information adopted by the magistrate as the charge or of a separate document embodying the charge to be tried, and would then ask the accused in conformity with sec. 778(3) "whether he is guilty or not of such charge." In *Manzi's Case* the record of the illegal trial was that the accused pleaded "guilty." There was, therefore, substituted for the strict magisterial warning which should have been given under sec. 684 (preliminary enquiry), an unauthorized taking of defendant's admission of guilt. Such would seem to be ground of prejudice of the accused on his being brought before the same magistrate afterwards for the preliminary enquiry, although the plea is vacated along with the illegal conviction.

The plea of "guilty" having been irregularly taken should not be held equivalent to a like admission which the magistrate could regularly have received, on a preliminary enquiry, only after giving the statutory warning.

The Court has power under Cr. Code sec. 1120 on an inquiry into the legality of the imprisonment questioned on "certiorari, habeas corpus or otherwise," to make an order for the further detention of the person accused and to direct the justice *or any other justices* to take any proceedings, etc., "as in the opinion of the Court may best further the ends of justice." Code sec. 1120 as amended, 7-8 Edw. VII., ch. 18, sec. 14, the Criminal Code Amendment Act, 1908. In the *Manzi Case*, supra, it will be noted that while the invalid conviction was set aside, the further detention which was directed was not that the accused should take his preliminary enquiry before the same magistrate, but left it at large so that the preliminary inquiry should be proceeded with "according to law."

In *R.* v. *Frejd*, 18 Can. Cr. Cas. 110, 22 O.L.R. 566, the defendant was brought before two justices of the peace and charged with issuing a false cheque. He pleaded "guilty," and they convicted him and imposed a sentence of imprisonment in the Central Prison at Toronto. The offence was an indictable one, and not one of those which two justices are, under Part XVI. of the Criminal Code, authorized to dispose of. Being taken to the Central Prison, the defendant obtained writs of habeas corpus and certiorari in aid, and, on the papers being returned

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Annotation

Annotation *(continued)*—Criminal law—Orders for further detention on quashing convictions—Cr. Code sec. 1120.

thereunder, moved for his discharge before Clute, J., who made an order quashing the warrant of commitment, but, instead of discharging the defendant from custody, ordered that he should be remanded to the place where he was convicted, and brought before the two justices for a preliminary hearing on the charge. The majority of the Court held that the defendant was, when in the Central Prison, "in custody charged with an indictable offence," within the meaning of sec. 1120 of the Criminal Code, R.S.C. 1906, ch. 146, now amended by 7 & 8 Edw. VII., ch. 18, sec. 14; and an appeal from the order of Clute, J., was dismissed. Meredith, J.A., was of a different opinion as to that section and thought that the order could not be supported under s. 1120; but that, apart from that enactment, there was power to remand the defendant so that he might be dealt with according to law upon the charge originally made against him; that the proper order would be one discharging him out of his present custody and providing for his proper return to his former custody, so that the proceedings which were properly begun against him might be properly continued. *Rex* v. *Frejd*, 22 O.L.R. 566, 18 Can. Cr. Cas. 110.

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CAMPBELL v. ROUBERT.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. December 20, 1915.

1. MORATORIUM (§ I—1)—FORECLOSURE OF LAND AGREEMENTS AND MORTGAGES—PERIOD OF EXTENSION.

The period of one year extension prescribed by secs. 3 and 7 of the amending Act (Man.), 5 Geo. V., ch. 10, known as the Moratorium Act, to enable purchasers and mortgagors of land to meet defaults, cannot be invoked after the period has once run without the default being made good; consequently payment by a purchaser of a tax arrear, the default of which had run a year, will not revive the operation of the statute as against a vendor seeking enforcement of the contract by reason of such default.

Statement

APPEAL from judgment of Macdonald, J., in favour of plaintiff in an action to foreclose agreement for sale of land.

L. McMeans, for appellant, defendant.

W. S. Morissey and *L. A. Masterman*, for respondent, plaintiff.

Perdue, J.A.

PERDUE, J.A.:—This is an action on a contract for the sale of land whereby the plaintiff agreed to sell to the defendant the land at the price of $4,200, payable, $1,400 in cash and the balance in two payments of $1,400, with interest at 6% per

annum on April 25 in each of the years 1914 and 1915. The agreement, which is dated April 25, 1913, provided that the purchaser should pay taxes from and after the last mentioned date, and that the proportion of the 1913 taxes payable by the vendor was to be deducted from the 1914 payment.

The agreement also provided that in the event of default being made in the payment of principal, interest, taxes, or premiums of insurance, or any part thereof, the whole purchase money should become due and payable. Provision was also made for the cancellation of the agreement by the vendor for default in payment of the moneys or interest due thereunder and for the retention by the vendor of the moneys already paid. The suit is brought by the vendor asking for payment of the instalment of interest due April 25, 1915, and the interest thereon. He demands payment of the amount due, or, in default thereof, cancellation and rescission of the agreement.

The defendant pleads the Act respecting Contracts relating to land, 5 Geo. V., ch. 1, commonly known as the Moratorium Act, and the amendments thereto contained in 5 Geo. V., ch. 10.

The statement of claim was filed on July 6, 1915. It is admitted that prior to the commencement of the action and on April 25, 1915, the taxes for 1913 and 1914 were paid. The only ground upon which the plaintiff was entitled to bring this suit, in view of the provisions of the above Acts, was that the taxes of 1913 were not paid within a year from the time they became payable. Although these taxes remained unpaid for more than a year after they were due, the defendant contends that the payment of them before suit was brought re-instated her in the rights she held under the Acts and that the suit could not be maintained.

The essential provisions of the statute, in so far as this suit is concerned, are those contained in secs. 3 and 7 of the amending Act, 5 Geo. V., ch. 10. Sec. 3 substitutes a new section for the former sec. 2. It declares that in the case of mortgages of land or agreements to sell land, no action or proceeding for foreclosure or sale

shall be taken by or on behalf of the mortgagee, vendor or other person to whom such money may be payable until after some interest or taxes or premium of fire insurance or money paid for such taxes or premium is un-

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paid and in arrear for one year or, in case no interest is payable under such instrument, then until some instalment of principal is overdue for one year.

Sec. 7 is as follows:—

As soon as the period has elapsed during which any action or proceeding mentioned in sec. 3 of this Act may not be commenced, the same or any other action or proceeding may be continued, or commenced and continued in all respects as if neither said Act nor this Act had been passed.

The object of the Act and the amending Act was to give mortgagors and purchasers of land further time to fulfil their obligations. The amending Act prevents proceedings on mortgages and agreements of sale until after some interest or taxes or premium of insurance "is unpaid and in arrear for one year," and if there is no interest payable, then until some instalment is overdue for one year. In the case of agreements such as the one in question, the Act gives to the debtor an extension of time covering a period of one year from the date of his default in paying interest, taxes or insurance. When that period elapses the restriction that was placed upon the taking of proceedings by the mortgagee or vendor is removed. The defendant contends that although she allowed the whole period of a year to elapse after her default in paying the 1913 taxes, the restriction against the bringing of an action revived as soon as she paid the taxes. It seems indisputable that when the year had elapsed the plaintiff had a right to sue, not for the arrears of taxes only, but for his whole claim on the agreement. The restriction upon bringing an action had run its course and was at an end. There is nothing in the statute enabling the debtor to revive the restriction by paying the taxes. The period during which all the plaintiff's rights were suspended in this case was measured by the period of a year from the default in respect of the taxes. When the period prescribed had elapsed and the plaintiff's right of action had revived, there is no power conferred on the defendant to give herself another period of a year by paying the taxes in arrear. Sec. 7, I think, was intended to make this clear:—

As soon as the period has elapsed during which any action or proceeding mentioned in sec. 3 of this Act may not be commenced, . . . any . . . action or proceeding . . . may be commenced and con-

tinued in all respects as if neither said Act nor this Act had been passed. Applying this to the present case, the period had elapsed during which an action might not have been commenced, then, an action might be commenced and continued as if the Acts had not been passed. The extension of time given by the statute had to be measured from some point of time. The point chosen was that when a default was made in paying interest or taxes or insurance. Then when a year had run without the default being made good the period of extension would have lapsed and the operation of the statute would have ceased. I think the proper interpretation is that when once the right of action is restored there is nothing in the Act which again takes it away.

The appeal should be dismissed with costs. The plaintiff is willing to confine the relief sought to a rescission of the agreement and the judgment might be amended accordingly.

Cameron, J.A.

CAMERON, J.A.:—It is contended that at the time of the commencement of the action all principal and interest up to July 3, 1914, were paid and that the taxes were paid June 25 before action and that, therefore, no action can be brought until the principal and interest due April 25, 1915, or the taxes due January 1 last have been in arrear for one year. It is argued on the other hand that the period of postponement having once arrived and come into being, the privilege accorded by the statute to the defendant of withholding the payments due under the agreement and being freed from actions therefor for the term of one year, is gone and cannot revive. The words of sec. 3 mention one such period only and contain no allusion to a second or other period. It is not expressly stated that it is available a second time. It is true the defendant made good her default in the payment of taxes. But, it is argued, the statute does not give a second period of immunity because of this action on her part. That is to say, the privilege, once lost, is gone for ever and if the action is properly maintainable on account of some other default in the agreement it can still be brought notwithstanding a year has not elapsed.

In arriving at an interpretation of the statute we must consider sec. 7, which is by no means as clear as it might be. It says that though an action may not be commenced in the period

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stated, nevertheless, after the lapse of the period when it may not be commenced, if an action has been commenced before the lapse of the period it may be continued, as if the Act had not been passed. Supplying the words which, it would seem to me, though not expressed are implied, the section may be read thus: "As soon as the period has elapsed during which any action or proceeding mentioned in sec. 3 of this Act may not be commenced (then if an action has been commenced during such period) the same or (if an action has not been commenced) any other action or proceeding may be continued, or commenced and continued in all respects as if neither said Act nor this Act had been passed."

If this be the correct reading, then it would appear that sec. 3 is not a complete answer to an action commenced within the period. It would rather be a ground for an application for a stay.

Upon consideration, I would say that sec. 7 means that only one one-year period of immunity from action is provided for, that when once that one-year period has elapsed, it has vanished absolutely and no other one-year period can be taken advantage of by the debtor, that the parties are thereafter placed in respect to the agreement in the same position as if sec. 3 had never been passed, and the defence afforded by that section is no longer available. The right of way to the vendor to bring his action is, once that period has elapsed, made clear provided the purchaser is in default thereunder when the action is brought.

It seems to me the inference which can be fairly made from sec. 3 itself that it was intended thereby to grant to the debtor one period of one year of immunity and no more than one is borne out by sec. 7. Sec. 3 modifies contracts already made and belongs to a class of legislation which is properly subjected to strict construction. There is nothing in that section providing for an additional period after one has gone. I think, therefore, in giving sec. 7 the construction I have stated, I am not giving it any strained construction, but, on the contrary, am reading out of its words what seems to have been the intention of the legislature as that intention had already, to some extent, been indicated in sec. 3.

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In my judgment the taxes for 1913 were in default for more than one year and the defendant was surely liable for her proportionate part of them. The defendant has enjoyed the statutory period of one year during which she could not be brought into Court on this agreement and is entitled to no other. The payments on the agreement were in default when the action was brought, and I consider the plea based on the sec. 3 inapplicable.

Haggart, J.A.

HAGGART, J.A.:—I have been permitted to peruse the reasons of Perdue, J., and I concur in his reasoning and in the conclusion at which he has arrived.

The sole question here is the interpretation to be given to sec. 2 of ch. 1, of the Statutes of Manitoba, passed in 1914, as amended by ch. 10, passed by the legislature in 1915, and also sec. 7 of the latter or amending Act.

Eliminating portions of sec. 2, the text to be considered is as follows:—

> No action or proceeding . . . for foreclosure or sale . . . shall be taken by or on behalf of the . . . vendor . . . until after some interest or taxes . . . is unpaid and in arrear for one year.

If this section alone governed the rights of the parties, then I would hold that the conditions for continuing the absolute stay of proceedings had not only arisen, but continued to exist, and did exist when this action was commenced.

But sec. 7 has to be interpreted. It is peculiarly worded. The text is as follows: (see judgment of Perdue, J.).

This certainly limits the signification of the former sec. 2 in the original Act and 3 in the amending Act, and applies to the question before us:—

> The same or any other action or proceeding may be continued or commenced and continued . . . as if neither the said Act nor this Act had been passed.

If what was given by the former section to the debtor was as I have above indicated, then it was taken away by this sec. 7. I would dismiss the appeal.

Howell, C.J.M. Richards, J.A. (dissenting)

HOWELL, C.J.M., and RICHARDS, J.A., dissented.

Appeal dismissed.

CAN.

EX. C.

JOHNSON v. OXFORD KNITTING CO.

Exchequer Court of Canada, Cassels, J.

1. PATENTS (§ I—4)—CONSTRUCTION OF—WHOLE INSTRUMENT TO BE LOOKED AT.

The proper mode of construing a patent is the same as would be applied in the case of any other written instrument, and it is not in accordance with the true canons of construction to read the claim alone without the specification; the whole document must be looked at to see what the claim is.

[*Consolidated Car Heating Co.* v. *Came*, [1903] A.C.509, followed.]

Statement

ACTION for damages for alleged infringement of a patent.

A. W. Anglin, K.C., for plaintiffs.

W. C. Languedoc, K.C., for defendants.

Cassels, J.

CASSELS, J.:—The statement of claim in this case was filed by Horace G. Johnson, and Henry S. Cooper and Penmans, Ltd., as plaintiffs, against the Oxford Knitting Co. Ltd., defendant. The claim is based upon Letters Patent, No. 130,413, bearing date January 17, 1911, granting to Johnson and Cooper certain rights for an invention consisting of a certain new and useful improvement in garments.

The plaintiffs allege that the defendants have infringed their patent, and ask for an injunction restraining them from further infringing, with the usual claim for damages and costs.

The case came on for trial before me at Toronto on September 28, 29, and 30 last. I have been unable to dispose of the case earlier on account of pressure of work. The very able and astute argument of the counsel for the plaintiffs shook the views that I had formed at the trial, and I deemed it necessary, before coming to a conclusion, to very carefully consider the evidence adduced at the trial, and the various exhibits.

I may say that, after the best consideration I can give to the case, I am of opinion that the argument of Mr. Anglin that the plaintiff's patent should be construed broadly, as a quasi-pioneer patent, is not well founded. I will give some of my reasons for this view subsequently.

At the trial the plaintiffs' counsel relied upon the 4th claim of the patent, and I have not thought it necessary, as no argument was adduced before me on behalf of the defendants, to consider the effect of the first 3 claims of the patent as affecting its validity.

The 4th claim of the patent does not contain the words, as the previous 3 claims do, at the end of the claim, "substantially as described." I do not think this affects the case one way or the other.

Before dealing with the merits I may cite one or two cases as to the manner in which a patent should be construed. An important case, is *Edison-Bell Phonograph Corporation* v. *Smith*, 10 T.L.R. 522. I do not find a report of this case in the regular reports. In this particular case the contention was raised that the claim was too broad, as the claim itself had not the words "substantially as herein described," and had to be construed in a broad way. I quote the language of the Master of the Rolls:—

The first question was, what was the proper mode of construing a patent? The rules of construction were the same as would be applied in the case of any other written instrument. It was not in accordance with the true canons of construction to read the claim alone without the specification. The whole document must be looked at to see what the claim was. In *Arnold* v. *Bradbury*, L.R. 6 Ch. App. 706, it was contended that the claim, when read alone, was too large, as including something which could not be patented, and that therefore the patent was bad. Lord Hatherley, however, said that the specification must be read first to see what the inventor had described as the thing to be patented. He said: "I do not think that the proper way of dealing with this question is to look first at the claims, and then see what the full description of the invention is: but rather, first, to read the description of the invention, in order that your mind may be prepared for what it is the inventor is about to claim." Therefore, in order to construe the instrument, the description of the invention must be looked at to see whether the claim went further than the specification. That rule had been followed in subsequent cases. That was the true rule, and it was the same as was applicable to any other instrument. In the present case there was an elaborate and detailed specification of what the inventor wished to patent. It was an invention of certain improvements in phonograph machines. He described those improvements minutely. It was not suggested that the descriptions in the specification were too large. The objects and the means of carrying out those objects were described. Then the claims were headed with a statement that the inventor, "having now particularly described and ascertained the nature of this invention and in what manner the same is to be performed," claimed, etc. Claim No. 1 was the one chiefly contested. It was said that it was too wide. But in the specification, the inventor had pointed out the exact manner in which he would carry out the object stated, and any one reading the claim reasonably, would come to the conclusion that all he meant to claim was what he had previously described and shewn. Therefore, the claim was not too large, and the patent was not bad upon that ground."

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In the case of *Badische Anilin Und Soda Fabrik* v. *Levinstein*, 12 A.C. 710 at 717, Lord Herschell is reported as stating that Fry, L.J., had complained of the course pursued at the trial in not calling witnesses to prove what the invention is. He states:—

I cannot think that this complaint was well founded. The question what the real invention is must be answered from a critical examination of the specification.

Another case that might be referred to is the case of *Consolidated Car Heating Company* v. *Came*, [1903] A.C. 509—the judgment of the Privy Council in which Lord Davey pronounced the judgment of the Board. In that case the claim had to be construed in the light of the specification.

Any number of cases might be cited for the same proposition. Before referring to the specifications of the patent in question, it may be well to state that union suits, so-called, were old at the date of the alleged invention of the patentees. These union suits, so-called, were otherwise styled combination undergarments and were formed in one piece. The effort was to obtain a union under-garment with a permanently closed crotch, with a slit or opening at the back of sufficient depth to permit the wearer to perform the operations graphically described by the patentee.

Numerous prior patents have been filed, and evidence adduced before me to shew the gradual advance and improvement in the art. The fourth claim sued upon reads as follows:—

A permanently closed crotch under-garment having a posterior opening extending below the crotch and a sewed-in flap constituting a closure for said opening, said flap having one of its lateral margins permanently sewed to the garment from a point above the seat to a point in one leg below the crotch, the other lateral margin being free from a point above the seat to a point in the opposite leg below the crotch.

I agree with Mr. Anglin that the crotch referred to is the crotch in the garment and not the crotch of the human body.

It is admitted that a permanently closed crotch under-garment is old. It is shewn by the art that the extension of a flap extending below the crotch to the leg is also old. This is made clear by what is called the Austrian patent to Caroline Tichy of January 25, 1907. This patent shews the covering with

two flaps instead of a *single* flap. The exhibit produced of the Holmes Knitting Co., namely, ex. D, referred to by Lacher, shews a permanently closed crotch, but with *two* flaps.

In arriving at the question of the construction of a patent of this character, and whether it is to be construed as a pioneer patent or merely a patent for a specific mode or method of construction, a considerable amount of stress has to be laid upon the nature of the article for which the invention is sought; and I think the case cited before me by Mr. Languedoc, of *Dalby* v. *Lyons*, 64 Fed. Rep 376, is very apposite.

According to the evidence of the patentee, Johnson, he seems to have discovered what would have been obvious to anybody, that a longer slit or opening would have answered all his objections to the previous union garments. His difficulty apparently, which lasted for a considerable period, was to devise some kind of flap which would act as a cover for this extended slit. The idea apparently flashed upon him one Friday night of how to devise such a covering. He may or may not have known of this Austrian patent, which indicates by the drawing and specification the extension down the leg. I should judge that what he was aiming after was to break away from the prior art and obtain something which would enable him to get a construction patent, and that idea has been carried out in the description in the patent.

Bearing in mind the previous state of the art, and of the character or nature of the article in question, I turn to his specification. He says:—

> This invention relates to that class of underwear known as union suits, and has for its chief object, to provide an improved construction of such garment permitting the use of a permanently closed crotch and *dispensing with the use of double flaps* or a single, wide drop-fall or flap, with their numerous fastenings, heretofore used to cover the posterior opening, while, at the same time, presenting a posterior opening of ample dimensions for its required purpose *covered by a single flap* capable of being secured by a single button or other fastening. In *other* words, my present invention is designed to supply a garment combining in its construction the two most essential requisites for comfort and convenience in garments of this character, namely, a permanently closed crotch, and a posterior opening of ample dimensions and convenient location that will not gape to expose the person, and *closed by a single flap* requiring but a single button or equivalent fastening.

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He then proceeds to describe his invention, and towards the end of the specification he states:—

From the above, it will be seen that my invention provides a garment having a *permanently closed crotch* and a posterior opening extending from a point near the waist-line to a point below the crotch in one leg only. By carrying this opening obliquely from a point substantially in the waist line down to a point on the inner side of the leg below the crotch, I provide a construction affording an opening of ample dimensions and not requiring twisting or lateral displacement of the intermediate portion of the garment when in service. *This opening is covered and fully protected by the single stitched-in flap L*, requiring to be buttoned at but a single point to effect a perfect closure.

His claim sued upon as No. 4, is, as I have stated,

a permanently closed crotch undergarment having a posterior opening extending below the crotch *and a sewed-in flap* constituting a closure for said opening, said flap having one of its lateral margins permanently sewed to the garment from a point above the seat to a point in one leg below the crotch, the other lateral margin being free from a point above the seat to a point in the opposite leg below the crotch.

The defendants do not use the single flap; their garment has two flaps—and as far as I can see does not differ from that of the Holmes Knitting Company. Lacher, in his evidence, shews that there are 2 flaps in the Holmes' garment; that there are 2 flaps in the defendants' garment; also 2 flaps in what is called the fit-to-fit garment.

McLoughlin shews the same thing, and so does Meyer—and I think a consideration of the garments themselves indicates that these witnesses are correct in the view which they have expressed.

It was contended before me that the patentee was in reality entitled to 2 flaps. I do not think this contention is correct. I do not think that patent would have been granted to him had it been as large as contended for by counsel.

After the best consideration I can give to the case, and bearing in mind the specification which I have quoted, and the construction which I am forced to place upon the patent, having regard to the prior art and evidence, I am of opinion that the plaintiffs have failed to prove infringement on the part of the defendants. Having come to this conclusion, and following the precedent set before me in the case of the *Consolidated Car Heating Co.* v. *Came*, [1903] A.C. 509, it is unnecessary for me

to enter into the question of the validity of the plaintiffs' patent. I may say, however, that were I called upon to pass upon this point, I would find grave difficulty owing to the manner in which the case has been presented for my consideration. With the exception of what is called the Austrian patent to Tichy, I have had no assistance by evidence of experts or on examination of the patents by counsel.

I would refer to one case in the Supreme Court of the United States which is worthy of perusal, namely, *Bischoff* v. *Wethered*, 9 Wall., p. 812. The language of Lord Westbury referred to in that case, can be seen in Frost on Patents, 4th ed., at pages 108, 144 and 148.

Betts v. *Menzies*, 10 H. of L. Cases, p. 117, may be referred to on the same point.

Another case may be looked at, lately decided by the House of Lords, *Pugh* v. *Riley Cycle Co. Ltd.*, 31 R.P.C. 266. It has not much bearing upon the case before me, but is very important as shewing how publication may be made by a prior specification. A drawing, even without a specification may amount to publication, if it could be understood by any machinist, and would be prior publication. See Terrell on Patents, 5th ed., p. 80; and also *The Electric Construction Company* v. *The Imperial Tramways Co.*, 17 R.P.C., p. 550.

There is not much to be gained by an elaborate citation of authorities in these patent cases. Authorities go into the thousands, but I think the principles which govern are well understood.

As I have said, my opinion is, for the reasons I have stated, that the defendants in this particular case do not infringe. I decline to pass one way or the other on the validity of the patent.

Action dismissed.

Annotation—Patents—Construction of—Effect of publication. **Annotation**

(By RUSSELL S. SMART, B.A.M.E., of the Ontario Bar, Ottawa.)

The law as to infringement is substantially the same in Canada as in Great Britain: *Electric Fireproof Co. of Canada* v. *Electric Fireproof Co.* (1910), 43 S.C.R. 182, at page 193.

The question of infringement involves both law and fact, and in the matter of law it is the function of the Court to construe the specification

CAN.

Annotation

Annotation *(continued)*—Patents—Construction of—Effect of publication.

and claims to determine what is the patented invention: *British Dynamite Co.* v. *Krebs* (1896), 13 R.P.C. 190.

The construction of the claims and specifications will be determined by the Court like the construction of any other written instrument, the Court placing itself in the position of some person acquainted with the surrounding circumstances as to the state of the art and manufacture at the time, and making itself acquainted with the technical meaning in art or manufactures which any particular word or words may have: *The British Dynamite Co.* v. *Krebs* (1896), 13 R.P.C. 190, at 192; *Nobel's Explosives Co.* v. *Anderson* (1894), 11 R.P.C. 519.

The patented invention, that is the invention which is protected by the patent, is what is claimed and nothing more. In *Nobel's Explosives Co.* v. *Anderson* (1894), 11 R.P.C. 119, Romer, L.J., said, at p. 128: "In order to make out infringement it must be established to the satisfaction of the Court that the alleged infringer, dealing with what he is doing as a matter of substance, is taking the invention claimed by the patent, not the invention which the patentee might have claimed, if he had been well advised or bolder, but that which he has in fact and substance claimed on a fair construction of the specification:" *Bradford Dyers Association* v. *Bury* (1902), 19 R.P.C. 1; *Bunge* v. *Higginbottom Co. Ltd.* (1902), 19 R.P.C. 187.

There is, therefore, no such thing as infringement of the equity of a patent. In *Dudgeon* v. *Thompson* (1873), 3 App. Cas. 34, Lord Cairns said, at p. 44: "There used to be a theory in this country that persons might infringe upon the equity of a statute, if it could not be shewn that they had infringed the words of the statute; it was said that they had infringed the equity of the statute, and I know there is, by some confusion of ideas, a notion sometimes entertained that there may be something like an infringement of the equity of a patent. My Lords, I cannot think that there is any sound principle of that kind in our law; that which is protected is that which is specified, and that which is held to be an infringement must be an infringement of that which is specified."

In *Moffatt* v. *Leonard* (1905), 5 O.W.R. 259, at p. 261, Meredith, C.J., said: "That they have not adopted exactly the same form as that used by the plaintiffs is immaterial, if they have, as I think they have, taken substantially the substance and pith of his invention." The way the matter is generally put, is that infringement consists in taking the "substance of the invention." Instead of "substance" the words "pith and marrow" are sometimes used. The use of these words has, however, been criticized as being misleading: *Incandescent Gas Light Co.* v. *De Mare Incandescent Gas Light Co.* (1896), 13 R.P.C. 301, *per* Wills, J.

While the subject-matter of the patent must be determined by the Court as a matter of law by construing the specifications and claims, it is not sufficient to consider merely the specification and claims to decide whether there has been infringement or not. Infringement involves the question of fact as to whether the substance of the invention has been taken, and this necessitates an examination as to what is the essence or substance of the invention. The substance of the invention must be got at by ascertaining what the step is which has actually been taken by the inventor, and this can only be done by considering not only what has been

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Annotation

Annotation *(continued)*—**Patents—Construction of—Effect of publication.**

claimed, but the state of existing knowledge on the subject, what is generally described as the state of the art, at the date of the patent, and by obtaining an understanding of the invention itself.

In *Consolidated Car Heating Co.* v. *Came*, [1903] A.C. 509 (a Canadian case), Lord Davey said, at p. 516; "Their Lordships cannot adopt the view apparently taken by the learned Chief Justice that the matter is to be determined simply on reading the specification. They think that according to established authority, the Court is bound to decide as a fact whether the alleged infringer has taken the substance of the invention, and, in forming an opinion on that question, to have regard to the evidence as to the existing state of knowledge on the subject at the date of the patent, and as to the operation of the machine."

The principles of construction referred to are applied somewhat differently to two distinct classes of invention. The first class is that which involves the application of a new principle, such as referred to in the case of *Proctor* v. *Bennis* (1887), 4 R.P.C. 337. The second class is that in which the invention consists of a new method of applying an old principle, and such as referred to in the leading case of *Curtis* v. *Platt* (1863), 3 Ch.D. 135. Where the principle is new, the Court will give a wide construction to the claims, but where the principle is old and its application only is new, then a narrower construction must be given as in the case above reported: *Moore* v. *Thompson* (1890), 7 R.P.C. 325.

The following Canadian cases may be consulted: *Short* v. *Federation Brand Salmon Canning Co.* (1899), 7 B.C.R. 197, 31 S.C.R. 378; *Clinton Wire Cloth Co.* v. *The Dominion Wire Fence Co.* (1907), 11 Ex. C.R. 103, 39 S.C.R. 535; *Chamberlain Metal Weather Strip Co. of Detroit* v. *Peace Metal Weather Strip Co.* (1905), 9 Ex. C.R. 399, 37 S.C.R. 539; *Carter & Company* v. *Hamilton* (1893), 3 Ex. C.R. 351, 23 S.C.R. 172; *American Dunlop Tire Co.* v. *Anderson Tire Co.* (1896), 5 Ex. C.R. 194; *The American Dunlop Tire Co.* v. *Goold* (1899), 6 Ex. C.R. 223.

On the question as to the effect of publication, the law is in some doubt in Canada. There is no doubt that publication before invention would render a patent bad because the invention would not be new.

The further question arises as to what, if any, effect has publication made after invention, but before application for patent. In England such publication is fatal to the grant of a patent: *Mouchel* v. *Cuignet*, 23 R.P.C. 649, 26 R.P.C. 280.

Section 7 of the Canadian Patent Act reads in part:—

"Any person who has invented any new and useful art, machine, manufacture or composition of matter . . . which was not known or used by any other person before his invention thereof; and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada may, etc." Public use and sale is referred to, but not publication.

Section 17 provides that the Commissioner may refuse to grant a patent "(*d*) When it appears to him the invention has been described in a book or other printed publication before the date of the application, or is otherwise in the possession of the public."

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Annotation

Annotation *(continued)*—Patents—Construction of—Effect of publication.

This section was undoubtedly derived from the American Act of 1836, and it has been held that the time of publication referred to is the time of invention: *Bartholomew* v. *Sawyer* (1859), 4 Blatch. 347.

The question seems still open in Canada, but it would appear that sec. 17 is subsidiary to the provision of sec. 7, and that if objections were raised under sec. 17, an applicant would have the opportunity of shewing that he had made the invention subsequent to the date of any publication cited against him.

SASK.

S. C.

HAUG BROS. v. MURDOCK.

Saskatchewan Supreme Court, Elwood, J. October 8, 1915.

1. SALE (§ II C—35)—FARM MACHINERY—STATUTORY REQUIREMENTS AS TO BOILERS—NON-COMPLIANCE WITH—EFFECT.

Regulation 1 of the Department of Public Works, issued under sec. 19 of the Steam Boilers Act, R.S.S., ch. 22, controls and forms part of the specifications set forth in the regulations, and shews that an absolute compliance with the regulations is not required by the Department, and that a sale could be made of engines which do not strictly comply with the regulation, and the effect is, not to prohibit the sale, but to penalize the engine by reducing the pressure allowed, and consequently does not render any sale void on that account.

2. SALE (§ I D—20)—DEFECTIVE TRACTION ENGINE—ACCEPTANCE AND RETENTION—EFFECT.

Where, in a sale of a traction engine a purchaser accepts the engine and continues to use it after the discovery of defects, he is thereby precluded from later returning the engine.

[*Alabastine Co.* v. *Can. Producer, etc., Co.*, 17 D.L.R. 813, 30 O.L.R. 407, applied.]

Statement

ACTION to recover balance of purchase price on sale of machinery.

H. Y. MacDonald, K.C., for plaintiff.

G. E. Taylor, K.C., for defendants.

Elwood, J.

ELWOOD, J.:—On May 22, 1911, the defendant signed a contract to purchase from the plaintiff one Avery self-steering traction engine, rated at 20 h.p., Alberta Special. This order was obtained through the instrumentality of one Burr, an agent of the plaintiff. At the time of taking this order I find that the said Burr represented to the defendant that this engine would work in Saskatchewan, and that it was built according to the Saskatchewan Steam Boilers Act. The agent at the same time told the defendant that he was foolish to get a 20 horse-power, that he should get a 30, and that the 30 was a stronger and better engine, and would last longer. On June 2, the defendant wrote the plaintiff to substitute for the 20 h.p. a 30 h.p. engine, and accordingly a 30 h.p. engine was shipped to the defendant.

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who subsequently took delivery of the engine. From almost the beginning, the engine proved unsatisfactory. It consumed a large quantity of water, was hard to steam, and leaked at the flues. The expert of the plaintiff told the defendant that the leakage in the flues would take up shortly by expansion, and the defendant operated and continued to operate the engine, but, I find, at a loss. He was not able to run it continuously, and had to stop from time to time on account of the leaking flues. In May or June, 1912, the defendant replaced a number of the flues, and then discovered for the first time that the flues inserted in the tube plate had around them copper ferrules in order to give them a tighter fit. The evidence shews, and I find as a fact, that boiler tubes should be fitted into the tube plate by having the hole in the plate as nearly as possible the same size as the tube, and the tube then forced through the hole by a slight pressure, and the ends of the tubes beaded on to the plate; that it is not good workmanship to use a copper ferrule, the copper being a different metal from the steel, of which the tubes and plate are constructed, is affected so far as expansion and contraction are concerned differently from the steel, and the result is an imperfect fit, and leakage. The defendant, after discovering that copper ferrules had been used, continued to use the engine during 1912, and to the end of 1913, with, however, very poor results; in fact I find that the engine was never satisfactory, and continued from time to time to leak, and that in consequence of this the defendant was not able to operate the engine continuously, and operated it at a loss. This action is brought to recover the unpaid portion of the purchase-price.

Sec. 19 of ch. 22 of R.S.S., known as the Steam Boilers Act, provides as follows:—

> Every new boiler sold or exchanged, for use within Saskatchewan from and after the 1st day of January, 1911, shall be constructed in accordance with specifications set forth in the regulations issued by the Department.

Sec. 43 of the same Act provides:—

> Any person guilty of a breach of any of the provisions of this Act for which no provision is herein made shall, on summary conviction thereof, be liable to a penalty not exceeding $50.

The Department of Public Works issued certain regulations

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under the provisions of the above sec. 19. Sec. 10, of those regulations is as follows:—

101.—TUBES.

Tubes must fit the holes in tube sheets as nearly as possible before expanding, the end nearest fire being a driving fit when applied. The ends must be prepared for this, and the holes in sheets be truly round, with edges slightly rounded and true to size.

The hole in sheet where tube is entered is to be only large enough to allow free entry of tube.

Tubes must be expanded by roller expanders.

The ends of tubes must not extend more than three-sixteenths to one-quarter inch beyond sheet, according to the thickness of the tube, and then be beaded against the tube sheet without cracking, to ensure which the ends of tubes must be annealed.

The hand welding of tubes is prohibited.

It is contended that, as the engine in question does not comply with sec. 101, therefore the sale of an engine not complying with that regulation is prohibited and void. I find as a fact that the tubes in the engine do not as nearly as possible before expanding fit the holes, nor is the end nearest the fire a driving fit when applied, nor is the hole in the sheet where the tube is entered only large enough to allow free entry of the tubes. Regulation 1 provides in part as follows:—

All boilers that do not comply in every particular with these regulations will be penalized by the inspectors, by a suitable reduction in pressure allowed.

As I stated above, I find as a fact that the construction of this engine does not comply with regulation 101. But it seems to me that regulation 1 controls and forms part of the specifications and shews that an absolute compliance with the regulations was not required by the Department, and that a sale could be made of engines which did not strictly comply with the regulation, and the effect is, not to prohibit the sale, but to penalize the engine by allowing a reduced pressure. That being so, then, in my opinion, the sale was not rendered void on that ground.

It was further objected that the engine was represented to have been constructed according to the Saskatchewan Steam Boilers Act. I find as a fact, however, that the only representation in this respect was made with respect to the 20 h.p. engine, and that there was no representation made with respect to the 30 h.p. engine. I also find as a fact that the representation

with regard to the 20 h.p. engine was false, but was made innocently.

It was further objected that the engine delivered was not the one sold, that, on account of its defective construction or workmanship, it was not capable of developing continuously 30 h.p., and was not true to type. There was filed at the trial copies of the plans and specifications furnished by the plaintiff to the Department under the Act, and I am of the opinion, and find, that these specifications do not provide for copper or any ferrules being used on the flues, and in fact that the proper construction of the specifications is that no ferrules shall be used, and the defendant, in ordering a 30 h.p. engine, had the right to expect that the engine would be constructed in accordance with those specifications. The defendant, however, having accepted the engine and having continued to use the engine after the discovery of the use of the ferrules, is, in my opinion, precluded from now returning the engine. In *Alabastine Co. of Paris, Ltd.* v. *Canada Producer Gas Engine Co. Ltd.*, 17 D.L.R. 813 at 817, 30 O.L.R. at p. 407, Meredith, C.J.O., is reported as follows:—

> In the recent case of *Wallis Son & Wells* v. *Pratt & Haynes*, [1910] 2 K.B. 1003, [1911] A.C. 394, the difference between a condition and a warranty was considered, and the rule referred to by Mr. Benjamin was stated in somewhat different language by the Lord Chancellor, [1911] A.C. at p. 395. He there says, "If a man agrees to sell something of a particular description, he cannot require the buyer to take something which is of a different description; and a sale of goods by description implies the condition that the goods shall correspond to it; but if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it, but he may treat the breach of the condition as if it was a breach of warranty, that is to say he may have the remedies applicable to a breach of warranty."

The defendant being reduced, then, to relief for a breach of warranty, it remains to be considered whether or not there is anything in the contract which deprives him of that remedy.

It seems to me that the provisions in the contract sued on deprive the defendant of the right to now complain of a breach of warranty; and that being so, there must be judgment for the plaintiff against the defendant for the amount sued on and costs, and for the plaintiff dismissing the counterclaim with costs.

Judgment for plaintiff.

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REX v. OMA.

Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Brown and Elwood, JJ. November 20, 1915.

1. ALIENS (§ III—24)—ASSISTING ENEMY ALIEN TO LEAVE CANADA—CR. CODE, SEC. 75A.

A jury trying a charge under Cr. Code, sec. 75A for assisting an enemy alien to leave Canada may properly infer that the person assisted is an alien enemy on his testimony that his earliest recollections are of residence in the enemy country and proof that he had registered in Canada as an alien enemy.

[*Guerin* v. *Bank of France*, 5 Times L.R. 160, referred to.]

2. ALIENS (§ III—24)—"ASSISTING" ENEMY ALIEN TO LEAVE CANADA—ESCAPE PREVENTED.

Where an enemy alien starts for the boundary line with the intention of leaving Canada he is to be considered as in the act of leaving Canada on every part of the journey, and any person knowing such intention on his part and doing any act in furtherance of that intention thereby assists such enemy alien within the meaning of Cr. Code, sec. 75 A, whether the latter got across the boundary line or not.

[Compare *R.* v. *Nerlich*, 25 D.L.R. 138, 24 Can. Cr. Cas. 256.]

Statement

CROWN case reserved by LAMONT, J., as follows:—

"The accused was charged before me on two counts: (1) that he did assist subjects of a foreign country at war with His Majesty to leave Canada without the consent of the Crown; (2) that he did assist certain alien enemies of His Majesty who were prisoners of war in Canada, but suffered to be at large on their parole in Canada, to escape from Canada.

"The evidence shewed that in the month of May last the accused, knowing that there were a number of foreigners in Regina who were desirous of getting into the United States, made an arrangement with an automobile firm to have ten of them taken to the boundary line between Canada and the United States or to a place close thereto, well knowing that the intention of such foreigners was to cross over said boundary line and leave Canada. For making this arrangement the accused got twenty-five cents from each of the passengers taken and ten dollars from the automobile firm for procuring the passengers. The firm started two automobiles with five passengers and a driver in each, but they did not reach the United States boundary, as they were all arrested some miles on this side of the line.

"Two of the passengers, Franz Sysak and Milan Warga, testified on behalf of the Crown. Both swore that the date of their earliest recollection—which was when they were about five years of age—they were living in Austria-Hungary. Sysak served in the Austrian army before coming to America, which was some thirteen

years ago. Warga did not serve in the army, being rejected as unfit. He came to America three years and three months ago. He testified that no one but a subject of Austro-Hungary could serve in the Austrian army. They both swore that they had not become naturalized in any country since leaving Austria-Hungary, and they admitted they had registered as alien enemies pursuant to the Order-in-Council of October 28th, 1914, which required all aliens of enemy nationality in cities, etc., to attend before registrars and answer such lawful questions as might be put to them. Neither of them had obtained the consent of the Crown to leaving Canada.

"At the close of the case for the Crown, I withdrew the last count from the jury on the ground that there was no evidence that any of those assisted by the accused were prisoners of war.

"Counsel for the accused applied to have the first count also withdrawn from the jury on the ground (1) that there was no proper evidence that the persons for whose transportation the accused had arranged were subjects of Austria-Hungary, and (2) that as they did not get across the boundary line it could not be said that he assisted them to leave Canada within the meaning of sec. 75 A of the Criminal Code. In reference to the first point, I instructed the jury that from the fact that at their earliest recollections both Sysak and Warga were residing in Austria-Hungary, and the fact that Sysak served in the army and that Warga would have done so had he not been rejected as unfit, and the further fact that both of them registered as alien Austrian enemies, they (the jury) were at liberty to draw the inference that both Sysak and Warga were subjects of Austria-Hungary.

"On the second point, I instructed the jury that where the subject of a foreign state at war with His Majesty intended to leave Canada and started for the boundary line to carry out such intention, he was in the act of leaving Canada on every part of the journey for that purpose, and that if the accused, knowing a subject had such intention, did any act furthering to that intention, he was assisting such subject to leave Canada within the meaning of sec. 75A of the Code, whether he got across the boundary line or not.

"The jury found the accused guilty.

"The question reserved for the Court is:—

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"Were the instructions given by me to the jury on either of these points erroneous?"

H. E. Sampson, for the Crown.

G. A. Ferguson, for accused.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—In my opinion there was ample evidence upon which the jury could find that the persons in question were alien enemies and the jury was properly charged on that point.

On the second point I also agree with what was said to the jury by the learned trial Judge. To say any more would be simply to repeat the summary of the evidence and of his charge as stated by the trial Judge.

As an example of what has been considered sufficient evidence to go to a jury on the question whether a person was in fact a British subject, I might refer to the case of *Guerin* v. *Bank of France* (1888), 5 Times L.R. 160. Mr. Dicey, in his Conflict of Laws, 2nd ed., p. 165, cites this case in support of his opinion, that whether a person is in fact a British subject may be decided by a jury on the facts of the case in accordance with the law determining the acquisition of British nationality.

The question submitted to us, must, therefore, be answered in the negative.

Conviction affirmed.

FINKBEINER v. YEO.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. December 20, 1915.

1. SOLICITORS (§ II A—22)—LIABILITY TO CLIENT—DEFECTIVE DRAUGHTSMANSHIP—FAILURE TO PROVIDE ANNUAL PAYMENT OF INTEREST.

A solicitor, who is retained to draught a mortgage, is responsible for damages resulting to his client in consequence of his failure to include in the instrument a sufficient provision for the yearly payment of interest thereon.

[*Whiteman* v. *Hawkins*, 4 C.P.D. 13, applied.]

2. INTEREST (§ II A—60)—ANNUAL PAYMENT—"PER ANNUM"—MEANING OF.

The words "at 6% per annum," as applied to a payment of interest, simply indicate the method of computation and the rate allowable by way of interest, but do not imply a contract to pay yearly or each year, merely signifying that the interest becomes payable at the time of the maturity of the principal obligation.

[*Atherstone* v. *Bostock*, 2 Man. & G. 511, 719, applied.]

Statement

APPEAL by defendant from judgment for plaintiff in an action for counsel fees. The judgment was varied.

L. J. Elliott, for appellant, defendant.

J. C. Collinson, for respondent, plaintiff.

Howell, C.J.M.

HOWELL, C.J.M.:—I have read the judgment of my brother Haggart, and I agree with the conclusions at which he has arrived. It seems to me that the words within the brackets in that part of the agreement quoted in his judgment increase the plaintiff's difficulty. They shew by strong implication that the principal and interest were to be paid at the same time. An agreement to pay principal at a fixed time "with interest at 6 per cent. per annum" I have always thought made principal and interest payable at the same time, the words "per annum" merely fix the rate of interest.

It is significant that after the agreement was executed the agent for Gray drew up a mortgage in which interest and principal were made payable at the end of the term.

Clearly the solicitor knew that it was intended by his client to have the interest payable annually and because of his oversight the agreement was not corrected and it is but fair to infer that this neglect caused, at all events, some of the loss. The American cases cited by Haggart, J., are in harmony with my view of the law.

Perdue, J.A.

PERDUE, J.A.:—From a careful perusal of the evidence I have come to the conclusion that the solicitor allowed his client

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to sign the mortgage in the condition it was in before the amendment. On the solicitor's own admission he filed the mortgage, while it was in that condition, along with the transfer in the land titles office. He completed the transfer of the farm, accepting for his client a mortgage, none of the interest on which was payable until the expiration of 5 years.

There can be no doubt that the solicitor revised the agreement. The clause I have above cited mentions no specific time for the payment of the interest. It does appoint a time for the payment of the principal. The words, "at 6% per annum," simply indicate the method of computation; they provide the measure of the allowance by way of interest; they do not imply a contract to pay yearly or each year but provide a rate: See *Atherstone* v. *Bostock*, 2 Man. & G. 511. In the absence of a provision in the contract appointing a time or times for the payment of the interest it will become payable at the time stated for the payment of the principal. It is to be noted that the clause in question states that the principal is to be paid on or before 6 years "with interest, etc." If, therefore, the principal were paid in 6 months the interest would be payable with it at that time; if in 6 years the interest would also be then payable with the principal.

Dealing with the whole transaction, the interest provision in the agreement, the registering by the solicitor of a transfer of the land to the purchaser and the acceptance and registration by him at the same time of a mortgage to the vendor securing the balance of the purchase money which contained a clause seriously depreciating the value of the security, and which was contrary to the vendor's intention, and the fact that the vendor had to pay, and did pay, a considerable sum to get the mortgage put in the form intended in the first place; all these facts taken together establish, in my opinion, a case of actionable negligence against the plaintiff.

The evidence is not free from doubt as to whether the whole of the $500 was paid for the purpose of getting the amendment in the mortgage. I would fix the damages on the counterclaim at the sum of $300. The plaintiff should pay the costs of the appeal.

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Cameron, J.A. (dissenting)

CAMERON, J.A. (dissenting):—The alleged mistake or oversight of the solicitor, of which the defendant complains in his set off or counterclaim, consisted in his revising the agreement of April 1, 1912, leaving unaltered these words therein: "together with $4,400 to be paid by the said R. C. Gray to me on or before 6 years with interest at 6% per annum (to be paid in whole or part at any time at the option of R. C. Gray) subject to mortgage on farm." The charge made by the defendant that this does set out the agreement of the parties as expressed to him by them, that the interest should be at the rate of 6% per annum to be paid annually, that, on the other hand, it means that the interest is to be paid at the end of the term whenever that might be.

If there was any negligence here, it was evidently an error in apprehending and appreciating the precise meaning of those words in the draft agreement. Now we must remember that all language is infirm and imperfect. Here, moreover, we have two languages employed. No one can be certain that the idea which he clothes in his own language will be exactly reproduced in the mind of another who hears or reads his words. To what degree of "strict accountability" is a solicitor to be held with reference to his interpretation of words and language? A distinguished Chief Justice of England on the rule of skill to be employed by a solicitor, said this:—

> No attorney is bound to know all the law: God forbid that it should be imagined that an attorney, or a counsel, or even a Judge is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into.

And Lord Mansfield said: "An attorney ought not to be held liable in cases of reasonable doubt."

In the New Oxford Dictionary I find this:—

> "*Per.*" A Latin (Ital. and old French) preposition, meaning "through," "by," "by means of"; in med. L. and Fr. also in a distributive sense, "for every" . . . "for each . . ." used in Eng. in various Latin and old Fr. phrases and ultimately becoming practically an Eng. preposition used freely before substantives of many classes.
>
> 2. *Per annum* (so much), by the year, every year, yearly: almost always in reference to a sum of money paid or received.

Using this definition of the term as a key, the expression in the agreement would read "with interest at 6 per centum by

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the year" or "with interest at 6 per centum every year" or "with interest at 6 per centum yearly." It is true that the words may well appear to convey the meaning that the interest is to be paid when the principal is to be paid. But if we give (as we must) the words the equivalent meanings set forth in the New Oxford, does not it also appear that they may convey the meaning that the interest at the given rate is payable yearly? I confess I think this meaning may readily enough be taken from the words. That is as they, the words, appeal to my mind. Perhaps this is due to the idea that subconsciously the word "payable" or some word or phrase equivalent to it is inserted in the expression. In any event, I am not prepared to say that the words in question are, in my opinion, incapable of bearing and conveying the meaning which it was the intention of the parties they should have and give. I should hesitate, therefore, before holding the solicitor liable where the question involves the construction of language where it is obviously susceptible of more than one meaning. There is a doubt and, I think, a reasonable doubt, one which might give even the cautious man trouble. When Disraeli wrote to a young author who sent him a book of his just published, "Dear sir, I have received your book. I shall lose no time in reading it," is it at all surprising to read that the young author was deeply affected by the compliment?

Even before consulting the New Oxford, I felt that the expression used was capable of more than one construction, having regard to the particular part of it where the accent might be placed. When we speak of interest at 6 per cent. it is generally taken to mean interest at 6 per cent. per annum. If, therefore, in the expression we emphasize the term "per annum" separately from the figure and symbol "6%" it does seem to me the conception may well be raised in the mind of an annual payment to be made at that rate. And after consulting the New Oxford the possibility of this construction seems greater than ever. In particular the equivalent expressions "every year" and "yearly" appear to me inferentially, and, it might be said, almost necessarily, to give rise to the conception of yearly payments.

