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NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 15TH, 1910.

BROWNLIE & CO. v. THE SYDNEY CEMENT CO.

Sale of Goods—Refusal to Accept—Goods Supplied not According to Contract—Liability for Price Where no Set-off or Counterclaim—Warranty—Pleadings—Evidence.

Appeal from the judgment of LAURENCE, J., in favour of plaintiffs, for the amount claimed with costs in an action for goods sold and delivered.

H. Mellish, K.C., in support of appeal.

G. A. R. Rawlings, contra.

RUSSELL, J.:—This is an action for the price of a quantity of pebbles sold and delivered by the plaintiffs to the defendants, but which were rejected upon examination as not being according to contract. I cannot gather that there is any distinct finding of fact by the learned trial Judge as to the quality of the pebbles. He says:—

"The defence set up is that of some ten or fifteen bags of the six hundred only about 20 or 30 per cent. of the pebbles are usable or of good quality according to those who examined them. I am unable to accept this as a satisfactory reason for rejecting the whole shipment. The most that can be said is that, of the small number of bags examined, the pebbles were inferior in quality but not wholly useless. In my opinion the plaintiffs are entitled to recover in this

action the price of the goods sold, there being no set-off or counterclaim setting up inferiority and claiming a diminution of amount sued for."

It seems that a fair sample was taken from the bulk by selecting the centre bag from each tier, the bags being arranged in tiers, and drawing a pebble or two from the bags "without looking." If the plaintiffs were not satisfied with these samples they could have selected samples themselves. If the samples were fairly selected, the evidence of the defendants' witnesses, if it stood alone, would be overwhelming to shew that the goods were not according to contract. It is met by evidence for the plaintiffs which, if it stood alone, would be convincing to the effect that the goods were such as were contracted for. Having examined the evidence with the greatest possible desire to appraise it fairly I cannot say, with anything approaching conviction, which set of witnesses is most worthy of credit. Nor do the circumstances throw much light upon the question. It is difficult for me to believe that the defendants, being desirous of having these goods for use in their mills, would refuse to accept without some reasonable ground for complaint, and it is equally difficult to understand why the plaintiffs being desirous of securing a new customer would not send the defendants a merchantable article as they swear they have done. The result of the evidence being to leave my mind in an even balance I have to apply the principle of burden of proof, and the burden is in this case upon the plaintiff.

If the learned trial Judge had made a finding of fact in favour of the plaintiffs I should have accepted it. He could not have done so without disbelieving the defendants' witnesses and I should have felt bound to concur in his finding. But if he has made any finding at all it is to the effect that the samples taken from the bags selected, and which seem to have been fairly selected, were inferior in quality although not wholly useless, and he has declined to allow any diminution in the price because there is no set-off or counterclaim. I do not find it necessary to discuss the question whether the pleadings are sufficient to give the defendant the benefit of an abatement of price because of inferiority in quality, in lieu of a remedy by way of cross-action on the warranty.

The action here is for goods to be supplied according to a description, and it is a condition of the contract that the

goods shall comply with the description. It is not a mere warranty "in the narrower sense of the term." The burden of proof was on the plaintiffs to shew that they had furnished goods such as contracted for, and I think they have failed to do so.

The appeal must therefore, I think, be allowed with costs and the action dismissed.

LONGLEY, J., concurred.

DRYSDALE, J.:—The plaintiffs contracted to deliver to the defendants at Sydney, thirty tons best selected round French pebbles for tube mills. The goods were forwarded to Sydney and when examined were alleged by defendants not to be of the class or quality ordered, and were rejected. I think the sampling was done in a fair and businesslike manner and the question to be passed upon was whether the plaintiffs have sent best selected round French pebbles as contracted for. The defendants say no, that the goods sent were of such an inferior quality that not more than 20 or 30 per cent. could be said to be of the class contracted for. If this were true the defendants were right in rejecting them. When I examine the learned trial Judge's finding I do not find anything explicit on the point. He says:—"That the most that can be said is that of the small number of bags examined the pebbles were inferior but not wholly useless; that the defence is that of some ten or fifteen bags of the 600 only about 20 or 30 per cent. of the pebbles are usable or of good quality, according to those who examined them, and that he is unable to accept this as a satisfactory reason for rejecting the whole shipment."

If the samples were fairly taken and fairly represented the lot, and after examining the evidence relating to the sampling I see no reason to doubt it, and this can be considered as a statement that the defendants could not as of right reject the shipment on discovering that only about 20 or 30 per cent. of the pebbles were usable or of good quality, I cannot agree with the learned trial Judge.

The plaintiffs were bound to send goods that answered the description contracted for, and if they forwarded goods of an inferior quality which cannot reasonably be said to be "best, selected, round, French pebbles for tube mills" the defendants were right in rejecting them.

This compels an examination of the evidence. It is to be noted that although the goods were lying at Sydney at the time of the trial the plaintiffs did not offer any evidence as to the quality of the goods based on any inspection or examination of the specific lot tendered. They content themselves with the depositions of witnesses taken under commission in France. The first witness examined is John Brownlie. He does not throw much light on the quality of the pebbles actually shipped. He admits he handed the order over to an agent and did not select the pebbles himself. The second witness is the agent mentioned, by name Julien Petitpas. He states he had the pebbles in question taken out of a heap of 700 of 1¾ to 2¾, and that he supervised the whole operation as usual. He states that it is quite impossible the 30 tons could be bad as they were taken from a heap of 700 to 800 tons, the rest of which have since been disposed of, and no complaints from customers, and that they were in compliance with the order. I do not know what he means by supervision as usual, and from the tenor of his answers I am inclined to think he knows personally little about the actual goods sent, his answers being chiefly opinions. Then follows the foreman, Vauthier, who states he assisted in filling the bags; that they were taken from a heap of 900 to 1000 tons and that they were quite up to the standard of quality, shape and size usual in the trade. The next witness is the bag marker, and does not, I think, assist much as it is not his business to select. Then follows three women sorters. The first one says this 30-ton order was taken from a heap of 1000 tons; that the pebbles were all of very good quality; and the heap from which the particular order has been taken has since been sold and that she never heard of any complaint being made. The second one says the pebbles were of good shape and quality and were generally in accordance with what the firm is in the habit of supplying ever since she has been in its employment. Whilst the third sorter states that the pebbles sent to fill the order were of good shape and similar to what they are in the habit of supplying. And they all answer the question, "were these the best round, French pebbles for tube mills?" by stating that they never saw better, and it was on this evidence the plaintiffs rested their case. Practically, this means that the foreman and three women sorters speak to the quality of the goods sent. The witnesses were not cross-examined or examined by counsel, ex parte interrogatories