Lord Ellenborough in *Baikie* v. *Chandless*, 3 Camp. 1720, where it was sought to hold an attorney liable when he had been employed to prepare an assignment of an annuity before the Courts had held that the trusts in annuity deeds must be particularly set forth in the memorial and had failed to advise his client that the annuity was consequently void, said:—

An attorney is only liable for *crassa negligentia*; and it is impossible to impute that to the defendant for not discovering a defect in the memorial of an annuity which was subsequently held to be a defect upon a very doubtful construction of the statute.

There have been decisions in the Courts of some of the States of the Union holding that somewhat similar expressions have been construed in favour of the defendant's contention here. But it does not appear that decisions on the point are to be found in our own Canadian Courts, or those of England. And can it be considered actionable wrong on the part of a solicitor that where there are, it is stated on authority, more than 2,000,000 reported decisions of Courts of the forty-eight states he is ignorant of two or three of them upon a point of construction which does not arise more frequently than once in a lifetime? I do not consider it can be said that there has been such a consensus of authoritative decisions on the subject as would make the solicitor's action or non-action in this case so plainly wrong as to amount to gross negligence on his part. This case is not before us to decide upon the precise meaning of the terms of the contract as in an action for specific performance. Rather our task is to examine the contract with a view to determine whether the solicitor here was reasonably justified in concluding that the words in the contract meant what the parties instructed him they intended them to mean. If there was a reasonable doubt as to the construction, then, as Lord Mansfield said, the solicitor ought not to be held liable.

This is an action for negligence against the solicitor by way of counterclaim, the liability alleged arising out of his construction of an expression which I confess seems to me equivocal in meaning. It is incumbent on the defendant, on this appeal, clearly to establish that liability, and this, I think, in view of the foregoing considerations, he has not succeeded in doing.

RICHARDS, J.A., concurred with CAMERON, J.A. Richards, J.A.

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FINKBEINER v. YEO.

Haggart, J.A.

HAGGART, J.A.:—In April, 1913, the defendant retained Messrs. Coulter & Procter, solicitors, to perform certain professional services for which they rendered a bill amounting to $592.67. The solicitors assigned the account to the plaintiff, a clerk in their offices, who is only a trustee and has no beneficial interest in the cause of action.

The defendant in this suit denied any liability and counterclaimed on three counts for damages: (1) for damages in a certain Dowsett deal for negligence and improper handling of the work, and claims $250; (2) for damages in handling a certain Gray deal and claims $500; and (3) for damages for the loss of certain documents by the solicitors causing delay in closing some transactions, and claims $100.

The trial Judge, after taxing the solicitors' bill, gave judgment for the plaintiff, including costs, for $527.43, and disallowed the entire counterclaim.

The defendant appeals, asking that the plaintiff's verdict be set aside and that judgment be entered for him on the counterclaim.

The work was done by the solicitors, and I see no reason to interfere with the verdict for the plaintiff.

As to the counterclaim, I would affirm the trial Judge's disposition of the first and third count, that is, the claim for damages in respect of the Dowsett transaction and for the loss of the title deeds. To my mind the defendant has not established any liability as against the solicitors on these two counts.

As to the second count in the counterclaim for damages alleged to be due to negligence and improper handling in connection with the Gray deal, and particularly in connection with the preparation of the preliminary agreement and the mortgage from Gray to the defendant, with all due respect, I come to a different conclusion from that arrived at by the trial Judge.

On the sale of the farm and chattels by Yeo to Gray one L. M. Young, a real estate agent and a brother-in-law of Gray's, acted for the purchaser and drew an agreement which Yeo had him submit to Mr. Procter for his approval. In this agreement is a stipulation relating to a portion of the purchase money in these words:—

Together with $4,400 to be paid by the said R. C. Gray to me on or before six years with interest at 6% per annum (to be paid in whole or part at any time at the option of R. C. Gray) secured by mortgage on farm.

This agreement is dated April 1, 1913, and about 10 days after the mortgage to secure the $4,400 was prepared by Young, containing terms of payment substantially the same as those in the preliminary agreement quoted above. This mortgage was handed to Procter by Young at the instance of the defendant, who desired it to be revised in his interest.

On April 18, Procter presented for registration the transfer from Yeo, which he himself had prepared, and this mortgage. The transfer was retained and registered, but the mortgage, for some informality, was rejected by the district registrar.

Either before or after the presentation for registration there was a discussion between Procter, Young and Yeo as to the terms upon which the interest was to be paid. Yeo contended that both the agreement and the mortgage made the interest payable only after the expiration of the 6 years when the principal became due, to which he never agreed. Gray in these negotiations had the advantage to this extent that the title was vested in him and the mortgage was unregistered, and he refused to consent to a change making the interest payable annually unless he was credited with the sum of $500 on the mortgage. Yeo was in this position, that he had either to pay that $500 or else commence a suit for the reformation of the mortgage which might involve considerable expense and some time, and Yeo says he wanted a security that he could use at once, and it would be a very difficult matter to negotiate or sell a mortgage upon which nothing would become due for six years. I think that under the circumstances the defendant acted wisely in allowing the credit of $500 on the mortgage.

The defendant Yeo claims that this loss was caused by the negligence of Procter who had not properly revised the preliminary agreement or the mortgage made in pursuance of the same. Yeo swears that he gave proper instructions to Procter as to the terms of the same, and I have no doubt that when the bargain was originally made it was in the contemplation of the parties that the interest was to be paid yearly.

First the solicitors say that the $500 was given not solely

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for the purpose of obtaining the alteration in the mortgage, but was given in settlement of some disputes as well, one of which was in connection with the cattle and stock. The solicitors are contradicted in this not only by Yeo but by Young, the real estate agent, and Gray, the purchaser. Gray, the purchaser, says that as to the chattels Yeo agreed to take back any of the chattels he thought were overcharged, and he returned some of the hogs and the credit given for the chattels had nothing to do with the credit of $500. He says:—

> This credit of $500 was given in settlement for my changing the way the interest should be paid, and not for a settlement of the overcharge on the chattels.

I would hold that the $500 was the price paid for altering the mortgage.

Again, the solicitors contend that the stipulations as to the payment of interest in the original agreement provides for payment of interest yearly. Now, the first question for us to determine is the interpretation of that preliminary agreement.

In the Supreme Court of Kansas this question was considered in the case of *Ramsdale* v. *Hulett*, 31 Pac. Rep. 1092. There a promissory note, by its terms, was made payable on or before 3 years after date with interest at 8% per annum after date until paid, and it was held that the interest did not become due or payable until the maturity of the note. Green, C., on p. 1093, discusses the question in this way:—

> We must, therefore, look to the terms of the note to ascertain when the interest becomes due. The last clause in the note reads, "with interest at 8% per annum after date until paid." It is contended by the defendant in error that this clause made the interest payable annually and a default in its payment made the whole sum due, that "per annum" and "annually" mean the same. Strictly speaking the words "per annum" mean "by the year" or "through the year." But we must construe the note as an entirety. It is a promise to pay a stated sum of money with interest thereon at 8% per annum. This we think means that the principal and interest are due and payable at the same time.

Green, C., does not lay down the above proposition without authority. He cites from the reasons given in another American case involving the same question where practically the same facts were before the Court: *Koehring* v. *Muenninghoff*, 61 Mo. 406. His citation is as follows:—

> In the note under consideration the promise in the note was to pay the

sum of money named "with interest from date at the rate of 8% per annum" five years after the date of the note. No different time is fixed for the payment of the interest from that fixed for the payment of principal secured to become due by the note. In such a case both principal and interest become due at the same time; in fact the promise plainly is to pay the principal with the interest 5 years after the date of the note. The words "with interest at the rate of 8% per annum" only fix the rate of interest to be calculated on the note and have nothing to do with the time it shall be paid.

Green, C., also cites for his authority the reasons given by Deady, J., in the case of *Tanner* v. *Dundee Investment Co.*, 12 Fed. Rep. 648, where the facts were similar to these in the case before us:—

It is too plain for argument that no interest is due on a promissory note payable at a future day with interest at a certain rate per annum until the principal sum is due. The promise to pay the interest is to pay it with the principal at the time the latter becomes due, and if the payee or holder of a note claims that interest is due and payable thereon during the period the note has run he must shew some exceptional provision or agreement to that effect before his claim can be allowed.

The promise in a note must be construed as the promise or covenant in a deed or mortgage.

Atherstone v. *Bostock*, 2 M. & G. 511, 719, was a case in which the meaning of the words "per annum" used in a similar connection was considered. A. wrote B. making some alternative proposals for the occupancy of certain rooms, one of which was "or take them unfurnished at the rate of eighty guineas per annum" and it was held that the words "at the rate of eighty guineas per annum" do not imply a contract for a year.

I do not think that there is any question as to the meaning of the clause in the agreement respecting the payment of interest. The interest is not payable until the principal is due, and there was a good and valid consideration given for the alteration in the terms of the mortgage.

The next question presented is what remedy the client has against the solicitors for a breach of the contract created by the retainer or for negligence in the conduct of the business, and what is the measure of the damage?

10 Hals., p. 346, says:—

In actions against a solicitor for negligence in the conduct of an action, the measure of damages is the amount which the plaintiff might have recovered in such action if the solicitor had exercised due diligence: *Lee* v.

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Ayrton, Peake 161; *Harrington* v. *Binns*, 3 F. & F. 942; *Godefroy* v. *Jay*, 7 Bing. 413.

Cordery on Solicitors, 3rd ed., p. 132, discusses the subject in this way:—

> The active remedy of a client is by action against the solicitor for a breach which must be directly raised or inferable from the pleadings and the duty arising out of the retainer to bring sufficient care and skill to the performance of the contract.

And on p. 134 the author says:—

> The measure of damages is estimated on the view that the client is to be put in the same position as if the solicitor had done his duty.

Whiteman v. *Hawkins*, 4 C.P.D. 13, was a case where the plaintiff held a mortgage for £4,600 on lands belonging to one F. He agreed to make him a further advance of £400 upon having an additional piece of land which F. had subsequently acquired added to the former security. The defendant, who acted as the plaintiff's solicitor in the transaction, omitted to ascertain that a third person had an equitable charge to the extent of £46 upon this additional piece of land, in consequence of which the plaintiff, upon a sale of the property, was unable to convey without paying the £46, and it was held there that this was negligence for which the defendant was liable and that, in the absence of evidence to reduce the amount, the £46 so paid was the proper measure of damage.

Mayne on Damages, 8th ed., p. 7, in discussing this question, says:—

> So in the case of an attorney. His employer has a right to his best services and may sue him for negligence; but if the attorney can prove affirmatively that even his diligence would have been ineffectual it is a bar to the action: *Godefroy* v. *Jay*, 7 Bing. 413.

And on p. 554, Mayne further says:—

> Damages in actions against attorneys for neglect of their duty are governed by exactly the same principles as those laid down in the case of sheriffs. The plaintiff is entitled to be placed in the same position as if the attorney had done his duty. But he is entitled to no more. Therefore, where no diligence could have been effectual, as where the client had no grounds of action or defence, the attorney cannot be liable for negligence, unless it has caused loss independent of the necessary result of the suit or other proceeding. It lies upon the defendant, however, to establish this defence affirmatively, and the fact that the plaintiff has suffered no actual injury is no bar to the action, if otherwise maintainable. He is still entitled to nominal damages.

The amount of the damages is a question for the jury: *Rus-*

sell v. *Palmer*, 2 Wills. 325; *Pitt* v. *Yalden*, 4 Burr. 2061. The amount of damage also depends upon the amount of loss which the plaintiff has suffered: *Stannard* v. *Ullithorne*, 10 Bing. 491.

The defendant has made out a case on his counterclaim. Even if his damages were nominal he would be entitled to a verdict. The question is, here, how shall we, sitting as a jury, measure those damages? It is true that Yeo gave Gray a credit for $500 on the mortgage, but it is not conclusively proved to us that he lost that $500. We do not know the value of the land in question, because a part of the consideration given for it was some property in Colorado, and the mortgage as subsequently agreed upon which is one of the exhibits in this suit shews that it is subject to three other mortgages already on file in the registry office. We do not know that the land in question is worth all the encumbrances against it, and we do not know whether the covenant of Gray, who is apparently a resident of the United States, is worth anything or not. The onus was upon the defendant Yeo to prove that the mortgage was an absolute security for $4,400. He has omitted to do that. Under the circumstances, and with such facts as we have before us, it is our duty, however, to measure the damages as best we can.

I would enter judgment for the defendant Yeo for $300, which should be set off as against the plaintiff's verdict.

The appeal should be allowed to this extent and the plaintiff should pay the costs of the appeal.

Appeal allowed in part.

CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO.

Alberta Supreme Court, Walsh, J. November 4, 1915.

1. DAMAGES (§ III P 2—340)—LOSS OF PROFITS—OUTPUT OF CEMENT PREVENTED BY DELAY OF BUILDING CONTRACT.

The loss of profit on the output of cement, occasioned by a delay in the performance of a contract for the erection of the plant at the appointed time, is damage naturally resulting from the breach of contract and therefore recoverable as such.

[*Leonard* v. *Kremer*, 7 D.L.R. 244, 4 A.L.R. 152, 11 D.L.R. 491, 48 Can. S.C.R. 518; *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, applied.]

2. DAMAGES (§ III A 1—42*a*)—DELAY OF PERFORMING BUILDING CONTRACT—WAGES PAID TO MEN PRIOR TO COMPLETION.

A delay in the performance of a building contract does not involve a liability for wages paid to men engaged in the installation of the plant, who have come to the buildings for that purpose before the buildings were ready for them.

ACTION upon a building contract and for a mechanics' lien. Statement

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CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO.

Walsh, J.

E. B. Edwards, K.C., and *G. V. Pelton*, for plaintiff.

O. M. Biggar, K.C., and *S. B. Woods*, K.C., for defendant.

WALSH, J.:—This is a mechanics' lien action. The amount of the plaintiff's claim is undisputed except as to two or three small items. The defendant at the trial abandoned the contention that it should be reduced by the two sums of $34.65 and $7.65, set out in the 2nd par. of the statement of defence. I think that the sum of $84.20 claimed for by the 3rd par. of the defence must be disallowed. While the specifications provide that the material and work for which the defendant paid this sum should have been provided and done by the plaintiff, exs. 7 (*a*), 7 (*b*) and 7 (*c*), shew that the contract covers only the structural steel and the material, for which this charge is made, was not a part of the steel structure. I disallow the item of $84.56 claimed by the 4th par. I do not think that the plaintiff was under any legal obligation to follow the defendant's shipping instructions in the respect here complained of, and, even if it was, the evidence falls short of establishing that the extra sum was legally and properly chargeable by the railway company by reason of the plaintiff's failure to follow them. The plaintiff's claim, therefore, stands at $12,740.35, and there will be judgment for the plaintiff for that amount with interest at 5 per cent. from the times that it fell due under the contract, to be computed by the clerk if the parties are unable to agree as to it.

The real fight in this case is over the counterclaim. The defendant claims, by way of damages, a sum which it now fixes at $79,201.26, for the plaintiff's delay in supplying and erecting in place, the steel work of the defendant's building for the balance of the contract price, for which this action was brought.

In October, 1911, the defendant submitted to the plaintiff, specifications for the construction and erection of steel frame mill buildings at Marlboro, Alberta, which contain the following clause:—

> The work shall be entered upon immediately after signing the contract, and shall be pushed to the earliest possible completion consistent with good work. Time is an important factor in this contract and the guaranteed time of completion of the contract, which must be specified, will be considered in awarding the contract.

This clause is emphasized by the practical repetition of a part of it near the end of the specifications in the following words:—

> Time is an important factor in this contract, and the guaranteed time of completion of the contract will be considered in awarding the contract.

and the last clause of the specifications reads thus:—

> Proposals shall specifically state the guaranteed time of completion, and also time of delivery of material.

The plaintiff, under date of December 18, 1911, submitted to the defendant a tender for this work which is contained in two pages, the first of which is printed and the other of which is typewritten. The printed page is obviously the form of tender used by the plaintiff for the supply of plant and machinery. It proposes to furnish the "apparatus hereinafter described," and throughout the subject-matter of the tender is referred to as "plant and machinery." It is only by adaptation that it can be made to apply to the fabricating and erecting of structural steel. The only reference to time that is contained in this printed sheet is the plaintiff's agreement "to deliver with due despatch the plant and machinery comprised herein." The typewritten sheet, however, makes it quite clear that the offer is to supply and erect in place, the steel work for these buildings. It contains the following clause:—

> We would expect to make shipment of this material about April 1st, and to complete erection of the steel work in about two months after the arrival of same at site.

The formal contract of the parties is dated on December 27, 1911. It is absolutely silent as to the time for completion. The plaintiff's contract, however, as set out in this document, is to supply the defendant,

> with the apparatus and machinery as specified in the attached sheets which are part of this agreement.

The sheets thus referred to are those containing the plaintiff's tender, to which I have above alluded, and that tender is made "in accordance with your specifications." The contract therefore is composed of the specifications, the tender and the document of December 27, and in this way those portions of the specifications and tender which I have above extracted form parts of the contract.

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The plaintiff's tender is based upon and must therefore be read in the light of the specifications. They lay great emphasis upon "the guaranteed time of completion of the contract." Standing by itself, the plaintiff's statement, in its offer that it would expect to make shipment of the material and to complete the erection of the steel within the periods named, might, perhaps, not amount to a covenant that these things would be done by these dates. But when read, as I think it must be, with the specifications, it appears to me to assume a different form. I must take into consideration the whole of the contract, and in that way put, if I can, the proper construction upon this covenant. As said by Wilde, C.J., in *Ford* v. *Beech*, 17 L.J.Q.B. 114, at 115:—

> It ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.

I can reach no conclusion from the whole of the contract other than this, that the clause of the typewritten page of the plaintiff's tender as to the periods of shipment and erection creates the guaranteed times of completion and delivery called for by the specifications and that the plaintiff thereby bound itself to do this work within these times. In my view of it, therefore, the plaintiff, unless excused under other clauses, to which I will refer later, bound itself to make shipment of all this material from Toronto by April 1, 1912, and to complete its erection at the site in about 2 months after its arrival there.

The evidence is that it took about a month to carry the material from Toronto to the site. Allowing that time for that purpose, the contract in effect was, if my view of it is right, that these buildings would be erected by the plaintiff at the defendant's site about July 1, 1912.

The undisputed facts are that the first shipment of steel was made on July 18, the last car-load shipment was received at the site on November 10, 1912, though single lots were received later than this, and the work of erection was not completed until about March 8, 1913.

The plaintiff, while submitting that it has not been guilty

of any breach of this contract, says that even if it has, it is not liable to the defendant in damages, because it is freed from liability under a clause of the agreement, which is in the printed sheet constituting the first page of the plaintiff's tender, and is in the following words:—

> The company shall not be held responsible or liable for any direct or indirect damage, loss, stoppage or delay which the purchaser may sustain, whether the said plant or machinery is specified for any particular purpose or not.

It was quite competent for the plaintiff to provide by its contract that it should be under no liability for damages resulting from its failure to complete it within the specified time, no matter from what cause such failure arose. This was clearly the opinion of the learned Judge who tried the case of *Leonard* v. *Kremer*, 7 D.L.R. 244, 4 A.L.R. 152, and of all the Judges of this Court who sat in appeal from that judgment, and of all the Judges of the Supreme Court of Canada on appeal to it in that case (11 D.L.R. 491, 48 Can. S.C.R. 518). The question which I have to determine is, whether or not this clause has that effect. In the absence of express agreement to the contrary, the law imposes upon a contractor, who is guilty of a breach of his contract, liability therefor in damages to the other contracting party. When he seeks exemption from this liability under the terms of his contract, he should, I think, be able to point to something in it which in clear and unambiguous language gives that exception to him. More especially is that the case when, as here, the contract was prepared by him. I do not think that this clause measures up to that standard. I have tried very hard to decide what it really means, but I have been quite unable to do so. As I have already said, the printed sheet containing this clause was manifestly intended for use in tendering for the supply of plant and machinery and I am inclined to think that this clause was intended to protect the plaintiff against liability for loss arising from imperfections in the plant or machinery It is not my place, however, to speculate upon the intended purpose of this provision. It is sufficient for me to say that I am unable to read out of it an immunity to the plaintiff, under the circumstances there present, from the consequences of its breach of this contract.

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The plaintiff's tender, which now forms a part of this contract, contains the following clause:—

> The contractor shall furnish duplicate copies of detail and dimensions, drawings on crane and steel, within 30 days after signing the contract, which shall be approved by the engineers of the purchaser before any shop work is done, the responsibility for errors in said drawings to remain with the contractor.

It seeks to free itself from liability to the defendant for its delay in carrying out this contract, because of the defendant's delay in returning these plans approved, and because of alterations by the defendant in the plans and in the work to be done. It is rather significant that, throughout the correspondence which took place between the parties, covering a period of several months, in which the defendant was complaining bitterly of the plaintiff's delays, and threatening to hold it responsible for the same in damage, no suggestion was made by the plaintiff that the defendant was in any way to blame for them, either for the reasons now assigned or for any other reason. On the contrary other excuses for delays are given by the plaintiff in the correspondence, such as shortage of cars, and in a letter from the plaintiff's president to the defendant, under date of May 6, 1913 (ex. 237), when the work was all done, he says:—

> I could hardly credit that you had advanced claim for damages for delays which, as you know, were caused entirely through our inability to secure delivery of material in time.

In the mass of confusing correspondence that there is on this subject, I find it very difficult to ascertain the facts with exactness. In my reading of this correspondence, however, it strikes me that the plaintiff is more to blame than the defendant for the delays which undoubtedly occurred in the final approval by the defendant of all the plans. Under the contract, it was the duty of the plaintiff to furnish the defendant with the drawings by January 26, 1912. At that date it had only sent forward for approval one plan of one of the many buildings covered by the contract. This was followed by other plans on January 30; February 9, 13, 24; March 5, 12, and so on down through every month until August 7, when, in ex. 150, prints of two drawings are forwarded for approval. Changes were undoubtedly made in some of these plans by the defendant before their

final approval, which necessitated their re-submission to it, but its undoubted right was to make these alterations, and I can find no evidence of any material delay on its part in this respect. Additions were made to the work also. The evidence of one Klonoski, the defendant's engineer, is that in comparison with the time fixed for the office or shop work by the original contract, there should not have been more than two weeks' delay in all, in both office and shop, by reason of these alterations and additions. He is, I think, well qualified to speak of this, and his evidence on the point is uncontradicted. The contracts provide for the defendant's approval of the plans before any shop work was done. This means, I think, that as soon as the plans of any building were approved, the shop work on it might be commenced even though none of the other plans had been approved, and this is the view of it that the parties took. I am satisfied that the delays in shipment were due largely to the fact that other work under what the plaintiff's officers refer to as "penalty contracts," was given precedence. The excuse for that is, that in the great rush of work that the plaintiff undertook that year, it was necessary to schedule every contract for some set period and if anything interfered to prevent the work being done at that time, it had to go over so as to not interfere with the work scheduled to follow it. If the defendant was to blame for the delay in starting the work on schedule time, there might be some merit in this plea, but I cannot find that such was the case. Let me illustrate the difficulty I have in reaching the conclusion that the delays which the plaintiff seeks to attribute to the defendant in approving the plans are responsible for the plaintiff's delays in fabricating the steel. The plaintiff's particulars allege that plan A, being the plan of the power house, was delayed by the defendant in its return to the plaintiff, from January 17, to July 19. The following are the facts. On April 8, the defendant wrote inquiring when the shipment of steel for the power house would be made. This letter was received by the plaintiff on April 13. Nine days later, on April 22, the plaintiff's bridge department informed the chief draughtsman of this inquiry, and asked how the work stood so far as his department was concerned (ex. 79). On April 24, the chief draughts-

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man informed the bridge department (ex. 80), that all drawings and bills of material for the power house were then in the shops. On July 12, the plaintiff wired the defendant (ex. 25), that the power house steel was being loaded that day and, according to the plaintiff's telegram (ex. 137), it left on July 18. In other words, while the plaintiff now says that the defendant delayed it in the matter of the approval of the plans of the power house until July 19, its own records shew that these plans were in the shops 3 months before that, and the steel was actually shipped the day before that to which the plaintiff is said to have been so delayed. I must frankly confess that there is great difficulty in tracing through the voluminous correspondence the various stages of preparing, forwarding, altering and finally approving of these plans, and it is possible that, as a result, I have not reached the right conclusion on the matter. The evidence on this point is, however, all documentary, and for this reason there will be less difficulty in correcting me if I am wrong, than would be the case if my finding was based upon the view that I took of contradictory oral testimony.

The delays in the erection of the building after the arrival of the steel at the site, the plaintiff is clearly responsible for. It is true that the sidings for the cars containing the material were not placed as conveniently as they might have been, and this was the defendant's fault, but the delay involved in unloading the material and hauling it to the site by reason of this amounted to but a few days, and its influence upon the completion of the building was very slight. Lack of men and equipment, which it was the plaintiff's duty to supply, caused the real delay. This fact is clearly proved by the reports of its superintendent of erection on the ground, and of the manager of its Calgary office. Considerable delay is to be attributed to the plaintiff's attempt to have the rivets driven by hand in plain contravention of the specifications and responsibility for this delay must be plainly placed at the plaintiff's door.

This disposes in the defendant's favour of all of the objections taken to its right to recover damages for the delay complained of. It now but remains to fix the amount of these damages. There are but two items of damage claimed, namely,

$487.11, paid to a man named Dowling, and $78,714.15, loss of profit in the operation of the plant through the plaintiff's delays.

Dowling was the superintendent of the contractors for the gravity bucket conveyor systems in the defendant's plant. Under their contract they were bound to give the services of this superintendent for the installation of these conveyors for three months without charge, beyond the contract price. He seems to have come to this work before the erection of the building, in which the conveyors were to be installed, had been completed, and because of the plaintiff's delay in erecting it, he was detained there beyond the contract period of three months, and the defendant, in consequence had to pay, and did pay him this sum of $487.11, for his extra time and expenses.

In my opinion, the defendant is not entitled to recover this sum. My understanding of the facts is, that the conveyors could not be set up until the building was erected. That being so, the ordinary course would have been for Dowling to wait until the building was ready for him before coming to do the work. If he had done that he would not have been delayed beyond the 3 months. I do not think that it could have been within the contemplation of the parties when this contract was made, that workmen engaged in the installation of the plant would come to the buildings for that purpose before the buildings were ready for them, and that delay in the performance of the contract by the plaintiff would involve it in liability for the wages of such men as did so.

The claim for loss of profits stands upon an entirely different footing. The parties unquestionably knew that the defendant's operations as a manufacturer of cement could not commence until these buildings were completed, and the plant installed in them, and that the plant could not be installed until the buildings were up. They must have assumed that the defendant's operations were to be undertaken for profit to it. The natural and reasonable result, therefore, of delay in the commencement of the defendant's operations would be the loss of such profit, if any, as would have been made during this period of delay, unless the effect of such delay was simply to postpone for a time

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the defendant's enjoyment of this profit. It could not have been within the contemplation of the parties that the defendant would procure elsewhere such material as is here contracted for if the plaintiff failed to deliver on time, for that would be manifestly impossible without at least as long a delay as is now complained of. While in many cases it has been held that damages cannot be awarded for loss of profit resulting from a breach of contract because they are too remote, that is not so in every such case. In Mayne on Damages, 8th ed., at p. 64, the result of the decisions is summarized in the following words:—

> One very common instance in which damages are held to be too remote arises where the plaintiff claims compensation for the profits which he would have made if the defendant had carried out his contract. It is by no means true, however, that such profits can never form a ground of damage. Loss of profits is recoverable so far as it is the natural result of the breach of contract.

Vaughan Williams, L.J., in *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, at 790, says:—

> As regards remoteness, the test that is generally applied is to see whether the damages sought to be recovered follow so naturally or by express declaration from the terms of the contract that they can be said to be the result of the breach. This generally resolves itself into the question whether the damages flowing from a breach of contract were such as must have been contemplated by the parties as a possible result of the breach.

That test must, I think, be applied to every claim to damages for breach of contract, be that claim for loss of profits or for something else, and judged by that test, I am of the opinion that, in this case, the loss of profits may be recovered. The sum of $78,714.15 claimed by the defendant as loss of profit is worked out in this way. It says that if these buildings had been put up within the contract time, namely by July 1, 1912, or even within 4 months of that date, namely by November 1, the buildings could have been enclosed and the work of installing the plant could have been proceeded with during the winter months, and that it could, by April 1, 1913, have commenced the manufacture of cement. By reason of the plaintiff's delay until March 8, 1913, in doing its work, it was not able to start its plant until September 1, 1913. There was, therefore, an operating loss of 5 months or 153 days, including Sundays and

other holidays. When the plant did start it ran in all 180 days including Sundays and other holidays, and the output in that time was 126,900 barrels of cement, an average of 705 barrels per day, including holidays. If the plant had been running for the 155 days, including holidays, lost through the plaintiff's fault, the same average could have been maintained, and its output for that period would have been 110,865 barrels. The profit on each barrel so manufactured would have been 71 cents, being the difference between the price of $2.10 and the cost price of $1.39, and the defendant's loss of profit on the 110,865 barrels is therefore $78,714.15, which is the amount of its claim under this head. There is, however, one mistake in this calculation, as an output of 705 barrels per day for 153 days would be 107,865 barrels instead of 110,865, and the calculated profit should be reduced accordingly to $76,584.15.

This loss has been figured out to a nicety. The Court *en banc* in *Leonard* v. *Kremer*, 11 D.L.R. 491, worked out with equal precision, a judgment of $720, based upon 18 days of lost time in the operation of the machine there in question at $40 per day. The three Judges of the Supreme Court of Canada, whose judgments constitute that of the Court, reduced this award to $200. Anglin, J., with whom Davies, J., concurred, said that it was impossible to ascertain the amount of these damages "with anything approaching mathematical exactitude," and that he assessed them as a jury would. While Idington, J., characterized as remarkable the damages fixed by the Court *en banc*, stating that he had "failed to find a single case where the price earned has been wholly obliterated, as here, by loss of profits awarded the purchaser." I fear that if I fixed the defendant's damages in this case at anything approximating the amount claimed, my award would meet with but scanty support in the Supreme Court of Canada, if this case reaches that tribunal, as perhaps it will.

Apart from this, I do not feel that I could, upon the evidence, allow any such sum. I cannot take 705 barrels as the average daily production for these 5 months. It is true that, taking the aggregate production during the entire period of operation, the daily average of 705 barrels results. The direc-

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tors' report for 1913 (ex. 146) shews, however, that, owing to certain difficulties with the marl plant which were not removed until after the close of the operating season, the daily production from September 1, to December 13, was but 500 barrels. I think it obvious, and in fact it is admitted by the particulars, that these same difficulties would have been encountered had the operations commenced on April 1, and would have lasted practically over the whole of the period in question. I take, therefore, 500 barrels per day as the average for this period of 5 months, as that has been definitely ascertained in practice as the capacity of the plant in the initial stage of its operation. There were 128 working days in this period and 64,000 barrels would therefore have been the output in that time.

The average price of cement f.o.b. the company's works during the season of 1913 was $2.10 per barrel according to the evidence of Mr. Griffiths, the defendant's secretary-treasurer. The total output for the season was 49,797 barrels according to the evidence of Mr. Mason, the defendant's plant accountant. The total operating expense was $77,619.71 and the administrative and sales expense $9,913.80, according to the directors' report (ex. 246), making a total expense of $87,533.51. The cost of production, therefore, was a fraction of a cent over $1.75 per barrel, so that 35c. per barrel would, on these figures, be the profit for the period. Griffiths figured the cost per barrel on the car at $1.39, and Mason at $1.44, while the particulars delivered put it at $1.50. How these different calculations of the cost were made, I do not know, except that they include only labour, fuel and supplies. I understand, however, these figures relate, not only to the season of 1913, but as well to 1914, and in the latter period, with the improvements made in the interval, the capacity of the plant was largely increased without a corresponding increase in the cost of production. I think that I must ascertain, not only the capacity but the cost of production with reference to the conditions prevailing during 1913 alone, as the 1914 operations were carried on under such entirely different conditions.

I think, too, that allowance has not been made for many things that should have been but, admittedly, were not taken

into account in determining the true costs, such as depreciation, trade discounts, poor cement, and other things spoken of by Mr. Rowbotham, the expert accountant called by the plaintiff. I notice, also, that of the cement manufactured in 1913, there remained unsold at the end of the year 11,542 barrels. There were, of course, no expenses in 1913 in connection with the sale of this portion of the season's output, and this would tend to still further cut down the profit per barrel, based upon the above figures.

I think that the evidence justifies a finding in favour of all the contentions upon which the defendant bases its claim to damages for loss of profits, and that the profits which it might have made were actually lost and not simply postponed. The quantum of its loss is, however, much smaller than the amount which it claims. I think that substantial justice will be done by fixing the damages, as I do, at $10,000.

The plaintiff will have the general costs of the action and the defendant will have the costs of the counterclaim. The judgment on the counterclaim will be set off against the judgment for the plaintiff, subject to any lien for costs of the counterclaim which the defendant's solicitors may have. The plaintiff will have the usual mechanics' lien judgment for the balance.

Judgment accordingly.

GOWANS-KENT v. ASSINIBOIA CLUB.

Saskatchewan Supreme Court, Elwood, J. December 30, 1915.

1. CORPORATIONS AND COMPANIES (§ IV D 1—66)—CLUB—LIABILITY FOR GOODS ORDERED BY HEAD STEWARD—WANT OF SEALED AGREEMENT.
An incorporated club cannot disclaim liability for club supplies sold and delivered to it upon the verbal orders of its head steward or manager, although such orders were placed without the knowledge of the principal officers, and no agreement under seal relating thereto had been executed by the corporation.

Statement

ACTION for goods sold and delivered to an incorporated club.

J. A. Allan, K.C., for plaintiff.

J. N. Fish, K.C., for defendant.

Elwood, J.

ELWOOD, J.:—This is an action for goods claimed to have been sold and delivered by the plaintiff to the defendant. The defendant is a club for social purposes, incorporated under

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an Ordinance of the N.W.T. The goods in question were ordered of the plaintiff by an employee of the club referred to in the evidence as head steward and sometimes as manager. The order was a verbal one, given by this employee to a representative of the plaintiff who took the order down in writing. The goods were afterwards shipped to the defendant, received at the building occupied by the defendant in the City of Regina, placed into stock by or under the direction of the steward, and some of the goods were used. Invoices were sent by the plaintiff to the defendant—received in the ordinary course by the defendant. When checking over the goods, some objections were made as to the size of the coffee cups and a deduction was agreed on by the plaintiff to be made for the difference in size and for certain breakages. This reduction amounted to $183.70.

The order in question was apparently given without the knowledge of the principal officers of the club, and some time after the receipt of the goods, objection was taken by the officers of the club to the liability of the club for the goods, and subsequently all liability was repudiated. A number of objections were taken by the defendant to the club's liability. It was contended, as there was no agreement executed under the seal of the club, the club is not liable, and a number of cases were cited in support of that proposition—these I shall proceed to deal with.

In *Kidderminster* v. *Hardwick*, L.R. 9 Exch. 13, and *Oxford* v. *Crow*, [1893] 3 Ch. 535, the contracts sued on were executory. In *Young* v. *Leamington*, 8 A.C. 517, the statute expressly required a seal. *Manning* v. *City of Winnipeg*, 21 Man. L.R. 203, was decided upon the ground that the statute required a by-law; and also that there was no acceptance by the corporation of the service. *DeGrave* v. *Monmouth*, 4 Car. & P. 111, does not seem to assist us, except that it is authority for the proposition that goods ordered by the mayor of a corporation may, when supplied, be adopted by the council by a mere examination of them. In *Waterous* v. *Palmerston*, 21 Can. S.C.R. 556, the corporation had not accepted the goods, and was in this respect distinguished from *Bernardin* v. *North Dufferin*, 19 Can. S.C.R. p. 581. On the other hand, in *Clarke* v. *Cuckfield*

Union, 21 L.J.Q.B. 349, it was held that want of a seal is no defence where the goods ordered are for the purposes of the corporation, and the order was given by a board regularly constituted, and goods supplied and accepted, and consideration executed. *Lawford* v. *Billericay*, [1903] 1 K.B. 772, followed *Clarke* v. *Cuckfield*, *supra*, and held, "that the absence of a seal is no answer where the whole consideration for the demand is executed and the goods supplied are accepted."

In *Douglass* v. *Rhyl*, [1913] 2 Ch. 407, the plaintiff was held entitled to recover on an executed contract, and *Lawford* v. *Billericay*, *supra*, was approved. *Nicholson* v. *Bradfield*, L.R. 1 Q.B. p. 620, followed *Clarke* v. *Cuckfield*, *supra*.

In *South of Ireland Colliery* v. *Waddell*, L.R. 3 C.P. 463, at 469, I find the following:—

> A company can only carry on business by agents, managers and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal.

And at p. 470, quoting Erle, J., in *Henderson* v. *Australian Royal Mail Steam Navigation Co.*:—

> I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort.

In 8 Hals., par. 848, I find the following:—

> In the case of corporations other than trading corporations, the rights and liabilities of the corporation upon contracts which are not under seal, and which do not fall within the exceptions already mentioned, depend upon whether the contracts relate to matters incidental to the purposes for which the corporation exists, and whether the consideration therefor has been executed by the party seeking to enforce them.

In the case at bar the evidence shews that Stamper, the employee who ordered the goods, was the proper person to receive them into stock, and I therefore find that the goods were actually received by the defendant by the proper person, and that some of the goods were used, and that being so, I am of opinion that, so far as the plaintiff is concerned, the contract was completely executed, and that there was an actual receipt of the goods, and that therefore, on the authority of the above cases, a seal is not necessary. It was objected that Stamper had no authority to order the goods. Without deciding definitely as to whether or

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not he had an actual authority to order the goods, I am of opinion that, under the circumstances of the case, the defendant is estopped from denying his authority. The evidence shews that Mr. Ross, an official of the club, a year or so prior to the order in question, ordered all of the fittings of the club, including an order of china, of which the order in question was a duplicate; this order was given by Mr. Ross to the plaintiff and was not under the seal of the club, and was apparently a mere verbal order. The head steward who preceded Stamper had given various orders to the plaintiff for goods, not, it is true, of so large an amount, but in the view I take of the case, that does not affect the question. These orders were given, and the goods so ordered were subsequently paid for by the defendant. The person to whom the order in question was given had been told by the former head steward that additional goods would be required. Stamper had given an order to the plaintiff for goods which were received and paid for by the club. Stamper was apparently in full charge of the management of the club—he ordered all of the groceries and various supplies for the running of the club, and is referred to by Mr. Griffiths, the secretary, as the person there for the running of the club. Some question arose as to whether Stamper was head steward or manager—I do not think that that is material. The evidence shews that Stamper applied for the position in response to the following advertisement:—

> Wanted: Chief steward for club in Western Canada; must be competent to take over full management. Liberal salary and a bonus to right person on proof of success.

This advertisement was inserted in consequence of a resolution of the board,

> that the secretary be instructed to insert an anonymous ad. in an eastern paper for a steward to take over full management and entire charge;

and Stamper was engaged by Mr. Ross in consequence of a resolution of the committee of the club, "leaving the matter of getting a new manager for club to the president and vice-president."

The correspondence which took place subsequently to the receipt of the goods was all conducted by the officials or em-

ployees of the club who would ordinarily conduct such correspondence. There was nothing in the correspondence to lead the plaintiff to suppose that the goods were not properly ordered, and in fact the whole conduct of the correspondence up to a certain point, and the course of dealing with the plaintiff prior to the giving of the order in question, was such as to lead the plaintiff, in my opinion, to believe that goods ordered in this way were properly ordered. The prior order given by Mr. Ross for goods exactly the same as those in question was given verbally.

The evidence further shews, that at the time that Stamper was engaged, there were no instructions as to his authority or powers, and, in consequence of the advertisement under which he was engaged, and in the absence of specific instructions, and in consequence of the manner in which the management of the club was left to him, he was, I am of opinion, justified in concluding that he had full authority to give the order sued on.

In *Summers* v. *Solomon*, 26 L.J.Q.B. 301, at 302, I find the following:—

> The question is, not what was the exact relation between the defendant and Abraham, but whether the defendant had so conducted himself, and held the other out, as to lead the plaintiff reasonably to suppose that Abraham was the defendant's general agent for the purpose of ordering goods.

and at p. 303:—

> It was held in an early case, that one instance of recognized agency of a servant by the master, to purchase goods on his credit, was sufficient to make the master liable for the subsequent orders of the servant, until the authority was known to have been withdrawn.

See also, *Pickard* v. *Sears*, 6 A. & E. 469; *Freeman* v. *Cook*, 2 Exch. 654; *Hazard* v. *Treadwell*, 93 English Rep. 665, and *Prescott* v. *Flynn*, 131 English Rep. 521.

I hold, therefore, that the defendant is estopped from denying the authority of Stamper. There will, therefore, be judgment for the plaintiff for the amount sued on less the credit of $183.70. The plaintiff will have its costs of this action.

Judgment for plaintiff.

N. S.

S. C.

REX v. JACK.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Drysdale, Ritchie, and Harris, JJ. July 27, 1915.

1. JUSTICE OF THE PEACE (§ III—12)—TERRITORIAL JURISDICTION—CASES NEAR BOUNDARY—CR. CODE, SEC. 584.

Where an offence has been committed within 500 yards of the boundary between two magisterial jurisdictions, Cr. Code, sec. 584 (*b*), will not enable the prosecutor to lay it in one jurisdiction and try it in another; he may both lay and try the offence in either jurisdiction.

[*R.* v. *Mitchell*, 2 Q.B. 638, 2 G. & D. 274, followed.]

2. PROHIBITION (§ II—5)—ALTERNATIVE REMEDY OF APPEAL.

It is not a bar to the granting of prohibition to a magistrate for exceeding his territorial jurisdiction that an alternative remedy of appeal was available to correct the absence or excess of jurisdiction.

[*Channel Coaling Co.* v. *Ross*, [1907] 1 K.B. 145, referred to.]

3. PROHIBITION (§ I—2)—FOR DEFECT ON FACE OF PROCEEDINGS—RIGHT TO WRIT.

Where the defect of jurisdiction is clear on the face of the proceedings of an inferior Court, the issue of a prohibition, though not *of course*, is of right and not discretionary.

[*Farquharson* v. *Morgan*, [1894] 1 Q.B. 552, applied.]

Statement

APPLICATION for writ of prohibition directed to the stipendiary magistrate of the municipality of Cape Breton to prohibit him from proceeding further in a criminal matter.

W. A. Henry, K.C., in support of application.

V. J. Paton, K.C., contra.

The judgment of the Court was delivered by

Harris, J.

HARRIS, J.:—The stipendiary magistrate for the municipality of Cape Breton has convicted the defendant of a criminal offence. In the information and conviction the offence is set out as having been committed in the town of North Sydney. A perusal of the statutes bearing on the question shews that the stipendiary has no jurisdiction in criminal matters outside the boundaries of the municipality of Cape Breton. He has no jurisdiction in the town of North Sydney.

It is, however, contended that the want of jurisdiction is not apparent on the documents because by sec. 584, clause (*b*), of the Criminal Code it is provided that—

"Where the offence is committed on the boundary of two or more magisterial jurisdictions, or within the distance of five hundred yards from any such boundary, or is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in any one of such jurisdictions."

It is said that this extends the stipendiary's jurisdiction to a strip of territory all around the town 500 yards in width and that

it does not appear that the offence was not committed within this territory.

If the charge had been laid as having been committed in the municipality of the county of Cape Breton and the evidence had shown the offence to have been committed in the town of North Sydney within 500 yards from the boundary line of the municipality, I think a conviction by the stipendiary might be sustained, but that is not this case.

The charge and the conviction here are of an offence committed in the town of North Sydney, and the conviction is by a stipendiary magistrate who *prima facie* has no jurisdiction in the town of North Sydney, and in my opinion the defect of jurisdiction is clear on the face of the information and conviction.

In the case of *R.* v. *Mitchell*, 2 G. & D. 274, 2 Q.B. 638, where an offence had been committed within 500 yards of the boundary between two magisterial jurisdictions, it was held under the English statute corresponding to clause (*b*) of sec. 584 of the Canadian Criminal Code that this did not enable the prosecutor to lay it in one jurisdiction and try it in another, but it merely gave him the option of both laying and trying the offence in either jurisdiction.

In that case the offence was committed in the county of Northampton within 500 yards of the borough of Stamford. The indictment was found at the quarter sessions for the borough of Stamford in the county of Lincoln, and it was sought to justify it on the statute referred to.

Lord Denman, C.J., said: "But for an offence charged to have been committed in Northamptonshire, a venire into Lincolnshire is *prima facie* wrong."

Patteson, J., said:—

"The correct answer was given to the argument that this offence was committed within five hundred yards of the boundary between the two counties; in such cases you may lay and try the offence in which of the counties you please, but you must try it where you lay it."

Here the offence is charged to have been committed in the town of North Sydney, and *prima facie* the stipendiary magistrate for the municipality of Cape Breton has no jurisdiction to try it.

The authorities establish that where the defect of jurisdiction

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is clear on the face of the documents the issue of the writ of prohibition though not *of course* is of right, and not discretionary: 10 Halsbury's Laws of England, 141.

In *Farquharson* v. *Morgan*, [1894] 1 Q.B. 552, Lord Halsbury felt bound to grant the writ, although the applicant had no merits. At page 560, Lord Davey, L.J., said:—

"It has always been the policy of our law to keep inferior Courts strictly within their proper sphere of jurisdiction."

It was also suggested that, inasmuch as certiorari would lie to quash the conviction, that the writ of prohibition should not issue. It has been held that the Court in deciding whether or not to grant a writ of prohibition will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction. *Channel Coaling Co.* v. *Ross*, [1907] 1 K.B. 145.

It was also urged that an appeal had been taken from the conviction to the County Court and that prohibition should not for this reason issue. It appears that an appeal was asserted to the County Court at North Sydney, whereas under the Act it should have been to the County Court at Sydney, and that the appeal was dismissed on this ground.

The fact that an appeal lies against the absence of excess of jurisdiction (*Velcy* v. *Binder*, 12 Ad. & El. 265; *White* v. *Steele*, 13 C.B.N.S. 231) or that an appeal against such absence or excess of jurisdiction has already failed (*Devonshire* v. *Foott*, 5 I.R. Eq. 314) or the fact that an appeal on the merits of the case has already failed (*Harrington* v. *Ramsay*, 22 L.J. Ex. 326) cannot fetter the Court in granting a writ of prohibition. See 10 Halsbury 148.

In *De Haber* v. *Portugal* (*Queen*), 17 Q.B. 171, at page 214, Lord Campbell said:—

"This Court vested with the power of preventing all inferior Courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects is bound to interfere when duly informed of such an excess of jurisdiction."

Where the objection to the jurisdiction of an inferior Court appears on the face of the proceedings, prohibition lies at any time, even after judgment or sentence, in spite of the laches or acquiescence of the applicant. *Farquharson* v. *Morgan*, [1894] 1 Q.B. 552.

The want of jurisdiction being apparent on the face of these proceedings, the writ of prohibition should be granted. No costs against the stipendiary magistrate. *Prohibition granted.*

Re GREAT NORTHERN ASSURANCE CO.; BLACK'S CASE.

Manitoba King's Bench, Galt, J. October 19, 1915.

1. CORPORATIONS AND COMPANIES (§ V F 3—263)—CONDITIONAL SUBSCRIPTION—NON-FULFILLMENT—LIABILITY AS CONTRIBUTORY—RIGHT TO REPAYMENT.

An allotment of shares upon a subscription which was subject to a condition that the subscriber, a physician, should be appointed chief medical referee for the company, which has not been fulfilled, nor notice of such allotment given, is illegal, and will, therefore, not render the subscriber liable as a contributory upon liquidation of the company; nor will such subscriber be entitled to a repayment out of the assets of the company of the money paid on such subscription to the promoters, but which has never reached the company.

[*Wood's Case*, L.R. 15 Eq. 236; *Mogridge's Case*, 57 L.J. Ch. 932, applied.]

Statement

APPLICATION by liquidator to enforce liability of shareholder as contributory.

L. J. Elliott, for liquidator.

S. R. Laidlaw, for Dr. Black.

Galt, J.

GALT, J.:—This is an application on the part of the liquidator to fix Dr. Black as a shareholder and contributory of the company in respect of 25 shares of stock of the par value of $100 each, and a premium of $25 per share. A counter application on behalf of Dr. Black, for the return of $250 paid by him to certain promoters of the company in respect of said shares, came before me at the same time.

The grounds of objection set forth in an affidavit filed by Dr. Black are as follows: (*a*) In the fall of the year 1911, I was approached by Chester E. Latham and Lawrence B. Rosewald to become a shareholder in the said company, and was induced by them to consider an application for stock in the said company on their promise and on the distinct understanding that I was to be appointed chief medical referee of the said company on organization. (*b*) Later on, and at the request of the said Latham and Rosewald, I paid a deposit of $250 on the said stock and signed an application for the said stock, but before paying the same and signing the said application, and as a condition precedent to paying the said money and signing said application, I was again assured by them that the agreement

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and understanding was that, unless I was appointed such chief medical referee for the said company, I was not to be liable for the said stock. (c) I also gave them a demand note for $625, and it was agreed and understood that said note was not to be demanded until I was appointed such chief medical referee. (d) Upon organization of the company I was not appointed as such chief medical referee, and in fact, my name was not even put forward for such appointment. (e) Subsequent to organization of said company, and upon finding out that I was not appointed chief medical referee as agreed, I notified the said Chester E. Latham, who was then a director of the said company, that I would not accept the said stock, and would not be liable therefor, and the said Chester E. Latham assured me that my application would be cancelled and the money returned. (f) I never received any notice from the said company of the allotment of the said stock to me. (g) I claim that said application for stock and deposit thereon and note were obtained from me by fraud and misrepresentation.

Upon the hearing of the above two motions, Dr. Black gave oral evidence also.

It appears that, prior to the incorporation of the Great Northern Assurance Co., another company was in existence called the Continental Securities Co., and this latter company consisted mainly of Messrs. Huggard, Rosewald and Latham, and possibly others. I find that the agreement obtained by Rosewald and Latham from Dr. Black was subject to the terms sworn to by Dr. Black.

The Great Northern Assurance Co. was incorporated on March 15, 1912. It held its organization meeting on March 19. It never did any business as an assurance company, and the winding-up order was made on June 2, 1913. The Continental Securities Co. appears to have handed over to the Great Northern Assurance Co. all the applications for shares which had been obtained prior to the incorporation of the latter company. The form of application is printed. The particular form signed by Dr. Black does not contain any stipulation or reference to the arrangement he had made with Messrs. Rosewald and Latham. The evidence shews that the Continental

Securities Co. did not pay over to the Great Northern Assurance Co. the $250 obtained from Dr. Black, but they did hand over the promissory note for $625 given by Dr. Black as an additional payment on the shares.

Dr. Black says, in his evidence:—

The day before the first shareholders' meeting, namely, March 27, 1912, I heard rumours that negotiations were going on with other doctors. I saw Latham, who confirmed my version. Rosewald was there also. I said if there was any doubt they could give me back my money. Rosewald wrote out a cheque but did not give it to me. He went in and got my note, and I think Rosewald tore it up and threw it into the wastepaper basket. Then they conferred and agreed to carry out the original bargain, but I never gave any other note. Rosewald and Latham were at this time officials and directors of the Great Northern Assurance Co. I was never appointed medical referee, either here or elsewhere. On November 7, 1912, I met Latham after writing to him, and he agreed with me and said he would refund the money. He said I ought to get my money back, and he would see that I got it back. I heard that Dr. Hunter was appointed chief medical referee.

Mr. L. J. Elliott, on behalf of the liquidator, bases his argument on the following grounds: (1) That the application for shares was unconditional and that no collateral agreement can be allowed to vary it as against the rights of creditors in the winding-up. (2) That Dr. Black behaved as a shareholder and attended one or more meetings of the company. (3) That all things necessary in order to constitute Dr. Black as a shareholder were shewn, namely—(*a*) application for shares signed by Dr. Black; (*b*) allotment of shares by the company to him; (*c*) notice of allotment duly given to him.

The cases in which agreements, more or less similar to the one in question, have been set up by alleged contributories, indicate many fine distinctions as to whether or not the particular agreement should be regarded as collateral or as conditional. Several of these cases are referred to in Buckley's work on Joint Stock Companies, 9th ed., pp. 59, 60, and notes thereto.

I am of opinion, in the present case, that the agreement on the part of Dr. Black to take shares was subject to a condition that he should be appointed chief medical referee of the company. Rosewald and Latham, the parties who made this bargain with Dr. Black, became directors of the Great Northern Assurance Co. after its incorporation. They, on behalf of the

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Continental Securities Co., handed over to the Great Northern Assurance Co. the form of application signed by Dr. Black, and they were bound in fairness to see that any allotment of shares made by the company to Dr. Black should be accompanied with an appointment of Dr. Black as chief medical referee. This obligation was never repudiated either by Rosewald or Latham.

I am not satisfied that any legal allotment of shares was made to Dr. Black, and I consider the evidence given by Marian Tuckfield, the company's bookkeeper, as to notice of allotment, as being far too vague and inconclusive on which to decide, in opposition to his sworn denial of its receipt, that Dr. Black ever received notice of the allotment of the shares. I think the case falls within the decisions in *Wood's Case*, L.R. 15 Eq. 236, and *Mogridge's Case*, 57 L.J. Ch. 932, and that Dr. Black is entitled to have his name removed from the list of contributories.

With regard to the counterclaim of Dr. Black for repayment of the $250 paid by him to the Continental Securities Co., the evidence shews that this money never reached the Great Northern Assurance Co., and for this reason I think his application must be dismissed.

The argument in the above two applications was almost entirely confined to the liquidator's attempt to fix Dr. Black on the list of contributories. That motion I dismiss with costs. Dr. Black's motion must also be dismissed with costs, but, as I have above indicated, such costs should be almost nominal.

Application dismissed.

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HARVEY v. LAWRENCE.

Saskatchewan Supreme Court, McKay, J. August 24, 1915.

1. VENDOR AND PURCHASER (§ I E—27)—FRAUD—MISREPRESENTATION AS TO ERECTION OF HOTEL IN VICINITY—RESCISSION AGAINST VENDOR'S ASSIGNEE.

A purchaser, who is induced to purchase land by the fraudulent representations of the vendor's agent that the vendor would erect a costly hotel in the vicinity of the lot, is entitled to a rescission of the contract, which remedy he may exercise against the vendor's assignee suing for the balance due on the contract, although he is not entitled to counterclaim for damages against the assignee in consequence of the fraud.

2. ESTOPPEL (§ III G 2—90)—LAND CONTRACT PROCURED BY FRAUD—RESCISSION—CONTINUING PAYMENTS—ACQUIESCENCE—IGNORANCE OF LEGAL REMEDY.

Continuing payments on a contract for the sale of land procured by fraud, or a delay in rescinding it on that account, does not neces-

sarily amount to such acquiescence as will estop the purchaser from exercising his right of rescission, where all the material facts giving him the right to avoid the contract have not been discovered by the purchaser and where he was in ignorance of his rights as to the proper legal remedy.

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Statement

ACTION to recover balance of purchase price on agreement for sale of land and counterclaim for rescission and damages.

Donald Keith, for plaintiffs.

G. A. Cruise, for defendants.

McKay, J.

McKAY, J.:—This is an action by the plaintiffs, as assignees from the defendant, the Marlborough Investments Ltd., for the balance due with interest in an agreement of sale dated January 20, 1913, whereby the defendant, the Marlborough Investments Ltd., agreed to sell and the defendants, Lawrence and Goodspeed, agreed to purchase lot 18 in block 19, in the City of North Battleford, Saskatchewan, according to plan B1929, for the price of $6,250 on the terms set out in the statement of claim and for taxes paid on said lot.

The plaintiffs claim under an assignment dated July 10, A.D. 1913, whereby the Marlborough Investments Ltd. assigned to them the said agreement and lot and agreed to pay the amount due on default of the other defendants.

The plaintiffs allege that a notice in writing of the assignment of the said agreement by the Marlborough Investments Ltd. to the plaintiffs was duly given by the plaintiffs to the defendants, Lawrence and Goodspeed, and also notice of the default of said Lawrence and Goodspeed in making payment of the moneys due to the plaintiffs under the said agreement was duly given to the Marlborough Investments Ltd., but no part of the moneys has been paid. The plaintiffs claim the amount due to be $2,918.25.

Judgment by default was signed by the plaintiffs against the Marlborough Investments Ltd., before the trial, hence this defendant was not represented thereat.

The defendants Lawrence and Goodspeed and Lawrence, Goodspeed & Co., by their statement of defence and at the trial by counsel admitted the plaintiffs' claim as above shortly set forth. In other words, these defendants admit the allegations of facts set forth in the statement of claim except the prayer of

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the plaintiffs, and, amongst other things, set up misrepresentation and fraud, on the part of their co-defendant the Marlborough Investments Ltd. as a defence and ask for a rescission of the agreement of sale and a return of all moneys paid under the agreement. They also set up a counterclaim of $2,500 damages on account of said misrepresentation and fraud, and in the alternative $2,500 damages for breach of promise and undertaking on the part of their said co-defendant to build a $100,000 hotel, and set off these damages for whatever plaintiffs may receive against them.

They allege that the Marlborough Investments Ltd. induced them to enter into said agreement by falsely and fraudulently representing to them:—

(1) That it was then in a position to erect and build an hotel at a cash value of $100,000, upon lots 1 and 2, block 18, on Main St., in the Town of North Battleford, 275 feet from the property sold to these defendants. (2) That it was the owner of said lots 1 and 2, block 18. (3) That it would build the said hotel and have the same fully completed early in the fall of 1913. (4) That tenders for the building of the said hotel would and could be called for immediately. (5) That the excavation upon said lots 1 and 2 was for the purpose of building the hotel thereon.

That the foregoing representations were untrue to the knowledge of the Marlborough Investments Ltd., that they were made for the purpose of inducing these defendants to enter into the said agreement, and these defendants, believing these representations to be true, were induced to enter into said agreement.

The evidence is shortly as follows: In January, 1913, the defendants, Lawrence and Goodspeed, of North Battleford, dealers in electrical supplies, were renting the premises they occupied as a shop, and had spoken of buying a lot to build on. Mr. Detweller, a member of the firm of Simpson & Co., real estate agents in North Battleford, which firm was employed by the Marlborough Investments Ltd. to sell its lots, and also a director of the Marlborough Investments Ltd., heard of this, and called on them in their shop about January 20, 1913, and proposed that they should buy the lot in question—lot 18 in block 19, plan B 1929, North Battleford. Both Lawrence and Goodspeed were present, and they both swear Detweller then made the representations complained of. Lawrence and Goodspeed swear positively that Detweller asserted the Marlborough

Investments owned lots 1 and 2, and had the money to build the $100,000 hotel at once. It was only the cold weather that was withholding building operations, but that the Marlborough Investments Ltd. would prepare the forms for the concrete basement, walls and foundations during the winter, and was then hauling gravel to the site, and as soon as the weather permitted they would pour in the concrete, and that the $100,000 hotel would be completed early in the fall of 1913. According to Lawrence and Goodspeed these representations as to the building of the hotel in 1913 were repeated by a Mr. Norman, a clerk in Simpson & Co.'s office, who witnessed the agreement in question.

Detweller and Norman deny the above and say, in effect, that what they did tell Lawrence and Goodspeed was that the Marlborough Investments Ltd. had bought property and intended to build this hotel out of the proceeds of the sales of this property.

Other witnesses gave evidence and advertisements were put in evidence which went to corroborate that of Lawrence and Goodspeed, but, apart from this, I have come to the conclusion that Detweller did make the representations alleged, which induced Lawrence and Goodspeed to enter into the agreement to purchase.

The evidence also shews that, at the time of making above representations, the Marlborough Investments Ltd. did not own lots 1 and 2 in block 19, and it was not in a position to erect and build a $100,000 hotel. I find that these representations were very material and were fraudulently made by Mr. Detweller, as he must have known at that time that the Marlborough Investments Ltd. did not own the two lots in question, and, of course, admittedly knew it was not then in a position to build the hotel, because he himself says that the money to build the hotel was to be obtained from the profits made out of the sale of lots which had been bought under agreements of sale by the Marlborough Investments Ltd.

Detweller swears that negotiations by the Marlborough Investments Ltd. to purchase lot 1, block 19, were started in December, 1912, and carried on till the summer of 1913, but these negotiations were fruitless as they were not negotiating with

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the true owner, and he says the negotiations for the purchase of this lot were finally completed in June or July, 1913. The transfer from the owner, Robert F. Luck, to the Marlborough Hotel Co. Ltd., of which a certified copy was put in as ex. 7, is dated June 4, 1913. The transfer was signed and witnessed in England and the affidavit of execution sworn in England is dated July 24, 1913. The affidavit of value made by Albert Lipman, the president of the transferee company, is dated September 23, 1913, and the value of the lot is sworn to at $5,000. The certificate of title issued to the Marlborough Hotel Co. Ltd. is dated October 13, 1913. Undoubtedly, this lot was not acquired by the Marlborough Investments Ltd. until, at any rate, July 24, 1913. The evidence shews that the Marlborough Hotel Co. Ltd. is a subsidiary company of the Marlborough Investments Ltd., composed of the same persons.

Detweller also swears that lot 2 was purchased under agreement of sale dated September 23, 1912, but that at the trial the Marlborough Investments Ltd. had not yet a certificate of title for it.

Even if I held that there was sufficient ownership in lot 2 in the Marlborough Investments Ltd., under this agreement of sale, which I do not, there was certainly no ownership in lot 1 before July 24, 1913. And it was in January, 1913, that he was representing to Lawrence and Goodspeed that the Marlborough Investments Ltd. was the owner of these two lots. It may be argued that, because he had this agreement of sale for lot 2 and was negotiating for lot 2 with the supposed owner, he was justified in making such representations, but I do not think so. He was making statements that were untrue. Had he stated the true position of matters, Lawrence and Goodspeed may not have entered into the agreement, but I do not think it is necessary to speculate on what they might then have done; they swear that they would not have thought of the lot at all, had it not been for the representations as to the building of the hotel. The evidence shews that the lot was not worth nearly the price paid for it without the hotel being built.

Neither was he justified in asserting that the Marlborough Investments Ltd. was in a position (and I understood the evi-

dence to mean and it was so meant) financially to go ahead at once and build the $100,000 hotel. Lawrence and Goodspeed both swear that he represented the Marlborough Investments Ltd. had the money to build the hotel, and the evidence clearly shews it had not. These two representations, the ownership of the lots, and the financial ability of the Marlborough Investments Ltd. to build the hotel, which were untrue, are, in my opinion, so material that they are sufficient grounds for rescission of the agreement. And there is no doubt in my mind that it was these representations to Lawrence and Goodspeed, and they believing them to be true, that induced them to enter into the agreement in question and purchase the lots.

Innocent misrepresentation which brings about a contract is now a ground for setting the contract aside, and this rule applies to contracts of every description.

Anson, 12th ed., pp. 173 and 174, citing *Redgrave* v. *Hurd*, 20 Ch. Div. 1, where Jessel, M.R., at p. 12, states:—

As regards rescission of a contract there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of common law—a difference which, of course, has now disappeared by the operation of the Judicature Act, which makes the rules of Equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove the party who obtained it knew at the time that the representation was made that it was false.

In *Newbigging* v. *Adam*, 34 Ch. Div. 582, the rule laid down in *Redgrave* v. *Hurd*, was adopted as for general application. See Anson, p. 174.

But in the case at bar I find there was more than innocent misrepresentation, there was fraudulent misrepresentation by the agents of the Marlborough Investments Ltd., and the latter is bound by these misrepresentations, as a corporation can only act through its agents or officials.

The defendants, Lawrence and Goodspeed, then could have the agreement sued on rescinded as against their co-defendant, the Marlborough Investments Ltd., and they are also entitled to the like remedy as against the assignees, the plaintiffs, as an assignee of an agreement of this nature takes it subject to all equities: R.S.S., ch. 146, sec. 4.

If a man takes an assignment of a chose in action he must take his chance as to the exact position in which the party giving it stands. (Anson,

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12th ed., p. 264.) In like manner, if one of two parties be induced to enter into a contract by fraud, and the fraudulent party assign his interest in the contract for value to X., who is wholly innocent in the matter, the defrauded party may get the contract set aside in equity in spite of the interest acquired in it by X. (Anson, 12th ed., p. 264; *Graham v. Johnson*, 8 Eq. 36.)

The plaintiffs, however, in their reply plead that these defendants:—

(1) Have been guilty of laches and by reason thereof any claim that they might have had by reason of the matters complained of have been lost. (2) Have waived their rights in respect of the matters complained of by payment to the plaintiffs of part of the purchase price due under the said agreement for sale after they became aware that the facts alleged by them in their counterclaim were not true.

On the last day of the trial the plaintiffs amended their reply to the defence and counterclaim by adding the following plea thereto:—

(3) The plaintiffs say that by the defendants' acquiescence and delay the said defendants are now estopped from setting up as against the plaintiffs the representations complained of in the statement of defence and counterclaim.

Undoubtedly the law is that mere delay does not disentitle a defendant to relief, but

acquiescence, if it amounts to affirmation is a defence, if otherwise it is not. (20 Hals., sec. 1771.)

(*g*) Acquiescence must, for this purpose, mean such quiescence as amounts to an assent or adherence to the contract, in other words an election to abide by it. See title Equity, vol. XIII., p. 166.

On referring to p. 166, and particularly at p. 167, dealing with estoppel by acquiescence, Halsbury lays down that

when A. stands by while his right is being infringed by B. the following circumstances must be present in order that the estoppel may be raised against A. . . . (2) B. must expend money, or do some act, on the faith of his mistaken belief; otherwise he does not suffer by A.'s subsequent assertion of his rights; (3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A. must know of his own rights, etc.

The plaintiffs obtained the assignment of the contract on July 10, 1913, and I must assume, in the absence of evidence, then paid for it. And there is no evidence to shew that these defendants at that time knew of the misrepresentation and fraud complained of. Although they knew the hotel was not then being built they were led to believe from time to time that it would be started the following week. There is no clear evi-

dence as to just when they actually discovered the misrepresentation and fraud, but apparently it was not until well on in 1914.

The strongest evidence of acquiescence or affirmation of the agreement against these defendants is the payment they made of $1,800 on May 4, 1914, and the letter they sent with it.

In this letter, amongst other things, they say that the lot was sold to them with the understanding the Marlborough Investments Ltd. was to improve the property by the erection of a $100,000 hotel in 1913 on lots 1 and 2, in block 18. And that with this payment they claim to have paid full value for the lot until such time as the proposed hotel is completed, which the Marlborough Investments Ltd. (apparently meaning their co-defendant) has given them to understand will be built in 1914, and the letter concludes:—

> Until the hotel construction is assured we will protest any further payment and in case of failure to build the hotel we will claim damages to the extent of $2,500 to our property.

This letter is addressed to Marlborough Investment Co. and Loewen, Harvey & Preston.

Other than that they knew that the hotel was not then built; there was nothing to shew these defendants that the Marlborough Investments Ltd. had been guilty of the frauds complained of. They believed the representations made by Detweller as to the building of the hotel: first, that it would be built in 1913, and when not then built that it would be built in 1914. They had not then discovered that the company did not own the lots 1 and 2. They had not then discovered all the material facts giving them the right to avoid the contract. They were under the impression that all they could do was to claim damages for a breach of contract in not building the hotel as promised. They wrote this letter under the mistaken belief that that was their only remedy. They did not know that the misrepresentation and fraud could avoid the agreement, and I find it was under these circumstances that they wrote this letter, and it cannot be taken that this was an acquiescence or affirmation of the voidable agreement.

In this case I do not think these defendants can claim the

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HARVEY v. LAWRENCE.

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damages against the plaintiffs which they thought they could claim, as indicated in this letter.

For a release or waiver to be effectual it is essential that the person granting it should be fully informed as to his rights. (13 Hals., p. 166, sec. 198.)

It follows, from what has already been shewn, that if, *after discovery of the whole of the material facts giving him a right to avoid the contract*, the representee has, by word or act, definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission. (20 Hals., p. 749.)

(*b*) No less than this must be shewn to support the plea.

As above stated, these defendants had not discovered all the material facts giving them the right to avoid the agreement at the time they made the payment of $1,800 and wrote the letter of May 4, 1914, hence it cannot be taken as an affirmance of the agreement.

Affirmation of a contract induced by two distinct misrepresentations, with knowledge of the true facts as regards the one, but not as regards the other, does not debar the representee from relief. Nor does the fact that the representee has claimed and recovered damages against one of two representors, parties to the contract, even though they are partners, preclude him from obtaining rescission against the other. (20 Hals., p. 750, citing *Rawlins* v. *Wickham*, 3 DeG. & J. 304.)

In this latter case the action for damages was actually brought against both parties. In other words, in a sense the plaintiff, the representee, affirmed the contract by bringing thereon an action for damages; one of the defendants died before the declaration was delivered, and the action was prosecuted against the other to a verdict, and damages were assessed at $11,800, but plaintiff actually realized only $300, hence he filed a bill against both defendants to set aside the contract, and it was allowed.

The facts in this case seem to me much stronger in favour of the defendants than the facts for the plaintiffs. In the case at bar where these defendants, Lawrence and Goodspeed, with imperfect knowledge of their rights, only threaten to claim damages, they do not actually institute proceedings. And yet the contention of the defendants in the case cited failed.

Also see *Graham* v. *Johnson*, 8 Eq. 36, where it was held that Graham's promise, to the assignee of a bond, to pay the bond having been made in ignorance of his right to restrain the

assignee from suing him on the bond, did not preclude him from enforcing that right.

I am, therefore, of the opinion that these pleas cannot bar these defendants from their right to have the agreement rescinded.

As to the counterclaim for damages, having come to the conclusion that the agreement should be rescinded, and as the plaintiffs are not guilty of the misrepresentation and fraud complained of, I do not think I can allow these damages: see *Stoddart* v. *Union Trust Ltd.*, [1912] 1 K.B. 181.

These defendants, Lawrence and Goodspeed, ask for rescission of the agreement and a return of the moneys paid thereunder, in their defence and not in their counterclaim, as is customary; but, as no objection was made to the defence and counterclaim in that regard, and the trial and evidence adduced, proceeded as if this relief was correctly pleaded, I will allow all necessary amendments to be made.

The evidence shews that the defendants made the first payment to the Marlborough Investments Ltd. and $1,800 to the plaintiffs, which the plaintiffs in their claim admit they received.

As, however, the Marlborough Investments Ltd. was not represented at the trial, judgment having been already signed against it by default, and there was nothing in the pleadings of Lawrence and Goodspeed to clearly indicate that a personal judgment was being asked against it for a return of the moneys paid to it, I will not direct judgment against it for any moneys, but these defendants, Lawrence and Goodspeed and Lawrence, Goodspeed & Co., will be at liberty to bring a new action against it for a return of all moneys paid to it under the said agreement of sale, or as they may be advised.

The defendants Lawrence and Goodspeed and Lawrence, Goodspeed & Co. will be entitled to judgment for rescission of the said agreement sued on and that the same be delivered up for cancellation and the sum of $1,800 with interest from May 4, 1914, at the rate of 5% per annum against plaintiffs and will have a lien on said lot 18 for this amount, with costs.

Rescission ordered.

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EX. C.

BATHO v. INVINCIBLE RENOVATOR MFG. CO. Ltd.

Exchequer Court of Canada, Cassels, J., October 22, 1915.

PATENTS (§ V—50)—INFRINGEMENT — SUFFICIENCY OF PROOF AS TO — PRIMA FACIE EVIDENCE OF INVENTION.

Judgment delivered 22nd October, 1915.

I reserved judgment with the view of perusing the evidence in order to be satisfied infringement was proved.

Mr. Holden, in view of the American decisions decided not to produce any evidence as to the prior art.

The patent is *primâ facie* evidence of invention.

I think the infringement is sufficiently proved.

Judgment will issue declaring patent No. 79641, dated 17th ————, 1903, to be a valid patent, and the usual judgment for an injunction, damages and costs.

Annotation Annotation—Patents on dust collecting means—Vacuum cleaners.

By RUSSEL S. SMART, B.A., M.E., of the Ontario Bar, Ottawa.

This suit was brought on two patents, the Booth Patent 76595 and the Kenney Patent 79641, both of which patents appear to cover the same subject-matter, which is the combination of a dust extracting nozzle, a power driven pump and dust collecting means interposed between the nozzle and the pump. In brief the patents cover broadly any vacuum cleaner having a power driven pump.

Both of the patents sued on have been the subject of extensive litigation in Great Britain and United States, the case in Great Britain having reached the House of Lords. In the trial in Canada, no defence was made and the Kenney Patent 79641 was alone considered.

The headnote of the British Case, which was that of *The British Vacuum Cleaner Company, Ltd.* v. *London and South West Railway Company* (1912), 29 R.P.C., reads:—

"A patent was granted in 1901 for 'Improvements relating to the extraction of dust from carpets and other materials.' The specification stated that it was essential for practical success to drive by power the pump employed for producing a vacuum, and to maintain a vacuum of at least 5 lbs. per square inch in the filter on the side of the filtering medium where the air and dust entered, when the apparatus was at work, and that it was only to extractors working with a considerable vacuum that the claims related. In an action for infringement of the patent, a certificate of validity had been granted. A subsequent action for infringement was brought, and the plaintiffs claimed costs as between solicitor and client. The defendants denied infringement and validity, and made a counterclaim for revocation of the patent. The defendants contended that the direction to

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use a 5 lbs. vacuum was meaningless, as it was not stated at what part of the apparatus that vacuum was to be, that a vacuum of less than 5 lbs. at the nozzle was sufficient, and that there was no subject-matter. They also contended that forms of the apparatus, for which an independent claim (claim 6) was made, had been abandoned in practice as useless, and that the patent had been anticipated by the specification of H. and T. which described the use of an ejector for obtaining a vacuum. Held, at the trial, that the defendants had infringed; that no publication before the date of the patent had indicated the importance of a tight joint at the carpet, or the vacuum required for efficient working; that H. and T. had erroneously assumed that every ejector would give a sufficient vacuum, and that the evidence of user of their apparatus failed; that the patentee intended the vacuum of 5 lbs. to be at the dust collector; as being the most convenient part; that his specification gave sufficient directions for the construction of an efficient apparatus; and that the fact that certain forms claimed had ceased to be used did not render the patent invalid. An injunction and an inquiry as to damages were granted with solicitor and client costs of the action. Costs on the higher scale and three counsel were refused. The counterclaim was dismissed with party and party costs. The defendants appealed. *Held*, by the Court of Appeal (Buckley, L.J., dissenting), that the patent was not invalid by reason of want of subject-matter or misdirection, and that claim 6 was appendant, and, as such, was valid."

In the report of the case there were strong dissenting judgments, by the Lord Chancellor, the Earl of Halsbury and Lord Atkinson.

Lord Loreburn, L.C., in his dissenting judgment, said:—

"My Lords, I am not able to agree with the order of the Court of Appeal in this case, and I regard it as enlarging the patent law so as to bestow upon successful commercial adaptations a privilege which, by law, should be confined to inventions clearly and definitely explained for the benefit of the public; so that they can be put into use as explained. I agree with the dissenting judgment of Lord Justice Buckley.

"Patents are granted as a reward for invention, but, in return for the restraint upon commercial freedom thereby entailed there is a duty upon the patentee to explain clearly what is the nature of his claim to the privilege, and how it is to be put practically into use, and what are its limits, so that those who are restrained may have no difficulty in knowing what they may do consistently with the monopoly so created, and what they may not do. It is an abuse, which cannot be too sedulously watched and prevented by Courts of law, when a patentee, even if he is really an inventor, so shapes his claim that it may cover what he has not invented at all. Ambiguity in a claim, and the specification leading up to it, cannot be redeemed by a skilful demonstration in argument that the language used admits of an interpretation which makes the claim coterminous with the alleged invention, and makes the description of what is said to have been invented intelligible. The description must be clear of itself, and the interpretation must also be clear. In my opinion, there is no point

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of patent law which ought to be more strictly insisted upon. In that way alone can be defeated the perverse ingenuity which phrases specifications, so that they may terrify traders into submission by an apparent width of construction, and yet be compressible into narrower bounds when the patentee is confronted with a Court of law. These principles seem to me even more important to-day than they used to be when mechanical and other inventions were perhaps simpler than they are now, and drafting had not become so fine an art. But I do not imagine that they will be disputed, though there may be always a difficulty in their application as unfortunately I find to be the case in the present appeal.

"I now proceed to apply what I have said to the facts of this case. It is certainly the fact that Mr. Booth has put upon the market an apparatus which, when used skilfully and with modifications suggested by actual experience, effectually cleans carpets and other articles by removing the dust, and that he is the first person who has succeeded in doing so commercially. He has achieved a commercial success with his apparatus. How far this commercial success is due to business energy we need not consider, because commercial success is not the test of a right to the privilege of a patent, though it is strong evidence that an apparatus is useful. The primary test is invention. It has been often pointed out that different minds will differ on the point whether there has been invention or not. A combination of old parts to produce a new result or a better result may obviously imply invention. But that only indicates one phase of inventiveness, and we are still obliged to inquire whether, in the particular case, the combination does in fact imply invention. This is the main question in the present appeal. We are here concerned with an apparatus of a mechanical kind, consisting of a nozzle, a pipe, a filter or filters, and a power pump, which creates a vacuum at the nozzle, and thus sucks up the dust from the carpet, or other article to which it is applied.

"It is, to my mind, unnecessary that I should go through the three earlier specifications of Howard, Wilton and Cummings. It is enough to say that, at the date of Mr. Booth's patent, it was known that carpets, and so forth, could be cleansed from dust, more or less, by applying to them a nozzle, connected with a pipe through which the air was exhausted and so a vacuum created at the nozzle, which drew in the dust-laden air and so extracted the dust. There was nothing new in using a nozzle, nor in its shape, nor in using a pipe, nor in its dimensions, nor indeed in using a filter, so as to collect the sucked-up dust, nor in using all these things in combination for the purpose of cleansing the carpet. The only features which could be said to be original in Mr. Booth's apparatus or the use of it were as follows: (1) It was said that though Howard used a nozzle, pipe and ejector, and so sucked the dust-laden air from the carpet, yet he used no filter, and moved his apparatus near to but not touching the carpet. (2) It was said that, though Wilton used a nozzle, pipe and filter, and also a steam exhauster fan, bellows or other means to procure the required degree of vacuum, yet his mechanism did not remove the dust by

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suction of the dust-laden air only, but he used a brush and did not place his apparatus in direct contact with the carpet. (3) It was said that Cummings, though he used a nozzle, and pipe, and a fan to produce suction, and though he used close contact between the sucker and the carpet, yet he did not use a power pump or a filter to protect it. Nor did he confine himself to close contact. He contemplated also approximate contact. (4) It was said that Mr. Booth applied the nozzle to the carpet closely, so as to produce a seal, as it is called, whereas previous knowledge and invention had not aimed exclusively at placing the nozzle near the carpet. And further, that Mr. Booth used a power pump in place of a fan and also a filter. It was argued that by using the power pump, Mr. Booth provided a more powerful means of creating a vacuum; by using the filter he protected the pump while it was drawing in the dust-laden air, and by using a close contact between the nozzle and the carpet he maintained a more complete and, therefore, a more effective vacuum at the point of contact. No merit was claimed in regard to the use or size of the pipe, but the whole combination was said to be an invention. All these features were in common with some of the previous specifications, and the pipe was in common with all.

"I cannot perceive the invention. It was common ground, and indeed very obvious that the more powerful you make the air exhauster the more complete vacuum you create and the greater the inrush of dust-laden air, and therefore, the more dust you extract. To use a pump instead of a fan for exhausting the air is, surely, a familiar device. The use of the filter to protect the pump from being clogged with dust required no invention. It follows as a matter of course. Is it invention to say that you must press the nozzle closer to the carpet in order to get a greater rush of dust laden air? To say that is not less a truism than it would be to say that the tighter a piston rod fits the less steam will escape. Given the idea that you can suck the air from a carpet by applying to it a nozzle and creating a vacuum behind the nozzle (which was well known and stated in previous specifications) and, to my mind, there can be no invention in using a pump in place of a fan, or in pressing tighter the nozzle to the carpet, or in doing both together, and it does not mend matters that you employ the obvious accessory of a filter. In my opinion, Mr. Walter was right when he said that Mr. Booth did no more than place in juxtaposition quite familiar parts of mechanism and bid us pump harder. I can conceive that such a juxtaposition might be an ingredient in a patentable invention if Mr. Booth had discovered and disclosed that it would produce useful results, if worked in a particular way with a prescribed degree of force or with some prescribed conditions as to quality, dimensions or arrangement, imparting to it a utility which it would not possess if the prescription were disregarded. That would be analogous to the cases in which a chemical mixture or combination may possess peculiar properties, if certain preparations are adhered to and only then. But it cannot be said that anything of that kind exists here, because there is no critical point. The completeness of the vacuum depends principally upon how

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hard you pump, how hard you press the nozzle to the carpet, and also upon the length and size of the pipe communicating between the nozzle and the pump. It is a question of degree, depending upon all the factors, how much vacuum you will procure at the nozzle where the dust actually is sucked in. And there is no specific degree of vacuum (if I may use the expression) which is needed for the purpose. More vacuum is needed for some kind of carpet or other material. Less is required for others. It is not enough for the patentee to tell us that you can clear the dust through a carpet by using a nozzle, pipe, filter and pump. That was already known, and imparted to the public a familiar idea. It does not take him any further to tell us that he has depicted in his drawing and described in his specification excellent nozzles, pipes, filters and pumps, all of which are quite common. If he had gone further and not merely told us that we can clean a carpet from dust by using this nozzle, pipe, filter and pump, to suck in the dust, but had also given directions how to do it which imparted some new lesson, the case might have been different. This, however, he has not attempted to do, except in one particular, to which I will presently advert. He did not give these directions, because no directions could have been given. The subject did not admit of them, for there is no standard of the vacuum, or of the power needed to produce it, nor any standard of dimensions for any of the parts of this combination. It all depends upon the actual piece of work which has to be done and the conditions of doing it.

"What then is the invention? It is not in the idea of sucking up dust through a nozzle by producing a vacuum behind it. It is not in the mechanical parts of the apparatus or their relative dimensions. It is not in using those parts together, for the use of them together, whenever you wish to produce a vacuum, is elementary. It is not in the order of their juxtaposition, for there could be no other order. If there is any invention at all, it can only be in having produced a mechanical adjusting contrivance by which you would so adjust the pressure to the work, which has to be done, that the implement used on the floor may be at the same time effective and be easily moved. When it is analysed I can see no other possibility. For this last-mentioned result this specification and these drawings are absolutely valueless. And it must be so, because there is in fact no contrivance for adjusting the pressure. Indeed, it is not pretended that there is. Familiar instruments are presented to us adapted to produce a familiar result, namely, the production of a vacuum, and we are left to find out, as each piece of work is put to hand, how to regulate their use so as to clean a carpet. I said that on one point directions are contained in the specification. We are told that it is essential 'to maintain a vacuum of at least 5 lbs. per square inch in the filter in the side of the filtering medium where the air and dust enter, when the apparatus is at work, and therefore it is only to extractors working with a considerable vacuum that my claims relate.' I cannot doubt that this means the 5 lbs. pressure to be in the filter and not at the nozzle. In either case it is, to my mind, clear that the direction was useless and even misleading. It did

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not help; it hindered, because there is no fixed degree of minimum of vacuum. I have therefore arrived at the conclusion that this patent cannot be sustained. Mr. Booth put clearly the problem, if it may be so described, which had to be solved. He told the public what pieces of mechanism, if judiciously used, would produce the proper vacuum at the nozzle, all of which, together with the effect of their juxtaposition, were already known. But how to use them so as to get the proper vacuum he did not tell, except in one particular, wherein he was quite honest, but misleading, and nothing but experience could tell."

Earl of Halsbury, said: "My Lords, this is an appeal of a class which almost always raises a difference of opinion amongst those called upon to decide them; the reason is perhaps not difficult to discover. Mixed up with the question of law, on which the appellate tribunal is called upon to adjudicate, are questions of science and engineering, mechanics and other branches of human knowledge; and while the principles of law regulating the lawfulness of monopolies are simple enough, the application of these principles is sometimes exceedingly difficult. Since the case of *Harwood* v. *Great Northern Railway Company* (11 H.L.C. 654), certain principles of decision have been universally accepted by the Courts, although, of course, the application of these principles varies according to the facts of each particular case. As Lord Wensleydale said in this House, in commenting upon it, the questions in *Harwood* v. *Great Northern Railway Company* had been most fully discussed and considered in the Court of Queen's Bench and in the Court of Exchequer Chamber, in which the judgment of the Court of Queen's Bench was reversed. Every argument which could possibly elucidate the question in the cause had been brought forward, and the learned Baron went on to shew that eight Judges to five had, up to that time, agreed to the decision at which their Lordships ultimately arrived. No wonder that since that decision the principles of it have been generally accepted by the Courts. Now, the principle which is applicable to this case is that stated by Mr. Justice Blackburn (himself one of the dissentient Judges), 11 H.L.C. 666: 'The Statute of Monopolies (21 Jac. 1, ch. 3, sec. 6), excepts from the abolition of monopolies, patents for 'the sole working or making of any manner of new manufactures within this realm to the true and first inventor, and inventors of such manufactures, which others, at the time of making such letters patent and grant, shall not use.' In order to bring the subject-matter of a patent within this exception, there must be invention so applied 'as to produce a practical result. And we' (*i.e.*, the Court of Queen's Bench) 'quite agree with the Court of Exchequer Chamber that the mere application of an old contrivance in the old way to an analogous subject, without any novelty or invention in the mode of applying such old contrivance to the new purpose, is not a valid subject-matter of a patent.' Later on the learned Judge pointed out what I have already referred to, that the question refers to what might be called the region of expert knowledge of machines and engineering. . . .

"He has, I think, sought to prevent the public from using a common

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and well-known instrument for a common purpose, which is an abuse against which Mr. Justice Blackburn gave a warning in a most useful summary of the history of patents, in 1878. He pointed out that, in earlier times, the descriptions given by persons claiming monopolies were very vague, and that in Queen Anne's time the patentee was compelled, within six months, to describe and ascertain particularly the manner in which it was to be performed, and if not, the patent would be void. Then came the statute of 1852. It is enough to say that, by a somewhat elaborate procedure, the legislature has sought to insist that the owner of such a privilege as a patent right confers shall describe and ascertain in no doubtful manner what it is that he is claiming a right to monopolize. This, I think, in the present case has not been done. I am afraid that, even if I adopt the language of the Lord Chief Justice in the effort to interpret the specification, I should be compelled to say I do not quite follow what it means; but I entirely agree with Lord Justice Buckley. At most, what the patentee has said is this: 'Use your pump so that you will succeed in obtaining a draught through the mat.' Of course that is not patentable, neither is it made better by being called a combination. Beyond the fact of convenience of arrangements, there is no combination. A dust pan and a besom might be called a combination, but though they act together they cannot be called a combination machine. If this were held a sufficient specification, I do not know what, within the limits of all these different objects, could not be prohibited by this patentee. I should think there could never be used any suction pump, any piping, or any combination of suction pump with power. The only limit I see is what the patentee himself put in."

Lord Shaw, representing the majority of the Court, said: "My Lords, it is, of course, not sufficient to create subject-matter of a patent for a combination that the patentee has merely put 2 or 3 familiar things or parts of other apparatus together to enable them to achieve a fresh result, unless this also have been accomplished by some use of the inventive faculty as distinguished from what may be described as the accidents or incidents which occur in the working of the ordinary mind. The whole of this branch of the law has been the subject of repeated and frequent exposition. The opinion of Mr. Justice Blackburn, one of the consulted Judges in *Harwood* v. *Great Northern Railway Company* (11 H.L.C. 654), still remains of great value: 'In every case arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims, that there is no invention in the differences, if any, between the old contrivance and that for which the patentee claims a monopoly; and if there is none, there arises a further question of fact, viz., whether the purpose to which the contrivance was before applied and the new purpose are so analogous or cognate that there is no discovery or invention in the new application. Whether, in short, it is a mere application or not. For if there is invention or discovery producing a practical benefit, as in the case of *Crane* v. *Price* (1 Webs. P.C. 377), it is the valid subject of a patent.' The learned Judge then dealt with the question of degree, and

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added, 'And we think it always must be a question of degree, a question of more or less, whether the analogy or cognateness of the apparatus is so close as to prevent there being an invention in the application. . . . If there was any real invention, though a slight one, producing a practical beneficial result, the patent was given.' This last sentence, my Lords, is in entire accord with the opinions of many Judges of the greatest authority and is still the law. The judgment of Lord Chelmsford (Lord Chancellor) in *Penn* v. *Bibby*, L.R. 2 Ch. 136, well illustrates the working out of the rule: 'In every case of this description one main consideration seems to be, whether the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study.' The objection in that case was that 'the alleged invention was merely a new application of an old and well-known thing,' just as here the objection is that it is applying a force-driven pump to the well-known other things, namely, the extracting implements, etc.

"My Lords, it is impossible to shut one's eyes in this case to the history of what I may term the struggle of inventors towards the end achieved by Mr. Booth, and the fact that these repeated struggles were ineffective. This throws light upon the question whether Mr. Booth's application was an invention in the sense requiring thought and study. As I have put it, he did that which had never been done before. Much as these others had studied the subject, they had never accomplished their object. I hold, in these circumstances, that, while on a survey *ex post facto*, of the elements and combination in Booth's specification resulting in a verdict of its simplicity, it may be, if the analytical faculty of the critic be sufficiently dexterous, pronounced to be after all a simple and non-inventive achievement, it would be difficult to protect, under the guidance of such a consideration, a great portion of what, according to the established principles, is patentable subject-matter. There are two judgments of Lord Herschell clearly shewing that it is not invention of great magnitude which is required in such cases. In *Thomson* v. *American Braided Wire Company*, 1889, 6 R.P.C. 527, which was also a case of a claim for a combination, Lord Herschell said, 'I think that even with the state of knowledge which existed at the time the patent was applied for, some invention was required to produce bustle claimed to be protected by it.' And in *Vickers* v. *Siddell*, 1890, the same learned Judge, to whose opinions in patent cases the greatest weight must be attached, dealt with a case of combination, the elements of which were admitted to be all old, but the combining of which was said to have required no invention. On this topic, he said, 7 R.P.C. 304, 'There is no doubt about the law applicable to such a question, though it is often difficult to apply it to the circumstances of a particular case, and its application is perhaps most difficult when the alleged invention consists of a new apparatus combining known elements. If the apparatus be valuable by reason of its simplicity, there is a danger of being misled by that very simplicity into the belief that no invention was needed to produce it. But experience has shewn that not a few in-

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ventions, some of which have revolutionized the industry of this country, have been of so simple a character that when once they were made known, it was difficult to understand how the idea had been so long in presenting itself, or not to believe that they must have been obvious to everyone.'

"As I have already remarked, the simplicity which is alleged with regard to the present patent is far from apparent, and was only pleaded for in the course of a minute critical survey; but even had the simplicity been as real and plain as was contended for, it is thus clear that that would have formed no sufficient answer to the validity of the combination. I desire also to say that, as it must stand acknowledged that the invention in such cases is necessarily a question of degree, impressing differently different minds, which consider it, so in such cases weight attaches to the result which has impressed itself upon the learned Judges who have considered the facts. I shall refer subsequently to the opinion of Lord Justice Buckley on another part of the case, but upon this point he does not dissent, and the invention having been reviewed, in one case by Mr. Justice Farwell, and in the present case by Mr. Justice Neville, and by the Lord Chief Justice of England, and Lord Justice Kennedy, they are all of opinion that there was in fact invention. In that opinion I respectfully, after repeated consideration of the case, agree.

"Nor do I think it unimportant to note the view of Lord Justice Bowen in the *American Braided Wire Case*, 5 R.P.C. 125, the practical force of which must stand admitted: "What is, it seems to me, sound and safe, is the practical conclusion, 'that it is a very important element in the consideration whether there has been invention or not, if you see that the thing never was done in the memory of man down to a particular point, and that the moment it is done it is a great success as regards utility, and as regards value in the market.' It is not conclusive of the question of ingenuity, but it forces this reflection on one: 'unless there is some ingenuity in the person who brought out this article, why was it never brought out before?' In the present case the attempted solutions of the problem by a fan and by an ejector are very amply proved to have been inefficient, wasteful and futile. The evidence is quite plain upon that subject. And when, the problem having been thus before men's minds, and a solution having been anxiously and repeatedly attempted and failed, I think, although not perhaps, *per se* conclusive, it goes a long way to satisfy the mind as to the presence of invention, when Booth's attempt under the patent, now assailed, was accompanied by complete and satisfactory success.

"I only remark in conclusion, upon this part of the case, that I think the appellants' argument which made light of this combination because, upon analysis, its elements could be separately declared to be old, is altogether without force. In *Harrison* v. *Anderston Foundry Company*, the Lord Chancellor (Lord Cairns) dealt with a patent for a combination which he described, L.R. 1 App. Cas. 577, as 'a new combination of old parts to produce a new result, or to produce a known result in a more useful and beneficial way,' and of that he remarked: 'It is not doubted

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that a combination, of which this may be said, is the subject of a patent.' I am humbly of opinion that that elementary rule governs the present case, and that the appellants' argument as against the subject-matter of the Booth patent fails."

Lord Mersey said: "The claim is for a combination consisting of 3 things, namely, an extracting implement, a power driven suction pump, and a dust collecting apparatus. It is truly said that none of these 3 things was a novelty at the date of the patent, and it is also truly said that it required no ingenuity to place them side by side. But the evidence, I think, shews that they are not merely placed side by side, but that they are fitted and worked together in combination in such a manner as to produce one machine which is both novel and useful. To use a homely adage, 'the proof of the pudding is in the eating.' This combination does its work well, and the machine is admittedly a practical success. No earlier contrivance, having the same object in view, has been anything but a failure. This circumstance may not be conclusive in law, in favour of the patentee, but it goes a long way to prove that there is invention, and is, in my opinion, amply sufficient to support the judgment of Mr. Justice Neville.

"As to the second question, namely, whether the machine is sufficiently described in the specification, I think there can be but one answer. The evidence for the plaintiffs on this part of the case shews satisfactorily that the specification is sufficient to enable a fairly competent workman to construct the machine, and it therefore justifies the finding of the Judge at the trial. It appears to me that the omission to state the length of the tubes or the poundage of pressure to be applied is of no consequence. They are matters which a man of ordinary skill would know how to adjust according to the distance of the engine from the carpet or other material being treated, and according to the texture of the material.

"The corresponding Kenney United States Patent 847947 has also been supported by the United States District Court in the Southern District of New York, in the *Vacuum Cleaner Company* v. *American Rotary Valve Co.* (1915), 219, Official Gazette, 587. The important parts of the judgment in this case read:—

"The commercial vacuum cleaner art has grown to substantial proportions, and has been developed in two general directions: (1) the installation of plants in large buildings, and (2) the use in smaller areas, business and home, of single implements operated by hand or electric motive power.

"So rapidly has the commercial art grown that this suit seems to involve a controversy of substantial importance financially (the gross business of the vacuum company from 1905 to September 27, 1907, aggregating over eight hundred thousand dollars, and the plaintiff as the Vacuum Company's reorganized successor, having received since 1909 about $270,000 in license fees), and thus the defendant has presented a vigourous defence, especially in respect of the prior art and a certain prior use, known in the litigation as the Westman defence.

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Annotation (*continued*)—**Patents on dust collecting means — Vacuum cleaners.**

"There is no doubt that Kenney, the patentee, was the founder of the present vacuum cleaner commercial art, and that prior to his time, efforts in the same direction resulted either in indifferent success or in absolute failure, although as far back as 1869, inventors had turned their attention to the subject-matter here concerned (McGaffey Patent No. 91145, same as Lake British Patent).

"Defendant insists that the development of the art is largely due to natural increase of building and greater desire for easy and effective methods of cleanliness, and also the warnings of scientific men in respect of badly behaved germs which find their nesting and developing places more particularly in dust-laden fabrics and floors; but I suppose that even in 1869, prudent housewives and others would have welcomed a labour-saving device for removing dust from floors and furniture, and as early as 1896, Messrs. Young and Douglas appreciated the problem of seeking out the 'many nooks and corners not accessible to the broom, where the dust and dirt settle and accumulate, making nesting places for microbes and breeding disease.' . . .

"But neither they nor any one else prior to Kenney accomplished the result sufficiently to found or maintain any substantial business enterprise, based upon their alleged inventions.

"The success of Kenney was not accidental, nor is this a case where previous meritorious inventions have failed for want of capital.

"Kenney was almost the story-book inventor. In 1901, when he made his invention, he had a cash capital of not more than $500, and he was working on a salary of $40 to $50 per week.

"Mr. Foley, consulting engineer, during the construction of the Frick building in Pittsburg, met Kenney in New York in 1901, and, learning of Kenney's apparatus, went to Kenney's small room in Trinity place where experimental work was being carried on. Foley was sufficiently impressed, so that after negotiation, the Kenney system was installed in the Frick building in May, 1902. The public demonstration of the operation of the Kenney vacuum cleaning installations was described in some Pittsburg newspapers, and thereafter, the business grew by leaps and bounds, and after some changing of hands, the patents are now owned by this plaintiff.

"A history of the prior art will help to shew why Kenney succeeded where others theretofore failed. Like many combination patents, the principal elements of claims 1, 2, 3, of the first patent, speaking broadly, were old, *i.e.*, (1) a suction-creating device, (2) a cleaning-tool, and (3) a separator. In claim 4 for the cleaning tool, the emphasized characteristics are, (1) a narrow inlet-slot, bounded by (2) lips which lie in the contact-surface of the cleaner with the outward mouth of the slot lying in the plane of this contact-surface.

"The testimony of the two experts, Professors Reeve and Kinealy, and the demonstrations in the court-room, were interesting and to the point, but the situation gets down to the proposition that Kenney taught the art that the essential element was a narrow elongated slot capable of contact or sealing with the surface to be cleaned. This element, co-operating

Annotation (*continued*)—**Patents on dust collecting means — Vacuum cleaners.** CAN.

with the others, produces, for all practical purposes, a vacuum, whereby the dirt is sucked up as distinguished from an air-current where the material is blown up and some of it escapes, although the surface seems, to the layman's eye to be cleaned. [Annotation

"The prior art proceeded on the theory of non-contracting or non-sealing slots or impracticable wide slots, and some of the illustrative apparatus, from a practical standpoint, were grotesque.

"But, if there were any doubt, commercial utility has resolved the doubt. I am a strong believer in the rule as to commercial utility. It often pierces a labyrinth of the technique of science and the law, and applies the experience of the big workaday outside world. It places achievement above forgotten files and file-wrappers. It is frequently an aid to the conclusion that what seems simple to-day was an unsolved problem yesterday.

"In arriving at these conclusions, I have considered it unnecessary to discuss the details of the development of the art as relating to motive power and separators because I have accepted these elements as old. Further, I have not overlooked the decisions of foreign Courts, but I am quite in agreement with the views of Judge Dodge as stated in *Haskell Golf Ball Co.* v. *Sporting Goods Sales Co.* (210 F.R. at p. 628)."

REX v. FITZPATRICK. MAN.

Manitoba Court of King's Bench, Prendergast, J., and Galt, J. October 2, 1915. K. B.

1. CRIMINAL LAW (§ IV D—122)—SENTENCE OF IMPRISONMENT—ALTERNATIVE OF LEAVING THE JURISDICTION—STAY OF COMMITMENT.

Where a magistrate imposes a sentence of three months' imprisonment on convicting the accused tried before him under Part XVI, sec. 774, for an indictable offence, and at the same time directs that the accused be given time to leave the city by staying the issue of the commitment for forty-eight hours, the accused is free from arrest under that conviction on returning to the city more than three months after the commitment might have issued, for the sentence of commitment was then spent. (Per Galt, J.)