being administered, and whilst four of the witnesses testify directly as to the goods sent being under their own observation, the examination of the witnesses is not very full. The plaintiff's case rests here and is met by actual sampling and examination of the goods that reached Sydney. The defendants had formerly gotten their supply of such goods from New York, were in need of them and knew by experience what best, round, French pebbles should be. Their experts, on examination, condemned this lot at once, and I must say defendant's witnesses make a case that to my mind is not met by the class of evidence on which the plaintiff solely relied, and which I have fairly fully abstracted. In the light of the evidence on the part of the defendants I think if plaintiffs had confidence in their position it was incumbent on them, after rejection of the 30 tons under the circumstances stated, to do more than rely upon the class of evidence given under commission. It was an easy matter to have the bags lying at Sydney examined and to meet defendant's case as to the condition of the goods that actually were sent if it could be met. On a careful examination of the whole evidence I cannot come to the conclusion that plaintiffs forwarded the goods they contracted to send, and I feel obliged to hold that defendants were justified in their rejection.

I am of opinion the appeal should be allowed, and the action dismissed, all with costs.

MEAGHER, J., read an opinion not filed. He said: "I am not satisfied that the judgment appealed from was erroneous, but dissent would be of no avail, and I therefore content myself with an expression of doubt."

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 6.

OCTOBER 18TH, 1910.

E. O. LEADBETTER v. TOWN OF PORT HOOD.

Municipal Corporation—Assessment and Taxes—Appeal from Assessment of Real Estate—Jurisdiction of Assessment Appeal Court to Increase Assessment — Reduction by Judge of County Court.

J. D. Matheson, for plaintiff.
Dal. McLennan, for defendant.

MACGILLIVRAY, Co.C.J.:—The defendant is an incorporated town, incorporated under the provisions of the Towns Incorporation Act. The plaintiff is an inhabitant of the town owning real estate within its limits. He purchased last year a town lot, in the town, without buildings. The same was assessed for civic taxation for the current year, 1910.

The town is divided into three wards. An assessor for each ward, and a town assessor, were appointed under the provisions of the law in that behalf.

The assessors before entering upon their duties, are required to be sworn "to make a fair and impartial assessment of the property within the town, and faithfully perform the duties of their office."

Under the provisions of section 14 of the Assessment Act, the assessors make up the assessment roll, after having ascertained, as nearly as they can, the particulars of the real and personal property to the assessed. Section 15 of the Act lays down the rule for their guidance in making up the assessment roll. Rule 2 prescribes that,—

"All property, liable to taxation, shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessors it would realise in case it was offered at auction after reasonable notice."

The assessors of the defendant town, guided by the rule above quoted, assessed the lot of the plaintiff at $300. But the Assessment Appeal Court, consisting of three members of the town council and the town solicitor appointed under the provisions of section 28 of the Assessment Act, of its own motion, added to the assessment $100, making the assessed value $400. From this assessment the plaintiff appealed to this Court.

The power of the assessment appeal Court, to add to the amount of the assessed value of the assessors, is given by section 47 of the Assessment Act which provides:—

"The Court shall also have power, of its own motion, to add to the roll the name of any person improperly left off, with the value of the property and income for which, in the judgment of the Court, such person should be assessed; and also of its own motion to add to the amount of the assessment of any person: Provided: that in such cases notice shall forthwith be given by the clerk to the person whose name is added, or whose assessment is increased."

I can understand the provision of the section empowering the Assessment Appeal Court to add to the assessment roll the name of any person improperly left off with the value of his property; but I cannot conceive why the power is conferred upon it to add, of its own motion, to the assessment of any person already duly assessed, without request so to do by him. In making up the assessment, the party whose property is to be assessed, is directly or indirectly heard by the assessors, or its value is ascertained upon view or by other evidence, before a valuation is placed upon his property, and the amount thereof finally fixed. In the case of the arbitrary power given the Assessment Appeal Court, the interested party, the owner of the property, is not heard, and knows nothing of the increase in the valuation until after it is made; nor has he had previous notice of any intention to increase the already appraised value of his property. It may be contended that there is an appeal from the Assessment Appeal Court's decision; but it is contrary to the spirit of the statute giving appeals that there be any decision given behind a person's back, and when he has no notice to be present; and the injustice thereof, if there be iujustice, is to be rectified by appeal. I think, therefore, the power conferred by the above quoted provision—whatever cases it may have intended to remedy—was not intended to apply to cases like the one under consideration. I am strongly of opinion that the cases for which the statute provides are where property is omitted to be assessed by the assessors the Assessment Appeal Court may determine the value thereof, and add to the already assessed value of other property of the owner. His assessment is thus increased, which is the increased assessment contemplated by the second provision of the section cited, but that is not this case.

At the trial the plaintiff proved that he bought the property for $250. Since purchasing it he offered it for $300, but could not get his price. Since the trial I examined all the rate rolls in the office of the clerk of the defendant town since it was incorporated, viz., in the year 1903. I find that in the first year of the town's incorporation, the property, which was then owned by a non-resident, was assessed for $80. During the subsequent three years it was assessed at $100. In 1907 it was assessed for $800; but the next year it was cut down to $400. The two last years it was assessed by the assessors at $300; but raised by the Assessment Appeal Court to $400. It appears the increased

value given the lot in 1907 was in consequence of a temporary boom in town lots that year in that vicinity. One of the assessors who has been assessor for three years and who gave evidence at the trial, states that they assessed the property at what they considered it would bring if advertised for sale. I may here note that according to the assessment roll for 1910 the assessment on the property of three only of the ratepayers of the town was increased by the Assessment Appeal Court, either of their own motion or otherwise. So it cannot be urged that there was a general increase by the Assessment Appeal Court in the assessment of the ratepayers.

In view of all these facts I am of opinion that the Assessment Appeal Court, should not, at least without application, interfere with the judgment and decision of the assessors. Indeed, I think the Assessment Appeal Court without grave reason, should hesitate to interfere with the valuation of the assessors. I therefore decide that the valuation of the plaintiff's property should be reduced from $400 to $300—the value placed upon it by the assessors. An order will pass making such reduction with costs.

NEW BRUNSWICK.

SUPREME COURT.

KING'S BENCH DIVISION, IN CHAMBERS. DEC. 27TH, 1910.

JOHN AMOS v. ALBERT R. C. CLARK AND JOHN A. ADAMS.

The Workmen's Compensation for Injuries Act, N. B. Con. Stat. 1903, Ch. 146 — Acts of New Brunswick, 1907, Ch. 26, Sec. 2, s.-s. 1 — Accident—Facts—Negligence — Contributory Negligence — Compensation Where Injury Caused by Reason of Defect in the Condition or Arrangement of Ways, Works, Machinery, Gear, Appliances, Plant, Etc., Used in Business of the Employer—Acts of New Brunswick, 1908, Ch. 31, Sec. 2 "Defect"—Review of Authorities—Comparison of English and New Brunswick Compensation Acts.

The facts of the case are fully set out in the judgment of MCKEOWN, J.

John B. M. Baxter, K.C., for the petitioner.

Fred. R. Taylor, for the defendants.

St. John, N.B., December 27th, 1910, the following judgment was now delivered by

McKeown, J.:—This matter comes before me by petition under the provisions of sub-section 1 of section 2 ch. 26 of the Provincial Acts of 1907. The petitioner claims damages for personal injuries received by him while working in the employ of Clark and Adams on the 16th day of July, 1909. It appears from the evidence that the petitioner's duty—or at least a part of his duty—was to take charge of a machine known as a concrete mixer, which, without going into particularity of detail, consists of a drum into which quantities of sand, gravel and cement, are cast, with some water, and by rapid revolution a complete mixture of its contents is effected. The machine is operated by a gasolene engine and the mixture is supplied with the necessary bearings to which lubricants must from time to time be applied. The accident to petitioner occurred while he was in the act of oiling one of these bearings when the mixer was in motion. In his evidence he says it was his duty to run the mixer and "to keep it well oiled everywhere there was a bearing. The bearing were all covered to the public. Some were underneath the machine. I got hurt at the one under the machine. The drum rests on a bed and a spindle runs through underneath the drum and there was a grease cup right against the bed to grease the journal. To grease that, I would have to screw the cup down from the top. To reach it I would have to reach in about 18 inches. There was not space enough to put my hand in between the cog and grease cup, and as I was screwing the top of the cup down, the cogwheels caught my hand and I lost a thumb, two fingers, and part of my hand, —it is my left hand. . . . The machine was running hot, it needed oil on the bearings. . . . I greased it in some places before it started that morning. I greased that particular place that morning. I filled the cup with grease, also filled the other cup on the other end of the shaft. I screwed it down tight so that the grease would go out on the bearing. . . . The cogwheel that caught me was revolving away from me. One cogwheel struck me. I don't say the other cogwheel caught me. I don't say it didn't. I don't know how fast it was going. The grease cup cover was working hard. There was sand behind it. I had hold of it with the strongest part of my hand about the middle."

The petitioner was cross-examined with a view of shewing that the accident happened while he was attending to the bearing directly underneath the drum. At the time of the accident the petitioner was wearing a glove which was torn from his hand and afterwards was found near the bearing last mentioned. There was no eye witness to the accident other than the petitioner, and I see no reason to discredit his statement as to where the accident occurred, and I find as a fact that the accident took place where he said it did.

Another question of fact presents itself embodied in the dispute existing between the parties in interest as to whether the petitioner had received orders from Mr. Clark, one of his employers, to stop the machine when oiling it. Mr. Clark testifies that he did so order the petitioner, and in this statement he is corroborated by Wm. Logan, a fellow employee with petitioner, and who, after the accident, took charge of the mixer. On the other hand Amos says there was no warning as to stopping the machine to oil it before the accident; that if Mr. Clarke had said to stop the machine when it wanted oiling he would only have been too glad to stop it. He further says his reason for not stopping the machine to oil it, was that he didn't want to lose time for his employers who, he knew, wanted to get on with the work as soon as possible, and they had told him the more batches of concrete they got out the more money was in it for them, and the work was proceeding rapidly. Amos says further that Mr. Clark may have said to him to oil up when the machine was stopped, but he never remembered Mr. Clark saying to stop it when he wanted it oiled; also that after coming out of the hospital Mr. Clark told him he thought he (Amos) got his hand caught in the cogs underneath the drum, but he (Amos) says he took Clark and shewed him how the accident happened, and Clark said it was too bad and that he should have stopped the machine.

After listening to the witnesses who speak of this disputed matter, and having regard to what I might call the logic of the circumstances, I have, not without hesitation, arrived at the conclusion that the petitioner was not disobeying his employer's orders in oiling the machine without stopping it. I am clearly of opinion that each witness gave when on the stand his complete and honest recollection of what took place. To my mind, although there is a discrepancy in the evidence, neither witness is swerving from his honest

conviction of what took place (the evidence being given a good many months after the event described). The accounts are irreconcilable and my mind is influenced by the fact that if the employer had told Amos to stop the machine when oiling it he would almost certainly have done so as everything suggested that course as the safer one to pursue.

It comes, then, in my opinion, to this: that the petitioner met with his accident while screwing down the top of the grease cup as described by him, and that he was not, in so doing, acting in disobedience of his employer's orders. This was the only way, as the machine then stood, to oil the bearing and I do not think that it was negligence or carelessness on the part of Amos to make use of the only facilities provided for oiling the machine, nor to oil it when in motion, neither do I think from an examination of the machine, and having a regard to the way the cogwheels were running, and the part of the hand injured, that the fact that the petitioner wore a gauntlet glove contributed to his injury.

With these matters of fact disposed of, I am free to approach the larger question of statutory liability underlying the petitioner's right to recover. The Act provides for compensation where personal injury is caused to a workman by reason of any defect in the condition or arrangement of ways, works, machinery, gear, appliances, plant, etc., used in the business of the employer. (Acts of 1908, ch. 31, sec. 2), and the question of the petitioner's right to recover herein, involves the construction of the word "defect" as applied to the "condition or arrangement" of the machinery, gear (and) appliances" of this concrete mixer, which, it is not denied, was a fit and proper machine for the work it had to do, and was as far as the evidence discloses, as good and perfect machine as could be procured.

In the case of Morgan v. Hutchins and another, reported in 59 L. J. Q. B. (1890), p. 197, the headnote is as follows:— "A leather pressing machine in every way perfect and in no way defective for the purpose of pressing leather had at its side a wheel and cogs unguarded. The unguarded condition of this wheel, and the possible danger likely to arise from it, was within the knowledge of the employers. A boy who fed the machine with leather, by some means entangled his hand in this machine and received injuries.