Statement

HABEAS corpus applications made first to PRENDERGAST, J., and then to GALT, J., raising an additional ground.

M. N. Doyle, for applicant.

John Allen, Deputy Attorney-General, for the Crown.

Prendergast, J.

PRENDERGAST, J.:—This is an application for habeas corpus. The main objection urged for the prisoner is directed against the practice which has now become common with magistrates, whereby the accused in a certain class of cases, after being convicted and sentenced to imprisonment is, as it is commonly expressed, given time to leave the city or country. I find, however, that this is effected by, and involves, no other judicial act by the magistrate than a direction that the execution of the warrant of commitment be withheld for a short space of time

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specified, the understanding being that the accused will not be interfered with if he chooses to leave within that time.

The practice seems to me to be in the interest of the community, as it affords an inexpensive means of ridding it of undesirables. On the other hand, it would appear that convicted parties also consider it to be in their own interest. In fact, it is generally adopted only when the accused signifies his readiness to avail himself of it. I should add that in the present case the prisoner pleaded guilty and was assisted by able counsel.

I am free to admit that the practice can easily be made an occasion for abuse, inasmuch as the re-arrest is not dependent on any further action by the magistrate as in a case of suspended sentence. But nothing of that nature happened in this case. The application should be dismissed.

Galt, J.

GALT, J.:—On the 15th of March, 1915, the applicant, Ida Fitzpatrick, was convicted before a police magistrate of being an inmate of a disorderly house; she was convicted and sentenced to three months' imprisonment. The warrant was held over for forty-eight hours to give her an opportunity, if she felt disposed to take advantage of it, to leave the city. No definite time was fixed as to how long she was to remain away. As a matter of fact she left the city and remained away for three months. Upon her return she was re-arrested upon a warrant based upon the above conviction.

An application is now made for a writ of habeas corpus to secure her discharge, on the ground that her re-arrest was illegal.

It appears to me that at the expiration of the three months the effect of the conviction was spent, and no power existed to re-arrest the applicant on a warrant based on the old conviction.

I enquired of counsel for the Crown whether he had any authority to shew that the police court, or any other court in Manitoba, had power to banish an individual for life, and he frankly admitted that no such authority was known to him. In my opinion no such power exists. For these reasons I think the order must be granted, and the prisoner discharged from custody. There will be the usual protection to the magistrate, jailer, and any constable or other officials concerned in the re-arrest. *Prisoner discharged.*

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

FARB v. NELSON.

SASK.

S.C.

Saskatchewan Supreme Court, McKay, J. December 21, 1915.

FIRES (§ I—6)—*Negligent operation of threshing engine—Open spark arrester—Placing outfit in direction of wind—Close proximity to barn—Manure piles.*]—Action for negligence in the use and operation of a threshing outfit thereby setting fire to barn and contents therein.

C. P. Tisdall, for plaintiff.

F. C. Wilson, for defendants.

MCKAY, J.:—I come to the conclusion that the spark arrester was open at the time defendants were threshing for plaintiff and at the time of the fire, and so find, and this was negligence on the part of defendants.

But, apart from this question of whether the spark arrester was open or closed, the defendant Nelson swears the engine threw out sparks even when the spark arrester was closed; and yet he set the engine and separator east and west with, according to his evidence, a wind blowing from the east which would carry the smoke and sparks in the direction of the separator and stacks. But I do not believe the wind was so blowing, but believe the plaintiff, and find that a strong wind was blowing from the south-westerly direction, which carried the smoke and sparks from the engine in the direction of the barn, and that the fires started in the manure pile above referred to were started by the sparks from the engine.

The defendant Nelson should have set the engine in a position not to carry the sparks in the direction of the barn, and I find that this could have been done. Both plaintiff and his witness, Peter Nelson, swear the engine and separator could have been set north and south, which setting would have been quite safe.

The plaintiff swears defendant Haugen, on the day of the

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fire, admitted to him in a conversation he had with him that defendant Nelson should have known better than set the engine the way he did. Defendant Haugen does not deny this, except that he says he has no recollection of any conversation with plaintiff on that occasion. I believe the plaintiff's evidence as to this conversation and find that Haugen did make that statement to him: *Lane* v. *Jackson*, 52 E.R. 710, 711. I therefore find that the defendant Nelson was negligent in setting the engine and separator east and west with a strong wind blowing from a south-westerly direction. I also find that the defendant Nelson was negligent in setting the engine within 28 ft. of the barn.

The evidence shewed that the barn had no real foundation, and that sparks from the engine could easily be blown under the foundation into the barn, or the fire started in the manure pile along the south-west corner of the barn could easily burn its way into the barn, and I find that the fire that burned the barn and its contents—the plaintiff's goods and chattels—was started through the negligence of the defendants by the sparks from the engine operated by defendant Nelson for, and owned by, defendant Haugen; that said fire started in the manure pile along the south-west corner of the barn, and from there burnt its way into the barn.

There will, therefore, be judgment against the defendants for $1,147, with costs. *Judgment for plaintiff.*

DICK v. LAMBERT.

Saskatchewan Supreme Court, Newlands, J. December 23, 1915.

VENDOR AND PURCHASER (§ II—31)—*Vendor's lien—Acceptance of note no waiver of—Purchaser acting as agent for undisclosed principal—Vendor's right to file caveat under Land Titles Act—Subsequent registration of mortgage—Effect.*]—Action by vendor of land for personal judgment and a vendor's lien.

Blain, for plaintiff.

Bigelow, for defendants.

NEWLANDS, J.:—The dealings in this case were between the plaintiff and defendant Wm. M. Lambert, and plaintiff took the promissory note for the balance of the purchase money be-

lieving the same to be due by said Wm. B. Lambert to him, and he afterwards sued on the same and obtained judgment in Manitoba before it came to his knowledge that Sadie B. Lambert was the principal and Wm. B. Lambert her agent.

This finding disposes of two objections that defendant put forth to the plaintiff's right to succeed, viz., that the note of Wm. B. Lambert was taken in settlement, not as mere evidence of the amount due, but as security for Sadie B. Lambert's indebtedness. This could not be the case when, at the time he took it he regarded Wm. B. Lambert as the debtor; and second: that by bringing an action on Lambert's note he elected to accept his liability to pay in place of the vendor's lien. This, too, could not be the case, as he did not then know that Wm. B. Lambert was acting for an undisclosed principal, and there could, therefore, have been no election.

The defendant also pleads sec. 136 of the Land Titles Act is a bar to this action. As no claim is made which affects the defendant's title but in fact admits her ownership and must do so in order to succeed, I do not think this section applies to a case like the present.

The defendant also advanced the proposition that I could not grant the plaintiffs' claim to a vendor's lien because the Royal Bank of Canada had a mortgage registered against this land, and were not parties to this suit. As this mortgage is subsequent to the caveat filed by the plaintiff and is, therefore, subject to it by the provisions of sec. 125 of the Land Titles Act, I must overrule this objection.

A more serious question would have been plaintiff's right to file a caveat, as a vendor's lien does not arise by virtue of any instrument, unless it can be said to arise under the transfer from plaintiff to defendant, which I very much doubt; and I take it that sec. 125 only gives the right to file a caveat to persons having interests therein specified and arising under the instruments mentioned. However, the caveat was filed, and I must therefore give effect to it, particularly as defendant does not raise any question in his defence as to plaintiff's right to file same.

Plaintiff will have judgment against Sadie B. Lambert as

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claimed, together with a vendor's lien on the above described property for $2,000 and interest, with 3 months to pay same, otherwise sale. Costs against Sadie B. Lambert. Action dismissed against Wm. B. Lambert with costs.

The counterclaim is dismissed with costs, there being no evidence to support same. *Judgment for plaintiff.*

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DOIG v. MATHEWS.

British Columbia Supreme Court, Macdonald, J. November 17, 1915.

CORPORATIONS AND COMPANIES (§ IV G 1—106)—*Election of directors—Sufficiency of quorum—Disqualification of members—Unpaid calls.*]—Interim injunction restraining defendant from acting as director.

Bodwell & Lawson, for defendants.

Taylor & Campbell, for plaintiffs.

MACDONALD, J.:—Plaintiff suing, on behalf of himself and other shareholders of the Port Edward Townsite Co. Ltd., other than the defendants, applied to me for an interim injunction to restrain such defendants from acting as directors. The validity of their election was questioned and such a doubt was raised in the mind of counsel for the defendants, that I was asked to adopt the course indicated in *Harben* v. *Phillips*, 23 Ch.D. 14—the necessary undertaking was given on the part of the defendants, and the application for injunction was then adjourned so that the validity of the election of directors might be settled by

a proper and undoubted meeting of the shareholders, and to leave to the shareholders their undoubted right of settling in their own way what is to be their policy and how their business is to be carried on.

An extraordinary general meeting of the shareholders of the company has accordingly been held. Such meeting practically confirmed the result of the previous meeting and again elected the defendants as a board of directors. This meeting is now attacked on the ground that there was not a proper quorum present, and thus the election of such directors was invalid. The company is governed by Table "A" of the Companies Act, except with respect to certain modifications, which do not affect the point in question. Art. 51 of Table "A" provides that:—

No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members present, shall be a quorum.

It appears there were eight shareholders present at the meeting, but only the defendants Mathews and Johnston were qualified to vote, and they alone exercised such right in the election of the directors. The other six shareholders present were disqualified from voting under art. 63, which provides that:—

No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

The question is, did they or any one of them, notwithstanding their inability to vote, constitute, with Mathews and Johnston, the requisite quorum at the time when the meeting proceeded to business? The election is sought to be upheld on the ground that a shareholder may be in arrears for calls and still be one of the "members" referred to in art. 51. In other words, he might be debarred from voting and still be entitled to be present at the meeting and assist in forming the quorum. Counsel state that there is no direct authority to assist me in arriving at a conclusion as to whether this contention is tenable. On first consideration it seems a startling proposition. It would mean that if the meeting had been called by the directors, through a requisition signed only by shareholders entitled to vote, it might be attended by persons of a different class, viz., those not entitled to vote at such meeting. There is no doubt, however, that weight is given to the defendants' contention by some of the sections of the Act in which even a "subscriber" is declared to be a "member" as well as those who have, by agreement, become members on the register of the company. Then, on the contrary, the article outlining proceedings at the general meeting, provides for a vote being taken by a show of hands and poll may be demanded "by at least three members." This could not be accomplished if there were only two shareholders present entitled to vote, unless the curious anomaly took place of all persons entitled to vote, calling in a third person who had no vote, to obtain a poll of votes, in which such third person could not himself take part. Then art. 60 states that

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on a show of hands every member present in person shall have one vote, on a poll every member shall have one vote for each share of which he is the holder.

Art. 58 provides that where there is an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting shall be entitled to a second or casting vote. The chairman of the meeting, under consideration, was not entitled to vote as he was one of those in arrears for calls upon shares, so if the event outlined in this article occurred, it could not have been consummated. Art. 59 contemplates that a poll may be taken on the election of the chairman of the meeting. This could not be accomplished unless the three members required for that purpose included a person not entitled to vote, as previously indicated. I might have come to the conclusion that under these circumstances the election of directors was invalid, were it not for the remarks of Kekewich, J., in *Young* v. *South African, etc., Syn.*, [1896] 2 Ch. 268 at 277. This Judge, with great experience in company law, in discussing the necessary three-fourths majority to pass a special resolution said:—

I say nothing here about the distinction between "members" and "a member entitled to vote." The distinction is certainly to be found in the face of the Act, and it may be, I do not pause to consider it further, that members who are not entitled to vote may be members who are entitled to form a quorum. This seems a practical absurdity but I pass it for the present purpose.

This case was referred to in vol. 5, Hals., p. 254, note (*a*) as follows:—

Members not entitled to vote may possibly be entitled to form a quorum.

Sir Henry Buckley, in his work on Company Law, referring to this case and its bearing on art. 51, says:—

Whether under this article the members to form the quorum must be members entitled to vote, *quære*.

The fact of this distinguished Judge thus referring to the question in his valuable work, is an indication that the point was well worthy of consideration. It is to be noted that he does not express any contrary view. From Palmer's Company Precedents, 10th ed., p. 642, it would appear that in order to remove any doubt as to the matter under discussion, it was deemed advisable by special art. 82, to provide that no member should be entitled to be present at a meeting "or be reckoned in a quorum"

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whilst any call was due by him to the company, thus removing the doubt created under art. 51 of Table "A."

The granting or withholding of an interim injunction under the circumstances here presented is a matter of discretion. It is generally applied, in order to enable matters to remain in *statu quo* until the trial of the action. Even although the plaintiff and those associated with him may be the minority shareholders I should, of course, not hesitate to interfere if I were satisfied that a clear legal right was affected or that they were being oppressed by the majority. The matter is not, however, in such position. The trial Judge may, or may not, follow the remarks of Kekewich, J., I am not required, upon this application, to express a decided opinion on the point. I think that in view of the *dicta* and authorities referred to, I should not interfere and restrain the directors from further acting. I have not dealt specially with the matter of the chairman of the meeting not being entitled to vote, as this was not raised in argument before me.

The injunction is refused and the action may proceed to trial—costs reserved. *Injunction refused.*

Re McCORMICK.

British Columbia Supreme Court, Macdonald, J. November 2, 1915.

TRUSTS (§ II B—49)—*Investments specified in will—Power of trustee to invest in statutory securities unless expressly forbidden.*]—Motion by executor for directions as to investments.

D. Donaghy, for administrator.

E. A. Dickie, for Mrs. McCormick.

MACDONALD, J.:—Under the provisions of the will of George McCormick the executors were directed as soon as conveniently might be, but not so as to sacrifice the same,

to sell and convert all the real and personal estate, and the proceeds or sums of money so arising, to invest in the Savings Bank Department of the Dominion Bank or in the Government Savings Bank.

The advice of the Court is sought, by the administrator with will annexed, as to whether this stipulation as to investment is such as to prevent trust funds being invested in the securities mentioned in sec. 12, ch. 232, R.S.B.C.

This is an enabling statute, and a similar enactment in Eng-

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land has received the favourable construction applied to legislation of that nature. It is clear that an investment in such securities is not "expressly forbidden" by the will; but does the designation of specific modes of investment operate inferentially as a prohibition against any other course being pursued by the administrator in dealing with the trust funds?

In *Burke* v. *Burke*, [1908] 2 Ch. 248, the will provided that the trustees should *keep* the trust estate and invest the same by leaving it on deposit with a particular bank. Neville, J., referring to the Act, enabling trustees to invest trust funds, said that "the words of the Act require, not a direction that the trustees shall invest in certain investments; but an express prohibition of any of the investments permitted by the Act which the testator wishes to exclude." After referring to the judgment in *Re Maire*, *infra*, he then adds:—

> It would, in my opinion, be wrong to introduce nice distinctions as to the application of the Act, because it was intended to give trustees a plain and safe guide.

Re Maire, *Maire* v. *De la Batut*, 49 Sol. J. 383, the will provided for sale and conversion of trust funds and investments of proceeds in three per cent. consolidated bank annuities. Farwell, J., held that the trustees were entitled to change the investment of the trust fund and that the statutory provisions as to investment could be applied.

Re Dick-Lopes v. *Hume-Dick*, [1891] 1 Ch. 423 at 430, Kay, L.J., refers to the object of this statute

> speaking generally, being to *enlarge the powers of trustees* even under existing trusts as well as under trusts created in future.

In *Ovey* v. *Ovey*, [1900] 2 Ch. 524, the will provided that the trust funds should be invested in three per cent. consolidated bank annuities *and no other securities*. Hardy, J., in refusing to follow *Re Wedderburn's Trusts*, 9 Ch.D. 112, said: "It would be a strong thing to set aside the express directions." This case was cited in *Burke* v. *Burke*, *supra*, but doubtless from the prohibitive nature of the wording in the will, was not referred to nor can it be considered as effecting the judgment in the latter.

In my opinion, as negative words were not used in the will in question, the authorities based on a similar statute apply, and

should be followed. The wider scope afforded by the B.C. Statute for investment can be properly adopted. There can be, as it were, read into the will the words of said section 12. The trust funds may thus, subject to the proviso, be invested in the manner indicated. *Order accordingly.*

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CLARKE v. CLARKE.

Nova Scotia Supreme Court, Graham, C.J., Drysdale, J., Ritchie, E.J., and Harris, J. December 20, 1915.

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DEEDS (§ II D 2—40)—*Conveyance by parents in consideration of support for life—Reservations and exceptions—Household and farming effects.*]—Appeal from judgment of Longley, J., in favour of plaintiff in an action of conversion, which is reversed.

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

V. J. Paton, K.C., and *L. H. Martell*, for respondent.

The judgment of the Court was delivered by

GRAHAM, C.J.:—There is no dispute that the defendant, the son, agreed verbally to support the plaintiff, his father, and his mother for life. Also that at the time of this agreement the father conveyed to the defendant the place at Miller's Creek, near Newport, on which they lived. We have the usual printed form of deed for that executed by the father and by the mother, the latter releasing her dower. What the dispute is about is whether the verbal agreement also provided that the farming implements and other personal property on the place were to be the son's property.

The son had been living in the States, working as an electric car driver. In the summer of 1910, he and his wife came to visit his parents at Miller's Creek. There was a proposal made that he should return to the province and support his parents on the place. The plaintiff himself says: "I said to my son, 'You have everything to start with,' but I did not give them to him." "In regard to the personal property was there any agreement? A. No, because I thought he would fulfil his agreement."

The plaintiff went back to the States, and in March, 1911, packed up his furniture there and moved to this place, and he and his wife have lived there since.

During the absence of the son in the States, the deed I have

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mentioned was executed and given to the defendant's wife who had remained in Nova Scotia, and it was registered.

Two witnesses, James C. Spence and David Stillman, called as witnesses by the defendant, each testifies, that on two occasions respectively after this, the father said he had not any property.

The defendant lived on the place for two years and used the personal property in question, the farming implements, of course, in cultivating the place. He paid off a mortgage on the farm. There was quarreling, unfortunately, and the plaintiff and the mother left the place.

The Judge who tried the case apparently came to the conclusion that the son was only to have the use of the personal property as long as he supported them. But I can draw no distinction between his having the use of the property in dispute and agreeing that it should belong to him. I mean that the testimony, if taken, is rather in favour of the latter view. There is no midway position.

Then, if it is contended, as it was, why was not the personal property included in the deed, the answer would be why was not the condition for the support of the old people in the deed? Either there was to be a separate instrument or there was to be nothing but the parol agreement.

The judgment for the plaintiff for the sum of $120 damages must be set aside and the action dismissed with costs. But as to the property in respect to which the defendant disclaimed, mentioned in the second paragraph of the defence, there will be a declaration that there was no conversion thereof, and that it is the property of the plaintiff. *Appeal allowed.*

FEINDEL v. GUNN.

Nova Scotia Supreme Court, Graham, C.J., Longley, J., and Ritchie, E.J., and Harris, J. December 29, 1915.

APPEAL (§ VII L 3—497)—*Action for negligence against bailee—Death of hired horse caused by negligent driving—Review of findings of court—Insufficient evidence to sustain verdict for plaintiff.*]—Appeal from the judgment of Forbes, Co. Ct. J., in favour of plaintiff in an action by a livery stable

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keeper, claiming damages for the death of a horse caused by negligent driving.

V. J. Paton, K.C., for appellants.

J. A. McLean, K.C., for respondent.

The judgment of the Court was delivered by

RITCHIE, E.J.:—The defendants hired a horse from the plaintiff, a livery stable keeper at Bridgewater. The horse died while in their hands and the plaintiff's claim is, that the death of the horse was caused by the negligent, careless and furious way in which the horse was driven by the defendants.

Upon this question of fact the decision in this case depends.

The burden, of course, rests upon the plaintiff. The County Court Judge has found the question of fact in his favour.

The rule as to the treatment of findings of fact which come to a Court of Appeal from a Judge trying a case without a jury is well settled. The presumption is in favour of the finding, and in order to succeed, it is incumbent on the appellant to displace that presumption to the satisfaction of the Court. But the case is reheard on appeal, and it is the duty of the Court to act on its own considered conclusions on questions of fact as well as of law.

In this case I am very strongly of opinion that there is no evidence upon which it ought or can properly be held that the death of the horse was caused by the negligence or improper conduct of the defendants. I do not think that there is any object in discussing the evidence. After giving it the most careful consideration, I have come to the conclusion which I have indicated.

I therefore think that the appeal must be allowed with costs, and the action dismissed with costs. *Appeal allowed.*

BARNABY v. O'DONNELL.

Nova Scotia Supreme Court, Graham, C.J., Longley and Drysdale, JJ., and Ritchie, E.J. December 20, 1915.

EXECUTORS AND ADMINISTRATORS (§ IV A 1—75)—*Claims against estate—Medical attendance upon deceased—Reasonableness of charges.*]—Appeal from the judgment of Foster, Judge of Probate for the County of Halifax, disallowing plaintiff's account for medical services in attendance upon deceased,

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amounting in all to $775, less the sum of $220, credited as received on account.

James Terrell, for appellant.

R. T. Macilreith, for respondent.

The judgment of the Court was delivered by

DRYSDALE, J.:—Counsel for the estate objects to recovery herein by plaintiff on the ground that plaintiff has failed to prove that he is registered under and in accordance with the provisions of ch. 103, R.S.N.S. of the Practice of Medicine and Surgery, and that sec. 25 of such Act is a bar to recovery. There were no pleadings governing the contest below, and we cannot tell what took place in this connection before the Judge of Probate, and as there is, on the merits of the claim, admittedly about one month's services unpaid, it seems unjust to deprive plaintiff of the right of recovery at all if he is now ready and willing, as his counsel suggests, to prove before us due registration under the chapter. I am of opinion this privilege should be accorded plaintiff at the present stage. As to what disposition should be made of plaintiff's claim on the merits I have no hesitation in saying that the account on its face has all the earmarks of an account improperly padded as against the dead. I am of opinion we ought to make such order as the Judge of Probate should have made in the premises, that the plaintiff is entitled to a reasonable allowance to cover an unpaid balance. I think, under the evidence, an examination of the account discloses a long series of improper charges. Guided by such independent testimony, as we have in the case, a very large portion of the account ought to be disallowed. Attendances are charged for that never were made, if independent women are telling the truth, and I see no reason whatever for doubting their statements. In fact their statements are consistent with the probabilities, and the telephone charges are ridiculous.

In my opinion, full justice would be done plaintiff if a decree is made allowing him to rank for a balance as due him of $75.

Appeal allowed.

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ROLT v. GRIESE & WOOD.

Saskatchewan Supreme Court, McKay, J. November 6, 1915.

VENDOR AND PURCHASER (§ I E—27)—*Fraud — Misrepresentations as to erection of hotel—Purchaser's right of rescis-*

sion—Remedy exercisable against vendor's assignee—Estoppel.] —Action for rescission of agreement of sale of land.

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O. M. Biggar, K.C., for plaintiff.

D. Keith, for defendants, Griese & Wood.

J. K. Sparling, for defendant, Fidelity Trust Co.

MCKAY, J.:—Griese and Wood of Griese & Wood, Ltd., one of the defendants, and other citizens of North Battleford, had, in the fall of 1912, decided to form a company or syndicate for the purpose of buying and selling real estate, and building a hotel in North Battleford at a cost or value of $100,000. This company or syndicate was incorporated on October 22, 1912, under the name of The Marlborough Investments Ltd. The same parties formed another company called The Marlborough Hotel Co., incorporated on December 19, 1912, to operate the hotel when built. The Marlborough Investments Ltd. represented that it intended to build and complete the hotel during the year of 1913, and started the excavations for the hotel in the fall of 1912 on lots 1 and 2, block 18, North Battleford.

The hotel was not built, in fact nothing was done towards the actual erection other than the excavations made during the fall of 1912, and hauling some gravel and sand on to the proposed site during that winter, 1912-1913. The company was never in a position to build, as it had not the money. The agreement in question was signed by plaintiff in Edmonton before he came down to North Battleford about November 7, 1912.

The question is: Were these representations true or false?

The substance of these representations is that the company owned these lots 1 and 2, and was in a position to build the $100,000 hotel, that all arrangements had been made, which would include financial as well as others.

As to ownership of the lots, the evidence clearly shews the company did not own them. It did not start to negotiate for lot 1 until after the sale to plaintiff. As to lot 2 it apparently had an agreement of sale, but it did not own it, and did not own it at the time of the trial.

As to all arrangements being made, including financial, the company had not the money itself, and Messrs. Wood and Lipman admit it had to depend upon proceeds of sales of real estate

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or a loan, neither of which could be obtained, and the company never was in a position to build and never had all arrangements made for building. The plans and specifications were not prepared.

These representations, as to ownership of lots and financial and other arrangements being ready, being false and upon which the building of the hotel would depend, I do not think it is necessary for me to deal with the others, particularly as many of the others fall with them.

These representations being false and being material representations that induced the plaintiff to enter into the said agreement, are sufficient, in my opinion, to void it. And it is immaterial whether Mr. Wood believed them to be true or not at the time he made them.

Innocent misrepresentation which brings about a contract is now a ground for setting the contract aside, and this rule applies to contracts of every description: Anson on Contracts, 2nd ed., pp. 173-174; *Redgrave* v. *Hurd*, 20 Ch.D. 1.

For the purpose of proceedings to set aside a contract or transaction, it is immaterial whether the representation was fraudulent or innocent: 20 Hals., p. 737 and cases there cited.

But in the case at bar, were it necessary for me to do so, I think I would be justified in coming to the conclusion that the representations were made fraudulently. The representation as to ownership of the lots in the sense that it was made recklessly without caring whether it was true or false, which would be a fraudulent representation in law. Mr. Wood was—according to his own evidence—only informed that the company owned these lots and by very little trouble he could have ascertained it did not own them. With regard to the other representations, as to the company having made all arrangements and building would commence as soon as winter was over, etc., he must have known that this was not true, or made the statement recklessly, not caring whether it was true or false.

The plaintiff then is in a position to set aside this agreement as against defendant Griese & Wood Ltd., and I am also of the opinion he can do so as against the assignee, the other defendant, as the assignee takes the assignment subject to all equities: R.S.S. ch. 146, sec. 4.

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If a man takes an assignment of a chose in action he must take his chance as to the exact position in which the party giving it stands: Anson on Contracts, 2nd ed., p. 264; *Mangles* v. *Dixon*, 3 H.L. Cas. 734.

In like manner, if one of two parties be induced to enter into a contract by fraud, and the fraudulent party assign his interest in the contract for value to X, who is wholly innocent in the matter, the defrauded party may get the contract set aside in equity in spite of the interest acquired in it by X: Anson on Contracts, 2nd ed., p. 264; *Graham* v. *Johnson*, 8 Eq. 36; also see Williams Vendor and Purchaser, 2nd ed., 832; 4 Hals., p. 386.

But the defendant, The Fidelity Trust Co., contends that the plaintiff has disentitled himself to relief on the grounds pleaded and above set forth.

As to the first objection: Estoppel. Estoppel is a rule of evidence and is thus stated by Lord Denham, in *Pickard* v. *Sears*, 6 A. & E. 469:—

Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

Also see 13 Hals., p. 167, where it is stated in giving the elements in Estoppel:—

When A stands by while his right is being infringed by B, the following circumstances must be present in order that the estoppel may be raised against A. . . . (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise he does not suffer by A's subsequent assertion of his rights. (3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights. . . .

The facts in the case at bar are that Hull, Sparling & Co., solicitors for this defendant, notified plaintiff by letter dated January 22, 1913, of the assignment. The cheque for the consideration for the assignment (ex. 15), is dated February 1, 1913, and according to Mr. Hull's evidence was mailed from Winnipeg on February 1, 1913. The plaintiff's letter to Hull, Sparling & Co. is dated February 5, 1913, and at this time he was not aware of the misrepresentations and fraud complained of. According to plaintiff's evidence, his suspicions began about May or June, 1913. And in July or August, 1913, he placed the matter in his solicitors' hands. The plaintiff himself was ill and in England from February, 1913 to May, 1914.

It will be seen from above that the money for the assignment was paid over by this defendant before it heard from

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plaintiff and before he was aware of the representations complained of.

In order to create estoppel, the person insisting upon it must have changed his position on the faith of the statement or conduct of the person estopped.

In *Mangles* v. *Dixon*, 3 H.L. Cas. at p. 739, the Lord Chancellor says: "Let any man point out what damage accrued to the Messrs. Dixon in consequence of the acts of Messrs. Mangles." I do not think the plaintiff's letter of February 5, 1913, or his silence after his suspicions were aroused, caused this defendant any damage, and it cannot succeed on this ground.

With regard to the second objection: delay and acquiescence.

In addition to the foregoing remarks I may add:—

Delay (or laches) is not, *per se*, a defence to proceedings for rescission . . .: 20 Hals., p. 752, and cases there cited.

See also 13 Hals., p. 167, above quoted, as to acquiescence being founded on conduct with knowledge of one's rights.

There is nothing to shew that this defendant suffered or changed its position during the delay after plaintiff's suspicions were aroused, or after the letter of February 5, 1913, was written, which I again repeat was written before the plaintiff knew of his rights, and cannot be taken as an affirmation of the agreement.

As to the third objection: Repudiation and refusal not until after second payment due.

If a party asks rescission of a contract, it is not necessary that there shall be a declaration of his intention to rescind before plea: Kerr on Fraud, 4th ed., p. 425, citing *Clough* v. *L. & N.W. R. Co.*, L.R. 7 Ex. 26 at 35.

At the trial, this defendant's counsel in his argument advanced a fourth objection, namely, that the letter of February 5, 1913, was a new contract with the assignee—an agreement to pay the money called for by the agreement.

I do not think that this should be construed as a new contract, and I do not so construe it. It was written by plaintiff in reply to the letter of January 22, 1913, notifying him that Griese & Wood Ltd. had assigned the agreement sued on to this defendant:—

The Fidelity Trust Co., P. O. Box 178, Winnipeg, to whom all pay-

ments hereafter will be made. Will you kindly acknowledge receipt of this notice.

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The plaintiff at that time not knowing of the fraud and misrepresentations writes: . . .

My agreement calls for payment to be made at North Battleford, as long as I am put to no extra expense in the matter, I have, of course, no objection to making payment at Winnipeg, etc.

This letter does not in any way discharge the former agreement, but simply declares that plaintiff is willing to make the payments under it at Winnipeg, provided there are no extra costs. And it could not have been so regarded by the parties to the old contract, otherwise either of the defendants would have surely so pleaded.

The plaintiff is entitled to have the agreement rescinded and delivered up for cancellation, and the money paid by him to Griese & Wood Ltd. returned to him. The assignment is an assignment of the lots agreed to be purchased by the plaintiff as well as of the moneys alleged to be due, and this defendant, The Fidelity Trust Co., is now the registered owner of these lots under certificate of title dated February 14, A.D. 1913. Were I to give plaintiff a lien on these lots for the money paid to the defendant Griese & Wood Ltd., it would, in this case, be tantamount to a judgment against The Fidelity Trust Co. to pay this amount, as it would undoubtedly have to pay it to protect the lots. As, however, at the close of the trial, counsel for plaintiff stated he was not asking money relief against The Fidelity Trust Co., I do not think I should make such direction.

The plaintiff will, therefore, be entitled to judgment against defendant Griese & Wood, Ltd., for $7,500, with interest at 5 per cent. per annum from October 21, 1912, and against both defendants for rescission of the agreement and to be delivered up for cancellation, with costs. *Judgment for plaintiff.*

SMITHSON v. SMITHSON.

B. C.
S. C.

British Columbia Supreme Court, Gregory, J. November 3, 1915.

EXECUTORS AND ADMINISTRATORS (§ VI—130)—*Alien executor—Qualifications upon oath—Probate to.*]—Caveat to will naming alien as co-executor.

D. S. Wallbridge, for plaintiff.

M. B. O'Dell, for defendant.

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GREGORY, J.:—Notwithstanding the many cases cited by defendant's counsel in support of his contention that the defendant only is entitled to probate, I cannot agree. The ordinary method of appointing an executor is by express designation in the will: 14 Hals. 136. This will expressly appoints three persons as executors, and I cannot override this provision. In only one of the cases cited had an executor been named in the will: *In the Goods of Wakeham*, L.R. 2 P. & D. 395, and in that case the executor or executrix rather was appointed only "for all property not named in the will," and Lord Penzance refused probate saying, "This Court cannot grant probate to an executor who is precluded from dealing with the property which passes under the will." In my opinion none of the cases referred to has the slightest bearing upon the case before us.

It is also objected that in any case probate cannot be granted to Hattie B. Marshall because she is an alien. This objection, in my opinion, also fails. She has come to this jurisdiction and taken the oath of an executrix, and in such case the practice in B.C. has always been to grant probate. It is also done in England.

The Court unquestionably has some discretion in the matter, but it is a discretion which should be exercised very sparingly —I see no special reason for exercising it in this case—the estate is well protected—there are two other executors residing within the province; all three are it is admitted entitled to hold the office of trustee; it is not contended that at the time of the making of the will the deceased did not know the lady's nationality (American) and residence—he apparently deliberately selected her with the others, and probate must be granted to all three.

As to the costs—there is ground upon which I could direct them to be paid by the defendant, but, in all the circumstances of the case I think justice will be done by directing that all costs be paid out of the estate, which I do. *Caveat dismissed.*

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LE BRUYNE v. RURAL MUNICIPALITY OF LAURIER.

Saskatchewan Supreme Court, Lamont, J. November 22, 1915.

TAXES (§ III A—105)—*Seizure for arrears — Goods and chattels of "occupant"—Thresher's outfit temporarily on pre-*

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mises—Wrongful seizure—Damages.]—Action for damages for the unlawful seizure and sale of plaintiff's threshing outfit.

E. J. Brooksmith, for plaintiff.

Charles Schull, for defendant.

LAMONT, J.:—About the end of November, 1913, the plaintiff, who is a thresher, moved his outfit to the north-east quarter of sec. 13, township 5, range 16, which was owned by his son Louis Le Bruyne, for the purpose of finishing the threshing on said quarter. The night after he moved the machine, it snowed so heavily that threshing operations became impossible. On December 13, the defendants' bailiff came upon the land with a distress warrant authorizing him to make a seizure for the taxes in arrears on said quarter, which amounted to $135. No person was living upon the land. As there did not appear to the bailiff to be any sufficient goods and chattels belonging to Louis Le Bruyne on the land, he seized the plaintiff's outfit, and hauled the same to Radville, a distance of some 10 or 12 miles, where he sold the whole outfit for $138 to one Cummings. On learning of these proceedings, the plaintiff went to Cummings and had to pay him $291 and an additional $10 for legal expenses in order to get back his machine. When he got the machine home he found that certain parts of it had been broken and other portions lost, due, he alleges, to moving the machine to Radville over very rough and frozen ground. He now brings action against the municipality for the amount which it cost him to get back his machine and the damage to the machine as a result of the seizure. The defendants claim that they had a right to seize the machine under sec. 308 of the Rural Municipalities Act (ch. 87, R.S.S.).

A perusal of this section shews that the treasurer or his agent has a right to enforce the taxes in arrear by distress on (1) the goods and chattels of the person against whom the same are assessed, situate in the municipality, and (2) against any goods or chattels upon the land, the property of or in possession of any other occupant of the premises. The goods and chattels seized were not the property of Louis Le Bruyne, who was assessed for the land, so that the municipality obtained no right to seize under the first of the above. The only other goods and

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chattels of which the defendants could make a seizure under this section are the goods and chattels belonging to or in possession of any other occupant of the premises. The plaintiff was not an occupant of the premises. He had merely moved the machine there for the purpose of threshing the balance of the grain. For that purpose he was entitled to be there, but that did not make him an occupant of the premises within the meaning of the section. It was argued on behalf of the defendants that as the machine was on the premises, it might be said to be in the possession of Louis Le Bruyne. A short answer to that is that Louis LeBruyne was not in residence himself upon the premises; but even if he had been, the moving of the machine on to his quarter section and leaving it there because the weather made it impossible to continue threshing operations would not place him in possession of the machine. Goods and chattels, to be in possession of an occupant of the premises, must be in his possession under circumstances which give him a right to the control over them. At no time did Louis Le Bruyne have any control over the threshing machine of the plaintiff. The plaintiff could at any time legally have gone there and moved it away and neither Louis Le Bruyne nor anybody else would have any right to stop him. The defendants, therefore, had no right to seize the plaintiff's machine. The plaintiff is therefore entitled as a result of the unlawful seizure to $301, which he had to pay to get back the machine; and he is also entitled to the depreciation in value of the machine caused by the seizure: this I assess at $50.

The plaintiff also claimed against the defendants for the balance due him under a contract for grading certain roads. At the trial I intimated that on this claim he was entitled to two sums, one of $50 and the other of $122.50.

There will therefore be judgment for the plaintiff for $532.50 and costs of the action. *Judgment for plaintiff.*

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K. B.

POWELL v. MADDOCK.

Manitoba King's Bench, Galt, J. November 1, 1915.

PARTNERSHIP (§ V—21)—*Secret profits and commission — Sale of land—Duty of accounting.*]—Action for accounting between partners.

E. K. Williams, and *J. M. DeC. O'Grady*, for plaintiff.

A. E. Hoskin, K.C., and *G. Coulter*, for defendant Maddock.

W. C. Hamilton, for defendant Dart.

GALT, J.:—This action was commenced on April 22, 1915. In it the plaintiff claims a declaration that the defendant Maddock is a trustee for the plaintiff of certain moneys received by him by way of secret profit or commission in respect of a purchase of lands and payment of the amount due to the plaintiff. Furthermore, the plaintiff claims an account from the defendants Maddock and Dart of all transactions of a certain partnership between them in relation to said lands.

Mr. Hoskin argues that the defendant Maddock was under no fiduciary responsibility to the plaintiff or Dart until they joined in the deal, and he relies upon several well-known authorities, of which *Burland* v. *Earle*, [1902] A.C. 83, is a prominent example. There, a director of a company had purchased property without any mandate from the company, and under such circumstances as did not make him a trustee thereof for the company, and thereafter he re-sold the same to the company at a profit. It was held by the Privy Council that, whether or not the company was entitled to a rescission of the contract of re-sale, it was not entitled to affirm it and at the same time treat the director as trustee of the profit made.

The American case, cited and strongly relied upon by Mr. Hoskin, viz.: *Banta* v. *Palmer*, 48 Ill. 99, is widely distinguishable from the present.

In the present case Maddock never intended to become sole purchaser, and thought that the document he obtained from Mackenzie was only an option, and he so represented his position to the plaintiff.

The position of a director in a company is very different from that of a partner. It is the duty of partners towards each other to refrain from all concealment from each other in the partnership business. If a partner be guilty of any such concealment and derive a benefit therefrom, he will be treated in equity as a trustee for the firm and compelled to account to his partner. This principle extends to persons who have agreed to become partners, and if one of them negotiates for the

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acquisition of the property for the intended firm, receives a bonus or commission, he must account for it. See Kerr on Fraud, 175.

In *Fawcett* v. *Whitehouse*, 1 R. & M. 132, it was held that a person employed on behalf of himself and his co-partners in negotiating the terms of a lease is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, the sum of £12,000 was paid in pursuance of such stipulation, the party receiving it was declared to hold it in trust for the partnership.

The difference between a director and a trustee is very clearly set forth in Kerr on Fraud, at pp. 155 and 156.

The extracts from Lord Lindley's work on Partnership, pp. 342 and 354, have a direct bearing upon the questions arising in this case, and are amply supported by the cases cited in the notes.

The above authorities, in my opinion, are amply sufficient to decide this case in favour of the plaintiff's claim against the defendant Maddock.

But, in addition to that, the plaintiff alleges in par. 12 of his statement of claim that the defendant Dart, after the execution of the agreement hereinbefore referred to, became aware of the secret advantage obtained by the defendant Maddock and demanded from the defendant Maddock and received an accounting of the sum of money and the interest in respect to which the said Dart was entitled in respect thereof, and the said Dart has refused to account to the plaintiff in respect thereto, although requested so to do.

There is much force in Mr. Williams' argument in support of this claim; but, with considerable diffidence, I have reached the conclusion that the defendant Dart is not liable to account for any part of the $1,250 recovered by him from his co-defendant. If Maddock had refused to pay Dart and the latter had sued for the overpayment, I cannot see that Dart would have been under any obligation to make the plaintiff a party to the action, or to account for any part of the proceeds to him. It was simply a wrongful overpayment obtained by Maddock from Dart. On the other hand, Dart was certainly under an obliga-

tion to the plaintiff to disclose to him what had occurred. He knew that the plaintiff was contributing on the basis of a purchase at $35,000, while he and Maddock knew that the true price was $30,000. If this fact had been disclosed at the time, the plaintiff Powell would have likewise secured relief. As it is he has been kept in the dark by both Maddock and Dart. Under such circumstances, I think that Dart has disentitled himself to any costs of action.

There will be judgment for the plaintiff against the defendant Maddock for $1,250 with interest from the dates of the overpayments, together with costs. The action will be dismissed as against the defendant Dart without costs.

Judgment for plaintiff.

CLARKE v. LATHAM.

Manitoba King's Bench, Mathers, C.J.K.B. October 25, 1915.

PRINCIPAL AND AGENT (§ II A—8)—*Authority to sell land—Repurchase agreement—Agent co-owner with principal—Agreement not signed by agent—Liability of principal for refusal to repurchase.*]—Action to recover money and taxes paid on land contract.

Hon. A. B. Hudson, K.C., and *G. Coulter*, for plaintiff.

J. T. Haggard and *J. T. Beaubien*, for defendant.

MATHERS, C.J.K.B.:—In 1910 Chester E. Latham, the defendant, Thomas Berry and Charles Curtis purchased lots 72 and 73 and the most westerly 25 feet in width of lot 74, part of lot 87 according to the Dominion Government survey of the Parish of St. Boniface as shewn on plan 692. The purchase was made in the name of the defendant Latham, who gave each of the others a declaration of trust as to one-third interest. There was nothing in the agreement under which the defendant held to shew that any person other than himself had any interest in the property. Berry was at that time carrying on a real estate business and was the agent for all purposes of dealing with the property of his co-owners.

The following document was drawn up:—

To Mrs. Alice M. Clarke, wife of Dr. Adam Clarke, Winnipeg.

In consideration of your purchasing from us, the undersigned, the above mentioned property, upon the basis of one-third cash, and the balance in

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one, two and three years with interest at 6% per annum, purchase price to be the sum of $65 per foot frontage, we undertake, at your written request, and at your option, to re-purchase from you said property, and refund you all moneys paid on account of purchase by you with interest and taxes, at the expiration of two years from the date of the agreement of sale, such option on your part to continue for 30 days after the expiration of said two years during which said 30 days you have at any time the privilege of applying to us for the repayment of the moneys under this agreement.

Dated this 14th day of March, A.D. 1912.

(Sgd.) CHESTER E. LATHAM. [SEAL]

..... [SEAL]

Berry drew up an agreement of sale from the defendant to the plaintiff and took both documents to the defendant for signature. The latter demurred to entering into the re-purchase agreement, but, being urged by Berry, he signed the document on the understanding, as he says, that it should also be signed by Berry and Curtis, and he, at the same time, signed the agreement of sale wherein the party of the first part is stated to be

Chester E. Latham, of the City of Winnipeg in the Province of Manitoba, accountant (hereinafter called the vendor).

The defendant re-delivered both documents to Berry for the purpose of closing the transaction.

In the latter agreement no reference is made to the fact that the defendant is not the sole owner, nor is any reference made to the undertaking to re-purchase.

Within the time limited by the re-purchase agreement, to wit, on March 16, 1914, the plaintiff notified the defendant that she required him to re-purchase, and to refund to her the moneys paid with taxes and interest, amounting to $4,528.81. The defendant refused to re-purchase, and this action is brought to recover the money paid, with taxes and interest.

The defence relied upon is that the defendant signed the agreement to re-purchase on the undertanding that it would also be signed by his co-owners Berry and Curtis, and that the plaintiff had notice that such was the understanding upon which the defendant signed the document, at least in so far as Berry is concerned.

The plaintiff had no notice of the terms or conditions upon which the defendant signed the re-purchase agreement. It is not pretended that the defendant communicated his instructions

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to any person other than to Berry, his agent. He signed the document and handed it to Berry on the understanding that Berry would sign it himself and procure Curtis to do so. Berry disregarded the instructions of his principal and concluded the transaction without either signing the document himself or procuring Curtis to do so. The plaintiff, relying upon the agreement of re-purchase and in consideration thereof, entered into the agreement to purchase the land, and paid over the money now sought to be recovered. The defendant seeks to set up as a defence the default of his own agent. Had Berry carried out the defendant's instructions and secured the signatures of himself and Curtis to the document before handing it over, the plaintiff would have an undoubted right to compel re-payment. But it is contended the defendant is in a better position because of his agent's default than he would have been in had his agent pursued his instructions to the letter; in other words, that the disobedience of his agent accrues to his advantage and he is now entitled to retain what he would have been compelled to give up had there been no disobedience. Such would be a rather peculiar result to accrue from an agent's default.

I think the law is clear that where an agent is clothed with ostensible authority to carry out a transaction, no private instructions prevent his acts, within the scope of that authority, from binding his principal: *Per* Lord Blackburn in *National Bolivian Nav. Co.* v. *Wilson*, 5 A.C. 176 at 209; *Trickett* v. *Tomlinson*, 13 C.B.(N.S.) 663; *Murphy* v. *Thompson*, 28 U.C.C.P. 233; 31 Cyc. 1327; 1 Hals. 202.

A case in some respects very like the present is *Beaufort* v. *Neeld*, 12 Cl. & F. 248. There a commission had been appointed to re-arrange the lands in a parish by exchanges and otherwise. The Duke of Beaufort instructed his agent to consent to certain exchanges on his behalf, including a piece of woodlands; but as to the woodlands he stipulated that the exchange must be for woodlands. The agent disobeyed the instructions as to the woodlands and exchanged the Duke's woodlands for meadowland. The Court held that the Duke was bound by what his agent had done. Here, at most, the defendant signed the docu-

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ment and handed it over to his agent Berry, intending to be bound by it, but stipulating that it should be delivered only after it had been signed by himself and Curtis. Berry disobeyed these instructions and handed it over and completed the transaction without either of these signatures. In doing so he was acting within the scope of his ostensible authority, and in the course of his employment, and the plaintiff is not affected by any private instructions which the defendant gave him.

The defendant relied upon a number of cases which shew that where one party signs a document on condition that it will also be signed by others, he is not bound if the others do not sign. The reason for the holding is that each party agreed to enter into an undertaking jointly with several others from whom, in the event of his being called upon to make good, contribution could be obtained. If any of these parties failed to sign, contribution could not be obtained from him, and consequently the basis on which the party sought to be charged had contracted was gone. Here the most that is contended is that the plaintiff had notice that Berry had an interest in the land, and it was intended that he should sign the document as well as the defendant. Undoubtedly the defendant would be entitled to enforce contribution as against Berry, although he has not signed the undertaking, if not against Curtis also: *Sandilands* v. *Marsh*, 2 B. & Ald. 673. The cases relied upon by the defendant are distinguishable because in none of them was it held that a party to an agreement could escape liability because his agent entrusted with the duty of carrying the agreement into effect had, without the knowledge of the other party thereto, neglected to comply with his principal's instructions with respect to obtaining the signature thereto of some third person.

In my opinion the plaintiff is entitled to judgment for the amount claimed with costs of suit. *Judgment for plaintiff.*

LONDON GUARANTEE v. HENDERSON.

Manitoba King's Bench, Mathers, C.J.K.B. October 25, 1915.

[See also *London Guarantee* v. *Henderson*, 23 D.L.R. 38.]

DISCOVERY AND INSPECTION (§ I—2)—*Action against company directors for fraud — Production of auditors' reports — When*

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ordered—Relevancy—Privileged communications.]—Application for production of auditors' reports.

E. A. Cohen, for plaintiff.

H. Phillipps, for defendant McWilliams.

MATHERS, C.J.K.B.:—This is an application to compel the defendant McWilliams to permit inspection by the plaintiff of certain auditors' reports of the Royal Grain Co., now in liquidation. The action is brought against the directors of the Royal Grain Co., alleging that by false representations the plaintiff guarantee company was induced, in August, 1912, to issue a guarantee bond to the grain company under the Manitoba Grain Act. It is alleged that the grain company made default and that the plaintiffs were compelled under the said bond to make good the default to the extent of $1,037.26, and this sum they seek to recover from the defendants as damages.

The statement of claim contains a large number of other allegations charging that the defendants were guilty of misfeasance and negligence in their office of directors in not holding meetings, by allowing the company to be recklessly, extravagantly and negligently managed and allowing the company to engage in the business of buying and selling of grain on margin, etc.

On September 27, 1912, an order was made to wind up the grain company, and the National Trust Co. was appointed liquidator. It was admitted by counsel for the plaintiff that as to all issues other than the issue as to the plaintiffs having been induced by false representations to enter into the said bond that the plaintiff cannot succeed in the action as at present constituted.

The defendant McWilliams in his affidavit on production says that he has in his possession certain auditors' reports of the grain company, bearing date January 6, 1908; November 11, 1909; March 2, 1909; October 15, 1910; February 2, 1911, which he objects to produce. First, on the ground that they are not relevant to any issue in the action; Second, on the ground that they are confidential and were handed to counsel for instructions in relation to threatened action; Third, that he received

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them in his capacity as a director of the grain company as confidential information relating to the affairs of the grain company; and fourth, that he does not hold the documents in his personal capacity, but only *qua* director and the company is not a party to the action.