"Held, that taking sub-sec. 1 of sec. 1" (which as far as it goes is similar to that part of sec. 2, ch. 31, Acts of 1908,

above cited), "and sub-sec. 1 of sec. 2" (which was originally embodied in our Compensation Act and repealed in the amendment of 1908 by sec. 4 of ch. 31), "of the Employer's Liability Act together, the danger caused by this wheel was a defect in the condition of this machine within the first of these sub-sections since the danger being within the knowledge of the employers they were negligent in allowing the wheel to remain unguarded." In discussing the meaning of the word "defect" in connection with the leather pressing machine which caused the injury in the above cause, Lord Coleridge says: "It is difficult to define every possible thing which might come within the meaning of the word "defect," and to attempt to define what "defect" is, in the abstract, is to attempt an impossibility. Here the words are where any personal injury is caused to a workman "by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer." To this sub-section must, on the authority of the Court of Appeal, be added the words of sec. 2, sub-sec. 1 "Owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery and plant were in proper condition" Walsh v. Whitely, 57 L. J. Rep. Q. B. 586. In the case before us the injury was caused by the condition of the machinery. The machine would not do work of itself, it wanted human skill and labour to be useful and it was used by boys. That it was as a matter of fact dangerous cannot be doubted . . . But the question arises, is danger a defect in the condition of a machine within this sub-section? It seems to me that here (in a case cited by His Lordship, Reske v. Samuelson, 53 L. J. Rep. Q. B. 45), the Court of Appeal have in a measure decided the principle that I am asserting in the present case . . . The governing principle, in my opinion, is, that when a machine is defective with reference to danger, and such defect is within the knowledge of the employer, he is then liable. Lord Esher, M.R., in the same case in his judgment says. "The argument in the present case is that there is no defect in the machinery, if the machine in question is in itself a proper one for the work it is to perform. It must be carried to this length that if the machine contains a secret defect which causes danger to the workman, but which does not affect the purposes for which it is to be used then this is not a defect within the meaning of the Act.

Now this leather pressing machine cannot be worked without workmen—without labour it is useless as a machine. Surely this fact of itself is something that has to do with the condition of the machine. If its condition be such that the workman cannot do his part with safety is that, or is it not, a defect in the condition of a machine the working of which is a necessary performance? It seems to me that unless we hold the defect complained of here to be one within the sub-section in question the Act might as well have never been passed."

It is to be noticed that the section of the English Act above referred to does not contain the word "arrangement." Its operation is confined to a defective "condition" whereas the Act now before me for consideration seems broader in the sense that the defect may be looked for either in the "condition or arrangement" of the machinery, gear, etc., of the machine. I gather from a consideration of the cases dealing with the question of defect that in coming to a conclusion as to whether any given machine is defective within the meaning of the Act, one must consider the actual construction of it, or, in the words of the statute "the condition or arrangement of its machinery, gear, etc.," and recollect that its operation involves human effort and attention, and from these considerations conclude whether it is, or is not defective. Every danger cannot be considered, in my opinion, a defect, still less can the occurring of an accident to a workman be of itself a proof of deficiency, but having regard to the condition or arrangement of the machine in question, of its mode of operation, of the work necessary to be done around it, of the exposure involved in doing the work under the condition and arrangement prevailing with reference to its construction, and operation, can it be said, viewing the whole matter, that there is a defect under the Act? To my mind in a case like the present, the question cannot be answered by saying or proving that some alteration might secure more safety and minimize risk. Presumably all alterations and improvements are for the better; but taking the machine just as it may be, looking at its parts, examining the condition and arrangement of the whole, can it fairly be said that it is "defective with reference to the danger" which its condition and arrangement exposed the workman to? This is of course a question of fact for the determination of the Judge to whom a petition

is presented, and I have thought it well in this case to indicate as clearly as I can, what, to me, appear to be the matters for consideration which properly enter with the determination of this section of the Act.

No case was pointed out to me, and I know of none, which treats or discusses in a broader sense, the meaning of the word "defect," as used in legislative enactments such as compensation Acts, than the one from which the preceding extracts are made.

In arriving at a conclusion in this matter I do not attach any particular weight to the fact that, subsequently, an employee, James L. Clark, who ran the machine after the petitioner was hurt, erected upon this particular bearing a vertical pipe with a grease cup attached, by which arrangement he was able to apply the necessary oil without putting his hand under the machine. This he says, was his own idea. The fact that an improvement is made does not, ipso facto, stamp the machine in its previous condition as defective under the Act, in my opinion, but the test of its deficiency is, I think, to be found in the application of the principles enumerated by Lord Chief Justice Coleridge and by the Master of the Rolls in the case above alluded to. Did the condition or arrangement of this mixer, as to its machinery, gear, etc., involve such danger to the one in charge running it in the way it was arranged to be run, as to amount to a "defect" in such condition or arrangement Thinking of these cogwheels rapidly revolving about five inches from the bed of the machine, in immediate proximity to which was the top of this grease cup about an inch and a quarter in diameter, having necessarily to be turned by hand, and bearing in mind further, that this part of the machinery, including the cogwheels and grease cup, were covered from sight by a metal hood so that to reach the cup the workman had to put his hand under the hood, a distance of from 18 inches to 2 feet, where he was unable, except by feeling, and by his previous knowledge, to guide the direction which his hand should take, I am forced to the conclusion that a defect did exist in both the condition and arrangement of this mixer, and which defect was responsible for the accident. I have not overlooked the provisions of sub-sec. (c) of sec. 5 of the Act. I think the employer, Mr. Clark, had full knowledge of the defect in the machine. The amendments to that section make it necessary that rules

or orders be posted in case the defence relies on carelessness of the employee in disobedience to his employer's order, as an answer to such a claim as this. If that section, under any view of this case, is applicable as urged by petitioner's counsel, certainly no such posting was had. In view of the finding of fact, it is unnecessary for me to express any opinion as to whether an order of the kind Mr. Clark says was given to the petitioner, concerning the stoppage of the machine for the purpose of oiling it, is within this sub-section.

The petitioner commenced working for Clark and Adams on Monday, the 31st day of May, 1909, and was steadily in their employ until the accident occurred, a period of six full weeks, and from Monday, the 12th of July, to the morning of Friday, the 16th of that month. During the six full weeks he earned on the whole seventy-eight dollars and thirteen cents, and for the days of the last uncompleted week he was paid nine dollars and twenty-five cents. His average weekly earnings I take to be one-sixth of seventy-eight dollars and thirteen cents, one-half of which under section 6, sub-sec. (2) of the Act must be paid to petitioner weekly during his incapacity, or for one hundred weeks. The petitioner's average weekly earnings in the employment of the same employer were thirteen dollars and two cents, fifty per cent. of which would be six dollars and fifty-one cents. In this case the petitioner suffered a total incapacity which lasted some months, and a partial incapacity which will last his lifetime.