It is quite clear that these auditors' reports did not come into existence for the purpose of instructing counsel in view of contemplated litigation: *Savage* v. *C.P.R.*, 15 Man. L.R. 401. I think it equally clear from the evidence that the defendant is not in possession of these documents for the company, but that they are his own personal property. That disposes of all the claims of privilege with the exception of the first. I do not think the plaintiff company is entitled to ask for production in respect of issues raised by their statement of claim as to which it is admitted they cannot succeed as the action is at present constituted. The plaintiff's counsel says he intends to apply for leave to amend so as to make the action one on behalf of all creditors. When he has obtained such leave and amended accordingly he may then apply for production in support of their re-constituted action. Unless the reports are of such a character that their production might assist the plaintiffs in establishing their claim that they were induced to issue the bond in question by the false representation that the company had at that time no liabilities or in repelling the defence set up, they are not entitled to see them. The defendant McWilliams swears that they are not relevant and that the last in date, namely, that of February 2, 1911, does not contain any entry respecting any indebtedness or liability of the Royal Grain Co. after the dates August 21, 1910, and December 31, 1910. It is not denied that the other reports scheduled do shew liabilities of the company as of their respective dates, or that the report of February 2, 1911, shews liabilities as of December 31, 1910. The bond in question was issued in August, 1912, and the company went into liquidation on September 27, 1912. Under the circumstances I think it probable that the auditors' reports of October 15, 1910, and February 2, 1911, may throw light upon this issue. The earlier reports appear to be too remote in date to be of any assistance to the plaintiff.

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I, therefore, order the production of reports dated October 15, 1910, and February 2, 1911.

If the defendant so desires he may seal up all portions of these reports not material to the issue as to false representations, in which case he must make and file an affidavit that none of the parts so sealed up are material to that issue.

Costs of this motion will be in the cause to the plaintiffs.

Order accordingly.

SECH v. RODNICKE.

Manitoba King's Bench, Mathers, C.J.K.B. October 20, 1915.

BAILMENT (§ III—17)—*Money for safe keeping — Theft — Liability of gratuitous bailee.*]—Action to recover the sum of $885, which the plaintiff left with the defendant for safe keeping.

R. A. Bruce, for plaintiff.

R. W. Wydeman, for defendant.

MATHERS, C.J.K.B.:—There is no dispute concerning the fact that the defendant received from the plaintiff the $885 in question for the purpose of safe keeping and that she demanded its return and that he has not returned it. The onus was clearly upon the defendant to excuse himself for not giving the plaintiff back her money. As his position was that of a gratuitous bailee he could satisfy that onus by shewing that the money had been lost or stolen. The onus would then be shifted to the plaintiff to shew, if she could, that the theft was due to the gross negligence of the defendant.

The question of negligence is material only if he has satisfied the onus upon him of shewing that the money was stolen as he alleges it was. The fact as to the deposit of the money in the earth and its subsequent theft and all the circumstances surrounding it depend upon the evidence of the defendant alone. He says he had $1,300 of his own which he buried with the plaintiff's. There is no evidence but his own that he had that money. No person saw the money in its place of concealment except himself. He it was who discovered the door of the shack open. He alone was present when he discovered that the money was gone. Sitting as a jury and weighing all the circumstances, I hold that he has not discharged the onus upon him of shewing

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that the money was lost or stolen and that the plaintiff is entitled to a verdict.

There will be judgment for the plaintiff for $885 and costs of suit. *Judgment for plaintiff.*

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Re WILSON ESTATE.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. November 20, 1915.

[See *Re Wilson Assignment*, 25 D.L.R. 417.]

COSTS (§ I—16)—*Out of insolvent's estate—Appeal by creditors.*]—Application to have the costs of an appeal paid out of the estate.

Hoffman, for Swift Canadian Co.

Bastedo, for the assignee.

LAMONT, J., in delivering the judgment of the Court, said that the contest was between 2 sets of creditors as to proper disposition of the money in the hands of the National Trust Co., the assignee of the estate. The assignee took out an originating summons for directions. Representatives of both sections of creditors appeared before my brother Newlands, who decided that all creditors should rank alike. One creditor, Hepburn by name, was dissatisfied with this and appealed. The appeal was opposed by the Swift Canadian Co., a creditor of the other class. The appeal was dismissed with costs: 25 D.L.R. 417.

The Swift Canadian Co. now apply to have the costs of that appeal paid out of the estate, or, at least, an order directing the assignee to pay these costs out of the share of the estate, if any, to which Hepburn may be entitled. This application is opposed by the assignee.

The only costs which the estate should be called upon to bear are such costs as were necessarily incurred in obtaining the order for directions by the assignee. If the two classes of creditors wish to indulge in the luxury of costly appeals, they must do it at the expense of one another, and not at the expense of Wilson. Any costs incurred by the assignee by virtue of being served with the notice of appeal are properly chargeable to the estate, but as the National Trust Co. was in no way interested in the result of the appeal, counsel should not have appeared for it, and, having appeared, cannot be awarded a counsel fee.

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As far as Hepburn's claim against the estate is concerned, I do not think we should make any order in the matter. The company could have garnisheed the amount coming to him, if any, to the extent of their costs. As that remedy is sufficiently ample, I think they should now be left to it.

The costs of this motion will be paid by the company to the assignee.

LOOMIS v. ABBOTT.

B. C.

S. C.

British Columbia Supreme Court, Macdonald, J. November 24, 1915.

COURTS (§ II A 4—165)—*Jurisdiction of Local Judge—Foreclosure action—Judgment as to title.*]—Application under the Land Registry Act, for a direction to the Registrar of Land Titles to register a title to land, based on a judgment for foreclosure granted by a Local Judge of the Supreme Court.

Lucas & Lucas, for plaintiff.

Burns & Walkem, for defendant.

MACDONALD, J.:—This involves the question as to whether a Local Judge has jurisdiction to grant a judgment for foreclosure and supplement the sum by an order absolute. He must necessarily have proceeded under O. 27, rule 11 (marg. rule 304). The Judge of every County Court in the province, with certain exceptions, has power

in all actions brought in his county to do all such things and transact all such business and exercise all such authority and jurisdiction in respect to the same as by virtue of any statute or custom or by the rules of practice of the Supreme Court are now done, transacted or exercised by any *Judge of the said Court* sitting at Chambers.

Assuming then that a Local Judge of the Supreme Court has thus, with such exceptions, the same jurisdiction as a Judge of the Supreme Court sitting in Chambers, has the latter Judge jurisdiction at Chambers to give judgment under said O. 27, r. 115? This rule is similar to the English rule and is as follows:

In all other actions than those in the preceding rules of this order mentioned, if the defendant makes default in delivering a defence, the plaintiff *may set down the action on motion for judgment* and such judgment shall be given as upon the statement of claim *the Court or a Judge shall consider* the plaintiff to be entitled to.

It is contended that the words "or a Judge" in this rule give jurisdiction to a Judge, sitting in Chambers, to exercise the powers conferred by the said rule. No assistance in determin-

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ing the point can be obtained from a similar rule in Ontario, as in that province the words "or a Judge" are omitted from the rule. It was thus deemed necessary, under these circumstances to have a special rule providing for judgment for redemption, foreclosure or sale, where infants were defendants, being made in Chambers, subject to certain evidence being supplied. There is no doubt that in England the words "or a Judge" have been decided as being usually applicable to a Judge, sitting in Chambers—see Kay, L.J., *Re B.*, [1892] 1 Ch. 459, at 463; *Baker* v. *Oakes*, 2 Q.B.D. 171; *Frearson* v. *Loe*, 26 W.R. 138; *Dallow* v. *Carroll*, 14 Q.B.D. 543; *Smeeton* v. *Collier*, 1 Ex. R. 457. . . .

It would thus appear to be clear that if "judgment of the Court" is sought under O. 27, r. 11, it is to be obtained by motion for judgment. It was decided in *Salomon* v. *Hole*, 53 W.R. 588, that where a plaintiff was entitled to have a defence struck out, for non-compliance with an order to answer interrogatories, that a motion for judgment in default of defence might be joined with the motion to strike out the defence for such non-compliance, but the motion for judgment must be set down and 2 separate orders made. The notes in the Annual Practice to O. 27, r. 11, outlining the procedure in England in setting down a motion are inapplicable to a Chamber application. Two copies of the minutes of "proposed judgment" must be left on setting down the motion and the notice of motion should ask for judgment in accordance with such minutes. If no minutes of judgment proposed are filed then the notice of motion should set forth the precise words of the judgment asked for. Even where the usual judgment is asked, the minutes or form of words of the judgment asked for must be left with the Judge. This is the practice in the Chancery Division and differs only slightly from that pursued in the King's Bench Division. As to the proof of plaintiff's case, see Annual Practice (1915), p. 459. At a meeting of the Judges a majority decided that the Court cannot receive "any evidence in cases under this rule, but must give judgment according to the pleadings alone." See *Smith* v. *Buchan*, 58 L.T. 710; *Young* v. *Thomas*, [1892] 2 Ch. 134. It is apparent that upon the hearing of the motion the

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Court is required to consider the form of the pleadings and decide upon the judgment that should be given. It has discretion to refuse to adjudicate and may refer the action for trial or it may give an interlocutory judgment and refer the case to a referee to ascertain what amount the plaintiff is entitled to:—

Motions for judgment are not brought on as ordinary motions, but are set down in the cause book in room 136. (See Ann. Prac. 1915.)

The motion is treated as a "cause" to be heard, and the Court fee charged is £2, being the amount fixed by the tariff as chargeable.

On entering or setting down . . . a cause or matter for trial or hearing in any Court in London or Middlesex, or at any assizes,

The forms to which reference is made in the Annual Practice clearly indicate that the judgment is rendered in Court and not in Chambers, *e.g.*, see form of notice of motion in Chitty's Forms, 14th ed., p. 417:—

That *this honourable Court will be moved* that judgment be entered herein for plaintiff . . . pursuant to W. R. S.C. Ord., 27, r. 11;

also form of judgment given in Seton on Decrees, 6th ed., p. 178.

In England by O. 54, r. 12, a jurisdiction similar to that given to our Local Judges of the Supreme Court is conferred upon the Master in the Queen's Bench Division and upon the Registrar of the Probate and Admiralty Division. . . .

I am, therefore, of the opinion that all judgments given under O. 27, r. 11 (marg. r. 304), require to be made "in Court." While the presiding Judge in Chambers may, for convenience, deal with motions under this rule, he at the time acts as Judge in Court and not in Chambers. The result is that a local Judge of the Supreme Court has no jurisdiction under this rule and the judgment of foreclosure in question is of no effect. I have no doubt as to my conclusion being correct, but as the matter is one of great importance I naturally feel a desire that it should be considered by the Court of Appeal. There will be no costs.

Application refused.

HUCKELL v. GALE & WILLIAMS.

British Columbia Supreme Court, Macdonald, J. November 18, 1915.

JUDGMENT (§ VII C—282)—*By default—Relief against—Delay—Leave to shew payment.*]—Application to set aside default judgment.

B. C.
S. C.

Lucas & Lucas, for plaintiffs.

Burns & Walkem, for defendants.

MACDONALD, J.:—Plaintiff on October 12, 1911, issued a writ of summons herein and alleged that the defendants were indebted to him for work and services rendered in the sum of $800 less certain credits, leaving a balance of $442.25.

In default of appearance, judgment was signed against defendant Gale and the partnership on December 1, 1911. On February 6, 1912, such defendant made an affidavit stating that he had discovered the writ of summons in his office on November 30, but that it had never been served on him personally and he had not become aware of it until that day. He then gave instructions to his solicitors to enter an appearance. An affidavit was also filed stating that the plaintiff had been paid for all services. Defendants on these affidavits launched an application, but did not succeed in getting the judgment set aside before the plaintiff died—in March, 1912. The application was allowed to drift, the excuse given being that it was expected that the wife of the plaintiff would take out administration. She did eventually become administratrix of her husband's estate, but no active steps were taken to set aside the judgment or revive the action until June, 1914. Motion was then made for an order substituting Mrs. Huckell, administratrix, in lieu of the plaintiff, and notice was given that the defendants intended to proceed with the application to set aside default judgment "as set out in Chamber summons, dated February 20, 1912." This application was not pressed to a conclusion and lapsed. Then in the present month the matter is again revived and the same application is sought to be proceeded with. While there might have been some reason for delay, after the death of the plaintiff, I think there is no valid excuse for the matter not having been proceeded with in the latter part of 1913 and 1914 and up to the present of the current year. This continued delay has not been satisfactorily accounted for. If the substitution takes place and the action is allowed to proceed to trial without any conditions the plaintiff's claim would, I think, be seriously handicapped. The affidavit of defendant Williams while admitting a promise to pay of $800 asserts that this was only by way

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of a "gratuity" and suggests that from a legal standpoint it could be withdrawn. He claims that the services were not for himself and partner, but for one Fredrickson. If any liability existed against Fredrickson in the spring of 1909 it would now be outlawed. The delay which has thus taken place would not only in this respect prejudice the administratrix for the plaintiff, but would render it more difficult to support the claim. As to delay and consequent prejudice to plaintiff being a ground to refuse application to set aside judgment, see *Regina Trading Co.* v. *Goodwin*, 7 W.L.R. 651; also on same point of delay alone see *Tait* v. *Calloway*, 1 Man. L.R. 102, and *Union Bank* v. *McDonald*, 1 Man. L.R. 335, and cases there referred to. Defendants have seen fit to allow the judgment to remain in force for a great length of time. I do not think, under the circumstances, that it would be unjust, to refuse *in toto* to open up the judgment at this late date. The good faith of the defendants as to personal service not having been affected was evinced however before the death of the plaintiff and this influences me in allowing the defendants an opportunity of proving what is practically their defence: viz., that they have paid the $800 and in fact overpaid the plaintiff. The substitution sought for is granted and the defendants allowed to defend only as to proving payment of the sum of $800, but the judgment will remain in force as security of the plaintiff. Proceedings under the judgment are stayed pending a speedy trial of the action. Considering the small amount involved, I think the action should be transferred to the County Court at Prince Rupert, if such Court is considered convenient to the parties. Costs of this application reserved. *Order accordingly.*

DEISLER v. SPRUCE CREEK POWER CO.

British Columbia Supreme Court, Macdonald, J. October 19, 1915.

[*Deisler v. Spruce Creek Power Co.*, 17 D.L.R. 506, referred to.]

INTEREST (§ I D—35)—*Judgment for damages for trespass to mining claim—Appeal from—Payable from date of judgment.*]—Claim for legal interest on judgment. Plaintiff recovered judgment against defendants on April 30, 1914 [17 D.L.R. 506, where the facts are fully stated].

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S. C.

S. S. Taylor, K.C., for plaintiffs.

E. V. Bodwell, K.C., for defendants.

MACDONALD, J.:—Defendants appealed from this judgment, but were unsuccessful, and the inquiry was then proceeded with and upon the report of the registrar being filed both plaintiff and defendants moved to vary the same. The matter came before me for consideration and I reduced the amount found to be due to the sum of $14,490. Plaintiff claims legal interest on this sum from the date of judgment, viz., April 30, 1914, and relies upon *Borthwick* v. *Elderslie Steamship Co.*, [1905] 2 K.B. 516. Defendants contended that this decision is distinguished under a similar state of facts to those existing here in *Ashover Fluorspar Mines Ltd.* v. *Jackson*, [1911] 2 Ch. 355, and that the latter case is an authority in support of their position that the plaintiff is not entitled to interest on the amount of damages so ascertained. I think that in principle there is no reason why the defendants should not pay interest upon the amount which was found to have been due by them at the time judgment was pronounced. I could have inquired and ascertained such amount, but in accordance with the general convenient practice it was deemed advisable, after deciding the question of liability to refer the amount of such liability to the registrar for determination. Defendants should not obtain the benefit derived from delay in proceeding with the inquiry as it arose out of their appeal already referred to and naturally pending the decision of such appeal the inquiry was not proceeded with. I think the form of the order and facts of the case differ from *Ashover* v. *Jackson*, *supra*. From the outcome of the litigation it has been decided that the defendants were on April 30, 1914, liable to the plaintiff for damages in the sum of $14,490. This liability arose out of a wilful trespass or what is commonly called a "jumping" of the plaintiff's claim by the defendants. The trespass was committed in 1906 and all the valuable ore at that time within the plaintiff's claim was appropriated, some of which was even shipped and returns obtained therefrom. In my opinion, judgment should be entered in favour of the plaintiff as of April 30, 1914, for $14,490 so that it will carry interest from that date. *Judgment for plaintiff.*

B. C.
S. C.

ELLIOTT v. HOLMWOOD.

British Columbia Supreme Court, Macdonald, J. November 11, 1915.

DISCOVERY AND INSPECTION (§ IV—31) — *Examination of officer of company—Managing director—Employees or servants as distinguished from officials.*]—Application to examine for discovery.

A. Wilson, for defendant.

MACDONALD, J.:—Plaintiff seeks to examine for discovery John Brydges as a past officer of the defendant company. The affidavit in support of the application states that Brydges was managing director of the company in British Columbia and this statement is met by a flat contradiction on the part of Brydges. He also states in his affidavit that he was not, at any time, "a director or an officer of the defendant company." Cross-examination of this affidavit has taken place and the deponent having refused to answer certain questions, the matter is brought before me for consideration. I think that counsel for the defendant has taken too narrow a view of the position that must be occupied by a person in order to come within the provisions of the rule and thus be examinable as an officer. Our rules, as to discovery by oral examination, are taken from the Ontario rules, and this particular rule, as to the examination of an "officer" of a company, has received judicial interpretation declaring that the word "officer" is a word of very wide signification. It has been given the liberal construction usually applied to such a remedial provision and may include employees of a company who are usually termed "servants" as distinguished from officials. It is not limited to the higher or governing officer only. The object of the rules is to discover the truth relating to the matters in question in the action, and the examination ought to be of such "officer" of a defendant company as is best informed as to such matters. Plaintiff contends that Brydges is such person and in support of this contention seeks to fully cross-examine him in that connection. The whole matter is discussed and other cases referred to in *Leitch* v. *G.T.R.*, 12 P.R. (Ont.) 671, 13 P.R. (Ont.) 369.

I think Brydges should attend and be further examined as to

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the position he occupied with respect to the defendant company, the powers he was intrusted with, and the duties he had to perform. Such examination should be confined to these points and should not deal with matters in question in the action. Having expressed my views generally as to the enlarged scope of the further examination I have not deemed it necessary to deal specifically with the question sought to be answered. It should not be required. As a result of such examination it may be possible to determine whether Brydges is examinable for discovery as a past officer of the defendant company.

The costs of this application and examination are reserved.

Application granted.

MAN.
K. B.

MOMBERG v. JONES.

Manitoba King's Bench, Mathers, C.J.K.B. October 20, 1915.

WILLS (§ I A 2—10)—*Testamentary capacity—Delusions—Execution by mark.*]—Action to establish a will.

H. V. Hudson and *H. E. Swift*, for plaintiff.

W. H. Curle, for defendant.

MATHERS, C.J.K.B.:—Elizabeth Jones, the testatrix, had married the defendant Henry Jones on December 30, 1914. She was then a widow, her husband having died a couple of years before. The plaintiff is her son by her first husband. The alleged will was executed about 5 o'clock in the afternoon on March 17 last, three-quarters of an hour to an hour before her death. She was then extremely ill, suffering from Bright's disease in an acute form. Neither the defendant nor the plaintiff was present. The only persons in the house at the time were Dr. Yonkers, her physician, and a neighbour woman, Mrs. Simpson. The latter had been with the testatrix all afternoon. The doctor was first called about 2.30 o'clock and was called again about 4.30. They both say that about 5 o'clock on the day in question the deceased said that she thought she was going to die and wanted to make "her last wish," and asked for some paper for that purpose. Mrs. Simpson endeavoured to find paper in the room, but without success, and the doctor produced his prescription pad and handed it to the deceased, but her hand shook so much that she was unable to write. She then asked the

doctor to write and said she would make her cross. He asked her what she wanted him to write and she replied: "I wish my son Charlie to have all my property." The doctor asked her if she did not want to leave her husband anything, and she said she did not. He then, in pencil, wrote the following will:—

Wpg., Man., March 17/15.

I wish my son Charlie Momberg to have all my property.

The deceased endeavoured to sign this document but was unable to do so and she, with her own hand, made a cross, and the doctor wrote her name, "Mrs. H. Jones." Mrs. Simpson, who was present, was also unable to write, and she made a cross opposite which the doctor wrote her name. He then signed the document himself. This is the will which the plaintiff seeks to establish. The defendant urges four objections to it: 1st, that it was not executed according to the Manitoba Wills Act; 2nd, that the deceased did not execute it, or, if she did, she did not know or approve of its contents; 3rd, that at the time of the alleged execution of the said will she was not of sound memory and understanding, and 4th, that the execution of the alleged will was procured by fraud and undue influence.

The last of these grounds of objection the defendant abandoned at the trial.

As to the first objection, the document in question was, in my opinion, executed in accordance with the provisions of the Wills Act. The deceased executed it by her mark in the presence of both the doctor and Mrs. Simpson, and they each signed as a witness in her presence and in the presence of each other.

The second and third objections raise practically the same question. The onus is upon the plaintiff to shew that the testatrix was, at the time she executed the alleged will, capable of understanding the nature and character of the act.

I am satisfied by the evidence of Dr. Yonkers and Mrs. Simpson that she then clearly understood the nature and quality of the act she was about to perform and that the making of the will in question was her spontaneous act.

I see nothing in the relationship between the deceased and the defendant, or in the circumstances, to excite surprise that the deceased should have preferred her son to the defendant.

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K. B.

Although the plaintiff had misused his mother, she appears to have forgiven him, and their quarreling does not seem to have been renewed in the few days that he resided with her before her death. Before she died she asked for him and wanted to see him.

It is argued that in cutting off her husband she was labouring under the delusion that he had poisoned her. It is not shewn that she was under that belief at the time she made the will. She had said when the doctor called at 2.30 in the afternoon that she believed he had poisoned her, but the doctor assured her that that was not true. Even if she did entertain the belief until the time the will was made it was not such a delusion as proves testamentary incapacity. As a matter of fact, the medical testimony shews that her death was due to uremic poisoning, the result of the disease from which she suffered, and that she had more or less symptoms of having been poisoned. Her belief that her husband had poisoned her was not due to an insane delusion, but to a mistake which an entirely rational person might make. She had refused to make a will in his favour at a time when she entertained no such belief respecting him, and there is nothing either in the circumstances or by her conduct towards him to indicate that she had changed her mind. On the other hand, the circumstances are entirely consistent with the disposition in question being in accord with her real desire.

There will be judgment declaring that the paper writing set out in the statement of claim is the last will and testament of Lizzie Jones, deceased; that the plaintiff is the party entitled under the said will to the estate and effects of the said Lizzie Jones. Question of costs of the action reserved.

Will sustained.

MOMBERG v. JONES.

Manitoba King's Bench, Mathers, C.J.K.B. October 25, 1915.

COSTS (§ I—16)—*Out of decedent's estate—Unsuccessful opposition to probate of will.*]—Application for costs out of decedent's estate.

H. E. Swift, for plaintiff.

W. H. Curle, for defendant.

MAN.

K. B.

MATHERS, C.J.K.B.:—The defendant, having opposed the probate of his wife's will in the plaintiff's favour and failed, applies to have his costs out of the estate. In *Williams* v. *Coker*, 67 L.T. 626, Sir Gorell Barnes states the principle which should guide the Court in such a case: *Spiers* v. *English*, [1907] P. 122; see also *per* Boyd, C., in *McAllister* v. *McMillan*, 25 O.L.R. 1. Even the fact that a contestant has unsuccessfully charged undue influence is not conclusive against the right to receive costs out of the estate: *Gilbert* v. *Ireland*, 9 O.L.R. 124.

I have already stated the circumstances under which the will in question was executed. The defendant pleaded undue influence, but expressly abandoned that issue.

I think the circumstances are such as to justify me in ordering that the costs of both plaintiff and defendant be paid out of the estate. *Application granted.*

SASK.

S. C.

ATKINSON v. CANADIAN PACIFIC R. CO.

Saskatchewan Supreme Court, McKay, J. August 6, 1915.

EXECUTION (§ I—11) — *Stay of pending appeal — When granted—Affidavit shewing inability to repay.*]—Application under r. 663 for a stay of execution pending an appeal.

A. L. McLean, for plaintiff, respondent.

P. H. Gordon, for appellant.

MCKAY, J.:—Our rule is the same as English r. 880, and the practice under the latter rule, according to the Annual Practice (1915), p. 1151, is that a stay of execution will only be granted on special grounds, which must be shewn by affidavit (see judgments of L.J.J. in *The Annot Lyle*, 11 P.D. 114), *e.g.*, that the respondent will be unable to repay the amount levied by execution if the appeal is successful: *Barker* v. *Lavery*, 14 Q.B.D. 769; *Atkins* v. *G.W.R. Co.*, 2 Times L.R. 400. In none of the three cases above referred to was there any affidavit or other evidence produced in support of the application.

The above authorities, referred to in the Annual Practice, in my opinion go to shew that there should be some evidence, either by affidavit or otherwise, to shew that, as the Master of the Rolls states in *Atkins* v. *G.W.R. Co.*, *supra*, "if the damages and

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the costs were paid there was no reasonable probability of getting them back even if the appeal succeeded."

The notice of motion in this case gives notice that besides the affidavits will be read the pleadings and proceedings already on file in the action. What evidence, then, has been produced in support of the application? The plaintiff's statement of claim shews that the action was for damages owing to injuries received while in the employ of the defendant company; and the proceedings shew that the judgment was for $12,000 damages and hospital and doctor's bills, $574.50. Para. 2 of the plaintiff's statement of claim states that he worked as a railway brakeman for a period of 5 years immediately prior to September 18, A.D. 1914, and was so employed by the defendant company on that day at the time of the accident. Para. 14 states: "Since the inflicting of said injuries and by reason thereof the plaintiff is incapable of doing work of any kind." In his examination for discovery, taken on May 12, 1915, the plaintiff stated that on that day he was doing nothing, that he was rooming with a friend in a garage, and ate at an hotel. When asked what he depended on for paying for his living expenses, he stated, on money saved and given to him. He also stated that previous to working as brakeman for the C.P.R. he had acted as a porter in an hotel.

This evidence goes to shew that he was not a man of means at the time of the accident. The affidavit of Mr. Hanbidge, of the town of Kerrobert, the town wherein the plaintiff is living, states that he believes that if the sum of $12,574.50 and costs were paid over to the plaintiff, in the event of the judgment being reversed the defendant company would be unable to recover the said amount from the plaintiff. He also states that he has acquired the above information from several men. He was cross-examined on his affidavit, and his cross-examination goes to shew that he derived the above information from inquiries made from the bank manager in the town, the station agent of the defendant company and other parties living in Kerrobert, and also from his own observation.

In this particular case this evidence satisfies me that if the amount of the judgment were paid over to the plaintiff, there

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is no reasonable probability of getting it back if the appeal succeeded.

I will, therefore, grant the stay of execution until the appeal is disposed of.

I may add that the evidence in this case is to my mind much stronger than the affidavits produced in *Covert* v. *Janzen*, 1 S.L.R. 424, referred to by counsel for the respondent. In the latter case the affidavit of Mr. Straton, the solicitor for the defendant, did not refer to the improbability of recovering the amount of the judgment if paid, and the affidavit of Mr. Gordon, the agent for the defendant's solicitors, merely stated that he was informed by counsel for the defendant, and believes, that if the amount of the judgment therein was paid to the plaintiff it is doubtful if the defendant will ever be able to recover the same from the plaintiff in the event of the appeal being successful. In other words, Mr. Gordon based his affidavit on the information he received from counsel for the defendant, and the defendant's counsel, Mr. Straton, did not himself deal with this matter in his affidavit; whereas in the case at bar Mr. Hanbidge swears to what he has gathered himself from inquiries and his own observation, while living in the same town as the plaintiff.

Stay granted.

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CURRY v. McGREGOR.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Parker of Waddington, and Lord Sumner. December 14, 1915.

[*McGregor v. Curry*, 20 D.L.R. 706, 31 O.L.R. 261, affirmed.]

EXECUTORS AND ADMINISTRATORS (§ III B—70)—*Specific performance against—Agreement to transfer company stock.*]—Appeal from judgment of Ontario Supreme Court, Appellate Division, 20 D.L.R. 706, 31 O.L.R. 261.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—Their Lordships do not think it necessary to hear the respondent in this case. Under ordinary circumstances they would take time to consider their judgment, but the case is one which, now that the point as to the Statute of Frauds turns out to be untenable, may be disposed of, with a single observation.

The remaining and only real contest is one as to the effect of

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the agreement in question, and as to this two Courts have found substantially to the same effect. Under these circumstances their Lordships see no reason for disturbing the judgment of the trial Judge; and they will humbly advise His Majesty to dismiss the appeal with costs. *Appeal dismissed.*

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HUESTON v. GEMMEL.

Saskatchewan Supreme Court, Brown J. September 29, 1915.

APPEAL (§ III E—91) — *Service of notice of — Vacation — Foreclosure action between vendor and purchaser — Sub-purchasers as parties.*]—Appeal from an order made by a Local Master.

C. M. Johnston, for defendant, appellant.

A. F. Sample, for plaintiff, respondent.

BROWN, J.:—Notice of appeal was served and made returnable during vacation without special leave being granted, and it is objected that the proceedings are invalid and that the appeal should be dismissed on that account. Ordinarily the notice of appeal must be served so as to be returnable in Chambers within 15 days after the decision complained of: r. 622: *Arnold* v. *Fortescue, sub-nom. Re a Taxation*, 11 D.L.R. 191. The hearing of an appeal to a Judge in Chambers is clearly, in my opinion, contested business, and, therefore, under r. 693, such hearing should not take place during vacation apart from special leave. In view of what is laid down by my brother Newlands in *Mills* v. *Harris*, 19 D.L.R. 872, I am of opinion that the proper practice in a case such as the present is to serve the notice of appeal during vacation, making the same returnable after vacation. The appellant would have his 15 days clear of the vacation term. In my view, therefore, the appellant was right in serving his notice during vacation, but in error in making it returnable during vacation. The practice in this respect is new, and the rules are far from clear on the point, and I am, therefore, not disposed to penalize the appellant. I will extend the time, as I have a right to do, and treat the appeal as if properly brought.

The action is brought by the respondent vendor under an agreement of sale, he being the registered owner. The appellant Gemmel was the purchaser under said agreement, and the de-

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fendant Belbeck has filed a caveat against the property affected, although there is nothing to indicate in what way he became interested. On the application before the Local Master for an order *nisi*, the appellant filed an affidavit in which he sets up that he prior to action resold the property under an agreement of sale to A. M. Nicolson, James Mulligan, H. S. Brisbin and Catherine Foley, all of Prince Albert, for the sum of $8,000, and that there is still owing by them the sum of $2,847.25, more than sufficient to satisfy the plaintiff's claim against him. The final paragraph in his affidavit is as follows:—

> And I make this affidavit as a basis of an application for an extended time for redemption.

The Local Master made his *fiat* as follows:—

> July 9th, 1915: Order to go for sale; 4 months for redemption.

The appeal is taken by Gemmel on the ground that his sub-purchasers should have been made parties to the action or served with the order *nisi*. There is nothing in the registry office to indicate that these sub-purchasers have any interest in the property, and it is not contended that the plaintiff had any knowledge of such interest until the appellant's affidavit was filed as aforesaid. These sub-purchsers have not been made parties to the proceedings. They are not now applying to be added as parties, nor is it shewn that they would want to be made parties. They apparently have no knowledge of the proceedings being taken. The appellant alone contends that they should have been added, and the plaintiff contends otherwise. There is nothing to indicate that the appellant asked that these sub-purchasers be added as parties before the Local Master. I am satisfied that no such application was made, as the paragraph which I have quoted from the appellant's affidavit shews that the certificate was used not for the purpose of having these parties added as defendants, but that he, the appellant, might get ample time in which to redeem. Moreover, had such application been made, I am sure the Local Master's decision on the point would have been set out in the fiat which he made. Notwithstanding all that is aforesaid, I am of opinion that this property should not be sold behind the backs of those sub-purchasers. It strikes me as an unheard-of proceeding to sell property without giving interested parties a chance to protect themselves. Apart altogether

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from the question as to whether or not the appellant or the respondent wants these sub-purchasers added as parties, I think it the duty of the Court or the Judge, as the case may be, from whom the plaintiff seeks relief to see that all parties who are shewn to be interested are given a chance to fully protect their interests. This, as I understand it, is the constant practice of our Courts: Daniells' Chancery Practice, 7th ed., vol. 1, p. 216; 39 Cyc., p. 1858; Annual Practice (1915), p. 1032; *Atty.-Gen.* v. *Sittingbourne, etc., R. Co.*, L.R. 1 Eq. 636.

I am of opinion that under the circumstances of this case it will be sufficient if these sub-purchasers are brought into the Local Master's office on the application for the order *nisi*.

In the result the order appealed from will be set aside, the sub-purchasers made parties to the action, and served with a 15 days' notice of the application to be made for an order *nisi*. There will be no costs of this appeal. *Order set aside.*

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Re STRATFORD LOCAL OPTION BY-LAW.

Ontario Supreme Court, Middleton, J. November 27, 1915.

INTOXICATING LIQUORS (§ I C—33)—*Local option by-law—Submission to electors—Sufficiency of number of petitioners—Ascertainment—Mandamus—Costs.*] —Motion by David M. Wright for a mandamus directing the Municipal Council of the City of Stratford and the members thereof to give effect to a certain petition presented to the council, by submitting a local option by-law to the vote of the municipal electors.

Section 137(4) of the Liquor License Act, R.S.O. 1914, ch. 215, is as follows: "If a petition in writing signed by at least 25 per cent. of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections is filed with the Clerk of the municipality, on or before the 1st day of November next preceding the day upon which such poll would be held, praying for the submission of such proposed by-law, it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid."

R. T. Harding, for the applicant.

J. C. Makins, K.C., for the respondents.

MIDDLETON, J.:—A petition signed by a very large number of ratepayers was duly filed with the Clerk of the City of

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Stratford on the 15th September, 1915, and presented to the city council at its meeting on the 20th September. Upon examination by the City Clerk and Assessor, it was found to contain 1,211 names. The voters' list contained 4,025 names; the petition therefore contained about 200 more than the requisite number of signatures.

The report of the City Clerk and Assessor was before the council at its meeting on the 18th October, when the report was referred to a committee of the council, who were directed to report at the next meeting. At that next meeting, on the 1st November, a resolution was passed directing the preparation of a by-law, and the Clerk was instructed to scrutinise the petition again, and certify whether it had been signed by 25 per cent. of the ratepayers whose names appeared on the last revised list; and a special meeting to consider the petition was appointed.

On the 11th November, the Clerk reported that the petition did contain the names of more than 25 per cent. of the persons named in the list of voters. He also reported certain correspondence and another petition which had been presented to him. A resolution was then passed directing the City Solicitor to prepare the necessary by-law for submission. It also appears that the committee to whom the matter had been referred prepared a report, but apparently it was not submitted to the council. This report stated that the petition was sufficiently signed.

At the meeting of the 15th November, the by-law having been received from the solicitor, it was moved that it be now read a first time. A motion was made in amendment "that the petition be scrutinised by the entire council, and that the Moral Reform Association be asked to supply the necessary proof of signature." This was ruled out of order; and the motion being submitted it was negatived.

There is only one other meeting of the council—that to be held on the 6th December—before the 10th December, the last day for advertising if the by-law is to be submitted at the January election.

The majority of the council having thus refused to pass the by-law, this motion is made for a mandamus.

It is argued that the motion is premature, and that the council has until the last possible moment to determine whether it will

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pass the by-law or not; and it would follow logically that the Court could never grant a mandamus, because, after that critical moment had passed, it would obviously be too late—for the Court cannot dispense with the advertising stipulated by the Act.

To test the good faith of the council, I asked if an undertaking would be given to pass the by-law; but counsel had only the stereotyped answer, "I have no instructions;" so that I think it must be taken as reasonably established that it is the intention of the majority of the council to defeat the wishes of the petitioners and to avoid discharging the duty imposed upon the council by the statute, if that end can be accomplished.

It was also argued that it was premature to consider the matter, because the council had not yet determined to its satisfaction whether the petition was in truth adequately signed. On this motion there is no material whatever suggesting that the opinion expressed not only by the applicant but by the committee of the council and its Clerk and Assessor, after a long and careful scrutiny and after hearing those interested both pro and con, that the petition is sufficiently signed, is erroneous; and I find that the petition presented was sufficiently signed.

The respondent relies upon the decision of my Lord the Chief Justice, speaking for a Divisional Court, in *Re Halladay and City of Ottawa* (1907), 15 O.L.R. 65, as establishing the proposition that the council, as a council, must enter upon a scrutiny and be satisfied that the petition is duly signed. In that case the statute was that relating to early closing by-laws, and the language was "if the council is satisfied that the application is signed by not less than three-fourths in number, the by-law shall be passed." No such provision appears in the statute here in question. It (the Liquor License Act, R.S.O. 1914, ch. 215, sec. 137, sub-sec. 4) provides that "if a petition in writing signed by at least 25 per cent. of the total number of persons . . . is filed . . . it shall be the duty of the council to submit the same to a vote of the municipal electors."

Here, there being the petition, it becomes the duty of the council to submit the proposed by-law to the voters; and the intention to refuse to discharge this duty abundantly appears. The pretext of any necessity or honest desire for further scrutiny cannot be given any weight or effect; and I think that the mandamus sought should be granted, with costs to be paid individually

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by those members of the council who voted against the by-law and who are parties to this motion.

MENZIES v. McLEOD.

Ontario Supreme Court, Boyd, C. November 9, 1915.

DISCOVERY AND INSPECTION (§ IV—20)—*Examination of co-defendant—"Party adverse in interest"—Action to Establish will—Beneficiaries.*]—Motion by the defendant McLeod and two other defendants, next of kin of Margaret Menzies, deceased, to commit the defendant Martha McGuire, for refusal to attend for examination for discovery, at the instance of the applicants, as a "party adverse in interest" to them, under rule 327.

W. Lawr, for the applicants.

A. W. Langmuir, for the defendant Martha McGuire.

BOYD, C.:—The constitution of the Court of Chancery in this Province was altered by 12 Vict. ch. 64, and in the 11th section, referring to the report of the Chancery Commission before appointed, which recommended certain changes in the procedure, it was declared desirable to give effect thereto in regard to enabling the plaintiff to obtain discovery through the medium of a *vivâ voce* examination of the defendant, and by extending a like privilege to the defendant in relation to the *vivâ voce* examination of the plaintiff. Under that power, the Judges framed and issued Order L. (1850), which begins: "Any party to a suit may be examined as a witness by the party adverse in point of interest without any special order for that purpose." See Cooper's Rules, 1851. This Order of 1850 appears to be the first wherein the phrase "adverse in point of interest" is used, and thence it has passed into current usage in subsequent Orders, to the present day. It is carried into the Orders of 1863 as No. XXII. (1).

By the Administration of Justice Act, R.S.O. 1877, ch. 50, sec. 156, the Legislature carried the equity practice into actions at law in almost identical words: "Any party to an action at law, whether plaintiff or defendant, may at any time after . . . issue obtain an order for the oral examination . . . of any party adverse in point of interest . . . touching the matters in question in the action." The only practical difference was that at law an order was required, but it was issued as of course.

Then the two lines of practice were blended together in the

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Consolidated Rules of 1887. These sections were left out of the Judicature Act of that date, but were declared to be of statutory force by 51 Vict. ch. 2, sec. 4. In this consolidation the rule appears as Rule 487. The same rule is reproduced as No. 439 in the Consolidated Rules of 1897, and it is now found in the Rules of 1913 as No. 327. The meaning and language are identical with that of the earliest Order—except that, for the sake of conciseness, "adverse in point of interest" appears as "adverse in interest." When the expression was first used in 1850 and afterwards, the word "interest" in connection with parties and witnesses had a well-defined meaning. It meant direct pecuniary or other legal, as distinguished from moral, interest in the matters and in the results involved in the litigation. The word is of frequent recurrence in the legislation on evidence in the middle of last century in this Province: 12 Vict. ch. 70; 14 & 15 Vict. ch. 66; and 16 Vict. ch. 19.

The object of this action is to establish the will of Margaret Menzies. The judgment will operate *in rem* and conclude the rights of all parties interested. The executor sues alone, and makes the beneficiaries and next of kin defendants. Some of the latter, who are also beneficiaries, contest the validity of the will on the ground of undue influence and incapacity. The will was executed at Daytona, Florida, U.S.A., where, it is alleged, the textatrix, an old and diseased woman, was in the hands of the executor and one of the defendants, Martha McGuire, who was the nurse in waiting on the deceased, and who gets a legacy of $10,000. The estate is a large one, and, after the legacy to the nurse and pecuniary legacies of $1,000 each to eleven next of kin, the residue goes to the executor. The defendant McGuire has entered no defence, and the pleadings against her are closed. It is stated on affidavit that the plaintiff and the defendant McGuire are in the same interest, and are neither of them of the next of kin of the testatrix.

A notice was given by the contestants to McGuire to attend for examination under Rule 327 (1), but she made default on the ground that she was not compellable; and to test this question the matter has been argued before me.

Counsel for McGuire relies on a Manitoba decision of Mr. Justice Mathers in 1909, *Fonseca* v. *Jones*, 19 Man. R. 334, in which, declining to regard *Moore* v. *Boyd* (1881), 8 P.R. 413, as

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well decided, he follows English cases and holds that a defendant is not a party adverse in point of interest to another party on the same side of the record within the meaning of the Rule (apparently corresponding to ours) unless there are some rights to be adjusted between them in the action.

This testamentary action discloses really two sets of litigants who are adverse—those who seek to uphold the will and those who seek to invalidate it. No doubt as to which side McGuire is on; if the will stands, she gains $10,000; if it falls, she loses all. She might well have been made a co-plaintiff: her whole interest in the litigation is with the executor and in his success. An actual issue in tangible form spread upon the record is not essential, so long as there is a manifest adverse interest in one defendant as against another defendant. "Adverse interest" is a flexible term, meaning pecuniary interest, or any other substantial interest in the subject-matter of litigation.

Moore v. *Boyd*, 8 P.R. 413, was decided by the Master in Ordinary in 1881, and has been referred to with approval subsequently (*Bank of Ottawa* v. *Harty* (1906), 12 O.L.R. 218, 220), though not as to the particular point in question. But on that point his interpretation of what is meant by a party adverse in interest accords with that expressed by Mowat, V.-C., in *Forsyth* v. *Johnson* (1868), 14 Gr. 639, at p. 643.

Having regard to the genesis of the Ontario Rule now in force, Rule 327, and the practice which has obtained, it is not competent to introduce the limitations as to examination of co-defendants which are found in the English practice, under Rules differently framed and expressed. The characteristic English phrase is "opposite party," and ours is "party adverse in interest." The very point of difference is noted by Cotton, L.J., in *Molloy* v. *Kilby* (1880), 15 Ch. D. 162, at p. 164: "'Opposite party or parties,'" he says, "does not mean a party or parties having an adverse interest, but a party or parties between whom and the applicant an issue is joined." The English decisions which Mr. Justice Mathers has followed decide that as between co-defendants one cannot examine the other for discovery unless between the two there be some right to be adjudicated (Lord Esher) or some community of interest (Lindley, L.J.), or some question in conflict in the action (Lopes, L.J.) This is the summary of the expressions used in *Shaw* v. *Smith* (1886), 18 Q.B.D. 193, as given

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by A. L. Smith, L.J., in *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q.B. 124, 127.

Another case under English practice which would conclude the present applicants' right to examine is *Marshall* v. *Langley*, [1889] W.N. 222: where the defendant admits the plaintiff's case and puts in no defence and claims no relief, there is no issue raised, and he cannot be treated as an opposite party by a co-defendant who wishes to examine. The last English case is *Birchal* v. *Birch Crisp & Co.*, [1913] 2 Ch. 375.

I am by no means sure that even under the English limitations there is not something to be adjudicated here between the co-defendants—there is a community of interest in the disposal of the estate, though one claim as against the other is adverse.

In my judgment, *Moore* v. *Boyd* is to be preferred to *Fonseca* v. *Jones*. Within the meaning of the Rule, the defendant McGuire is a party to the action adverse in interest to her co-defendants who seek to gain discovery from her as to the execution of the will and the condition of the testatrix. The Court favours an early disclosure of all matters surrounding the execution of an impeached will from those who know, that an opportunity may be given in a proper case to withdraw from hopeless or unnecessary litigation.

It is to be remarked also that in probate actions especially the Court exercises a wider latitude in ordering discovery than in other actions not *in rem*, owing to the nature of the issues raised. It is the duty of the Court not only to do justice between the parties, but also to do justice to the deceased: Tristam and Coote's Probate Practice, 14th ed., p. 506.

In all likelihood this nurse knows more about the physical and mental condition of the testatrix than any other available person.

The defendant McGuire should, on due notice of time and place, attend at her own expense and submit to be examined under Rule 327.

Re FAULKNER LIMITED.
CITY OF OTTAWA'S CLAIM.

Ontario Supreme Court, Britton, J. October 26, 1915.

CORPORATIONS AND COMPANIES (§ VI F 2—350)—*Claim of municipal corporation for business tax—When preferred—Distress.*]—Appeal from the ruling of a Local Master under the

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Dominion Winding-up Act, R.S.C. 1906, ch. 144, disallowing a claim for taxes as a preferential claim.

F. B. Proctor, for the appellant corporation.

George D. Kelley, for the liquidator, respondent.

BRITTON, J.:—The appeal is from the decision of the Local Master, refusing to allow the claim of the City of Ottawa for the amount of taxes upon a business assessment against the said company, as a preferential claim upon the assets of the said company.

It was admitted upon the argument that the business tax was properly imposed. The amount of that tax was not disputed. It was also admitted that, prior to the winding-up order in reference to the said Faulkner Limited, there were goods and chattels upon the company's premises sufficient to realise the said taxes, and that some of these goods and chattels sold by the liquidator were in possession of purchasers occupying the premises and upon the premises formerly occupied by Faulkner Limited. It was admitted that the city corporation was properly a claimant for the amount mentioned, but only as an ordinary creditor, not preferred in respect to that amount. The City of Ottawa could have collected these taxes by distress and sale. See the Assessment Act, R.S.O. 1914, ch. 195, sec. 109, and its sub-sections. I do not stop to discuss or consider from what property or where situate the amount could have been or could now be levied. The city corporation did not distrain.

The Master's conclusion was arrived at, by analogy, from the decisions with regard to the right to preference as to rent. Before the statutory lien created in Ontario for rent, to a limited amount, due by an insolvent, the law, as laid down in *Fuches* v. *Hamilton Tribune Co.* (1884), 10 P.R. 409, was not questioned, viz., that a mere notice of a claim to be paid preferentially for rents was not sufficient, and that even an undertaking by a provisional liquidator to pay such a claim, without the permission of the Court, could not be enforced.

Re Fashion Shop, 21 D.L.R. 478, 33 O.L.R. 253, decided that where, before the assets of the debtor were taken possession of by the liquidator, these assets had been taken possession of by an assignee, who, by reason of the Ontario Act, was bound to re-

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cognise the priority of the landlord, and the winding-up order was subsequently made, the assets became vested in the liquidator, subject to the preferential lien of the landlord for the limited amount of rent: Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38.

In reference to the landlord's priority, there was at first the necessity for distress or distraining. Then preference was given by legislation—as to Ontario—and as to assets in the hands of an assignee for the benefit of creditors; but preference has not yet been given by legislation in winding-up proceedings under the Dominion Act; but, on the contrary, secs. 20, 23, and 84 seem expressly to prevent a liquidator from allowing a preference or priority unless impressed upon assets before such assets were taken possession of by him.

In re Ottawa Porcelain and Carbon Co. Limited (1900), 31 O.R. 679, was referred to. That case depended somewhat upon the power to impose water rates and to collect those rates, and to make those rates a lien upon the property. It does not assist much in disposing of the case in hand, but it is to be noted that the claim was filed only as the claim of an ordinary creditor.

The appeal will be dismissed with costs.

Appeal dismissed.

Re RUTHERFORD.

Ontario Supreme Court, Middleton, J. September 24, 1915.

EXECUTORS AND ADMINISTRATORS (§ IV A 2—82)—*Claim for services rendered deceased for long period—Promise to provide by will—Part of claim barred by limitations.*]—Appeal by the next of kin from the decision of the Surrogate Judge, allowing the claimant against the estate $2,340 and costs, being wages at the rate of $2.25 per week for a period of about 20 years.

R. S. Colter, for the appellants.

S. E. Lindsay, for the administrator.

H. Arrell, for the claimant.

The widow appeared in person.

MIDDLETON, J.:—Upon the evidence of the claimant, she remained with the late Mr. Rutherford, and worked for him, in reliance upon the promise of the intestate "that he had plenty and

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could do for me as if I were his own girl; he would provide for me, and I did not have to go away and earn." This promise is amply corroborated by witnesses, particularly the widow; and, although the words of the promise are not particularly clear, I think the Judge was amply justified in inferring that what was intended was that the claimant should be provided for not only during Rutherford's lifetime but also by his will.

Objection is taken to the amount allowed. I do not think it at all excessive. If there is any error, I incline to think that it is on the other side. No doubt, the Judge had perfectly present to his mind that this sum was being allowed in addition to whatever the claimant received by way of clothing or otherwise.

On the other hand, I think the Judge should have given effect to the Statute of Limitations, and that the allowance should be confined to 6 years. The learned Judge has taken the view that the administrator, who is friendly to the claimant and does not desire to plead the Statute of Limitations, can waive the statute, notwithstanding the wishes of those beneficially interested. It may be that, if the administrator had paid the debt before any contest had taken place in the Courts, the beneficiaries would be bound; but here the matter has been brought into Court, and the beneficiaries have, I think, the right to insist upon the statute.

In *In re Wenham*, [1892] 3 Ch. 59, it was held that where an originating summons had been issued the parties must be treated as standing in the same position as if an administration decree had been made, and that consequently the residuary legatee was entitled to insist upon the statute as a defence to a creditor's claim. *A fortiori* must this be so where, as here, the statute expressly gives a *locus standi* to those beneficially interested upon the summary contest provided: R.S.O. 1914, ch. 62, sec. 69(5). See also *Midgley* v. *Midgley*, [1893] 3 Ch. 282.