He is a young man to whom the loss of so great a part of his left hand will be a serious drawback. I therefore feel that I am constrained by the provisions of the Act to direct the payment to him of fifty per cent. of his average weekly earnings, such payment to continue for the period of one hundred weeks pursuant to sub-section (2) (b) of section 6 of the Act, and I do therefore order as follows:—

1. I order that Albert R. C. Clark and John A. Adams do pay to the petitioner John Amos the weekly sum of six dollars and fifty-one cents as compensation for personal injury caused to the said John Amos on the 16th day of July, 1909, by accident in the course of his employment arising out of a defect in the condition or arrangement of the machinery, gear, and appliances of a certain concrete mixer used by the said John Amos in the business of his employers the said Albert R. Clark and John A. Adams,

and provided by them; such weekly payments to commence as from the seventeenth day of July, 1909, and continue for the period of one hundred weeks.

2. And I do order that the said Albert R. C. Clark and John A. Adams do forthwith pay to the said John Amos the sum of four hundred and eighty-eight dollars and twenty-five cents ($488.25), being the amount of such weekly payments calculated from the seventeenth day of July, 1909, to the twenty-fourth day of December, 1910, and do thereafter pay the said sum of six dollars and fifty-one cents to the said John Amos on each succeeding Saturday until the expiry of one hundred weeks from the seventeenth day of July, 1909.

3. That the said Albert R. C. Clark and John A. Adams do pay the costs of the petitioner on this application which costs will be taxed and fixed upon application made to me for that purpose.

NOVA SCOTIA.

SUPREME COURT.

ON APPEAL.

FULL COURT. DECEMBER 3RD, 1910.

ROBINSON v. THE IMPERIAL LIFE ASSCE. CO.

Life Insurance—Right to Money Payable under Policy— — Beneficiary and Executors — Interpleader Issue — Debtor and Creditor—Policy Regarded as Security for Debt.

Appeal from the judgment of DRYSDALE, J., in favour of plaintiff in an interpleader issue as to plaintiffs right to receive and retain money payable under a life insurance policy.

W. F. O'Connor, K.C., in support of appeal.

W. B. A. Ritchie, K.C., contra.

RUSSELL, J.:—This is an interpleader issue to determine whether the plaintiff is entitled to receive from the defend-

ant $742 as a beneficiary under an insurance policy on the life of Richard Shepeard, deceased, or whether the money should go to the claimants who are the executors of Shepeard. It is not disputed that plaintiff is entitled to a sum outside of the $742, to wit, $309, for which the claimants admit the plaintiff had an interest in the policy. But they dispute the $742 on various grounds, all of which have been overruled by the trial Judge. It was contended that the debt was due, if at all to Bateman and Shepeard, and not to Shepeard; but the Judge has found that, although the correspondence is in the name of Bateman and Shepeard, the debt was really that of Shepeard, and there is evidence to support the finding. The amount of the claim cannot be successfully disputed on this appeal. The evidence is sufficient to support the finding that the services were actually rendered and the charges reasonable, although it is a circumstance worthy of remark that nothing seems ever to have been said about the claim for upwards of ten years. The only ground on which, if at all, the plaintiff's claim can be successfully resisted is that it is barred by the Statute of Limitations. The trial Judge has held that the money has come into the plaintiff's hands and he is entitled to hold it because of his claim against Shepeard, although no action could have been sustained against Shepeard, the debt being barred. The claimants contend on the other hand that the money has never come into the plaintiff's hands and that the principle as to the right to retain money coming into the hands of the creditor has been misapplied to the case.

I do not see how it can be said that the plaintiff is retaining moneys that have come into his hands. If he had the money in his hands he would not be suing the defendant company to recover it. I do not know, indeed, under what principle he is allowed to sue the company. In the New Brunswick case of Abbinett v. North Western Mutual Life Ins. Co., 21 N. B. R. 216, it was held that even a wife who was the beneficiary could not sue under the policy, not being a party to the contract, and the decision proceeds upon "the well known rule" referred to by Strong, C.J., in Burris v. Rhind, 29 S. C. R. at 502, where he says referring to the provision in the instrument in question in that case, "it created no trust . . . but was a mere contract between the parties to the deed, and the respondents are entitled to invoke the well known rule, thoroughly estab-

lished in equity as well as at law, that a mere contract enures to the benefit exclusively of the party from whom the consideration moves, and that no third party, however directly a covenant or contract may appear to be designed for his benefit can call for its execution."

As, however, the point has not been taken that the plaintiff has no right of action against the defendant company I assume that both parties to the controversy consider that a right of action has been given by the Statute of 1903, ch. 15. I express no opinion on that point. It may be and probably is a far plainer question that I had supposed. But if the plaintiff could not recover against the defendant company, not being a party to the contract, it would not at all follow that the executors, after receiving the money payable under the policy, could set up the Statute of Limitations as a defence. The plaintiff's debt, although barred by the Statute of Limitations, was an insurable interest that he had in the life of the insured. He did not even need to have any insurable interest as it was not he that was effecting the policy. It was Shepeard who contracted with the defendant company that they would pay the amount of the policy, and by a declaration or direction given after the policy was effected the insured has made the amount payable to the plaintiff. If the executors had recovered the money from the company they would have held it for the purpose, among others, of paying whatever claim the policy was intended to secure. If the plaintiff had been obliged to have recourse to proceedings at law or in equity to recover the amount of his claim his cause of action would have arisen within six years and the Statute of Limitations would have had no application.

I think, however, that there is still another question that requires to be answered before the judgment appealed from can be affirmed. It was competent for the assured to make the plaintiff a beneficiary for whatever amount and to whatever extent he should see fit, and it is a question of fact what debt or interest of the plaintiff it was his intention to secure. The policy seems to have owed its existence to the desire of the insured to procure an advance from Burns. Burns was unable to make the advance and the plaintiff did advance or procure money for the insured. All that the plaintiff can say about the transaction with refer-

ence to the policy is contained in the following extracts from his evidence:

"Q. What about the policy of insurance? A. After he got the note discounted I met him and asked him how he got along and he said all right. He said, 'I took out a policy so that I could borrow money on it.' He said it was made out in J. E. Burns' name, but he was unable to advance the money he promised to get. He said, 'I will get him to relinquish his rights and transfer it to you," which he did. . . . Q. Do you say that there was no agreement that you were to have the policy as security? A. No, he owed me for the work in New York and he knew that I knew people had sued him and got judgment against him and he gave me the policy to shew that he thought I was a good fellow. That was my idea.

"Q. Not as security for the debts? A. No. I cannot say what his ideas were.

"Q. He said nothing to you? A. No., not a thing."

The policy on its face, I assume, says nothing about any money payable to the plaintiff. The insured has given a direction to the company making the amount payable to the plaintiff. But this is only as between the insured and the company. It is still, so far as the plaintiff is concerned, a mere security, and it still remains to be ascertained what debt or claim it was intended to secure. The fact that the direction to the company is without limitation does not necessarily entitle the plaintiff to the whole amount of the policy. It is common ground that if the plaintiff's claim were less than the amount insured he would not be entitled to the whole face of the policy. It is a mere coincidence that the debts due by Shepeard to the plaintiff amount to the whole or more than the liability of the company. Where an instrument is held as a security it is always competent to inquire what debt it is intended to secure and evidence of that nature is not in contravention of the parol evidence rule. If the reported statement of the deceased could be received it would be very clear that he did not consider the policy to have been made payable to the plaintiff to any extent beyond that of the money advanced at the date of the transfer. The plaintiff's accommodation note, the transfer from Burns and the direction from Shepeard to the company all bear the same date, June 12th, 1906, and I have little doubt that they were all one transaction, and consider it

about certain that this was the debt which the policy was meant to secure. The terms of the direction to the company seem to me to support this inference. It is as follows:

"Halifax, N.S., June 12th, 1906.

"The Imperial Life Assurance Company,
"Toronto, Canada.

"Re Policy No. 17528, R. Shepeard.

"Gentlemen,—I hereby authorise and ask you to change the beneficiary under my policy above referred to, from John E. Burns, who is the present beneficiary, for value as his interests may appear, to that of Frank J. Robinson, beneficiary as his interests may appear. This was a case where Mr. Burns was to advance me some money, and it afterwards developed that he was not in a position to do so. This is my reason for changing the beneficiary in this contract.

"Yours truly,

"(Sgd.) Richard Shepeard."

This seems to me to say that whereas Burns was intending to make an advance to be secured by a policy of insurance, and was unable to do so, and the plaintiff was able and willing to make the advance, and had done so, the deceased was making the latter instead of the former a beneficiary for the purpose of securing his advance. "This is my reason for changing the beneficiary in this contract."

But it may be argued that while this was his reason for changing the beneficiary and his intention was, as I have no doubt it was, to limit the security to the amount of the advance, he has by writing over his hand made the plaintiff a beneficiary "as his interest may appear." That is true. But how is the plaintiff's interest to be made to appear? By evidence, I presume. His interest in the policy will be whatever it was agreed it should be. The plaintiff and the deceased are the only persons who ever knew what that agreement was, and if the plaintiff with all the advantage that he can derive from the circumstance of having the other party under ground, and with probably the necessary corroboration, if corroboration is necessary, for any agreement that he is able to set up, is utterly unable to tell us

on what account or for what interest he claims on the policy, I think he may count himself fortunate that he has been able to establish by reasonably satisfactory circumstantial evidence that he holds it as a security for his advances to the extent admitted by the claimants.

I should think it extremely improbable that Shepeard ever intended to give the plaintiff security for a claim which is of a very questionable character, the existence of which appears never to have been mentioned between the parties for ten years or more, and which, if it ever existed, was barred by the Statute of Limitations five or six years before the policy was taken out.

I therefore think that the appeal should be allowed with costs, and the plaintiff's recovery limited to the amount admitted by the claimants.

LONGLEY, J.:—I agree with the conclusion reached by Russell, J., in this case and on the grounds set forth in his opinion. But I wish to add that after a careful perusal of the evidence I am most unfavourably impressed with the plaintiff's testimony respecting his claim for services in New York. I think his whole story improbable, contradictory and trumped up. The learned trial Judge having found in support of his story, and corroboration, I do not feel at liberty to interfere with his finding on this point, but I am glad that there are legal grounds upon which we can avoid giving effect to this improbable old claim resurrected after many years, and for the obvious purpose of getting control of the whole insurance money, though assigned to him solely and specifically for security for his advance.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY.

VICE-CHANCELLOR'S COURT. DECEMBER 20TH, 1910.

SABINE v. WOOD.

Will—Devise to Widow—Dower — Election—When Widow Compelled to Elect.

A. C. Saunders, for complainant.

N. McQuarrie, K.C., for defendant.

FITZGERALD, V.-C.:—Administration of the estate of John Frederick Wood, deceased, testate, is sought by this bill.

At the hearing it appeared that the deceased's estate at his death roughly stood as follows:—

Homestead of 125 acres freehold lands since sold for		$1,825
Personalty sold for		450
2 mortgages on realty	$1,050	
Debts due	650	
Devise to widow	300	
Balance	275	
	$2,275	$2,275

His will first directs that all his just debts be paid, and devises and bequeaths all his real and personal estate, of which he may die possessed, in the following manner:—

To his wife Elizabeth Wood $300 cash, or $36 a year so long as she lives and remains my widow—and a grey horse, one cow and half the fowls (all the furniture being her private property).

To his daughters Bessie, and Eliza, one cow, and two sheep each.

To his daughter, Bertha, the loom.

To his son Frederick John, the homestead of 125 acres, with stock, implements, carriages, etc.

I detail testator's financial position at his death, and also give a short synopsis of his will, as I think, to arrive at his intention as expressed therein, it is necessary to know not only what he had to dispose of, but also how he proposed providing for his children and his wife—their stepmother.

The sole question now before me is, is the widow under this will put to her election, or does she take her devise of $300, and also her dower in the freehold?

Sir John Wickens, V.-C., in an English case, Thompson v. Burra, L. R. 16 Eq. 592, says, speaking of the case before him in which the question was as to whether under the terms of the will, the widow was driven to her election or not. "This is a case arising on a very difficult and unsatisfactory branch of the law, and to be determined on very meagre materials."

The authorities are undoubtedly irreconcilable, perhaps, as V.-C. Stuart says, "as clear one way, as the principle is the other;" and certainly the materials I am called to determine upon, are not less meagre than those which Vice-Chancellor Wickens had before him.

It may, however, be taken as settled law, that a widow entitled to dower, and taking benefits under her husband's will, is not compelled to elect between them, unless it is on the face of the will apparent that it was not intended by the testator that she should take both; or as laid down by Lord Redesdale in Birmingham v. Kirwin, 2 Sch. and Lef. 444, that if you find anything in the will which is inconsistent with the assertion on the widows part of her right to have one-third of the lands set out by metes and bounds, that raises a case of election.

The difficulty arises in the application of the law, and the different conclusions of different Judges, as to what is such an inconsistency. While a mere power of sale, or a direction as to the application of the proceeds of a sale under a trust for sale (Bending v. Bending, 3 K. & J. 257, Ellis v. Lewis, 3 Hare 310), have been held not sufficient to put the widow to her election; yet a direction to carry on a farm (Butcher v. Kemp, 5 Madd. 61), or a leasing power to trustees (Lowes v. Lowes, 5 Hare 501, Hall v. Hill, 1 D. & War. 94), and—other grounds being wanting—a power to lease from year to year only (O'Hara v. Chaine, 1 J. & Lat. 662), shew severally, it has been held, an intention inconsistent with the widow's right of dower.