The amount of the claim will therefore be reduced to the remuneration for 6 years, and costs of all parties will be paid out of the estate. *Appeal allowed.*

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

Ontario Supreme Court, Hodgins, J.A. December 28, 1915.

EXECUTION (§ I—11)—*Stay of—Appeal pending—Dismissal of action—Stay operative as to costs only.*]—Motion by the de-

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fendants the Ottawa Separate Schools Commission to remove the stay created under rule 496 by the setting down by the plaintiffs of their appeal to a Divisional Court of the Appellate Division from the judgment of Meredith, C.J.C.P., 24 D.L.R. 497.

Thomson, Tilley & Johnston, for applicants.

F. B. Proctor, for defendants the Corporation of the City of Ottawa.

J. H. Fraser, for plaintiffs.

HODGINS, J.A., said that the affidavits filed on behalf of the applicants indicated that, while the result of the judgment was to establish the position of the applicants, they had not received the school moneys raised by taxation, because the Corporation of the City of Ottawa retained them. The secretary-treasurer of the Commission deposed that these moneys were urgently needed for the opening of the Ottawa separate schools in the month of January, 1916, and for upkeep and maintenance, and for the payment of outstanding obligations.

Counsel for the city corporation stated that the corporation desired some definite direction of the Court before paying the moneys over; and had launched an application for such a direction, which was to come before a Divisional Court of the Appellate Division at the same time as the main appeal.

The form of the judgment here was a simple dismissal of the action. Under Rule 496, the entry of the judgment was not stayed, but merely its execution, except the taxation of costs under it. The judgment, therefore, when duly entered, as it may be, is a valid and effectual one until reversed, and can be used as the foundation of any other proceedings which may be necessary to compel payment to the Commission of moneys properly payable to it. The "execution of the judgment" is in this case limited to the enforcement of the payment of the costs awarded, when taxed.

Any desire for the execution of the judgment in this respect, pending the disposition of the appeal, being disclaimed by the applicants, the removal of the stay created by the Rule —the judgment being simply one dismissing the action—will not help the applicants. There is really nothing left upon

which the stay operates; and, therefore, to make a formal order for its removal would be like subtracting something from nothing.

No order, and no costs. *Judgment accordingly.*

McNEILLY v. BENNETT.

Ontario Supreme Court, Middleton, J. September 28, 1915.

COURTS (§ I B 1—10)—*Division Courts—Territorial jurisdiction—Cause of action, where arising—Contract by—Correspondence—Transfer of cause to debtor's place of residence.*]—Motion for prohibition and mandamus.

T. N. Phelan, for the plaintiff.

J. M. Ferguson, for the defendant.

MIDDLETON, J.:—Motion for an order prohibiting the transfer of this action from the First Division Court in the County of Wentworth to the Orillia Division Court, and for a mandamus to compel the Wentworth Judge to hear and determine the action upon its merits.

The amount involved in this matter is trifling, but the question is not free from difficulty. McNeilly has an establishment in Hamilton, and part, at any rate, of his business consists in reshaping ladies hats for retailers, so as to make unsold hats conform to new styles.

On the 2nd March, 1914, he sent what is said to be a circular letter to Mrs. Bennett: "This is the last request this season, advising you to send in your old hat shapes to be reshaped. Goods sent not later than the 16th March will be returned promptly. Our prices are fifty cents each for all kinds. . . . Send now."

In response to this invitation, the defendant did send some hats to be reshaped, and the controversy arises concerning the fulfilment of the obligation thus undertaken. The plaintiff says that he did reshape. The defendant says that what he sent her was not the same as that which she had sent for treatment.

The plaintiff sues in Hamilton, upon the theory that the whole cause of action arose there. The learned Judge has taken the view that the whole cause of action did not arise in Hamilton, but partly in Orillia.

Two questions are really involved:—

In the first place, is the receipt of the circular firstly men-

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tioned any part of the cause of action? It is argued, on the strength of *Johnston Brothers* v. *Rogers Brothers* (1899), 30 O.R. 150, that the latter was a mere quotation of prices, and that the sending of the goods in response to it did not complete a contract, it being necessary that there should be some further assent on the part of the plaintiff. It may be that this is correct; but, nevertheless, in my view, the sending of the circular letter did constitute part of the cause of action. The plaintiff initiates the transaction by making this quotation of prices in Orillia; and, although this did not amount to a technical offer, it is, I think, an essential ingredient in the "cause of action," as that expression has been consistently defined in all the cases relating to this subject.

The second aspect of the case is not important if I am right in the view just expressed. It is this: that the writing of the letter accompanying the goods from Orillia is in itself a part of the cause of action; and in support of this is the decision of the late Chief Justice Hagarty in *In re Hagel* v. *Dalrymple* (1879), 8 P.R. 183, who held, in precisely analogous circumstances, that, if the defendant's letter written in Orillia is to be regarded as the plaintiff's authority for performing the services in Hamilton, the writing of the letter at Orillia became part of the cause of action within the meaning of the rule. I should be bound to yield allegiance to this decision even if I were satisfied that it was not entirely satisfactory.

The case relied upon by Mr. Phelan, *Cowan* v. *O'Connor* (1888), 20 Q.B.D. 640, appears to be in conflict with this decision; but our own decision is in accord with the policy of the Division Courts Act, which compels the creditor to seek his remedy in the Court of the residence of his debtor unless the whole cause of action arises in some other division (see the Division Courts Act, R.S.O. 1914, ch. 63, sec. 72). Where there is a *bonâ fide* dispute, it is always a hardship to one litigant to have to travel to the residence of his opponent for its adjustment. The legislative sympathy is entirely with the debtor, and the provisions of the Act ought to be interpreted accordingly.

The motion for prohibition will be dismissed, and costs will follow. *Motion dismissed.*

McKINNON v. DORAN.

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Ontario Supreme Court, Clute, J. September 29, 1915.

CONTRACTS (§ I E 5—97)—*Purchase of railway bonds—Broker becoming purchaser — Correspondence — Admissibility—Memorandum in writing — Statute of Frauds—Damages.*]—ACTION for damages for breach of a contract, tried by CLUTE, J., without a jury, at Toronto.

J. B. Clarke, K.C., for the plaintiffs.

J. S. Fullerton, K.C., and *I. F. Hellmuth*, K.C., for the defendant.

CLUTE, J. (after setting out the facts at length):—The defendant pleads that he was employed as an agent to sell the bonds, by the plaintiffs, who agreed to pay him a commission of $2,500. Whatever the intention of the defendant was when he wrote the letter of the 26th May, I am satisfied by his subsequent dealings, and from the evidence, and I find as a fact, that, having found, through Daude, a purchaser, he decided to purchase the bonds himself, as he states in his telegram of the 3rd June. This, I think, is made clear beyond all doubt by the fact that neither his associate's name nor that of the purchaser were disclosed to the plaintiffs; and, although Daude was examined at length in New York, it does not yet appear what the Bloomingdale estate was to pay for the bonds. I entertain no doubt that the defendant and Daude, having effected, as they thought, a sale, on terms satisfactory to themselves, to the Bloomingdale estate, purposely withheld the terms of the transaction; the defendant treating the transaction, as in fact it was, as a sale to himself, and that he acted not as agent, but as principal, in the transaction.

There is a further defence under the Statute of Frauds, now R.S.O. 1914, ch. 102. I think it clear that the bonds in question, read in connection with the trust indenture, which gives the power, upon default, of sale of the mortgaged property, are within the statute. See *Driver* v. *Broad*, [1893] 1 Q.B. 539, affirmed *ib.* 744. Aside from the statute, there is no question that a sale to the defendant was concluded; and I am further of opinion that what took place meets the requirements of the statute. The correspondence referred to clearly discloses the

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vendors and the terms of sale and the fact that the defendant had purchased the bonds.

I think the correspondence between the defendant and Daude is admissible as evidence of the bargain. See *Gibson* v. *Holland* (1865), L.R. 1 C.P. 1. This case arose under the 17th section of the Statute of Frauds, but reference is made by Erle, C.J., to a number of cases in support of this decision, which were decided under the 4th section of the Statute of Frauds.

In Sugden's Law of Vendors and Purchasers, 14th ed., it is said (p. 139): "A note or letter, written by the vendor to any third person, containing directions to carry the agreement into execution, will, subject to the before-mentioned rules, be a sufficient agreement to take a case out of the statute;" citing *Welford* v. *Beazely* (1747), 3 Atk. 503; *Seagood* v. *Meale* (1721), Prec. Ch. 560; and a number of other cases, including *Leroux* v. *Brown* (1852), 12 C.B. 801; and the same doctrine is said to apply to a letter written by a purchaser: *Rose* v. *Cunynghame* (1805), 11 Ves. 550. Willes, J., in the *Gibson* case points out the distinction between the wording used in the 4th section and the 17th section, and, referring to *Bailey* v. *Sweeting* (1861), 9 C.B.N.S. 843, says: "As the letter contained evidence of the terms upon which he had once contracted to be bound, it was properly held to be a sufficient memorandum to satisfy the statute." That case was under the 17th section. He then proceeds: "I have, on former occasions, expressed the inability I felt to understand the case of *Leroux* v. *Brown*, though of course we are bound by it. It affords, however, a remarkable confirmation of the correctness of the construction we now put upon the statute . . . ."

I have not been able to find, nor has counsel cited, any case where the law has been held to be otherwise than as indicated by Erle, C.J., in the *Gibson* case. See also Agnew's Statute of Frauds, p. 244, and cases there cited.

I therefore hold that the correspondence between the defendant and Daude, above referred to, is admissible, and thus a sufficient memorandum in writing to satisfy the statute has been made out.

I also find that the defendant approved and affirmed the

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sale of $15,000 and $2,000 of the bonds which were sold by the plaintiffs and credited upon the defendant's account.

Owing to the general stringency, aggravated, no doubt, by the declaration of war, it was difficult to find a purchaser for the bonds. The plaintiffs, after due notice, duly advertised for tenders. The only tender received was from the Canada Trust Company at 92 and interest. The plaintiffs had purchased the bonds from the Canada Trust Company, who, at the time of the sale to the defendant, held the bonds as security for an advance made by them to the plaintiffs. I find that the plaintiffs endeavoured to induce the Canada Trust Company to put in a tender at 95; this they refused to do, but offered to put in a tender at 92. The price at that rate was less than the plaintiffs' loan. This difference was paid by the plaintiffs to the Canada Trust Company partly in cash and partly secured by collaterals. There was a secret understanding between the plaintiffs and the Canada Trust Company that the plaintiffs, if they succeeded in recovering from the defendant, should hand over to the trust company the proceeds of such action up to $6,201. If the plaintiffs did not recover anything from the defendant, the trust company would credit the plaintiffs for the bonds at 95, making a difference of three points. To. Mr. Hellmuth, on cross-examination, Mr. McKinnon stated that, whether they recovered in this action or not, the plaintiffs cannot lose more than $11,000. He followed this statement with the explanation that they have actually lost in fact nearly $17,000. It was urged on behalf of the defence that in no event can the plaintiffs recover more than $11,000. I am satisfied that the plaintiffs obtained the best price possible for the bonds, having regard to the condition of the market, and that what was done by the plaintiffs in their negotiations with the Canada Trust Company was not with a view to injure the defendant or obtain any undue advantage over him, but to realise the best price possible. The Canada Trust Company and the plaintiffs had large dealings between them, and, as explained by the manager of the trust company, the arrangement made in case the plaintiffs failed in recovering anything from the defendant was out of consideration, under all the circumstances, which they felt for the plaintiffs. The loss to the plaintiffs is in fact about $17,000. Out of this sum they

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have to pay $6,201 to the trust company. They are still losers of about $11,000.

After the best consideration that I can give the matter, I think the plaintiffs are entitled to recover the amount of their actual loss: see *In re Vic Mill Limited*, [1913] 1 Ch. 183. Anything less than the $16,911.77 would not be sufficient to recoup them.

The plaintiffs are, therefore, entitled to judgment for $16,911.77, with interest from the 3rd December, 1914, and costs of the action.

[January 19, 1916. Appeal to second Divisional Court, appeal dismissed, Court divided.]

Re PINSONNEAULT.

Ontario Supreme Court, Middleton, J. September 24, 1915.

INSURANCE (§ VI D 2—382)—*Disappearance of beneficiary—Presumption of death—Trust—Payment of proceeds into Court for distribution.*] —Motion by the widow of Napoleon Pinsonneault, deceased, and the next of kin of Hector Pinsonneault, an absentee, upon originating notice, for an order determining the person or persons entitled to a sum of $1,000 payable by the Catholic Mutual Benefit Association, under a benefit certificate or policy of insurance upon the life of Napoleon Pinsonneault, to his son, the absentee.

B. N. Davis, for the applicants.

G. Lynch-Staunton, K.C., for the Catholic Mutual Benefit Association.

MIDDLETON, J.:—The late Napoleon Pinsonneault had been for many years a member of the Catholic Mutual Benefit Association and the holder of a policy therein. This policy lapsed, but he was reinstated in membership, and a new policy issued on the 3rd December, 1909. This policy, for $2,000, was made payable $500 to his wife Zuluma and $500 to each of the sons, Joseph, Louis, and Hector. By endorsement bearing date the 14th December, 1909, this direction as to payment was revoked and the policy was made payable to the wife and to Hector, each $1,000.

Napoleon Pinsonneault died on the 8th February, 1912. The $1,000 payable to his wife has been paid to her. The remaining

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$1,000 is retained by the association; and this originating notice is for the purpose of determining who is entitled to receive the same.

It appears that Hector Pinsonneault was the son of Napoleon by a former wife. He lived with his father and stepmother until 1907. In August, 1907, Pinsonneault and his wife visited Montreal for some three weeks. Upon their return to Chatham, they found that Hector, who had been staying with a married half-brother, a child of Napoleon's first wife—for he was three times married—had left for parts unknown. He had said good-bye to his relations there and told them that they might never see him again. It was found that Hector had purchased a ticket to Detroit, and had gone to his home in Chatham and had taken all his clothes, his trunk, a bicycle, and other articles belonging to himself, and had cut from the frame and taken with him a photograph of his maternal grandmother.

Hector sometimes visited relatives living in Detroit, and inquiry was made of them, but no information could be acquired. From that time, although many inquiries have been made, no information has been obtained.

It is said that he knew that he was a beneficiary under his father's life policy. After the father's death, advertisements were inserted in two Detroit newspapers and in the Toronto *Globe* for a period of three months, stating that the father was dead, that Hector had been left $1,000 under the insurance policy, and asking him to communicate with his family. To these advertisements there has been no response.

Upon this state of affairs I am asked to infer that Hector Pinsonneault is now dead and to direct payment over of the insurance money accordingly.

The rule evolved from the many cases dealing with presumption of death is found in Halsbury's Laws of England, vol. 13, p. 500, where, after pointing out that there is no presumption of continuance of life, but there is a presumption concerning death, the writer says: "For if it is proved that for a period of seven years no news of a person has been received by those who would naturally hear of him if he were alive, and that such in-

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quiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead."

Following this formulation of the principle is found the statement (p. 502): "The presumption of death has been thought to be confined to cases where there are in evidence no circumstances which afford ground for a different conclusion; and it has accordingly been held to have no application to the case of a person who would have been unlikely to communicate with his friends. More recent decisions, however, appear to throw doubt on this restriction."

Reference to *Watson* v. *England*, 14 Sim. 28; *Bowden* v. *Henderson*, 2 Sm. & G. 360; *In re Phene's Trusts*, L.R. 5 Ch. 139; *Willyams* v. *Scottish Widows Fund Life Assurance Society* (1888), 52 J.P. 471, and *Wills* v. *Palmer*, 53 W.R. 169.

The stepmother states her belief that the father had no word of his son at any time; but he may well have had knowledge unknown to her; and I do not think that death ought to be presumed until the lapse of seven years from the date of the endorsement.

The insured being now dead, an order may be made upon this application permitting the money to be paid into Court and discharging the society from all liability; and, if no further information can be obtained, the money will be paid out on the expiration of that period and distributed upon the theory that the son did not survive his father; for it has been determined in *Re Phillips and Canadian Order of Chosen Friends* (1906), 12 O.L.R. 48, that the onus is upon the representatives of a beneficiary to prove that he survived the insured.

If the insurance money is now paid into Court, the costs of both parties may be paid out of the fund, and the fund will remain in Court until after the 14th December, 1916.

In the meantime the material ought to be supplemented, if possible, by a copy of the advertisement published, and by giving detailed information as to the publication.

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PARK v. MACDONALD.

Alberta Supreme Court, Harvey, C.J. March 31, 1915.

INJUNCTION (§ I G—60)—*Internal management of association—Medical colleges—Election of council—Validity—Parties—*

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Statutory remedy—Medical Profession Act, ch. 28.]—Application to dissolve injunction.

A. G. MacKay, for plaintiff.

Frank Ford, K.C., for defendant.

HARVEY, C.J.:—The plaintiff is a member of the College of Physicians and Surgeons of Alberta whose fees are paid. The defendant is the registrar of the college. This is an application to dissolve an injunction which I granted restraining the defendant from proceeding with an election of the council of the college which it was proposed to hold on the 17th instant. By sec. 9 of the Medical Profession Act (ch. 28, of 1906), the election is under the management of the registrar, the time and place being determined by the council.

Three grounds were urged, first, that the Court should not interfere, by injunction, with a matter of internal management, secondly, that the corporation should be a party defendant, thirdly, that the Act itself provides a remedy.

As to the first ground I am of opinion that this is not a matter of internal management in any sense. The rule applied to companies and clubs can have no application here because it is based on the view that the shareholders or members have the matter in their own hands and can exercise control. That is not the case here. The members of the corporation have nothing whatever to say even in the acts of the council, their influence being entirely limited to their right to vote for a member of the council, if they happen to have been careful enough to pay their fees. Even the council has no control over the acts of the registrar in holding the election, its management being by the statute expressly placed in his hands. Moreover, his acts could not be under the control of any one because they are expressly prescribed by the statute itself.

The second ground appears to me to be equally untenable. There are no doubt cases where the proceedings should be against the corporation itself or in which it should be a party, but in view of what I have just said with reference to the first ground it is the registrar and not the corporation or its governing body the council, who is invested with the duties the performance of which in an improper way it is sought to restrain. Nothing

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whatever would or could be sought against the college and I can see no substantial reason for adding it and if, indeed, there could be even a formal one the present tendency is to regard the substance rather than the form.

The third objection has presented more difficulty, though I am of opinion that it would have much more force as opposed to the granting of the injunction or in favour of its dissolution promptly than at the present stage. After an examination of the authorities, however, I am of the view that even at an earlier stage it would not stand in the way of the Court's interference.

In support of the argument I am referred to Kerr on Injunction (5th ed.), p. 9, where it is stated that—

> When the legislature has provided a special tribunal for the decision of a question the Court should not, except in very special cases, interfere by injunction or declaration of right.

The following authorities are given for the proposition: *Stannard* v. *St. Giles*, 20 Ch. D. p. 190; *Grand Junc. Waterworks Co.* v. *Hampton*, [1890] 2 Ch. 531; *Devonport Corp.* v. *Tozer*, [1902] 2 Ch. 182, and *Burghes* v. *Atty.-Gen.*, [1911] 2 Ch. 139, 156.

The rule as stated by Jessel, M.R., in the first case and repeated in the next two is:—

> Where the legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction.

In the last case, referring to the one preceding it, it is stated p. 157:—

> The learned Judge did no more than to hold that the circumstance of there being a special tribunal was one which ought to strongly influence the Court against exercising its discretion in the plaintiff's favour.

The cases of *Ellis* v. *Hopper*, 28 L.J. Ex. 1, and *Parr* v. *Winteringham*, 28 L.J.Q.B. 123, to which counsel referred, do not appear to me to apply to this case. They were in reality attempts to appeal, where an appeal was not authorized, from a decision given by a constituted body. The sections of the Act upon which the argument is sought to be supported are 21 and 26. By sec. 21, if the registrar is notified of the improper omission or insertion of a name in the list, it is his duty to rectify the error if any and advise the complainant of his decision, in which case the complainant, if dissatisfied, may appeal to a Judge, provided he does so at least ten days before election

day. Sec. 26 provides that in case of doubt or dispute the council may enquire into the legality of an election, and in the event of finding it illegal may hold a new election.

As to sec. 21 this injunction does not in any way interfere with the procedure prescribed by it. Moreover, the registrar does not appear to have any judicial or discretionary powers. He is an administrative officer whose duties are defined.

The injunction does not interfere with the council in the exercise of its duties under section 26 and none of the authorities seem to be in point. It does prevent the operation of sec. 26 and thus the action of what may be called a tribunal provided by the Act, but it does not for the purpose of preventing it from performing its prescribed duties, but it is for the purpose of preventing the consequences which would give rise to any such duties.

I can find nothing which suggests that it is improper for the Court to do that. The injunction is for the purpose of preventing unauthorized proceedings. The tribunal under sec. 26 has no power to deal with such a case, but only to remedy as far as possible the result of illegal proceedings. I think, therefore, that none of these grounds of objection can be sustained and I, therefore, dismiss the application with costs.

Application dismissed.

WEEKS v. TOWN OF VEGREVILLE.

Alberta Supreme Court, Beck, J. October 8, 1915.

MUNICIPAL CORPORATIONS (§ II F 1—170)—*Franchise for electric light system—Termination by lapse of time—Power of municipality to remove appliances — Delay by owner — Reasonable time.*]—Motion for interim injunction.

Alexander Stuart, K.C., for plaintiff.

F. A. Morrison, for defendant.

BECK, J.:—The plaintiff obtained from the defendant municipality a franchise for an electric light system. It purported to be for a term of 15 years from August 27, 1907. Provision was made for an application to the legislature for confirmation in as much as the statute authorized, apparently, a franchise for a term of 5 years only. No such application was made. The

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matter came before this Court in a former case and it was then decided that the franchise was not valid for a longer term than 5 years: *Weeks* v. *Vegreville* (Feb., 1915, not reported).

In the present action the plaintiff sets forth in the franchise agreement the fact of his having expended large sums of money in purchasing machinery and in erecting poles and stringing wires, etc., and in operating the system; that the agreement contains provisions under which the town might purchase the plant, etc.; that the defendant municipality has wrongly and illegally interfered with the plaintiff's business by threatening to cut the plaintiff's wires, etc., and asks for an injunction and, etc. This is a motion for an interim injunction.

I think it must be refused; counsel have referred me to no authorities.

My own investigation leads me to the conclusion that at the expiration of such a franchise as that in question the company has no right against the will of the municipality to continue its business; that upon the will of the municipality that it shall not continue its business being expressed it must cease to do so; that in that event it is entitled to remove its plant and appliances from the streets and other places, public and private, whereon they have been placed and is entitled to a reasonable time to enable it to do so; that if it fails to do so within a reasonable time the municipality may either take proceedings to enforce the removal by the company of such plant and appliances, at all events of such or such portion thereof as interfere with the reasonable use of the streets and other public places by itself or the public, or itself remove them doing no unnecessary damage to them. This view is supported by the following quotations from American sources, but none of the cases cited are available to me.

After the termination of the grant by revocation or lapse of time, the company has no right to continue the operation of the road without another grant of authority: *City R. Co.* v. *Citizens St. R. Co.* (Ind. 1898), 52 N.E. 157; *Plymouth Tp.* v. *Chestnut Hill &, etc., R. Co.*, 168 Pa. St. 181; 32 Atl. 19; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. 296; compare *Clinton* v. *Clinton*

&c., *etc., Horse R. Co.*, 37 Iowa 61; 36 Cyc., p. 1375, note 7, tit. "Street Railways."

Such use and occupancy is also subject to the right of the city . . . to remove or cause to be removed, the tracks when they no longer subserve the purposes for what they were intended: *Ib.*, p. 1376, n. 14.

On the expiration of a water company's franchise by limitation the company's right to operate its plant and use the streets of the city therefor, and the right of the city to demand service ceases: 40 Cyc., p. 777, tit. "Waters," and the company is entitled to enter on the streets to remove the pipes and appliances: *Ib.*, n. 91; *Laighton* v. *Carthage*, 175 Fed. 145.

The title to the rails, poles and other appliances for the operating of a public service utility are at the expiration of a franchise in the company: *Cleveland Electric R. Co.* v. *Cleveland*, 204 U.S. 116.

After the expiration of a franchise to use the streets, the public service company should be allowed a reasonable length of time to negotiate an extension or renewal of the franchise and close out its business and it has a right to enter upon the streets of the municipality to remove its plant without let or hindrance: Dillon's Municipal Corporations, 5th ed., sec. 1315.

There is a provision in the agreement for the purchase of the plant and, etc., by the municipality. It is however quite clearly expressed to be an option of which the municipality alone can take advantage.

For the reasons given, I refuse the interim injunction, and as the loss to the plaintiff must be quite large I do so without costs, and at the same time suggest to the municipal authorities that they minimize his loss as far as reasonably possible by arranging to take over as much of the plant, poles, wires and, etc., as they can profitably utilize in their own similar undertaking. *Injunction refused.*

MANNING v. BERGMAN.

Alberta Supreme Court, Beck, J. October 18, 1915.

MUNICIPAL CORPORATIONS (§ II E 1—152)—*Contracting debts not payable within current year—Purchase of site for town and*

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fire hall—Illegal proceedings—Right to mandamus.]—Motion in an action for an interlocutory order of mandamus.

B. Pratt, for plaintiffs.

Dickson, for defendants.

BECK, J.:—The statement of claim is in substance, so far as seems material, as follows: 1. The plaintiffs are all ratepayers of the town of Beverly, Alberta, and all on the voters' list; the defendant is mayor, and two of the plaintiffs, Manning and Richards, are councillors. 2. Following a report of a special committee the plaintiff Manning moved, seconded by the plaintiff Richards, the following resolution on June 21, 1915:—

That lots 13 to 24 inclusive in block 4, Beverley Heights be purchased from the firm of Robertson-Davidson, Ltd. (also plaintiffs) at a price of $6,000, purchase price to be repaid in future taxes which may be levied upon property owned by the firm of Robertson-Davidson, Ltd., taxes to be applied against such property as is selected by the firm Robertson-Davidson, Ltd.

3. This resolution was read at three separate council meetings, but the mayor refused to put the resolution to the meeting on the ground that the provision as to the payment of purchase money by future taxes was illegal. 4. At a council meeting held on August 2, 1915, it was decided that in order to meet the objection of the mayor the resolution should be put without mention that the purchase price should be applied on taxes and the following resolution was, therefore, moved and seconded by councillors Richards and Manning: "That the municipality of the town of Beverly do purchase from the firm Robertson-Davidson, Ltd., lots numbered 13 to 24 inclusive in block 4, Beverly Heights, plan No. 7242, A.H., for the sum of $6,000," and the said resolution was put to the meeting and carried. 5. The foregoing resolution was again read at the two succeeding regular meetings of the council, *i.e.*, on August 16 and 30, but at the last of the three, the mayor declined to submit the question to a vote. 6. At this last mentioned meeting councillors Lightfoot and Manning moved that the secretary be instructed to write to Robertson-Davidson, Ltd., stating that if their firm would pay $6,000 cash to the town treasury, then the council would purchase the lots for the sum of $6,000, but the mayor refused to put the motion. 7. In a committee of the whole council held on

September 20, councillors Richards and Lightfoot moved that the sum of $6,000 be provided for on the estimates for the purchase of property for the erection of a town hall and fire hall, but the mayor refused to put the motion. 8. At a council meeting held on September 27, councillors Richards and Lightfoot moved that the sum of $6,000 be included in the estimates for the purchase of land, but the mayor refused to put the motion. 9. At a committee meeting of the whole council held on October 4, councillors Richards and Lightfoot again moved that $6,000 should be put in the estimates, but the mayor again refused to put the motion or to leave the chair, although requested by 4 out of 5 councillors to do so.

The relief asked is: (*a*) An order directing the defendant to give effect to the resolution of June 21 or that of August 2, (*b*) a mandatory injunction directing the defendant to call forthwith a special meeting and put the resolution of June 21, August 2, August 30, September 20, September 27, and October 4; (*c*) damages, $1,000.

As to the resolution of June 21, providing for the purchase of the land for $6,000 on the terms that the purchase money should be paid by its being applied in payment of future taxes which might be levied upon such property owned by the vendors as they should select, I think there can be no question that it is illegal.

It is fairly clear that the $6,000 would not be required to pay only taxes which would be owing by the vendors in respect of the current year.

It is the clear intention of the Town Act (ch. 2 of 1911-12), that debts which are not payable within the current year shall not be contracted except in pursuance of a by-law submitted to and assented to by two-thirds of the burgesses and then passed by the council. See secs. 177, 178 and 294.

As to the resolution of August 2; it was in fact carried at a meeting held on that date. It does purport to be a by-law and, therefore, there was no reason for having it read three times. Sec. 173 applies to by-laws only. For what it was worth it was passed and I can see no reason in any case why the mayor should again be compelled to put a resolution in precisely the same

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terms under precisely the same circumstances and for precisely the same purpose.

I think, however, that in view of the purport of the resolution of June 21, and the statement on the plaintiff's behalf in respect of this later resolution of August 2, repeated before the meetings of August 16 and 30, that it was decided in order to meet the objection of the mayor, the resolution should be put *without mention*. That the purchase price should be applied on taxes leaves it open to the same objection as the former resolution. The unquestionable inference is that the illegal purpose continued; the fact that the illegal purpose ceases to be expressed in the resolution does not, in my opinion, purge it of its illegality.

As to the resolution of August 30, providing for the payment of the purchase price of $6,000 into the town treasury, the only fair inference is that this was to be a method of carrying out the same intention as was at the back of the two former resolutions. I think, therefore, that this resolution also was illegal.

As to the three resolutions to provide in the estimates for the current year for $6,000, that of September 20 for the purchase of property for the erection of a town hall and fire hall; that of September 27, for the purchase of land; that of October 4 without designation of the purpose; they can be conveniently treated together.

On their face—at all events the first two—are legal; and *primâ facie* the plaintiffs are entitled to a mandamus to compel the mayor to perform the duty of putting the resolution to the vote of the council—a duty to be implied from the duties expressly imposed upon him by sec. 23 *et seq.* of the Town Act.

But when the Court is asked to intervene, it is generally discretionary with the Court whether it will exercise its power; this is certainly so where the application is for the prerogative writ of mandamus. (See cases cited in Short and Mellor Crown Prac., 2nd ed., p. 199.) And I think it is equally so on an application for an interlocutory order for a mandamus in an action; it must appear to the Court or Judge to be just and convenient. (Jud. Act, C.O. 1898, ch. 21, sec. 10, sub-sec. 8.) This certainly is beyond question where the interlocutory order.

if granted, would be equivalent to a final judgment in the action, as would be the case here.

In the view I take of the present case it is not necessary for me to decide whether the procedure by action instead of the procedure by way of motion for the prerogative writ of mandamus is the proper one. I have a good deal of doubt whether in such a case as this an action lies for damages or any relief beyond the mandatory order. The English decisions are to the effect that mandamus cannot be claimed in an action except where it would be incidental to other relief, but I am not at all sure that the reasons for these decisions apply in this jurisdiction.

At all events in the present case it does not appear to me that it is just or convenient that I should grant an interlocutory order for mandamus. In addition to the history of the affair already disclosed these things appear.

By sec. 294 it is provided that the council shall not levy in any one year more than an aggregate of twenty mills on the dollar (exclusive of debenture rates, school rates and local improvement rates) upon the total value of the assessable property within the town according to the last revised assessment roll thereof.

Raising $6,000; by means of taxes of the current year will increase the rate for the year which would otherwise be fixed by 5 mills on the dollar—one-quarter of the maximum permissible rate.

Affidavit evidence is given that the property is not worth half the amount asked for it. The town is not at the mercy of the owners, for the land can be expropriated (sub-sec. 18 of sec. 163).

The land being proposed to be used for the erection of a fire hall and town hall must remain useless until funds are provided for the erection of these buildings. It is unreasonable to suppose that these funds are also to be raised by a tax rate in any one year. The reasonable course for the town is to provide at the same time for raising the funds both for the purchase of the land and the erection of the buildings and that by by-law submitted to the burgesses providing for the throwing of the cost over a term of years.

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Looking at all the facts and circumstances I am not satisfied that the majority of the council are acting in good faith for the benefit of the ratepayers of the town and for this reason I decline to intervene by making the order asked. The electors of the town are in the best position to judge of the real merits of the case and to decide upon what is expedient in their own interests. By refusing the order asked I am affording them an opportunity of expressing an opinion at the next annual election in an indirect way and if a by-law for the purpose of purchasing a property is submitted to them by their votes at the poll.

I dismiss the application with costs. *Mandamus refused.*

ROYAL TRUST CO. v. LLOYD.

Alberta Supreme Court, Walsh, J. September 25, 1915.

HUSBAND AND WIFE (§ II F 2—99)—*Mortgage by wife to secure loan to husband—Lack of independent advice—Undue influence—Application of payments in discharge of mortgages.*]—Action for the enforcement of mortgages.

J. C. Brokovski, for plaintiff.

H. P. O. Savary, for defendant, M. W. Lloyd.

WALSH, J.:—This is a mortgage action under two land and two chattel mortgages made by the defendants, Mary W. Lloyd and her husband George H. Lloyd. The main defence of the defendant Mary W. Lloyd, who alone defends the action, is that she is not bound by these mortgages because they were executed by her without independent advice, without knowledge on her part as to their effect, and under the undue influence and compulsion of her husband and co-defendant George H. Lloyd. I do not think that this defence is entitled to prevail.

The evidence establishes that she acted in the matter without independent advice. I am satisfied, however, that she quite knew what she was doing when she executed these mortgages and what the effect of them was. She struck me as being a bright, sharp woman of some business ability. There is not a suggestion in the evidence of the exercise upon her of any undue influence or compulsion in the matter by her husband. There is some evidence of a promise by Mr. McMillan, the agent of the original mortgagee, that the mortgages would be discharged so far as Mrs. Lloyd and her property were concerned, when cer-

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tain additions to the hotel premises had been made. I am satisfied that this promise was made after the last mortgage was given, and so it formed no inducement for her execution of them. A considerable part of the money for the security of these mortgages went to pay off encumbrances which were against her lands and in this way she directly benefited by them. Other large sums went towards the cost of construction of the hotel owned by her husband, and in payment of debts incurred in running it. When the first mortgage was given, two of the five lots constituting the site of the hotel were owned by her, and another one was transferred to her by her husband before the mortgage was registered. I am satisfied that, although the hotel business was carried on in his name, she was as much interested in it as he was. She had charge of the woman's part of the work in it. The hotel bank account was at first run in her name and afterwards in their joint names. One cannot read her letter to Mr. McMillan (ex. 34), written but a few months after the giving of the last mortgage without realizing that she took a deep personal interest in the business. I can quite well understand how, in spite of the objection which she says she had to the building of the addition to the hotel, in which some thousands of the advance secured by the last mortgage were spent, she was quite willing to help him get the money by lending her property as security for its repayment, for she was loyal to him and had faith in the success of the business. I can find no facts which bring the case within the *Bank of Montreal* v. *Stuart*, [1911] A.C. 120. In its facts it is more like those dealt with by Scott, J., in *Smith* v. *Doll*, 3 A.L.R. 383, and by Stuart, J., in *Doll* v. *King*, 10 D.L.R. 518. The other defences go simply to the question of amount. A quarter section of land owned by the principal debtor, George Lloyd, and upon which the plaintiff's first mortgage was a first charge, was sold for $3,000. The plaintiff seems to have been content to discharge its mortgage from this parcel upon the receipt of only $2,000 of this purchase money, although a further payment of $64.66 was afterwards made to it on this account. What became of the balance of the purchase money does not appear. Of this sum of $2,000, the plaintiff applied only $387.10

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upon this mortgage, crediting the balance of $1,612.90 on an open account against the mortgagor George Lloyd. The only land now available for payment of the balance of the mortgage debt is a quarter section owned by Mrs. Lloyd, the surety. As against her, I think the plaintiff was bound to get the full purchase money resulting from the sale of her husband's land before discharging its mortgage from the same, and to apply all of this money in reduction of the mortgage debt. On taking the accounts the plaintiffs will be charged as against her with $3,000 as of the date upon which this money was or should have been received.

If the view that I have taken of Mrs. Lloyd's liability on both mortgages is the right one, it is immaterial to her upon which of them that portion of the purchase money, resulting from the sale of the hotel property to which the plaintiff is entitled, is applied. I think that the plaintiff is entitled to apply it on the second mortgage as it had elected to do. If the parties are unable to agree as to the amount of the costs in the mechanics' lien action which the plaintiff is entitled to deduct from this purchase money they will be taxed by the clerk.

The plaintiff will be charged as against Mrs. Lloyd with the value of the horses taken by its bailiff, and which it allowed to be sold for the benefit of the insolvent estate of the mortgagor George H. Lloyd, less the proper costs of the proceedings taken by it under its chattel mortgage. The clerk will fix this value and tax these costs and the difference will be applied as of the proper date on the first mortgage as it was under it that the seizure was made.

I do not think that there has been any sale of the contents of the hotel. The plaintiff, in my opinion, is a mortgagee in possession of these goods, and is bound to account for same as such, having due respect to the provisions of the chattel mortgages and the terms of the agreement of November 30, 1908 (ex. 3). *Judgment for plaintiff.*

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POMEROY v. MILLER.

Saskatchewan Supreme Court, Haultain, C.J. September 8, 1915.

VENDOR AND PURCHASER (§ I E—27)—*Transfer of land — Fraud — Rescission — Fraudulent mortgage — Damages.*]—

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Action for rescission of transfer of land. Judgment for plaintiff.

R. R. Earle, for plaintiff.

A. Brehaut, for defendants.

HAULTAIN, C.J.:—Without going into all the details of a generally questionable transaction, I find that the defendant Miller fraudulently obtained the execution and delivery of a transfer of the land in question by the plaintiff. The execution of the mortgage to The Sun Life Assurance Co. sufficiently supports that finding.

The plaintiff is, therefore, in my opinion, entitled to rescission and damages. I will order, therefore, that the certificate of title issued to the defendant Jacob Herbert Miller of the south-east quarter of section 24 in tp. 45, in range 12, west of the third meridian, in the Province of Saskatchewan, be cancelled, and that a new certificate of title of the said land be issued to the plaintiff John Pomeroy, subject to the mortgage to the Sun Life Assurance Co. of Canada.

I award the plaintiff damages to the amount of the above mentioned mortgage, $800 and interest to the date of judgment.

The defendant will be credited with $134, the amount of the Budd note and interest to the date of judgment, and to the amount of any taxes paid by him, proper receipts for which must be filed with the local registrar within two weeks.

The defendant must also account to the plaintiff for rent and profits, and there will be a reference to the local registrar at Battleford to ascertain the same.

The defendant will pay the plaintiff's costs of action.

Judgment for plaintiff.

SEIGMAN v. MILLER SPENCER & CO.

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Alberta Supreme Court, Simmons, J. December 10, 1915.

LANDLORD AND TENANT (§ III D 3—110)—*Distress for rent—Excessive seizure—Liability of landlord.*]—Action for damages for excessive distress.

C. C. McCaul, K.C., for plaintiffs.

J. E. Wallbridge, K.C., for defendants.

SIMMONS, J.:—The plaintiffs were tenants of the defendants at 429-31 Jasper Ave. East, and carried on the business of a

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pool and billiard room, barber-shop and tobacco shop upon the premises leased to them by the plaintiffs.

In the spring of 1913, the defendants proposed to make alterations upon the premises consisting of the construction of an elevator at the front of the premises and an addition of 50 ft. at the rear, and the plaintiffs had the option of leasing the additional 50 ft. at a rental of $75 per month, and the construction of these alterations was made in the summer and fall, but the plaintiffs did not exercise the option of leasing the additional 50 ft.

On December 17, 1913, the plaintiffs were in arrears for rent in the sum of $700 and the defendants distrained upon the goods and chattels for the arrears of rent. The plaintiffs then, through their solicitors, made a demand upon the defendants to withdraw the seizure, claiming that the plaintiffs were entitled to an abatement in the rent on the ground that the defendants had so altered the premises as to decrease the rental value, and had also interfered with the plaintiffs' business by reason of the length of time occupied in making these alterations.

One Gilmour had a chattel mortgage upon the goods and chatteis of the plaintiffs which was also in arrears.

Upon cross-examination Seigman admitted the plaintiffs had no interest in the goods on account of the amount due on the chattel mortgage. I was not able to find that the plaintiffs' claim for abatement of rent had any foundation.

At the trial, however, I allowed an amendment whereby the plaintiff claimed damages for excessive and unreasonable distress.

The injunction obtained by Gilmour the mortgagee was removed, and the sales proceeded.

An English billiard table costing $840 sold for $360.

The pool tables costing $425 each sold at prices ranging from $82.50 to $69. Tobacco stock valued by the plaintiffs at about $700 sold for $138. In addition to these chattels there was a cash register and furnishings and fixtures included in the sale and the total amount realized was $1,182.

The sale was by public auction and about 50 people attended.

The defendants were present and made no objection to the manner in which the sale was conducted. When Gilmour's solicitors applied for an injunction to restrain the sale they used as material the affidavit of Seigman, who deposed that the goods and chattels were bought for $7,542.20 and there was a balance due the mortgagee of $3,029. He also deposed that the said goods and chattels if sold under a landlord's warrant would not bring more than about $1,200 to $1,500.

The evidence is to the effect that the depreciation in the cost on account of use was at least 25 per cent.

There was a financial depression at the time and a quantity of billiard room tables and equipment had been thrown upon the market. There is evidence that the goods would have brought more if sold by brokerage sale extending over a period of one month.

A digest of the law and the principles governing distress is given in Bullen & Leake's Precedents of Pleadings, p. 380.

While the landlord is not bound to calculate very nicely the value of the property seized yet the excess of value of the goods above the arrears of rent must not be unreasonably great.

The affidavit of Seigman indicates that his estimate of the probable amount that would be realized was not a considerable amount larger than the amount actually realized.

In the view of the absence of any protest by the plaintiffs against the sale by auction, I do not not think there was any duty imposed upon the defendants to resort to the risks and delay involved in a brokerage sale.

I conclude that the plaintiffs have failed to establish a claim for damages for excessive distress or for the price obtained and the plaintiffs' action is therefore dismissed with costs.

Action dismissed.

CITY OF CALGARY v. CANADIAN WESTERN NATURAL GAS CO.

Alberta Supreme Court, Ives, J. October 23, 1915.

MUNICIPAL CORPORATIONS (§ II F—174)—*Gas franchises — "Exclusive" grant of—Extension of city territory—Applicability of franchise—Ultra vires.*]—Action for the construction of a municipal franchise.

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Eugene Lafleur, K.C., for the city.

C. A. Masten, K.C., for Can. W. Nat. Gas L., H. & P. Co.

O. M. Biggar, K.C., for British Empire Trust Co.

IVES, J.:—The defendant, the Canadian Western Natural Gas, Light, Heat and Power Co., Ltd., is the assignee of a certain agreement dated August 14, 1905, between the City of Calgary and one Dingman, entered into by authority of city by-law numbered 610, duly submitted to a vote of the ratepayers and passed by the council. This agreement is popularly called the "Dingman" agreement.

At the date of the Dingman agreement, the area comprised within the municipal boundaries of the city was approximately 1,800 acres. These boundaries were extended from time to time by Acts of the Legislature and at the date of the institution of this action the city area had been increased to approximately 25,000 acres. In none of the legislative Acts of Extension is there reference to any of the provisions of the Dingman agreement.

The contention of the defendant company is that the franchise, rights and privileges conferred under the agreement extend to the new territory added since the date of the agreement and that the said franchise, rights and privileges are exclusive as against the city. The city brings this action in order that, by the judgment, it may be declared: (1) Whether or not the said franchise, rights and privileges extend beyond the area of the city as comprised within the municipal boundaries at the date of the agreement, and (2) Whether or not the said franchise, rights and privileges are exclusive as against the city.

Clause 4 of the agreement is the operative clause and reads as follows:—

That if the said company succeeds within three years in finding a sufficient and paying supply of natural gas which can be utilized in the city, the council doth hereby grant to the said company full power, license and authority subject to any rights and privileges that may at any time heretofore have been legally granted by the said city to any persons or corporation, to open up, dig trenches, and lay mains under or along the streets of the said city, and to make said necessary connections between the system of mains, pipes or other works hereby authorized and any dwelling, shop, factory, building or other place within the said city, and

to renew, alter or repair all or any of the works so laid down or constructed, and to pump or otherwise force through said pipes natural gas, provided that a plan shewing the proposed location of the said mains and pipes and building connections as aforesaid shall first be submitted to and approved by the said engineer.

The character of the agreement and the question at issue at once leads me to examine the leading case of a similar nature, namely, *Toronto* v. *Toronto Ry. Co.*, [1907] A.C. 315, 37 Can. S.C.R. 430.

The Supreme Court of Canada held that the city could not so require the company because the agreement did not extend to the new territory. On appeal to the Privy Council the judgment of the Supreme Court was affirmed by a judgment in the following very clear terms—"Their Lordships will therefore humbly advise His Majesty that an order should be made declaring and ordering *that neither the city nor the company* have any street railway powers *under the* said agreement over streets *within new territorial additions* to the city during the term therein mentioned.

I am unable to find that the language used in the agreement in this case differs from that of the Act, and agreement construed in the *Toronto case, supra*, to such an extent as will enable me to apply a different construction here.

Clause 5 follows in these words:—

That before any of the works hereby authorized are undertaken or commenced by the said company within the said city plans shewing the character and extent thereof shall be furnished to the council and approved thereby and the time and manner of the carrying out thereof shall at all times be under the supervision and control of the said engineer.

The effect of the clause is to make necessary the city's approval to the exercise of the defendants' rights upon or along the city's property, and such approval should be given, I believe, by some corporate or legislative Act: See *Toronto Electric* v. *Toronto*, 21 D.L.R. 859.

But surely it cannot be successfully urged that any course of dealing between the parties, any acts on the part of the city's executive officers, any conduct, passive or otherwise, would extend any of the provisions of the agreement into new territory and thereby enable the defendant to acquire rights *ultra vires* the power of the city to grant under the agreement.

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Clause 9 deals with this feature of the agreement, and is in the following words:—

That the exclusive rights and privileges hereby granted to the said company shall continue subject to the terms and conditions herein expressed for a period of 11 years from August 14, 1905, and may thereafter be extended for a period of 5 years by an agreement at the option of the said city, and the said city shall not (it being determined that the said city has such powers during the period of 11 years or the extension thereof as aforesaid) grant to any person, firm or corporation the right to construct or lay mains or pipes or connections on, in or through the streets of the said city for the supply of natural gas, unless the privileges hereby granted to the said company are forfeited and determined as herein provided or unless the said company's supply thereof shall fail to meet the demand therefor and it is determined by arbitration under the terms and provisions of the Arbitration Ordinance of the N.W.T. or otherwise as may be mutually agreed that the said company is not with proper speed and diligence taking the necessary means to increase the said supply.

Certainly the defendant can claim the exclusive exercise of its rights as against "any person, firm or corporation," and the city prohibits itself from granting, etc. The defendants' rights are therefore made expressly exclusive as against three classes of persons, a natural person, a partnership and a corporation. If it was intended to include the municipal corporation of the City of Calgary, then it is because the word "corporation" is used. It is true that the city is a corporation, but so, equally, is a joint stock company. If it had been intended to exclude the city it would have been necessary only to mention its name. Certainly the word "corporation" used in clause 4 does not refer to the city.

We appear to have very little case law in our own Courts that will aid in the construction. But turning to McQuillin Municipal Corporations, vol. 4, I find, par. 1635, under the subtitle of "Construction of franchise as to exclusiveness" some very stringent rules. In the United States, apparently, an exclusive grant must be construed strictly against the grantee, that is where there is necessity for construction. As illustrating the strictness of the rule of construction, Mr. McQuillin cites what has been held by the United States Courts, held that a company which has been granted an exclusive franchise to use streets for piping *manufactured gas* for lighting purposes cannot exclude from the use of the streets another gas company

which has been granted a franichise to use the streets to convey *natural gas* for lighting and heating. This is much in line with a judgment of the Supreme Court of Canada in the case of *La Compagnie pour l'Eclairage au Gaz de St. Hyacinthe* v. *La Compagnie des pouvoirs Hydrauliques de St. Hyacinthe*, 25 Can. S.C.R. 173, although it is to be noted that there was a private Act of the legislature that was under construction, and the fact that the City of St. Hyacinthe was not a party to the legislation bulked largely in the reasons of the Chief Justice.

The United States Courts (above reference to McQuillin) have also held that a grant of exclusive rights to lay a street railroad over certain streets named and all other streets within the corporate limits does not confer an exclusive privilege as to streets other than those named.

In the case of *Knoxville Water Co.* v. *Knoxville*, 200 U.S. 22, the Federal Supreme Court held that the grant of an exclusive franchise for a certain term of years as against "any other person or corporation," does not preclude the municipality from erecting a competing plant.

This case bears a striking resemblance to the present one and it will be observed that the Court did not construe the word "corporation" as including or applicable to the municipality. The effect of the judgment in the different cases before the Federal Supreme Court which I have examined would shortly appear to be that where the word "*exclusive*" or "*exclusively*" is used alone, then it must be taken in its absolute sense, and the municipality has excluded itself in the exercise of the rights granted, but where the grant is expressed as exclusive against "any firm, person or corporation," or where any words are used which could qualify the word exclusive, then the grant is not exclusive as against the municipality. There is no doubt in my mind that if the Dingman agreement were presented to the United States Federal Supreme Court for construction of clause 9 the judgment would be in favour of the city's contention.

Some of the State Appeal Courts, however, go further and refuse to follow the Federal Supreme Court holding that the use of the word "exclusive," without any qualifying words whatever, will not exclude the municipality. This is found in an

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Illinois case, *Rogers Park Water Co.* v. *City of Chicago*, 131 Ill. App., and this was a year after the *Knoxville* decision.

If in the case at bar, the city has prohibited itself from furnishing directly to the inhabitants of the city, light and heat by means of natural gas, it has not done so expressly, but by an implication to be construed from the words in clause 9 that, it "shall not grant (.....) to any person, firm or corporation." But the words are not clearly capable of such construction and should be construed strictly and not against the municipality, but against the grantee. The municipality should not be held to have bargained away its duty by implication.