Wickens, Vice-Chancellor, in Thompson v. Burra, sup., said that when a man makes a will by which he gives to his wife benefits carefully measured and defined, there would be, he thought, the strongest possible presumption that he did not intend her to take out of his property more than that which he had so carefully measured out for her; and he added, that he thought he could suggest cases in which the mode of division would conclusively shew that the testator intended his wife to have out of his property only that devised her and no more.

There is much common sense in this language.

I have here a testator with a farm of 125 acres, worth under $2,000, incumbered to an amount more than half its value; with personalty of the value of $450, liable primarily to debts amounting to nearly twice that amount who, leav-

ing out the small legacies to his daughter, gives to his wife—married to him less than two years previously, $300 in cash, or a $36 annuity during her widowhood, and to his son the farm absolutely.

If you deduct the testators total liabilities from his estate real and personal, there would not be sufficient left to satisfy the widow's legacy, and her claim for dower.

I think the widow must elect. The evident intention of testator was that his son should have the farm, though incumbered. If the widow adds dower to legacy, it will be taken from him entirely; and I must assume some knowledge of his position by the testator.

Again the defined alternate annuity to her out of the only lands subject to dower, is inconsistent with her right to one-third of this same land as dower. And the careful setting out and defining what the testator intended not only for each member of his family, but for his wife, with limitations in case of her remarriage, are inconsistent with her absorption of everything, and with other the provisions regarding the freehold in the will.

"If I am bound to spell out the intention of the testator," using the words of Lord St. Leonards in Hall v. Hill (1 Dr. & War. 94), I think looking at the whole frame of the will and its several provisions, that the testator meant to provide for his wife by his will, and that she was to have nothing further.

It is a greater provision than she would have otherwise been entitled to—an ingredient which Lord St. Leonards recognizes.

In Lapp v. Lapp, 16 Gr. 159, Chancellor Spragge dealing with a will in which provision was made for testator's children, but which provision would be nil if lands were held to be subject to widow's dower, took that fact into his consideration in arriving at testators intention, saying, "but the provisions of the will, and the situation of the testator, leave upon my mind a very strong impression, that it was his intention that his widow should have the provision he made for her, and that only. I do not mean to say that it is a case which admits of no doubt, but I am able to say that I have no doubt that such was the intention of the testator."

I desire to adopt that language, and therefore I must hold that the widow here is put to her election.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 15TH, 1910.

McDONALD v. THE EASTERN TRUST CO. ET AL.

Will—Construction — Shares of Stock — Calls — Right of Executors to Pay same out of Proceeds of Sale of Real Estate—Trust Fund—Specific Bequests.

Appeal from the judgment of LAURENCE, J., ordering calls on shares to be paid out of the general funds of the estate. Reported sub nom. In re Estate Israel Longworth, 8 E. L. R. 235.

T. S. Rogers, K.C., in support of appeal.

T. R. Robertson, K.C., contra.

LONGLEY, J.:—This is an action brought on an originating summons for the determination of certain questions arising out of the last will and testament of the late Israel Longworth. The matter was duly argued before LAURENCE, J., who in a written opinion gave certain answers to the questions submitted. An appeal has been taken from his decision and the whole matter has been fully argued before this Court. It will be most convenient to deal with each question in order:

"1. Can the executors of the last will and testament of the said late Israed Longworth, deceased, pay calls due and payable in respect of the shares of stock held by deceased at the time of his death in the several companies mentioned in the fifth paragraph of the said last will and testament out of the proceeds of the sale of real estate received by them?"

The learned Judge below has practically answered this question in the affirmative. It is not necessary to deal with this at length since both the learned counsel on the argument agreed that the answer should be in the negative, and in my opinion the answer to this question should be "No, they should be paid from the trust fund."

"2. If the first question is answered in the affirmative, will the plaintiff thereafter be entitled to receive dividends on the whole amount paid up on such stocks?"

In view of the previous answer this question requires no answer.

"3. Until the homestead farm at Truro and such lands about it and the Lorndale farm at Truro referred to in the tenth paragraph of said will are sold, is the plaintiff, daughter of the deceased, entitled to receive the rents and income therefrom?"

The answer to this question involves and really solves the important matter in doubt under the terms of the will.

The will which is very full and detailed may be summarized as follows:

He appoints the Eastern Trust Company, Norman Layton and his only daughter Marion, executors; directs the payment of his debts, the sale of real estate and the handing over of stocks held in trust for his daughter to her when she becomes of age.

Then he creates a trust fund said to amount to nearly $75,000 consisting of stocks and shares, &c., for the benefit and use of his said daughter, the income to be paid to her during her life and upon her death said stocks, shares, &c., to go as afterwards provided.

Then follow a number of small bequests to various persons, some money and some particular articles. Among these special bequests is one to his daughter Marion of real estate in the following terms:

"Tenth. I give my daughter Marion the use of my homestead at Truro and such lands about it and my Lorndale farm at Truro as she may desire, to occupy and enjoy, so long as she may wish to live upon the premises, with power to my executors to sell from time to time such portions or lots for reduction of my liabilities and purposes of my estate, and this my will as she may decide upon, and I give her in her own right my household furniture and perishable personal property in and about my dwelling house at Lorndale not herein specifically bequeathed, and also any horses and two cows she may select from my cattle."

The only thing that can be deduced from this clause is the right of Marion to live upon the homestead premises as long as she may wish, and the right of the executors to sell

from time to time such portions or lots as may be necessary to reduce his liabilities, with his daughter's assent. What shall become of this real estate in case his daughter ceases to occupy it is not set forth in this clause, and if found at all must be found in some other portion of the will, and if not found elsewhere it can only be treated as property undisposed of and therefore descending to the heir Marion. It may be mentioned that Marion has ceased to occupy the homestead, is married and has children.

After making these several special bequests he proceeds to provide for the contingency of his daughter's death without heirs:

"Twenty-second.—On the death of my daughter, or at my death, should she not survive me, should she leave lawful issue during the minority of such issue, I wish the income from the stocks set aside under the fifth clause of this my will, to be devoted to the maintenance and education of such issue, and each child of such issue as he or she attains age, to take a fair divide of said stocks or of the principal then representing them, in his or her own right till all are vested in this way; but should my said daughter die without leaving lawful issue of her body her surviving, such issue to include the children of any deceased child, then and in such case I desire the stocks and investments under the fifth clause, together with all the residue or remaining property of my estate to be disposed of as follows:"

If his daughter lives, or if when she dies she leaves heirs of her body the disposal of the fund is plain—the income of the trust fund is to be paid to her children or grandchildren until each attains age, and then to be evenly divided between them. But if his daughter dies leaving no issue, then the trust fund and all the residue of the estate, if there be any, is to be distributed among a large number of people with a residuary clause in favour of two persons.