There will be judgment, therefore declaring and ordering: (1) That the defendant company has no rights or powers under the agreement within new territorial additions to the city during the term therein mentioned. (2) That under the agreement, the city is not excluded from exercising the rights, powers and privileges therein granted to the defendant company.

Judgment for plaintiff.

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Re OWEN SOUND LUMBER CO.

Ontario Supreme Court, Middleton, J. October 20, 1915.

CORPORATIONS AND COMPANIES (§ IV G 5—133)—*Winding-up—Directors—Misfeasance—De Facto Directors—Liability — Payment of dividends—Bonuses.*]—Appeals by the liquidator of the company from the finding of the Local Master at Owen Sound, in a reference for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, that certain directors of the company were not liable for misfeasance in office.

D. Robertson, K.C., and *G. H. Kilmer*, K.C., for appellant.

C. A. Masten, K.C., and *W. H. Wright*, for Wesley Sheriff and W. H. Merritt, respondents.

C. A. Moss, for J. M. Kilbourn, respondent.

MIDDLETON, J.:—In this case the learned Master has, I think, taken an erroneous view of the situation. The misfeasance section of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 123, is one which does not create liability but relates to procedure alone.

I think the Master has erred when he has allowed those who

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are *de facto* directors of the company to escape liability by alleging irregularity in the proceedings of the company leading up to their election. When they assumed to exercise the fiduciary office of director, they became liable in all respects as though rightly appointed to the office.

Nor do I agree with the Master in all respects as to the liability of these directors. I do not think that they were guilty of intentional dishonesty. But more than honesty is required; reasonable intelligence and diligent attention to business are also essential. No one, at any rate in view of the numerous decisions to the contrary, would expect a director of a company to be familiar with all its details; but, before paying the extraordinary dividends declared in the case of this company, the directors should at least have had proper and adequate balance-sheets; and they ought not to have divided profits not yet earned.

With reference to the sums paid as a bonus upon suretyship, I am not prepared to say that this is such a misfeasance as to create liability.

On the material before me, I am not satisfied that I can rightly ascertain the amount of dividends paid out of capital, for which alone I think a case has been made against the directors; and I therefore refer the matter back to the Master to ascertain and state for what amount the directors should be liable in respect of dividends paid out of capital; declaring for the Master's guidance that the *de facto* directors are liable in respect thereof, notwithstanding any irregularity in their election or in the proceedings of the company, and declaring that the directors are liable for dividends in fact paid out of capital. The dividends so improperly paid were those for the years 1912 and 1913.

As success is divided, I think there should be no costs; but the liquidator should be allowed his costs out of the estate.

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STANDARD BANK v. McCULLOUGH.

Alberta Supreme Court, Harvey, C.J., Scott and Stuart, JJ. February 16, 1915.

BILLS AND NOTES (§ V B 3—147)—*Collateral security to bank—Holder in due course—Authority of corporation officer to indorse.*]—Appeal from Crawford, Co. Ct. J.

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G. B. Henwood, for plaintiff, appellant.

B. Pratt, for defendant, respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—This is an appeal from Crawford, Co. Ct. J., dismissing the plaintiff's action which was brought on a promissory note made by the defendant in favour of Canadian Mercantile Co. Ltd., of which the plaintiff claims to be the holder in due course.

It is, amongst other things, denied that the plaintiff is a holder in due course and that the note was endorsed to plaintiff by Canadian Mercantile Co. Ltd. I think the defendant is entitled to succeed on this ground, and it is therefore unnecessary to consider any other defence. The defendant having denied that the plaintiff is a holder in due course, the first thing the plaintiff is called on to shew is that it is the holder of the note. If it establishes that, then, by sec. 58 of the Bills of Exchange Act, it will be deemed to be a holder in due course unless coming within the exception specified by the section. "Holder" is defined by sec. 2 of that Act as meaning, "the payee or endorsee of a bill or note or the bearer thereof," and "bearer" is defined by the same section as "the person in possession of a bill or note which is payable to bearer." By sec. 21 (3) a bill is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank. The note in question is payable to "Canadian Mercantile Co. Ltd. or order." Consequently for the plaintiff to become the holder there must be an endorsement by the company. On the back of the note appears the word, "Pay to the order of The Standard Bank of Canada," placed on with a stamp, followed by the written words, "Can. Mercantile Co. Ltd." There is no evidence to shew who actually wrote those words other than that of experts that they believe it is in the handwriting of "W. D. Stewart" who was the secretary of the company.

Sec. 51 provides that a signature by procuration gives notice of the limited authority of the agent, and that the principal is bound only if the agent has actual authority to sign. A company can, of course, only sign by procuration.

The company was one incorporated under our Companies

Ordinance, which provides, by sec. 96, that notes, etc., may be made and endorsed in the name or on behalf of the company by any person acting under the authority of the company.

The only evidence there is as to who had authority to make or endorse notes or bills for this company is a resolution of the company which was filed with the plaintiff prior to this transaction authorizing the president and secretary to sign cheques. In addition to that this note was given to the plaintiff by the secretary as collateral security for a note of the company which was signed in the name of the company by both the president and secretary. There is thus no evidence that the secretary had authority to endorse, even if we assume that it is proved that the endorsement is that of the secretary, but there are circumstances from which it might be inferred that he had no such authority.

It was contended by counsel, however, that though the company might not be bound by the endorsement yet it might be sufficient to pass the title to the plaintiff, and he cited in support of that the case of *Smith* v. *Johnson*, 3 H. & N. 222. In that case the endorsement was made by persons who had no authority, and one of the Judges did say that while the endorsement was not such as to make the company liable, it was sufficient to transfer the title. The difficulty in that case, however, was one of pleading. The plaintiff had alleged the endorsement of the company. No such endorsement was necessary to transfer the title because the bill had already been endorsed in blank and was therefore payable to bearer. Consideration was given to the company and the note was delivered to the plaintiffs by an officer of the company, the endorsement being by the chairman and deputy chairman.

The real question was whether there had been a delivery though the plea had alleged an endorsement.

It appears to me that sec. 51 really means that an endorsement purporting to be made by an agent shall only be effective if made by an authorized agent.

It is stated in Palmer's Company Law (9th ed., p. 44), that "if the articles provide that a bill of exchange, to be effective must be signed by two directors, an outsider or anyone dealing

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with the company must see that it is so signed, otherwise he cannot claim under it."

The evidence in this case quite fails to establish that the endorsement on this note is that of the company and thus fails to shew that the plaintiff is the holder. The appeal should therefore be dismissed with costs.

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ORMISTON v. ULLERICH.

Saskatchewan Supreme Court, McKay, J. August 24, 1915.

PLEADING (§ II H—222)—*Statement of claim — Sufficiency of allegations—Assignment of interest in land.*]—Appeal from judgment of Local Master in favour of plaintiff.

In an appeal from the Local Master's order allowing judgment against the defendant for an amount found due to plaintiff on reference, on the ground of the insufficiency of the allegations in the statement of claim, in that it fails to set out acceptance of the assignment by the plaintiff. Paragraphs 12 and 13 read as follows:—

12. By indenture dated April 3, 1915, made between the defendant, Alexander Buie Thompson, of the first part, and the defendant, Anton Ullerich, of the second part, and the plaintiff of the third part, the said Alexander Buie Thompson did grant, bargain, sell, assign, transfer and set over unto the defendant Anton Ullerich the lands in question, etc.

13. By the said indenture dated April 3, 1915, the defendant, Anton Ullerich, in consideration of the plaintiff accepting the indenture dated April 3, 1915, which acceptance, it was stipulated may be without formal execution by the plaintiff, covenanted and agreed to pay the purchase money and interest sued for.

J. D Cameron, for plaintiff.

H. E. McEwan, for defendant.

MCKAY, J., held that the paragraphs sufficiently set out the cause of action, and that it was not a recital of what was to be done in the future under the indenture, but it is an allegation of a fact, that in consideration of the acceptance of the indenture, the defendant covenanted to pay the moneys sued for.

Appeal dismissed.

MILLER v. KUSS.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, Brown and McKay, JJ. November 20, 1915.

WRIT AND PROCESS (§ II D 2—49)—*Setting aside service—Actions against liquor licensees—Suspension because of war.*]—Appeal from judgment of Elwood, J.

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F. L. Bastedo, for appellant.

C. M. Johnson, for respondent.

A. L. Geddes, for Dept. of Attorney-General.

The judgment of the Court was delivered by

BROWN, J.:—This was an application made in Chambers similar to that in the case of *Imperial Elevator* v. *Kuss*, and Elwood, J., who heard the application, made an order setting aside the service of the writ, but not the writ itself, the order being similar to and made for the same reasons as that in *Imperial Elevator* case. For the reasons given in the *Imperial Elevator* case in appeal [25 D.L.R. 55], the issue and service of the writ should both stand and the judgment appealed from be varied accordingly. It does not appear from the statement of claim in this case or the material filed that any part of the plaintiff's claim arose out of the defendant's business as licensee, and, therefore, the defendant's application entirely fails. The plaintiff should have his costs on appeal and of opposing the application made in Chambers, and the defendant should have 15 days within which to file his defence should he desire to defend. *Judgment varied.*

CROOKS v. CULLEN.

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Alberta Supreme Court, McCarthy, J. September 15, 1915.

BILLS AND NOTES (§ VI B—158)—*Action on note—Defences—Renewal—Absence of consideration—Failure to allot shares—Fraud.*]—Action on promissory note. Judgment for plaintiff.

Alexander Hannah, for plaintiff.

A. A. McGillivray, for defendant.

C. B. Reilly, for defendant company.

MCCARTHY, J.:—This action tried before me on May 27, 1915. The plaintiff's claim is to recover the sum of $1,000 and interest at 8% from June 10, 1914, on a promissory note made by the defendant in favour of the plaintiff. The defendant set up that the note was a renewal note, the original note having been given in April, 1913, to the Alberta Mono Rail Co. Ltd., and alleged that there had been several intermediate renewals until the note sued on was given in favour of the plaintiff, the president of the Alberta Mono Rail Co. The defendant also set up that the original note was procured by fraud; that no copy

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of the prospectus of the company had been given to him and that the shares which were the consideration for the note had not been allotted to him.

There was considerable conflict of testimony, but I have come to the conclusion that the plaintiff must succeed and, therefore, give judgment for the plaintiff for $1,000 and interest from June 10, 1914, at 8% and costs. The counterclaim of the defendant and his claim against the defendant the Alberta Mono Rail Co. Ltd., by counterclaim are also dismissed with costs. *Judgment for plaintiff.*

DOCHENDORFF v. MESTER.

Alberta Supreme Court, Scott, J. November 22, 1915.

ASSIGNMENT (§ III—27)—*Rights of assignee of wages—Recovery.*]—Action on claims for wages.

D. P. Macleod, for plaintiff.

John Cormack, for defendant.

SCOTT, J., said, that though a partnership existed between the parties, upon the evidence the plaintiff was entitled to recover in respect of his personal claims for work done for the defendant in the capacity of engineer until the gold dredge ceased. As to the assigned wage claims it was contended that the plaintiff was not entitled to sue on them because he had no interest in them and that they were claimed on behalf of the assignors. Referring to *Comfort* v. *Betts*, [1891] 1 Q.B. 737, it was held, that under sub-sec. 14 of sec. 10 of the Judicature Act, where an assignment of a chose in action is absolute in form, the existence of a trust in favour of the assignor will not disentitle the assignee to recover. *Judgment for plaintiff.*

RIVERSIDE LUMBER CO. v. CALGARY WATER POWER CO.

Alberta Supreme Court, Ives, J. November 12, 1915.

WATERS (§ II D—95)—*Overflow of river—Obstruction by water power company—Dams and booms—Ice jams—Scope of corporate powers—Liability for negligence.*]—Action for damages caused by obstruction of stream.

Savary, Fenerty & De Roussey, for plaintiffs.

Lougheed, Bennett & Co., for defendants.

IVES, J.:—The Calgary Water Power Co. Ltd., to whom I

shall refer when speaking of the defendant, was incorporated by ord. 23 of the Ordinances of 1889, N.W.T.

In 1890 the defendant applied to the Parliament of Canada for confirmation of this ordinance and for certain additional powers, and by ch. 95 of 53 Vict., an Act respecting the Calgary Water Power Co. Ltd., was passed.

Under sec. 1 of the Act the ordinance . . . intituled, etc., is hereby ratified and confirmed. So that the provisions of the ordinance have been in no way restricted or enlarged but confirmed. The additional powers conferred by the Act in respect of permission to erect works in the Bow River at, opposite to, and above Calgary. These additional powers can be found in sec. 2 of the Act which reads as follows:—

> The company may improve the Bow River, opposite to and above Calgary, and the tributaries of the said Bow River, by the construction of dams, slides, wharves, piers, booms and other works of a like nature, and by blasting rocks, dredging and removing shoals and other impediments, and by straightening channels and otherwise; provided that every dam shall be constructed with an apron or slide, so as to admit of the passage over the same of such saw logs and timber as are usually floated down the said waters; but waste gates, brackets or slush boards may be used in connection with such dams for the purpose of preventing unnecessary waste of water therefrom and the same may be kept closed when no person requires to pass or float saw logs or timber as aforesaid over any such apron or slide.

I think it is clear that this legislation is permissive and not imperative and in construing this statute this should be borne in mind.

In pursuance of the undertaking and under the authority of the quoted section the defendant has constructed a dam and booms in the river and in so far as the evidence goes such construction is proper and no negligence is shewn in connection with these works. But it is alleged that in 1913 and 1914 these works in the river caused the ice to lodge and form a jam thereon which resulted in forcing the waters of the river over its banks and flooding plaintiff's lands and damaging their property.

There is no doubt that the flooding of and resultant damage to plaintiff's respective properties is the consequence of the ice jams. If the works of the defendant in the river are the sole or substantial cause of the ice jams, is the defendant, in the proper

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exercise of its powers conferred by legislation, and in the absence of negligence, liable to render compensation for property injured? If there is such liability then it is because it is to be found in the legislation *itself* and not otherwise. Turning to the ordinance of incorporation, sec. 8 is as follows:—

> In case the company for their purposes require the acquisition of any part of section 17 . . . or injuriously to affect any portion thereof or any buildings, erections, improvements or any rights or property of other persons thereon, the company shall have a right to enter upon any such land as they may deem necessary to examine and to make an examination and survey thereof, doing no unnecessary damage and paying the actual damage done, if any, and if on an application to a Judge of the Supreme Court of the North-West Territories as hereinafter provided, they obtain authority they shall be at liberty to take, acquire, hold and use such lands or injuriously affect such lands, buildings, erections or improvements or such portions thereof respectively as the said Judge shall deem expedient for the completion and efficient operation of the works proposed by the company.

As I read this section, it would seem to me to exactly meet the necessities of the plaintiffs, that is they would find here the defendants' liability to compensate them as their lands are a part of section 17. . . . And this case would be governed by *C.P.R.* v. *Park*, [1899] A.C. 535. In *C.P.R.* v. *Roy*, [1902] A.C. 220 at 229, the Lord Chancellor, in delivering their Lordships' judgment, quotes with approval the words of Lord Hatherly in the case of *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430 at 438: —

> If a company in the position of the defendants there—referring to *Cracknell* v. *Corp. of Thetford*, L.R. 4 C.P. 629—has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the power given by the Act, the person who is injuriously affected by that which has been done must either find in the Act of Parliament something which gives him compensation or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers.

I think a proper construction of the ordinance is clearly to the effect that it was not intended by the legislature of the North-West Territories that rights of property should be invaded without first obtaining a Judge's order which would naturally provide for compensation for any damage done thereby.

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I have thought it advisable to express my views upon this feature of the case in order that the point may be covered in the event of the judgment coming for consideration to an appeal Court.

But upon the facts I think the plaintiff must fail. I have no difficulty in finding, as I said before, that the ice jams of 1913 and 1914 caused the flooding and resultant damages, but I cannot find from the evidence that the works of the defendant were either the sole or the substantial cause of the ice jams. Certainly they were a contributory cause, and I think that is as far as the evidence will enable me to go. It appears that on the west end of the main works there is a gravel island or bar in mid-stream, greater in width than the combined width of the two channels into which the island divides the river. Immediately west of this again are other gravel bars and islands, and east of the works there are bridges and islands, all of which are acknowledged to be formidable obstructions to the natural flow of slush ice which forms the ice jams. I think the evidence stops far short of proving that in the absence of defendants' works, the ice jams would not have occurred. Action dismissed with costs.

E. & N.R. CO. v. CITY OF COURTENAY.

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British Columbia Supreme Court, Clement, J. November 25, 1915.

MUNICIPAL CORPORATIONS (§ I D—25)—*Revocation of charter —Power of province after incorporation—Usurpation of power—Exempting railway from taxation—Property situate within municipal territory.*]—

Maclean, K.C., for plaintiff.

E. C. Mayers, for municipality.

CLEMENT, J.:—On October 9, 1914, that is to say, 10 days after the date of the letters patent incorporating the defendant municipality, an order in council was passed under sec. 196 of the Provincial Taxations Act (R.S.B.C., ch. 222), exempting the plaintiff railway company for 10 years from taxation under sec. 193 of the Act in respect of a portion of the company's line, including, *primâ facie*, the portion lying within the bounds of the defendant municipality.

There is no *locus pœnitentiæ* for the Crown, or in other words,

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there is no power to arbitrarily recall or cancel the letters patent. The honour of the Crown was thereby engaged to do nothing in derogation of the grant of corporate powers; and any subsequent act of the Crown will be treated as done, without intent, to break faith with those benefited by the earlier grant. This is the principle of *Alcock* v. *Cooke*, 7 L.J.C.P. 126, and that class of cases dealing with grants to private parties. That the principle applies, *a fortiori*, in the case of a grant of such rights of local self-government as are conferred by municipal incorporation seems to me clearly established by the decision of Lord Mansfield in *Campbell* v. *Hall*, Lofft. 655. In that case the facts were that a Royal Proclamation, issued after the Treaty of Paris in 1763, had announced that a legislative assembly would be established in the conquered Island of Grenada and in the other colonies acquired under the same treaty—Canada, it may be noted, was one of them—"so soon as the state and circumstances of the said colonies will admit." The commission to Robert Melville, appointing him governor of Grenada, contained instructions to the like effect. It was considered that by the proclamation and commission "the King had immediately and irrevocably" parted with all legislative power over the Island, that is to say, with all power to legislate by order in council; and, accordingly, an order in council promulgated after the date of the commission to Governor Melville, but prior to the establishment of an assembly, for laying a tax upon exports from the Island, was held of no effect.

For the reasons above indicated the later order in council is inoperative—perhaps as not intended to apply—as to that part of the company's line which lies within the defendant municipality. *Action dismissed with costs.*

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WILSON v. MISHLER.

Alberta Supreme Court, Beck, J. October 2, 1915.

PARTIES (§ III—124)—*Third party notice — Substantive motion for—Contribution and indemnity—Covenants running with land—Agreement of sale—Assignment—Priority of contract.*]—Appeal from the Master's refusal to set aside a third party notice on the application of the third party.

I. B. Howatt, for motion.

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A. U. G. Bury, contra.

BECK, J.:—Rule 48 provides that where a defendant claims to be entitled to contribution or indemnity over against a third party, he may serve the latter with a notice setting out in the same manner, as in a statement of claim, the facts upon which he relies, and the nature of the relief claimed. Rule 50 provides that the third party may, at any time before he defends, move to set aside the notice.

The claim in this case is by one Wilson, as assignee of the moneys owing to the defendants, Fraser and Jeffords, vendors in an agreement for sale on which the defendant Mishler was purchaser, asking for specific performance, personal order for payment, etc.

The statement of claim alleges that the defendants Fraser and Jeffords covenanted that they would "forthwith on demand pay to the plaintiff any sums defendant Charles Mishler defaults," and alleges default and demand.

It is Fraser—not Mishler—who served the third party notice upon Munroe, not, however, because of the above mentioned covenant.

In his notice, Fraser alleges that he became assignee from Mishler to the latter's interest under the agreement, Fraser and Jeffords to Mishler, that subsequently he assigned his interest under the agreement to one McLean, who covenanted for himself *and his assigns* with Fraser that he or his assigns would pay the balance of purchase money, etc.; that subsequently McLean assigned his interest under the agreement to Munroe, "subject to the covenants and conditions on the part of the assignee thereunder, contained in the assignment" from Fraser to McLean.

Fraser, on these facts, asks to be indemnified by Munroe being ordered to pay what he may be ordered to pay the plaintiff, together with his costs.

My impression at the time of the argument was that the third party notice must be set aside on the ground that there was no privity between Fraser and Munroe; and I still see no reason to change the opinion I then held; Mr. Bury, for Fraser, contends that Munroe is bound to Fraser because McLean coven-

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anted for himself and his assigns, and that because Munroe accepted the position of assignee expressly, subject to McLean's covenant, Munroe became bound to Fraser.

I am relieved from discussing the cases because the whole question is discussed at length in the notes to *Spencer's Case*, 1 Smith's L. Cas., 11th ed., 55. It is there said (p. 88):—

> Upon the whole there appears to be no authority which has decided, apart from the equitable doctrine of notice, that the *burden* of a covenant will run with land in any case, except that of landlord and tenant. While the opinion of Lord Holt in *Brewster* v. *Kitchell*, 1 Salk. 198, and of Lord Brougham in *Keppell* v. *Bailey*, 2 M. & K. 517, and the reason and convenience of the thing, all militate the other way. This question was again much considered in *Austerberry* v. *Oldham*, 29 Ch. D. 750. . . It is difficult to conceive any case in which the burden could be held to run if it was incapable of running in this instance, and though the Judges guarded themselves from affirming the general proposition, it is submitted that the point is virtually decided by this case, and that, except as between landlord and tenant, the *burden* of covenants cannot run with the land at law.

On p. 90, cases are quoted shewing that the equitable doctrine of an assignee with notice being bound is not to be extended to other than respective covenants.

I therefore think the third party notice should be set aside.

I think such an application as this is properly made by substantive motion. I say this because it was suggested that it was proper to wait until a motion for directions is made. The order will carry costs. *Notice set aside.*

CUSHING v. HORNER.

Alberta Supreme Court, Harvey, C.J. October 26, 1915.

JUDGMENT (§ I F—45)—*Summary judgment — Application after joinder of issue—Defence of agreement to renew note.*]—Appeal from an order of Master directing plaintiff leave to enter final judgment under rule 275.

C. A. Grant, K.C., for plaintiff.

G. B. O'Connor, K.C., for defendant.

HARVEY, C.J., said that in the present case issue was joined by lapse of time, no reply or joinder having been delivered, but 5 days after the close of the pleadings the plaintiff took out an order for directions which provided for discovery by examination and affidavit, and fixed a time and place for trial. It also

contained a clause reserving the plaintiff "to apply to strike out the defendant's statement of defence, or for a summary judgment at any time as it may be advised." Referring to *Hackett* v. *Lalor*, 12 L.R. Ir. 44; *Stewartstown* v. *Daly*, 12 L.R. Ir. 418, cited in *Rutherford* v. *Taylor*, 24 D.L.R. 882, and distinguishing the latter case, it was held, that although no more unequivocal signification of an election to proceed in the regular course could be made by taking out an order for directions, still, under the foregoing clause, the defendant is precluded from relying on such objection. The defendant alleged in his defence an agreement on the part of the plaintiff to renew the note sued on. The Master held that evidence of the agreement to renew could not be given at the trial, as it did not constitute a defence, relying on *New London, etc.* v. *Neale*, [1898] 2 Q.B. 487. The Court said, that in that case the agreement was a contemporaneous oral one. In the present case the defendant, by affidavit, shews that the agreement is a prior written one, or at least partly written, and that a written agreement to renew is a perfectly good defence to an action on a note: *Maillard* v. *Page*, L.R. 5 Ex. 312; *Young* v. *Austen*, L.R. 4 C.P. 553, referred to. Appeal allowed with costs, and application for final judgment dismissed. *Appeal allowed.*

EDWARDS v. CITY OF EDMONTON.

Alberta Supreme Court, Ives, J. April 16, 1915.

TELEPHONES (§ I—4)—*Increase in rates—Refusal to pay—Removal of phone—Notice—Municipal powers—Nature of rental—Bailment—Duration of contract.*]—Action for injunction.

G. B. O'Connor, K.C., for plaintiff.

J. C. F. Bown, K.C., for defendant.

IVES, J.:—On May 28, 1914, the plaintiff applied for telephone services and with the defendants' "superintendent of telephone department" signed an agreement in a common form used by the city with its telephone customers. This form is intituled "Residence Service Contract," and the material clause reads:—

"In consideration of the City of Edmonton, Telephone Department, installing and maintaining on my premises the above

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telephone equipment, subject to the following conditions, the undersigned hereby agrees to make an installation and equipment deposit of five dollars ($5) and to pay quarterly in advance a yearly rental of $20—quarterly rate, $5—rental to date from the date of installation.

Plaintiff paid the deposit of $5; paid the balance of the first quarter's rate for the quarter expiring June 30; the equipment was installed and connection made.

On June 26, 1914, the defendant increased its rates of charge over its telephone system, such increase to take effect on July 1, 1914, and on June 27, gave notice of such increase to the plaintiff.

Plaintiff refused to pay the increased rate and tendered his quarterly payment of $5 on June 30 for the quarter beginning July 1. This was refused and about August 15 the city cut off plaintiff's telephone connection for non-payment and plaintiff brought this action, at the same time obtaining an order enjoining the city from interfering with his service. The phone was thereupon reconnected. . . .

The case of *Keith, Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147, is almost identical with this in its particulars.

If in the present instance we substitute "rental" for "hire" the language quoted exactly describes the facts here, and I have no hesitation in holding that the agreement before me is one of bailment, that is, "hire of chattels," and to such extent as such contracts allow, the relationship here is one as between landlord and tenant.

The question as to the duration of the contract can be determined only from the document itself and the only part of it from which I can make a finding is the covenant of the plaintiff which is the chief consideration, namely, the rental, and is "to pay quarterly in advance *a yearly rental.*" Therefore, as between ordinary parties to a hiring agreement this is a yearly tenancy and subject to cancellation by notice only if the notice be what is deemed "reasonable notice" under such tenancy. . . .

The power of the city in respect to the control and administration of its telephone system is held in trust for the public benefit of the ratepayers and cannot be surrendered, delegated

or restricted by the city by contract or otherwise, nor does the power given the city to contract with respect to its telephone system confer any power by implication to contract so as to embarrass and interfere with its future control over the system as the public interests may require.

[Secs. 7, 457 and 462 of the Edmonton Charter referred to.]

In view of these sections of the charter and the powers thereby conferred upon the city to manage and control its telephone system, it would clearly be beyond the city's authority to bind itself by contract with a telephone subscriber to furnish him with telephone facilities under any arrangement not subject to change as to charge therefor or as to the time within which a change would be made in the charge.

I think the expression in the sections quoted "*from time to time*" may be interpreted "*at any time*" and the city cannot restrict or curtail its authority to fix or change at any time its rate of charge for use of its telephone system.

Action dismissed.

BITULITHIC & CONTRACTING CO. v. CANADIAN MINERAL RUBBER CO.

Alberta Supreme Court, Hyndman, J. March 16, 1915.

PATENTS (§ II A—10)—*Improvements in street pavements—Novelty—Sufficiency—Utility—Presumptions as to.*]—Action for infringement of patent and injunction.

HYNDMAN, J.:—The plaintiffs seek an injunction and damages against the defendants for an alleged infringement of certain of their rights as licensees and patentees respectively, namely: Claims 4, 5, 6, and 9 and 11 of a certain "*new and useful improvement in street pavements*" letters patent for which were duly granted pursuant to the Patent Act of the Dominion of Canada, on July 5, 1904, numbered 88,116, in favour of Frederick J. Warren and his assigns, giving him the exclusive right, privilege and liberty within Canada of making, constructing, manufacturing and vending the said improvements, which patent is still in force. By assignment all the right, title, estate and interest in and to the said Letters Patent was granted to the plaintiffs, Warren Brothers Co. and the plaintiffs, Bitulithic

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& Contracting, Ltd., are the sole licensees within Alberta of their co-plaintiffs.

Warren Brothers Co. also possess the same patent rights throughout the United States of America and have done a very large business either by themselves or through licensees both in Canada and the United States, and the case is a most important one for the plaintiffs as well as for the City of Calgary and other communities in Alberta affecting, as it does, their right to construct such pavement municipally or through other contractors, for, in addition to the question whether plaintiffs' patent has been in fact infringed upon, the defendants also challenge the validity of the patent itself. . . .

The evidence is quite satisfactory that the result was similar to plaintiffs' pavement laid the previous year. The specifications used were similar to those of the plaintiffs in laying the "bitulithic." Therefore, if the specifications are the same as were used in manufacturing plaintiffs' protected pavement and comprise the method of scheme of the patent, there is no doubt in my mind that the defendants are guilty of infringement.

The United States patent, which is identical with the one in question, has been the subject of litigation in several States of the Union, and plaintiffs, Warren Bros. Co., have in each case been successful in establishing validity of their patent. The Canadian patent law has, to a large extent, been moulded after the United States laws rather than the English, and decisions in our Courts have followed the American rather than the English in many respects.

In England it appears that the plaintiffs must establish, at least, a *primâ facie* case of novelty, sufficiency and utility. In the United States the patent carries with it a presumption to this effect and the Canadian decisions appear to have followed in this respect and I so hold in this action: *Copeland* v. *Lyman*, 9 O.W.R. 908. (Fisher and Smart on Patents (1914), 215 to 225, and the cases cited there.)

The onus, therefore, is on the defendants to prove want of novelty, sufficiency and utility. . . .

The invention relates to an "improvement in street mineral matter and a plastic uniting medium consisting of a natural or

artificial or coal tar composition which are intimately associated together and used as the upper or top surfacing of the road bed." Validity must be decided according to the state of knowledge at the date of the patent: *Vidal* v. *Levinstein*, 29 Rep. Pat. Cas. 259. . . .

It seems to me from the evidence that, although it might be admitted that other pavements, *e.g.*, macadam, may possibly possess as great a density and great stability, still the process is altogether different and full of uncertainty. There was no way of ascertaining the density until after it was laid and treated and rolled on the street. The bitulithic as to all these features is prepared and may be known in advance and is laid down with at least an approximate certainty of its density. The inventor reduced the composition of the mineral aggregate to a certainty which before was uncertain and usually mixed in a haphazard way, "hit or miss" as engineer Craig put it, and this both as to quality and quantity of the mineral ingredients. . . .

I have come to the conclusion, therefore, that the plaintiffs' pavement was, at the date of the Letters Patent, not anticipated by any other known at that time and that its novelty has not been successfully challenged.

As to the sufficiency of the specifications the law seems to be well settled that in return for the monopoly or privilege which is granted him in respect to his inventions, the patentee must say clearly and plainly what his invention is so that others practising the art may learn and use it with facility at the expiration of the term of the patent—*uberrima fides* is required in this respect. . . .

Sufficiency being presumed, I do not see that the defendants have been successful in pointing out and proving wherein the specifications are defective. The evidence seems to be much to the contrary. The very fact that the defendant company was able to successfully construct the pavement under their contract without apparently any difficulty tends to prove this very point. . . .

As to utility I need say little. There is ample evidence that it is a very useful invention and according to city engineer Craig, and other witnesses, the bitulithic pavement is a highly

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satisfactory one. I hold also that the invention is proper subject matter for a patent.

I, therefore, find that the patent is valid and has been infringed—and the plaintiffs are entitled to an injunction. There will be a reference to the Clerk of the Court to ascertain what damages the plaintiffs have sustained by reason of such infringement, any party being at liberty to apply from time to time for further directions.

The plaintiffs shall have their costs both of the claim and counterclaim except as to infringement of trade mark and copyright. The defendant's counterclaim is dismissed, but they shall be entitled to costs in respect of their defence as to infringement of plaintiffs' trade mark and copyright to be set off against plaintiffs' costs. *Judgment for plaintiff.*

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HARWOOD v. ASSINIBOIA TRUST CO.

Saskatchewan Supreme Court, Brown, J. March 27, 1915.

ASSIGNMENTS FOR CREDITORS (§ VIII A—65) — *Preferred claims—Rent—Stipulation in lease—Validity.*] — Action for rent.

D. A. McNiven, for plaintiff.

F. B. Morrison, for defendants.

BROWN, J.:—The lease in question is for a term of 5 years, calling for a rental of $333.33 per month. . . .

There is a provision in the lease that, in the event of an assignment being made for the benefit of creditors, the then current rent together with the rent for three months thereafter shall immediately become due and payable. It is contended that this provision is invalid as against the assignees and I was referred to the case of *McKinnon* v. *Cohen*, 16 D.L.R. 72, in support of that contention. In that case it is held that such a stipulation in a lease is directly opposed to the general policy of the provisions of the Assignments Act of Alberta and clearly constitutes a fraud upon such Act. That contention, however, cannot be made in the case at bar, because by sec. 6 of ch. 20 (1914) of the Statutes of this province, which came into effect on Sept. 24, 1914, and therefore before this assignment was made, recognition is made in our Assignments Act for this very thing. It is there provided that, in case of such assignment, the

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preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding *and for three months following the execution of the assignment.* The stipulation, therefore, in the lease cannot, in this case, be said to be opposed to the policy of the provisions of our Assignments Act, or to in any sense constitute a fraud upon that Act; on the contrary, it is quite in harmony therewith. See *Langley* v. *Meir*, 25 A.R. (Ont.) 372, where a similar clause in the Ontario Act was before the Court. The mere fact that the assignees served notice that they would not require the premises after November 22 cannot affect this question.

Judgment for plaintiff.

BRYMER v. THOMPSON.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. October 29, 1915.

[Brymer v. Thompson, 23 D.L.R. 840, affirmed.]

LANDLORD AND TENANT (§ II B 2—15) — *Lease of flat in building—Implied stipulation to furnish heat.*]—Appeal by the defendant from the judgment of Middleton, J., 23 D.L.R. 840.

A. McLean Macdonell, K.C., for appellant.

G. N. Shaver, for plaintiff, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—The learned Judge, in his reasons for judgment, cites the rule laid down in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, that there is a right to imply a stipulation in a written contract where, "on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

He also refers to another case, *Ex p. Ford* (1885), 16 Q.B.D. 305, in which Lord Esher said: "It seems to me that whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."

Now in this case, there is not the slightest doubt that the contract was entered into upon the basis that the premises

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that were to be rented were to be steam-heated, and it would be nonsense, I think, to say that what the parties contemplated was that, although they were then being steam-heated, there was to be no obligation on the part of the landlord to continue to keep them so heated during the term of the lease.

I think the cases cited by the learned trial Judge in his reasons for judgment are conclusive against the contention of counsel for the appellant.

Speaking for myself, I think a case has been made for the reformation of the instrument so as to include in it a covenant on the part of the lessor that the premises shall be steam-heated during the whole of the period for which the premises are rented. The premises were rented as steam-heated premises, and there is no doubt that that was in the minds of both parties when the lease was entered into; and if, by the terms of the contract, there is no obligation to keep the premises heated, it seems to me that the document ought to be reformed in order to make that a provision of the contract. As I have before stated, I speak only for myself in regard to the last observation.

Appeal dismissed with costs.

McNULTY v. CLARK.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. October 4, 1915.

LOGS AND LOGGING (§ I—10)—*Woodmen's lien—Enforcement—Several claims—Jurisdictional amount.*]—Appeal from the judgment of the District Court dismissing action, brought under the Woodmen's Lien for Wages Act, R.S.O. 1914, ch. 141.

J. M. Ferguson, for appellants.

H. S. White, for defendant, respondent.

The judgment of the Court was delivered by

RIDDELL, J.:—Six woodmen, all of the township of Bonfield, claimed a "woodman's lien" for wages on certain pulp-wood and ties belonging to the defendant. Each claim was under $200: and the total amounted to $310.20. They united in one action and issued one writ in the District Court of the District of Temiskaming.

No proceedings were taken to set aside the writ; pleadings

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were delivered, and the action came down for trial before His Honour Judge Hartman on the 4th June, 1915.

The learned District Court Judge thought his Court had no jurisdiction, and dismissed the action. The plaintiffs now appeal.

Apparently the learned Judge was of the opinion that the language of sec. 11 of the Act R.S.O. 1914, ch. 141, imports that every claim under $200 must be brought in the Division Court, although it might, under the provisions of sec. 33, be combined with another or others in one action, bringing the whole amount claimed in the one action over $200.

We think the learned Judge is wrong in his interpretation of the statute.

The law allows the combination of two or more claims (sec. 33): and the word "claim" in sec. 11 refers to the whole amount claimed in the action.

All difficulty which might arise from the use of the word "person" in the first line of sec. 11 is got over by the Interpretation Act, R.S.O. 1914, ch. 1, sec. 28 (*i*).

The appeal must be allowed with costs, *i.e.*, all costs thrown away in the Court below and the costs of this appeal.

Appeal allowed.

GARMENT v. CHARLES AUSTIN CO. LTD.

Ontario Supreme Court, Britton, J. October 1, 1915.

MASTER AND SERVANT (§ V—340)—*Injury to servant—Falling into elevator shaft—Negligence—Contributory negligence—Remedy—Workmen's compensation—Power of Court to determine liability.*]—Action by a man employed by the defendant company to recover damages for personal injuries sustained upon the defendant company's premises, by reason of the negligence of the defendant company, as the plaintiff alleged.

R. L. Brackin and *B. L. Bedford*, for plaintiff.

O. L. Lewis, K.C., and *Ward Stanworth*, for defendant company.

BRITTON, J.:—The plaintiff was in the employ of the defendant company at Chatham. That company carried on a retail dry goods and furniture business. In the shop was an elevator, duly installed, and used for carrying goods from

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one storey to another in the building. The person in charge of goods from time to time went up and down upon the hoist or elevator car. There was an entrance to the car or hoist from the street-level outside and from the ground-floor on the inside of the building.

On the 23rd January, 1915, the plaintiff, who was then and had been for some months before in the employment of the defendant company, had occasion to use the elevator or hoist to take up furniture which the plaintiff had brought to the defendant company's shop. It was a lawful and proper use of the elevator by the plaintiff. The elevator was so arranged and equipped that, upon the hoist or car going up, it unloosed a gate which dropped to the opening below and served as a gate or fence or barrier to prevent any person stepping into the shaft and falling to the bottom.

At the time mentioned, viz., about 10.30 a.m. of the 23rd January, 1915, the plaintiff, finding the lower door shut and fastened, went inside the shop and to the door of the elevator, and, finding no gate or barrier there, stepped inside, thinking the car was there—as he had a right to think—because the gate or barrier was not in its place. The car was not there, and the plaintiff fell to the bottom of the shaft, breaking his right leg above the knee and injuring his right knee.

The barrier or gate was not in place because it was out of repair, in this respect, that the catch which held the gate at the upper flat was so out of repair that the car in going up did not loosen it, and allow it to go to its proper place and prevent persons from going in at the lower opening. Lowering of the gate was done automatically by the ascending car when the apparatus was in its normal condition.

The plaintiff brings the present action to recover damages from his employer. The defendant company contends that the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.), applies, and that the plaintiff has no right of action. If he has any remedy, it must be sought by proceedings before the Board. The defendant company did not raise the question of jurisdiction in its first statement of defence, but applied at the trial to add the following as paragraph 4: "The defendant, by way of further answer to the plaintiff's claim herein, sets up and avails itself

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of sections 5, 15 (as amended by section 8 of 5 Geo. V. ch. 24), 69, 105, and class 36 of schedule 1 of the Workmen's Compensation Act, as a defence to and in bar of the plaintiff's claim herein and right to institute and bring this action in respect thereof." This amendment was allowed.

The defendant company, at the time of the accident, was not doing business as an industry for the time being included in schedule 1 of the Act; so this section has no application to bar the plaintiff.

Section 15, as amended, gives the right to a party to an action to apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under Part I. of the Act. If the plaintiff in an action does apply, the adjudication and determination is final.

That does not take away from the Supreme Court the power to determine that question. In this case there was an application to the Board. There was not what can be called a formal adjudication and determination by the Board; but, in so far as it went, the action of the Board was in accord with the view I take of the Act. There was certainly no decision against the plaintiff's right to recover.

Reference to secs. 69, 109, 105, 106, 107, and 108.

In the result, it seems to me clear that such an action as the present is not such an one as requires the workman who was injured to go before the Board.

The jury had the question as to contributory negligence submitted to them, and they answered it. No doubt, they did as I told them in my charge they should do—take that into account in assessing the damages. Apparently the defendant company paid the doctor's bill $50, hospital charges $48, and about $220 as a weekly wage or allowance for 22 weeks at $10 a week.

The plaintiff claimed only $500 over and above the other sums.

Upon the answers and upon the whole case, there will be judgment for the plaintiff for $500, with costs on the Supreme Court scale. There will be nothing of any of above sums set off against the $500, and no set-off of costs.

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HIBBARD v. TOWNSHIP OF YORK.

Ontario Supreme Court, Meredith, C.J.C.P. September 17, 1915.

COSTS (§ II—28) — *Scale of costs — Jurisdiction of County Courts—Action removed into Supreme Court.*]—Motion by the plaintiff for leave to appeal to a Divisional Court of the Appellate Division from the judgment of Meredith, C.J.C.P., at the trial, upon the question of costs.

The action was brought in the County Court of the County of York to recover $2,500 damages, under the Fatal Accidents Act, for the death of a person by reason of nonrepair of a highway. Upon the defendants' application, the action was removed into the Supreme Court of Ontario. It was tried by MEREDITH, C.J.C.P., without a jury, and judgment was given for the plaintiff for $300, with costs fixed at $75.

The plaintiff appealed, seeking to increase both damages and costs. On the 17th June, 1915, his appeal was heard by a Divisional Court, and dismissed as to damages; as to costs, the appeal was not disposed of, an opportunity being thus given to the plaintiff to apply for leave to appeal.

H. E. Grosch, for plaintiff.

Grant Cooper, for defendants.

MEREDITH, C.J.C.P.:—There is no good reason, nor any reason good or bad, that I can perceive, for giving leave to appeal, on the question of costs only, in this case; justice seems to me to have been done to both parties in the order, respecting costs, made at the trial.

Encouragement should not be given to the launching in a higher Court of a claim that ought to be made in a lower Court; nor to the making of extravagant claims in a lower Court, especially if such claims are made in the hope of an objection to the jurisdiction being made which may end in the case being brought into a higher Court, and, lacking vigilance to prevent it, of advantage unduly had under sub-sec. (7) of sec. 22 of the County Courts Act, R.S.O. 1914, ch. 59, which does not give any *primâ facie* rights to costs upon the Supreme Court of Ontario scale, but does in substance interpret the meaning of a general order for costs, unlimited, as to scale, by the Judge who made it.

In cases of real doubt, and in cases near the border-line, interposition may well be abstained from. The whole subject is

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in the discretion of the trial Judge, whose unlimited order for costs is to be interpreted as an order for costs on the higher scale, but who is in no sense prevented from exercising a general discretion respecting them.

In this case the claim made was an extravagant one. There was no good reason for claiming any sum beyond that which would be within the jurisdiction of the County Court, and the plaintiff's conduct at the trial, in regard to the amount of damages sought, was, in my judgment, more than unreasonable.

The ordinary jurisdiction of the County Courts in actions such as this is limited to claims not exceeding $500; any jurisdiction beyond that sum is a jurisdiction by consent substantially —evidenced on the part of the plaintiff by the claim made, and of the defendant in not objecting to the trial of such a claim, in that Court. So that a defendant may be put in the awkward position of being precluded from objecting to the jurisdiction, or of objecting and causing a removal of the action into the higher Court at the risk of having to pay costs on the higher Court scale, no matter how exorbitant the claim may have been, or though purposely exorbitant with a view to higher Court costs, if the trial Judge should unwittingly give to the plaintiff the costs of the action not expressly limited as to scale or otherwise.

Ordinarily the discretion should be exercised as stated at the trial: costs upon the scale of the Court in which the action should have been tried, with a set-off of costs when tried in a higher Court by reason of a claim being made for more than one within the ordinary jurisdiction of the Court in which the action should have been tried; and such an exercise of that discretion applies with much force to the circumstances of this case. The plaintiff already has costs awarded to him amounting to 25 per cent. of the whole amount of damages awarded to him. Is not that enough? To give leave to appeal for more, with the addition of possibly 50 per cent. more for the costs of the appeal on that question, as well as another 50 per cent. for the costs of the appeal on the merits already had—ending in the costs, including those between solicitor and client, probably more than doubling the damages—would be, in my judgment, inexcusable.

But it is said that one of the Appellate Divisions retained the

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appeal on the merits in order that this application might be made, and from that it is argued that that Division must have been of opinion that such leave should be granted; but, whether or not that is a logical deduction from the action of that Division, I cannot give effect to the contention. If such were not the intention, the contention is baseless; otherwise, it is my discretion, not that of any other Judge or Court, that the Legislature has said shall be exercised; and, that being so, it would be a failure of duty, and a disregard of the legislation, if I were to act upon the discretion of any other Judge or any Court.

It would be an injustice to the learned counsel for the parties at the trial to say that any point, upon any question, was overlooked—except a reference to the case of *Robinson* v. *Village of Havelock* (1914), 7 O.W.N. 60, not then reported in the Ontario Law Reports: See 32 O.L.R. 25, 20 D.L.R. 537.

The application is refused. There will be no order as to costs of it; I cannot make any one but one of the parties to the action pay such costs; and they have already had enough to pay.

[On the 20th September, 1915, the appeal came again before the Divisional Court; and, leave to appeal on the question of costs having been refused as above, the appeal was dismissed with costs.]

BOWERS v. BOWERS.

Ontario Supreme Court, Riddell, J. October 7, 1915.

LIS PENDENS (§ I—4)—*Vacation of—Conveyance by husband to wife upon separation—Re-cohabitation—Action for declaration of rights.*]—Appeal by the plaintiff from an order of a Local Judge vacating the registry of a certificate of *lis pendens*.

J. M. Ferguson, for plaintiff.

H. S. White, for defendant.

RIDDELL, J.:—Charles R. Bowers and Rebecca Bowers, the plaintiff and defendant, are husband and wife, having been married in June, 1903. Differences arising between the married couple, they, on the 10th August, 1909, entered into an agreement for separation, under which certain lands were conveyed by husband to wife and certain other benefits were secured to her. They separated for about a year and a half, when the husband returned to the wife and resumed cohabitation for three or four weeks; then he went away again for some

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weeks, and, returning, cohabited with his wife till the 29th May, 1915, when he again left, returning at irregular intervals.

On the 4th September, 1915, he issued a writ for a declaration that the land is still his, *i.e.*, that the deed is void by reason of the resumption of cohabitation. He procured and registered a certificate of *lis pendens;* the defendant moved before a Local Judge, and an order was made setting aside this certificate. The plaintiff appeals.

Upon the argument the point was attempted to be made that the Local Judge had no jurisdiction to make such an order—I said that, if such were the case, I should treat this motion as a substantive application by the defendant.

A motion to vacate a certificate of *lis pendens* should not (speaking generally) succeed unless it is made to appear by "clear and almost demonstrative proof that the writ is an abuse of the process of the Court:" *Sheppard* v. *Kennedy* (1884), 10 P.R. 242; *cf. Jameson* v. *Laing* (1878), 7 P.R. 404.

The conditions of a separation deed may or may not come to an end in the event of reconciliation—that "depends upon the intention of the parties to be ascertained from the terms of the contract as a whole and the circumstances of the particular case:" Halsbury's Laws of England, vol. 16, p. 452, para. 927.

To vacate this certificate of *lis pendens,* I should, in the absence of special circumstances, have to hold that the conditions etc. of the separation deed could not possibly have come to an end by the occurrence of the facts mentioned. I cannot do that —there may be facts of the utmost importance not disclosed; and no judgment should be given until all the available facts have been threshed out.

But the defendant is endeavouring to sell the land; and the plaintiff must undertake to speed the action, as in *Sheppard* v. *Kennedy,* 10 P.R. at p. 245, "the plaintiff must serve his statement of claim forthwith and go down to trial at the next sittings of the Court" at Chatham.

A refusal or omission so to do I consider equivalent to an admission by the plaintiff that his action is an abuse of the pro-

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cess of the Court within the meaning of *Jameson* v. *Laing* and *Sheppard* v. *Kennedy*.

If, then, on or before Friday the 15th October, the plaintiff file his statement of claim and with it file an undertaking to go down to the said sittings of the Court, the appeal will be allowed and the substantive application to me refused; if not, the appeal will be dismissed and the application to me allowed; in each case costs in the cause to the successful party.

MANNING v. CARRIQUE.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., and Riddell, Latchford and Kelly, JJ. October 5, 1915.

CONTRACTS (§ I D 4—60)—*Offer and acceptance—Reasonable time—Counter-offer—Acceptance by telegram—Sale of bank shares.*]—Appeals by the defendant from judgment of the County Court action for the refusal to deliver shares of stock.

T. N. Phelan, for defendant, appellant.

A. G. Ross, for plaintiffs, respondents.

H. S. White, for third parties, appellants.

The judgment of the Court was delivered by

RIDDELL, J.:—The present two appeals are by the defendant from a judgment of $300 and costs and by the third parties from an order for relief over against them.

The third parties, a firm of Toronto brokers, not members of the Stock Exchange, offered the defendant 50 shares of Royal Bank stock at 202—the defendant did not accept, but said he would see and let the brokers know. Instead of accepting or rejecting the offer, the defendant wrote to the plaintiffs, a firm of broker-dealers in Montreal, a post-card: "I will sell 50 shares Royal Bank at 206. Please wire if you have a buyer on receipt hereof. J. H. Carrique." The plaintiffs telegraphed at once, treating this as an offer to sell to them—and the defendant then endeavoured to accept the offer made the previous day by the third parties. They refused to supply the required stock, and the defendant could not—at least did not—carry out the sale to the plaintiffs.

The plaintiffs then sued in the County Court of the County of York: the defendant made the Toronto brokers third parties—this order was moved against and affirmed. The objec-

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tion of the third parties does not appear to have been renewed at the trial, and we thought it was too late to take it before us.

Had the communication above set out stood by itself, it is possible that no contract of sale by the defendant to the plaintiffs could have been found—as the offer might be considered as being made to some customer of the plaintiffs to be found by them. But the post-card is ambiguous; and the parties, both offerer and acceptor, in subsequent correspondence and otherwise, treated the post-card as an offer to sell to the plaintiffs. That interpretation is possible, and it should be adopted, as it was the contemporaneous interpretation put upon it by the parties themselves.

The appeal of the defendant fails and will be dismissed with costs.

We express no opinion as to whether the third party proceeding is regular and such as is contemplated by the Rules.

Dealing with the appeal of the third parties on the merits—an offer for the sale of anything must be accepted, if at all, within a reasonable time—what is a reasonable time must depend upon the article offered. Where it is of a fluctuating nature, the time for acceptance must be short, and an offer remains open for a short time only. We think that an offer made as this was, of such stock, must be considered as no longer open on the following day.

The appeal of the third parties must be allowed, with costs throughout.

Re TORONTO R. CO. AND CITY OF TORONTO.

Ontario Supreme Court, Maclaren, J.A. October 9, 1915.

APPEAL (§ I A—1)—*To Privy Council—Right to—Orders of Railway Board—Review by Courts.*]—Application for an order approving security furnished upon an appeal to Privy Council.

C. M. Colquhoun, for applicants.

D. L. McCarthy, K.C., for railway company, respondents.

MACLAREN, J.A.:—The Corporation of the City of Toronto make application for the allowance of their appeal and security bond in an appeal to the Privy Council from the judgment of the Second Divisional Court, of the 6th October,

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1915, dismissing the appeal of the city from an order of the Ontario Railway and Municipal Board, which granted the application of the railway company to operate its railway on a certain portion of Yonge street, in the northern part of the city, under the agreement between the city and the company.

The company contend that there is no right of appeal from the judgment in question except by leave of the Privy Council, and cite, in support, the decision of the Privy Council in *E. W. Gillett & Co. Limited* v. *Lumsden*, [1905] A.C. 601, and the decision of the Court of Appeal in *City of Toronto* v. *Toronto Electric Light Co.* (1906), 11 O.L.R. 310, and *Canadian Pacific R.W. Co.* v. *City of Toronto* (1909), 19 O.L.R. 663. These three appeals were, however, all taken under what is now sec. 2 of the Privy Council Appeals Act, R.S.O. 1914, ch. 54, and it was simply held that the judgments in the three cases did not meet the requirements and provisions of that section.

The present application comes under sec. 48(6) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, which provides that "when the matter in controversy . . . relates to the duration of a privilege to operate a railway along a highway, or to the construction of an agreement between a railway company and a municipal corporation, or to any demand affecting the rights of the public, or to any demand of a general or public nature affecting future rights, an appeal shall lie from the Divisional Court" to the Privy Council. In my opinion, this provision expressly covers the present case, and sec. 3 of R.S.O. 1914, ch. 54, applies to it as fully as if it had been brought under sec. 2 of the last-named Act.

The appeal is consequently allowed and the security approved.

Re I.O.F. AND TOWN OF OAKVILLE.

Ontario Supreme Court, Hodgins, J.A. October 19, 1915.

TAXES (§ I F 3—85)—*Exemption—Orphan Asylum.*]—Case stated by the Judge of the County Court of the County of Halton for the opinion of a Judge of the Appellate Division of the Supreme Court of Ontario, pursuant to sec. 81 of the Assessment Act, R.S.O. 1914, ch. 195.

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David Henderson, for the town corporation, referred to *City of Bangor* v. *Rising Virtue Masonic Lodge* (1882), 73 Me. 428; *Re Linen and Woollen Drapers Institution* (1887), 58 L.T.R. 953; *Struthers* v. *Town of Sudbury*, 27 A.R. 217; Am. and Eng. Encyc. of Law, 2nd ed., vol. 12, p. 343, and cases cited.

W. H. Hunter, for the society.

HODGINS, J.A.:—Stated case by His Honour Judge Elliott, Judge of the County Court of the County of Halton, under the Assessment Act, R.S.O. 1914, ch. 195, sec. 81.

The statute exempts "every . . . orphan asylum," and the institution in question comes literally within those words.

I do not think that the words following, namely—"and every boys' or girls' or infants' home or other charitable institution conducted on philanthropic principles and not for the purpose of profit or gain"—indicate that the orphan asylum must be a charitable institution within the meaning of the cases cited by Mr. Henderson.

The judgment in *Struthers* v. *Town of Sudbury*, 27 A.R. 217, dealing with a hospital, states the principle to be applied here, and the changes in the section under consideration since that decision suggest that it has been accepted by the Legislature as correct.

I agree with the reasoning of the learned Judge, and would answer the question in the stated case in the affirmative. Costs should follow the result.

WILLIAM SHANNON CO. v. CRANE.

Ontario Supreme Court, Middleton, J. December 18, 1915.

INJUNCTION (§ I B—23)—*Restriction upon servant's exercise of trade for limited period—Trade secrets—Restraint of trade.*]—Action for damages and an injunction in respect of breaches of a contract.

Counterclaim to set aside a transaction by which five shares of the stock of the plaintiff company were sold to the defendant, and for the return of the money paid.

A. McLean Macdonell, K.C., for the plaintiff company.

R. W. Hart, for the defendant.

MIDDLETON, J., said that under an agreement dated the 15th January, 1915, the defendant, as a skilled braid-maker, entered the employment of the plaintiff company, for an indefinite

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period, terminable upon 7 days' notice, with a provision that on the termination of the agreement the defendant should not, during the period of one year carry on or be interested in, directly or indirectly, any business competing with or interfering with the plaintiff company's business. The employment lasted two weeks only; the actual manufacture of braid was not begun. The defendant saw an opening which he regarded as more favourable, and asserted his right to terminate the employment. The plaintiff company had never established a braid-making department of its business; but the defendant and his associates were carrying on precisely the same business as the plaintiff company had contemplated.

The main question was the right of the plaintiff company to an injunction restraining the defendant from carrying on this business from now till the 1st February, when the year will have expired.

The agreement was ambiguous in its terms. The defendant contended that the business he was carrying on did not compete or interfere with any business actually carried on by the plaintiff company, and that that was the only thing which the contract prohibited. The plaintiff company contended that the contract was intended to cover, not only the business as it existed on the date of the agreement, but the business with its added braid department, which the defendant was to establish.

If the agreement, said the learned Judge, had the wider significance contended for by the plaintiff company, it would offend against the rules laid down in respect to agreements in restraint of trade. The plaintiff company, not being engaged in the manufacture of braids, could not reasonably require for its protection the prohibition of the defendant from carrying on the business of braid-maker: *Herbert Morris Limited* v. *Saxelby*, [1915] 2 Ch. 57. Where the employer is not in fact carrying on the business, it would be oppressive to prohibit the employee from carrying on his trade; and it is clearly detrimental to the public interest.

It was not shewn that there was any breach or threatened breach of the covenant against disclosing trade secrets.

As to the stock transaction, no case of fraud was made out;

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but the plaintiff company agreed to refund the $500 paid by the defendant—as the stock-holding was intended to be incidental to the employment. The defendant, on his part, agreed to take over certain machinery purchased by the plaintiff company for the braid-making, at $150.65. These two sums should be set off pro tanto, and the stock and machinery should be transferred.

There should be no costs: for each party had failed on some issue; the defendant had unnecessarily and improperly charged fraud; and his conduct was shabby.

Re ISLER.

Ontario Supreme Court, Middleton, J. September 14, 1915.

DEPOSITIONS (§ II—8)—*Letters rogatory — Testimony for use in French Court—Criminating evidence.*]—Application on behalf of the Attorney-General for Ontario for an order under Part II. of the Canada Evidence Act, R.S.C. 1906, ch. 145, authorising the examination of a person within the jurisdiction of the Supreme Court of Ontario, for use in criminal proceedings against him in a French Court.

Edward Bayly, K.C., for the Attorney-General.

MIDDLETON, J.:—The application is based upon letters rogatory from the Judge of Instruction of the Court of First Instance of the Department of the Seine, in the Republic of France, seeking the aid of this Court in obtaining the testimony of Isler, now in Ontario, in relation to certain criminal proceedings pending in that Court against Isler upon a charge of fraud.

As, according to the law of Canada, the accused cannot be compelled to give evidence, though he is competent to testify on his own behalf if he so desires, I reserved judgment for the purpose of carefully considering the situation. Apparently the law of France authorises the examination of the accused, and so differs from English and Canadian law.

Reference to *Desilla* v. *Fells and Co.*, 40 L.T.R. 423, and *Eccles & Co.* v. *Louisville and Nashville R.R. Co.*, [1912] 1 K.B. 135.

Under our statute the only limitation upon the right to examine is that found in sec. 45, which gives the witness the same

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right to refuse to answer questions tending to criminate, or other questions, as a party or witness would have in a cause pending in the Court by which, or by a Judge whereof, the order is made.

Considering the matter as carefully as I can, I have come to the conclusion that the question of the obligation of Isler to submit to examination does not now arise, and that I ought to make the order sought, leaving it to Isler to object (if he sees fit) to undergo any examination or to answer any questions which he may think would criminate him. For all I know, he may be ready and anxious to give evidence; and, following the provisions of the statute, in the spirit indicated by the two cases adhered to, I think my proper course is to make the order, reserving to him all his rights under the section referred to.

REAUME v. CITY OF WINDSOR.

Ontario Supreme Court, Maclaren, J.A. September 21, 1915.

APPEAL (§ III G—106)—*Time for giving security—Extension—"Special circumstances."*]—Motion by the plaintiffs for an order allowing their appeal from the judgment of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, although the appeal was not brought within the time fixed by sec. 69 of the Supreme Court Act, R.S.C. 1906, ch. 139.

A. W. Langmuir, for the plaintiffs.

E. D. Armour, K.C., for the defendants.

MACLAREN, J.A.:—The plaintiffs move for allowance of their appeal to the Supreme Court of Canada from a judgment of the Appellate Division, notwithstanding it was not brought within the 60 days fixed by sec. 69 of the Supreme Court Act. Such allowance can only be granted "under special circumstances:" sec. 71 of the Act. It does not suggest what circumstances are sufficient, and there is a scarcity of authority on the point. The circumstances in this case are, that notice of intention to appeal was given to the respondents within the 60 days, but security was not given until 13 days after the expiry of the time. The delay was caused partly by the illness of one of the plaintiffs, who resides at a distance, and partly by a misapprehension in the office of the solicitors that the delay did not run

during vacation. It is established by affidavit that the plaintiffs had given definite instructions within the 60 days to proceed with the appeal, and, as mentioned, notice was actually given within the prescribed time.

Reference to *Smith* v. *Hunt*, 5 O.L.R. 97. See also *Re Manchester Economic Building Society*, 24 Ch. D. 488, at p. 497, and *Haydon* v. *Cartwright*, [1902] W.N. 163.

The amount in dispute in this case is large enough to allow the case to be taken to the Privy Council; so that it would be more expeditious and less expensive to have the appeal to the Supreme Court proceeded with.

In the circumstances, I would extend the time, approve of the security, and allow the appeal. The appellants should agree to expedite the appeal, and should pay the costs of the application.

SIMPSON v. GENSER.

Ontario Supreme Court, Meredith, C.J.C.P. September 16, 1915.

ARREST (§ II—10)—*Fraudulent Debtors Arrest Act—Proof of debt—Intent to defraud—Intent to leave without providing for debts.*]—Motion made *ex parte* by the plaintiffs for an order, under the Fraudulent Debtors Arrest Act, R.S.O. 1914, ch. 83, for the arrest of the defendant.

T. S. Elmore, for the plaintiffs.

MEREDITH, C.J.C.P.:—The extraordinary process which the plaintiffs seek in this application, that is, an *ex parte* order for the arrest of the defendant for debt, under the Fraudulent Debtors Arrest Act, ought not to issue until the applicants have fully complied with the provisions of the enactment.

How can the question whether a person is or is not about to quit the Province be generally anything but a pure question of fact; and equally, if not more, so, the question whether the leaving is for the purpose of cheating creditors out of the money owed to them?

That the fact that the quitting is about to take place without any provision for payment of debts being made may, in certain circumstances, be proof of the fraudulent intent, is quite true; but to say that it is always so would be obviously untrue: for instance, a debtor unable to pay by remaining in the Province, but

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enabled, and really intending, to pay with money earned or acquired out of the Province, could not be said, with any pretence of truth, to be going with intent to defeat the claims against him.

Reference to *Toothe* v. *Frederick*, 14 P.R. 287, and *Coffey* v. *Scane*, 25 O.R. 22, 22 A.R. 269.

With the additional evidence now furnished, the plaintiffs have, in my opinion, brought this case within the provisions of the Act in regard to the debt, which, if the testimony is true, is not barred by the Statute of Limitations, and is the debt of the defendant, as well as in regard to the defendant's intention to quit Ontario, and also in regard to the intention to defraud creditors; which intention, if the testimony be true, seems to be a perennial condition of mind of the defendant.

The application is necessarily made *ex parte;* and it may be that the defendant can prove facts and circumstances throwing a very different light upon the case; but in the meantime I am obliged to deal with it without any such light, if any such there be—a light which the defendant may, if he can, supply on an application, that I am willing to hear at any time, to discharge him out of custody; and an application which can be made within the twenty-four hours after arrest, in which, on the easy terms provided by the Act, the defendant may remain free from imprisonment.

A copy of the order for arrest, and of these reasons on which it is based, should be given to the defendant as soon as possible.

[The defendant was arrested on the 17th September; and he thereupon applied in Chambers, upon affidavits and on notice, under sec. 25 of the Fraudulent Debtors Arrest Act, for an order that he be discharged from custody, on the ground that he did not intend to leave Ontario. The motion was heard by MIDDLETON, J., on the 18th September; the defendant was examined in Chambers before the Judge; and an order was thereupon made discharging the defendant from custody.]

BRUNSWICK BALKE COLLENDER CO. v. FALSETTO.

Ontario Supreme Court, Clute, J. September 22, 1915.

DAMAGES (§ III A 4—71)—*Sale of goods—Manufactured articles—Refusal of purchaser to accept—Absence of General market—Profits.*]—Action for damages for breach of a contract.

A. A. Macdonald, for the plaintiffs.

No one appeared for the defendant.

CLUTE, J.:—On the 16th June, 1914, the defendant gave

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a written order for four billiard tables of the style and kind manufactured by the plaintiffs, as described in the order; price, $985; insurance, $26.16; total, $1,011.16; property to remain in the vendors until notes and lien fully executed; terms, $311.16 cash, balance in 16 months; $50 cash was paid on account. The goods were to be shipped "when notified, about July 10th," 1914. The goods were ready for shipment on the date for delivery. On the 13th July, 1914, the defendant cancelled the order and asked for return of the $50. The goods did not leave the possession of the plaintiffs, nor did they sell them or try to sell them. The plaintiffs' evidence shews that the goods might probably have been sold within a short time after the order was cancelled. The actual expense incurred by the plaintiffs in packing and unpacking the goods, storage, insurance, etc., would not exceed $50; and, the evidence before me being that the goods could have been sold at a price equal to the purchase-price, $50 would cover the plaintiffs' claim unless they are entitled, as they claim, to the profits on the sale.

The actual cost of the goods to the plaintiffs is $473.60. This would leave a profit of $511.40, which the plaintiffs claim.

Under the general rule in case of breach of contract, the plaintiffs are entitled to be put in the same position as if the contract had been performed. Reference to *Re Vic Mill Limited*, [1913] 1 Ch. 183.

In the present case it does not appear that there is a general market fixing the price of goods of this kind, but that sales by the plaintiffs were by order. See also Benjamin on Sale, 5th ed., p. 812; *Silkstone and Dodsworth Coal and Iron Co.* v. *Joint-Stock Coal Co.* (1876), 35 L.T.R. 668; followed in *Todd* v. *Gamble* (1896), 148 N.Y. 382; *Cort* v. *Ambergate etc. R.W. Co.* (1851), 17 Q.B. 127.

This case is, I think, distinguished from that class of cases where there is a general market price. I do not see how, in this case, the plaintiffs can be placed in the same position that they would have been in if the contract had been performed, without taking into account the profits they would have made upon the sale. These profits are ascertained by deducting the cost of production ready for delivery from the cost price. The plaintiffs

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are not entitled in this case to the expense of packing, as that would have been necessary if the contract had been carried out, nor to the incidental expense of travelling to North Bay to take the order.

The $50 should, therefore, be deducted from the $511.40, and judgment should be entered for $461.40, with County Court costs, without a set-off.

Re FENWICK.

Ontario Supreme Court, Middleton, J. November 27, 1915.

EXECUTORS AND ADMINISTRATORS (§ VI—130)—*Property of intestate domiciled in foreign country—Ancillary administration—Title to company-shares—Situs—Jurisdiction as to—Sale.*]—Application by administrators for an order to determine the title to certain shares of stock.

W. E. Raney, K.C., for the administrators.

E. C. Cattanach, for Rachel Eby, claimant.

H. E. Rose, K.C., and *J. L. Ross*, for beneficiaries.

MIDDLETON, J.:—The late George G. Fenwick was domiciled and resident in the State of Michigan. At the time of his death, he was the holder of 64 shares of stock in the Canadian Ford Company. Letters of administration were issued to the Detroit Trust Company by the Probate Court of the County of Wayne; and subsequently, for the purpose of enabling the stock in the Ford Motor Company of Canada to be effectively dealt with, letters of administration, limited to the property of the deceased within the Province of Ontario, were issued to the National Trust Company. Claim is now made by Mrs. Rachel Eby to the ownership of 32 of the 64 shares of stock, and she also claims to be entitled to receive part of the proceeds of the 32 shares already sold. This claim, no doubt made in good faith, is resisted by those beneficially interested in the estate of the deceased. . . . .

The cases relied upon are all collected in *In re Trufort* (1887), 36 Ch. D. 600; but neither that case nor any of the cases there cited deal with the problem here presented; for in all of them the claim which was relegated to the adjudication of the Courts of the domicile was a claim arising with respect to the estate of the deceased, made by some one claiming title under him. The claim here is a claim against the deceased and against his estate.

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Lord Westbury's statement in *Enohin* v. *Wylie* (1862), 10 H.L.C. 1, 13, places the matter more favourably to the contention made by Mrs. Eby than any other authority, but it falls very far short of being a statement that the proper forum for the adjudication of all claims made against the estate of a deceased person is the Court of his domicile. What is there said is: "I hold it to be now put beyond all possibility of question that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the Judge of the domicile. It is the right and duty of that Judge to constitute the personal representative of the deceased. To the Court of the domicile belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator, is the prerogative of the Judge of the domicile. In short, the Court of the domicile is the *forum concursûs* to which the legatees under the will of a testator or the parties entitled to the distribution of the estate of an intestate, are required to resort."

The shares of this Canadian company have a local *situs* in Canada, and *primâ facie* the title to the shares ought to be determined by a Canadian Court. The only foundation for jurisdiction in the Court of Michigan would be that indicated in *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sr. 444, and repeatedly affirmed in other cases; the jurisdiction of the Court over the person of the defendant. Had an action been brought by Mrs. Eby against Mr. Fenwick during his lifetime, the Courts of Michigan could have determined the title to assets having a *situs* beyond that State, because they had jurisdiction over his person, and could for that reason compel obedience to their decrees. But upon Mr. Fenwick's death the situation became entirely changed: the title to these shares became vested not in the Detroit administrators but in the Ontario administrators; and the Courts of Michigan, although they had complete jurisdiction over the Detroit administrator, cannot by reason of that jurisdiction deal with the title to the shares vested in the Ontario administrators, which is in no wise subject to their jurisdiction.

Had Mr. Fenwick died testate, so that the property vested in his executors, if the executors were subject to the jurisdiction of the Michigan Court, the action might well be maintained

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there; but the case is entirely different where, as here, the title is in the Ontario administrators, even though the Ontario letters of administration be regarded as ancillary.

For these reasons, I think that I should direct an issue to be tried for the purpose of determining the title to these shares and Mrs. Eby's right to any portion of the proceeds of the other shares. In this issue, as the onus will be upon Mrs. Eby, she should be plaintiff; and the trial, unless application is made to the contrary, should take place at Sandwich.

Costs and further directions will be reserved to be dealt with by the Judge presiding at the trial of the issue.

The notice of motion asked for a direction for the sale of stock, there being a difference of opinion between those interested in the estate and Mrs. Eby as to the desirability of selling at the present time. I do not think that a sale should be directed while the title is in doubt.

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DAOUST v. PARISH OF CHANTAL.

Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ. May 22, 1915.

HIGHWAYS (§ V B—255)—*Alteration by municipal corporation—Exchange of lots—Validity of by-law—Arts.* 16, 527, 794, 799 *M.C.—Art.* 1081 *C.C.*]—Appeal from judgment of Panneton, J., in the Superior Court.

Bastien, Bergeron & Co. for plaintiffs.

Rivet, Glass & Co., for defendants.

The case is one of a change of a front road in the defendant parish. There appears to have been strong antagonism between the partisans and the opponents of this change asked for and persistently followed up by a ratepayer named Champagne. After alternate victories and defeats on each side, the council, by the casting vote of the mayor, adopted, on December 23, 1913, a by-law authorizing the change of the road, and the exchange between the municipality and the said Champagne, of the lots on the old road and those necessary for the new, to be laid out. Mr. Champagne having been obliged to acquire the new lots which did not belong to him in order to convey them to the municipality.

The plaintiffs attack this by-law by action in the Superior Court and raise several questions of fact, among others, the

opposition of the ratepayers, the injustice and the prejudice they may suffer and various cases of illegality, one of them being that the said Champagne was not the owner of the lots which he had undertaken to give to the municipality in exchange for the laying down of the new road, and that he would never be able to acquire them; that the execution of this contract depended upon a condition purely potential on the part of Mr. Champagne. The defences of the defendant and of the *mis-en-cause* were denials of a general nature.

The only question of law relied on in the judgment of the Superior Court is that stated by the above-mentioned judgment. The action was dismissed.

Considering that it is proved that the change of the road in question, if it was made pursuant to the by-law attacked, awakes no serious injustice, and is not oppressive with respect to those who are affected, and that the change is trifling, only changing the position of the old road by a few feet;

Considering that this by-law could only have effect if the *mis-en-cause*, Champagne, acquires from the school commissioners the title to a piece of the land over which the road should pass, and that the defendant agrees to this change if the said Champagne can obtain these few feet from the said commissioners; that the said by-law is in reality only the acceptance of the change proposed in the case mentioned, and that the defendant may, at any time, annul this by-law by passing another, so long as the said Champagne does not succeed, and if he does not, the by-law will have no effect;

Considering that there is nothing which prevents the adoption of such a by-law, the contract only to be executed when the said Champagne will be in a position to convey to the defendant corporation the land of the road which he offers in exchange for that of the former road;

Considering that a part of the complaints set up in the action of the plaintiffs against this by-law are not proved, and that the others are not sufficient to maintain the conclusions of the declaration, the Court dismisses the action of the plaintiffs with costs.

This judgment was confirmed by the Court of Review.

Judgment confirmed.

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ROUSSEAU v. HEIRS OF A. J. DUBUC.

Quebec Superior Court, Guerin, J. January 11, 1915.

SALE (§ IV—90)—*Sale en bloc—Statutory formalities—Affidavit of names of creditors—Non-compliance—Presumption as to fraud—Arts. 1569b, 1569c, 1569d. C.C.—Art. 646 C.P.Q.*]—Opposition to seizure by creditor. On February 26, 1914, A. J. Dubuc, the predecessor of the defendant, sold *en bloc* to P. Theoret his business of brewing beer as well as all his business stock. He died on March 19, following. On May 18, 1914, Theoret resold *en bloc* to the opposant. On June 9, 1914, the plaintiff, a creditor of the late A. J. Dubuc, obtained a judgment against his heirs, the defendants, for $300, and caused the movables which had been sold to Theoret and to the opposant to be seized. The latter filed an opposition for withdrawal from seizure, claiming to be owner of the movables seized under the sale of May 18, 1914.

The plaintiff contested this opposition, alleging that in the sale of February 26, and May 18, 1914, the vendors did not comply with the requirements of arts. 1569 *et seq.* C.C., and that the said sales were fraudulent, void and of no effect with respect to the plaintiff; that Theoret never having been the owner of the said effects could not give a good title to the opposant. The Court maintained the contestation of the opposition, declared the 2 sales void and of no effect and dismissed the opposition with costs.

J. A. E. Dion, for plaintiff.

Beaudry & Beaudry, for defendants.

Handfield & Handfield, for opposant.

GUERIN, J.:—Considering that this sale to P. Theoret, which is a sale *en bloc*, is not accompanied by an affidavit and has not the special character required by arts. 1569*a* and 1569*b*, C.C., and that according to art. 1569c the deed of sale is void and of no effect in so far as the plaintiff, creditor of the deceased A. J. Dubuc, is concerned, his debt not having been paid;

Considering that the deed of sale *en bloc* to P. Theoret being void and of no effect so far as the plaintiff is concerned, the opposant could not acquire any rights against the plaintiff by his purchase from P. Theoret of the effects seized according to

the deed (which he sets up in his opposition), executed before A. Seguin, M.P., on May 18, 1914; QUE. S.C.

Considering that the contesting plaintiff has proved the essential allegations of his contestation;

Considering that the opposant has not proved the essential allegations of his opposition;

Declares void, etc. *Opposition dismissed.*

BONNEAU v. SEVIGNY. C.R.

Quebec Court of Review, Tellier, Greenshields and Pelletier, JJ. February 26, 1915.

MASTER AND SERVANT (§ V—340)—*Workmen's compensation —Temporary total incapacity—Permanent partial incapacity—R.S.Q.*, 1909, *arts.* 7322, 7346.]—Action under Workmen's Compensation Act. On June 7, 1912, the son of the plaintiff employed in the defendant's factory met with an accident. A saw for trimming planks cut off part of two fingers of the right hand, the index finger to the first joint, the middle finger to the second joint and cut the ring finger, which, in consequence, became partially stiff. An action was brought by his father under the Workmen's Compensation Act, claiming indemnity for temporary total incapacity, and permanent partial incapacity.

The Superior Court of the district of St. Francois (Hutchinson, J.), on September 20, 1913, maintained the action and granted an indemnity of $76.67 for temporary total incapacity and an annuity of $93.75 for permanent partial incapacity.

J. Nicoll, for plaintiff.

O'Bready & Panneton, for defendant.

The Court of Review modified this judgment as to the amounts of the two indemnities for the following reasons:—

Seeing that the parties are agreed upon the cause and the nature of the accident, the gravity of the injury and the daily and yearly wages of young Bonneau; that they acknowledge that the latter is affected with a permanent and partial incapacity, and that it is only necessary to determine the extent of the indemnities to which the victim is entitled under the law found in title xii, sec. 10 R.S.Q. 1909, and comprising arts. 7321-7347 of this Act;

Seeing that to determine these rights, it is necessary to con-

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sider that the legislature had in view three periods in the special situation of permanent and partial incapacity in which the victim has been left, the first period, that between the day of the accident and the eighth day following, during which the injured person has no right to any indemnity; a second period, during which it is impossible for the injured person to undertake any work; that this period runs from the first day after the expiration of the first period to the time when the injury is cured, and that during this time the injured party is entitled to a daily indemnity equal to half of his daily wages; and lastly, a third period, beginning from the day when the cure is certain and lasting during the life of the workman, subject to the provisions in art. 7346 of the Act; that during this last period the workman is entitled to an annuity equal to half the amount by which his earning capacity had been diminished by the accident;

Seeing in this case that the first period was from June 7 to 15, 1912, and that it calls for no enquiry; that the second period was between June 15, and October 31, that is 118 working days during which the daily wages of young Bonneau being $1.25 a day, he was entitled to an indemnity of half that amount or 62½ cents, that is to say $73.75; that the third period of indefinite duration commenced on November 1, 1912;

Seeing that for this latter period the knowledge furnished by the evidence enables us to value at one-third of his yearly wages, the reduction made by the accident on June 7, 1912, in the earnings of young Alfred Bonneau; that his wages being $375 a year the reduction is $125; that by the terms of art. 7322 R.S.Q. 1909, young Bonneau is entitled to an annuity equal to half of this reduction, that is to $62.50;

Considering that there is error in the judgment *a quo* in so far as it allows for temporary incapacity an indemnity of $76.67 to begin from the very day of the accident and for a partial and permanent incapacity an annuity of $93.75, and that this should be modified by reducing the said indemnity to $73.75 and the said annuity to $62.50;

Considering that there are reasons for confirming the judgment *a quo* in so far as it makes the said annuity to be paid

from November 1, 1912, and orders to be paid quarterly, not in advance; for these reasons revises and varies.

Judgment varied.

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SIMARD v. DUBORD.

K.B.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., and Trenholme, Lavergne, Cross and Carroll, JJ. June 15, 1915.

APPEAL (§ IV F—136)—*Record—Documentary evidence — Lost letter—Proof by affidavit—Art.* 123 *C.C.*]—Motion to establish lost letter by affidavits.

Cinq-Mars & Cinq-Mars, for appellant.

Brodeur, Berard, & Beaudry, for respondent.

The Court having heard the parties upon the motion of the respondent, orders that the contents of a lost letter, which was filed and exhibited, acknowledged by the opposite party, and serving as a commencement of proof in writing, which has not been sent with the record of appeal, be established by affidavits before a Judge of this Court with right to the appellant to examine it or to examine the persons who may make such affidavits.

Motion granted.

PAYETTE v. CITY OF MONTREAL.

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Quebec Superior Court, Archer, J. February 1, 1915.

MUNICIPAL CORPORATIONS (§ II G 1—195)—*Liability for accident caused by children skating on sidewalk—Enforcement of regulations—Arts.* 1053, 1054 *C.C.*]—Action for personal injuries caused by coasting.

Robillard & Julien, for plaintiff.

Laurendeau & Archambault, for defendants.

ARCHER, J., said in part:—The accident was caused by a young boy skating upon the sidewalk of Fullum street. The plaintiff claimed from the defendant city $177.50 as damages on account of injuries to her side in falling upon the sidewalk and she accused the city of negligence in permitting children to skate and slide upon the streets and sidewalks of the city. The defendant denied liability. It pleaded that there was a by-law forbidding children to use the streets and sidewalks for sliding and skating, and that everything possible had been done to have it obeyed. The evidence, according to the remarks of the Court, established that the policemen exercised strict care, but that

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whenever they appeared the children would know it; that in some cases they had been able to seize the sleds and take them to the police office. By-law 270, art. 17, of the city of Montreal, respecting the streets and the sidewalks, provides that "it is forbidden to skate or slide on sleds, etc."

The Court dismissed the plaintiff's action, with costs, and held that the municipality was not responsible for the consequences of accidents caused by children skating upon the streets or highways in violation of a municipal by-law, where the city constables were particularly instructed to exercise great care for the strict observance thereof: *Beaufort* v. *Coaticook*, 32 L.C.J. 118; *Dudevoir* v. *Waterville*, 37 Que. S.C. 389, 20 K.B. 309, distinguished. Moreover, it was the act of third parties which caused the accident, and as a general principle, a municipality cannot be held responsible for the acts of third parties, unless it has been guilty of negligence. *Action dismissed.*

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PHIPPS v. FREELAND.

Saskatchewan Supreme Court, Haultain, C.J. September 27, 1915.

SALE (§ I B—11)—*Time of delivery — Delay — Refusal to accept.*]—Action for goods sold and delivered. Dismissed.

McIntyre, for plaintiff.

Martin & Murray, for defendant.

HAULTAIN, C.J.:—I have come to the conclusion that the shipment of potatoes about June 3 was not a reasonable compliance with the order of the defendant dated the 18th May, which specifically required the potatoes to be shipped at once.

If I am right, it follows that the shipment and letter of May 18 were an entirely new transaction, and virtually constituted a new offer to the defendant by the plaintiff. Apparently the defendant did not receive the letter notifying him of the shipment, and refused to accept the goods as soon as he was notified of their arrival by the railway officials.

The action will therefore be dismissed with costs.

Action dismissed.

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LAFONTAINE v. GUINDON.

Quebec Court of Revision, Archibald, A.C.J. June 10, 1915.

HUSBAND AND WIFE (§ II C—65)—*Separation from bed and board—Community property—Mortgage of—Fraud—Contesta-*

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tion.]—Appeal from judgment of Dunlop, J., Superior Court, in favour of plaintiff in a contestation of mortgage as being fraudulent against community property. Affirmed.

E. Roy, D. McAvoy and *Goyette*, for plaintiff.

Dion & Lalonde, for defendant.

ARCHIBALD, A.C.J.:—On August 11, 1911, Virginie Therrien presented a petition to the Court to be allowed to sue in separation from bed and board from her husband the defendant, Jos. Guindon. On the 12th, in order to get money to pay his attorneys for their services in the action which his wife was to institute against him, Jos Guindon borrowed from Daniel McAvoy, *mis-en-cause*, $800 and gave a mortgage to D. McAvoy for the security of the loan upon real estate which was property of the community between Virginie Therrien and her husband Jos. Guindon. The mortgage which McAvoy got, he transferred to the plaintiff. This property is brought to sale upon an action by the plaintiff Lafontaine against Guindon, the defendant, and afterwards plaintiff sued thereupon and got judgment, and in the report of distribution of the ninth item, the plaintiff was collocated for the amount of $836, being the capital with interest.

Contestant claims that this mortgage was granted in fraud of her rights, after the commencement of her proceedings to obtain separation from bed and board.

The judgment has held the contestant was right in that respect; that, although the husband, as head of the community, has a right to deal with the community property, he cannot do so in fraud of his wife's rights.

I am of opinion that that judgment is sound and is to be confirmed with costs. *Judgment affirmed.*

Re CALGARY BREWING & MALTING CO.

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Alberta Supreme Court, Beck, J. November 29, 1915.

LANDLORD AND TENANT (§ III D 3—110)—*Distress for rent —Rights of chattel mortgagee.*]—Interpleader issue.

E. A. Dunbar, for the Calgary Brewing & Malting Co.

G. H. Steer, for Martin & Co.

BECK, J.:—On August 1, 1913, the Calgary Brewing and Malting Co. and Miquelon leased certain hotel premises at Har-

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disty, Alberta, to one Girvin for a term of years. Then Girvin procured the incorporation of a joint stock company called the Central Alberta Hotel Co., in which he held a large majority of the stock. On the 13th of the same month of August, Girvin proposing to assign this lease to this latter company, the lessors consented in advance to the proposed assignment. On September 22, 1913, Girvin executed the assignment of his lease to the hotel company. On September 26, 1913, the Ideal Bedding Co. shipped on account of Martin and Co., the claimants, to one Heffernan at Hardisty, a quantity of furniture which forms part of the goods, the subject of these proceedings. This furniture was intended for the hotel. It was shipped to Heffernan by rail. The object of shipping the furniture to Heffernan, rather than to Girvin—for evidently the arrangement with Martin and Co. was made in his name, and not in that of the Alberta Central Hotel Co.—was that Heffernan should obtain the execution of a chattel mortgage to Martin and Co. upon the furniture for a balance of purchase money before the bill of lading for the furniture should be delivered to Girvin. While the furniture still remained in the railway car at Hardisty, and while Heffernan still retained the bill of lading, Girvin, on October 6, 1913, executed a chattel mortgage in favour of Martin and Co. upon the furniture, the right to the possession of which Girvin thereupon acquired, and I infer that he at once received the bill of lading duly assigned, and took possession of the goods.

On or shortly after October 6, Girvin sold the furniture to the hotel company, subject to the mortgage as part of the consideration for shares in the hotel company.

Girvin subsequently sold all his shares in the company.

The hotel company continued to carry on the hotel business paying the rent to the lessors and the furniture in question continued to remain on the hotel premises. Some time in the year 1915, the rent having fallen in arrear, the lessors distrained, seizing the furniture in question. The question for consideration is whether this distress is effective as against the claimants' chattel mortgage. Referring to the Ordinance respecting distress for rent and extra-judicial seizures, C.O. 1898, ch. 34, sec 4 the policy of the enactment is that, generally speaking,

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a landlord shall not distrain upon goods that are not the property of the tenant. The lessor may, in every case, as in fact he appears to have done here, protect himself against his lessee ceasing to be his tenant, and any other person becoming his tenant. The mortgagee of his tenant's goods is not protected against distress. The mortgagee of the goods of any other person, though at one time tenant, is protected.

Although at common law only chattels could be distrained, now, under the very different conditions of society and business, partial interests in chattels may be distrained. Once this view is accepted the contention that the mortgage in this case is a mortgage by the tenant within the meaning of the enactment, because it was given by the person who was the tenant at the time it was executed, is in the present case met by the application of the principle expressed by Robinson, C.J., in *Ruttan* v. *Levisconte*, 16 U.C.Q.B. 495, 498, viz., that the effect of a grant of land on a sale with a concurrent mortgage back for a part of the purchase money is to give the purchaser only the equity of redemption. Therefore only the *tenant's interest* in the mortgaged goods is subject to distress.

In exercising the right of distress, however, the landlord's right is subordinate to that of the mortgagee. On a distress being made a specific lien upon the goods is created. This lien must be enforced with due regard to the mortgagee's rights. If the usual procedure following upon distress would be an undue interference with the mortgagee's rights, other appropriate proceedings must be invoked.

BRITSCH v. PIPER.

SASK.
S. C.

Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Brown and Elwood, JJ. November 20, 1915.

RECEIVERS (§ I B—12)—*Appointment in foreclosure actions—Parties—Motions and orders.*]—Appeal by defendant from judgment of Lamont, J.

P. H. Gordon, for appellant.

C. M. Johnston, for respondent.

HAULTAIN, C.J.:—There is no doubt that as soon as Richard H. Piper was added as a party defendant to the action, he had a right to be heard on the question of a receiver which had been

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S. C.

decided before he was a party. But his application should have been made to the Judge who appointed the receiver and no other leave was necessary, except leave to move in vacation to set aside the order appointing a receiver. This leave was obtained from my brother McKay, as will be seen from his fiat which is as follows:—

> Leave granted to serve and hear notice of motion during vacation, applying to add the registered owner a party defendant and move against order of July 22, 1915, appointing receiver.

If this fiat means anything it means that leave is granted to move in vacation to set aside the order appointing a receiver. It cannot possibly mean that my brother McKay was asked to grant leave to move my brother Lamont to grant leave to move my brother McKay to set aside the order. Yet that is how the defendant interpreted it, as his notice of motion was, "for an order allowing the said Richard H. Piper to move against the order of July 22, 1915."

This part of the application was properly refused as no leave was necessary, except leave to move in vacation which had already been granted by the Judge who had made the order, and to whom the application to set aside should properly have been made. As no leave was necessary, I think it must be taken that the order appealed from is an order refusing an unnecessary and improper application, although it must be confessed that my brother Lamont, in his memorandum of decision, decided the matter on other grounds. In my opinion, that does not make any difference as, in the result, the order appealed from as taken out is in the form which would have been followed if the application had been refused, because no such leave as was asked for was necessary.

The whole trouble has arisen from the defendant's misconception of the fiat of my brother McKay, and his ignoring of the rule that applications to set aside orders should be made to the Judge who makes them, and of the fact that no leave to make such an application was necessary.

It was urged on behalf of the appellant, that, in view of the decision of my brother Lamont, his right to apply to my brother McKay was taken away. I cannot agree with that. The order

appealed from did not forbid him to apply, it merely refused his request for leave to apply, that leave being unnecessary. SASK. S. C.

I think, therefore, that this appeal should be dismissed, and with costs, and that the defendant be left to apply to my brother McKay as he may be advised.

NEWLANDS and ELWOOD, JJ., concurred.

BROWN, J., dissented. *Appeal dismissed.*

LUND v. VANCOUVER EXHIBITION ASSOCIATION. B. C. C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. November 2, 1915.

CONTRACTS (§ IV D—360)—*Construction of fair grounds—Certificate of performance—Workmanship — Putting in floor previous to roof—Extra work—Demurrage—Penalty or liquidated damages.*]—Appeal from judgment in action and counterclaim on breach of contract.

Bodwell, K.C., for appellant, plaintiff.

Ritchie, K.C., for respondent, defendant.

GALLIHER, J.A.:—I would dismiss the appeal as to the $2,500 extras claimed.

While I am satisfied that plaintiff tendered upon the basis that the floor would be laid previous to the roof being put on, and while I am also satisfied that to do so would have been reasonable and workmanlike, if no change had been made in the flooring, and also that the change in flooring entailed considerable extra work and expense, the plaintiff having agreed to the change, and signed the contract to that effect, and also having received an additional sum of $600 on account of such change (true without its being specified as to the time for laying flooring), it becomes a question whether to have put down the floor under these changed conditions previous to the putting on of the roof would have been workmanlike and reasonable. I find no difficulty in agreeing with the finding of the trial Judge in this respect. As to the $3,750 allowed on the counterclaim: The giving of the final certificate by the architect shewing the balance due and making no mention of demurrage, does not in the circumstances of this case, preclude the respondents from claiming such demurrage. The cases cited by Mr. Bodwell are, I think, distinguishable. Mr. Bodwell also contended that where

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there had been an extension of time granted in consequence of delay caused by the owners, the penalty clause was waived.

This Court, composed of Macdonald, C.J.A., Irving and McPhillips, JJ.A., held otherwise in *Westholme Lumber Co.* v. *St. James*, 21 D.L.R. 549, and, in my opinion, that decision is applicable to the facts here.

There remains only for consideration the question as to whether the sum fixed as demurrage is a penalty or liquidated damages.

Considering the purposes for which the building in question was required, the necessity for having it completed within a certain time in order that the fair might be held during that year, its completion in good time so as to make all necessary arrangements as to advertising, exhibiting, renting of space and granting of privileges, all of which were circumstances within the knowledge of both parties, the fixing of a definite sum up to a time certain, and of a greater sum if greater delay ensued, seems to me to indicate that the parties had in view what was necessary to bring it within the rule laid down by the Privy Council in *Public Works Commission* v. *Hills*, [1906] A.C. 368.

MACDONALD, C.J.A., and MARTIN, J.A., agreed to dismissal of appeal, MCPHILLIPS, J.A., dissenting as to allowing the counterclaim. *Appeal dismissed.*

N. S.
S. C.

ROBERTS v. DANIELS.

Nova Scotia Supreme Court, Graham, C.J., Russell and Ritchie, JJ. March 17, 1915.

COSTS (§ I—14)—*Security for — Temporary residents.*]—Appeal from judgment of Drysdale, J., allowing an application for security for costs.

A. W. Jones, for appellant.

L. A. Lovett, K.C., for respondent.

The judgment of the Court was delivered by

GRAHAM, C.J.:—The principal ground of this application was Order 63, r. 5, where the plaintiff is ordinarily resident out of Nova Scotia, though he may be temporarily resident within Nova Scotia. The plaintiff against whom the Order was made is a married woman and her permanent residence is shewn to be

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in England where her husband presumably resides. There might be in this case a temporary residence on the part of the plaintiff in Nova Scotia, but that is provided for by the rule. I think that the Judge had discretion in this matter to find as he did.

It is mentioned that the costs in a former proceeding in respect to the same matter, when the parties were reversed, have not been paid by the present plaintiff. I do not contend that this case comes within the provisions of (*c*) and (*d*) of this rule, which allows security for costs to be given where there are unpaid costs in another action for the same cause, but it is a ground for consideration. *Appeal dismissed with costs.*

CLARK v. TRELOAR.

MAN.
K. B.

Manitoba King's Bench, T. D. Cumberland, Local Master, December 18, 1915.

PLEADING (§ I—I—65)—*Action for—Seduction under promise of marriage—Demand for particulars.*]—Motion by defendant for particulars of the time and place of the alleged agreement to marry and of the alleged seduction.

S. H. McKay, for plaintiff.

R. H. McQueen, for defendant.

CUMBERLAND, Loc.M.:—In the present case the defendant will be clearly entitled at some stage of the proceedings to information, not given in the statement of claim, to enable him adequately to prepare to meet the plaintiff's case at the trial, and this will be none the less so even though he is truthful in denying that he neither promised to marry or seduced the plaintiff. This being so, I follow what I conceive to be the principle on which the cases referred to were decided, and order particulars to be given of the time and place of the alleged agreement to marry, and the time and place of the alleged seduction. The defendant will have 16 days in which to plead after delivery of particulars.

I am quite satisfied that the defendant does not require the particulars to enable him to plead, and as it is quite likely that, after issue joined, he will examine the plaintiff for discovery when he will be able to get, or would have been able to get, all

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the information that these particulars will give him, I direct that costs of this motion be costs in the cause.

Motion granted.

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K. B.

JACQUES v. NORMANDEAU.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll and Pelletier, JJ. March 12, 1915.

VENDOR AND PURCHASER (§ III—35)—*Sale a réméré — Reservation of right to inhabit—Subsequent sale—Arts.* 495 *et seq.* 1487, 1546, 1552 *C.C.*]—Petitory action. On October 16, 1909, the respondent Angéline Normandeau, wife, separated as to property, of Philibert Chrétien sold to the appellant Elisée Jacques, lot No. 124 of the cadastre of Deschaillons for the price of $1,500. She reserved the right to redeem the immovable within 10 years from the time of sale, and the right to continue to occupy the premises on paying the annual interest on the price of sale, taxes, insurance premiums and expenses of maintenance.

On May 1, 1914, without having exercised the right to redeem already lost by her default to maintain the immovable in a good state of repair, she sold again the same immovable to the respondent Eugène Audet for the price of $2,089.65, of which $589.65 was paid down and $1,500 on discharge of the vendor from the terms of the sale, with right of redemption of October 16, 1909. Some days after the respondent Audet took possession of the immovable and announced it to be for sale by means of notices placed upon the house.

From that arose the petitory action of the appellant against the two respondents in which he demanded the recognition of his right of ownership in conformity with his title and the annulment of the sale of May 1, 1914, as being the sale of the thing to another.

The respondents by their pleas set up the clauses for redemption, and the right to inhabit stipulated for in the sale of 1909 to the appellant, the right of the respondent Normandeau to convey his rights and his obligations, and finally, their good faith.

By judgment on November 3, 1914, the Superior Court of the district of Quebec, presided over by Dorion, J., dismissed the plaintiff's action. This judgment is confirmed by the Court of Appeal, Pelletier, J., dissenting.

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Bedard, Lavergne & Prevost, for appellant.

Francoeur, Vien & Theriault, for respondents.

CROSS, J.:—The appellant's ground is that the respondent Normandeau has purported to sell and the respondent Audet has purported to buy his immovable fraudulently and without right.

It is material to observe that it is not proved and is not even alleged by the appellant that the deed from Normandeau to Audet has been registered, so that no opinion is here expressed as to what the judgment should be, if there had been averment and proof of such registration.

By the deed complained of, the respondent Normandeau purports to have conveyed, "cédé, abandonné et transporté avec garantie contre tous troubles et évictions;" the word "*vente*" is not employed. There is a recital of title in the vendor by a deed from de Langis of the year 1895. There is the usual recital of disseisin and seisin with possession. Next, it is covenanted that the *cession*—not the *vente*—is made in consideration of $589.65, due to the transferee, and thereby discharged, and $1,500 "payables à l'acquit de la cédante à M. Elizée Jacques, de Deschaillons, tel que convenu dans un acte de vente à réméré passé devant Mtre. Henri-R. Dufresne, notaire, octobre 16, 1909," which, of course, is the appellant's own title deed. Finally, it is recited that the property is to be affected in favour of the appellant *par privilège de bailleur de fonds* to secure the $1,500 and interest. The appellant complains that this is an unwarranted attempt to distort his right of ownership into a money claim. He also contends that the right of enjoyment of the buildings reserved by the respondent Normandeau was a mere right of habitation personal to her and not transferable.

Regarding this right of habitation, it is to be said that, coupled, as it is, with the reservation of right of redemption, it is not limited in the way indicated of such rights in arts. 495, 496, and 497 C.C. It is, moreover, a right for which the respondent Normandeau gives value by paying interest. The right is also in terms enlarged to include the "droit d'exploiter." The Superior Court was right in considering it to be a transferable (*cessible*) right, and consequently one which the respondent

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Normandeau could transfer, even by private writing to the respondent Audet. The fact of Audet's entry into occupation is thus justified.

The principal and determining question on the appeal accordingly is, whether the appellant has established a right of action such as is above described, and as is disclosed by the prayer of his declaration, namely, a right of action to have the unregistered deed between the respondents declared null. I mention that as being the determining question on this appeal, because the appellant's title is not called in question by the defences pleaded, and his prayer to be declared sole owner ceases to be material to the issue, and is merely accessory to the prayer for annulment of the deed.

It is true that a sale conveys title to the buyer, even when subjected to the right of redemption. It is a sale subject to a resolutory condition. The right of redemption is eventual, but, being resolutory, it has the effect that its exercise retroacts, and the buyer is held never to have had any title. Such being the nature of the right, the opinion has long prevailed that a sale of the immovable by one who has already sold it *à réméré* is treated as a sale, not of the property of another person, but as a sale of the right to redeem, and a sale which, upon accomplishment of the redemption, will operate as a full and complete sale.

The appellant's right is fully protected by his deed and by the registration of it. As regards the respondents, the right of the respondent Normandeau, whether a *jus in re* or *a jus ad rem* was a transferable right, and the deed attacked effectively transferred it to the respondent Audet. If, in the transfer, the right is spoken of as *a jus in re*, that, for the time being, may be an inapt use of language; but what is inappropriate would become appropriate upon exercise of the redemption, and upon that being done, the deed can be registered. In the meantime the appellant has not suffered, and is without interest to take this action.

It may be added that this conclusion is not in conflict with anything decided by this Court in *Sirois* v. *Carrier*, 13 B.R. 342, or elsewhere in *Salvas* v. *Vassal*, 27 Can. S.C.R. 68.

The appeal should be dismissed.

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