Under ordinary circumstances I should have thought the interpretation of this clause was fairly clear. If his daughter lived and had descendants who survived her the fund was to go to her and them. If she died without descendants, then the estate was to be divided among a stated list of friends. The only clauses in these added bequests that could throw any shade of doubt over this construction are two, in one of which he specifically bequeaths a safe to one friend and his library to another. The argument is natur-

ally made that he did not intend that these specific bequests should be postponed until the contingency—extremely remote—should arise of the death of his daughter and all her descendants. It is natural that these two special bequests should throw a little doubt on the obvious interpretation to be drawn from the fairly plain language of the 22nd clause of the will. But there are other expressions which make it fairly clear that the testator intended to make these added bequests subject to the contingency of his daughter's decease without issue. In the residuary clause in favour of his cousins Hazard and Longworth at the end are these significant words, "should he not survive me or my daughter."

On the whole, I do not think that the fact that he included two specific bequests to two friends is sufficient to over-ride what seems to me the natural construction of the 22nd section.

No further provision is found in the will for the disposal of real estate, and although the Court is reluctant to find an intestacy in respect of any portion of an estate conveyed by will, I see no alternative in the present case but to regard the real estate now remaining unsold, as devolving upon the heir and that she is to enjoy the income arising from its use, and if sold with her consent the income arising from the proceeds.

I think, therefore, the answer to the third question must be "yes."

"4. Have the executors of the last will and testament of the deceased power to sell and dispose of the said homestead at Truro and the lands about it, and said Lorndale farm at Truro?"

The answer, obviously, to this question, in view of the answer to the third, is "Yes, if the daughter Marion so decides."

"5. In case the said homestead at Truro and the lands about it and said Lorndale farm are sold by the executors is the plaintiff entitled during her lifetime to receive the income derived from the investment of the proceeds of such sale?"

The answer to this question is "Yes."

"6. If the fifth question is answered in the negative how is the said income to be applied by the executors?"

This question has been completely disposed of by the answers to the previous ones.

The costs of all parties to this action should, I think, be paid by the Eastern Trust Co. out of the general funds of the estate derived from real estate.

RUSSELL and DRYSDALE, JJ., concurred.

GRAHAM, E.J.:—The late Israel Longworth a barrister of this Court left a will which appointed the Eastern Trust Company and his daughter the present plaintiff executors and trustees.

It contained, among others, the following provision:—

"Fifth. All my stocks or shares at my death in the 'Toronto Electric Light Company, Limited,' 'The Merchants Bank of Prince Edward Island,' 'The Union Bank of Halifax,' 'The Bank of Nova Scotia,' 'The Halifax Banking Company,' 'The Merchants Bank of Halifax,' 'The Eastern Trust Company,' 'The Nova Scotia Steel Company, Limited,' and 'The Charlottetown Steam Navigation Company, Limited,' save four shares I leave to the Eastern Trust Company in trust to pay over the net income accruing and to accrue thereon annually in quarter yearly payments as nearly as may be found possible to my daughter Marion Longworth during the term of her natural life, and upon the death of my said daughter the said stocks and shares at market value or the money proceeds thereof to go as hereinafter provided."

"Tenth. I give my daughter Marion the use of my homestead at Truro and such lands about it, and my Lorndale farm at Truro as she may desire to occupy and enjoy, so long as she may wish to live upon the premises, with power to my executors to sell from time to time such portions or lots for reduction of my liabilities and purposes of my estate and this my will as she may decide upon, and I give her in her own right my household furniture and perishable personal property in and about my dwelling house at Lorndale not herein specifically bequeathed, and also any horses and two cows she may select from my cattle."

"Twenty-second. On the death of my daughter or at my death, should she not survive me, should she leave lawful issue, during the minority of such issue, I wish the income from the stocks set aside under the fifth clause of this my

will, to be devoted to the maintenance and education of such issue, and each child of such issue as he or she attains age to take a fair divide of said stocks, or of the principal then representing them in his or her own right till all are vested in this way; but should my said daughter die without leaving lawful issue of her body her surviving, such issue to include the children of any deceased child then and in such case I desire the stocks and investments under the fifth clause, together with all the residue or remaining property of my estate to be disposed of as follows:"

Then follows a number of provisions giving large pecuniary legacies to various persons, paragraphs from 1a to 20t. The last of these paragraph is as follows:—

"20t. The balance re residue of my property, if any, I leave to be equally divided between my cousins, Francis L. Hazard, K.C., of Charlottetown, and Robert Longworth of Glenwood, the Hazard children to take their father's share among them should he not survive me or my daughter."

The daughter, in July, 1903, after the testator's death, married and two children have been born of the marriage.

After her marriage she ceased to reside on the homestead farm at Truro and lives with her husband at Sydney.

She has taken out this originating summons in order to have certain questions arising under the will determined by the Court.

The legatees mentioned in the alternative portion of the will have been made defendants.

The first question arises in respect to some calls made since the testator's death upon the shares of the Eastern Trust Company specifically bequeathed by a clause in the will. And it is asked if these calls are payable out of the testator's estate, in this case the real estate.

I am of opinion that they are not, that the specific legatees take them with the burden. The payment of this call is not necessary to complete the testator's interest in the shares: Armstrong v. Burnet, 20 Beav. 424. Neither are the shares a portion of a residuary fund which the tenant for life was to have the enjoyment of but are specifically bequeathed by the will. I refer to Re Box, 1 H. & M. 552.

In Jarman on Wills, 2036, it is said:—

"If the shares had been given to her for life as a specific bequest 'such shares' (quoting from Re Box) 'would be

taken by the legatees cum onere and that the tenant for life and those entitled in remainder would have to provide for the payment of the calls either out of the shares themselves or otherwise as they might think fit, the residue of the testator's estate would have nothing to do with them.' As between the tenant for life and the remainderman it seems that in such a case, in accordance with the principle stated in ch. 34, the tenant for life would be entitled to have the amount required for payment of the calls raised out of capital, she paying the interest on it during her life."

The next question is whether the plaintiff, until the homestead and farm are sold by the executors, is entitled to receive the rents and income therefrom.

I think that it is reasonably clear that the testator intended the gifts from 1a to 20t inclusive to take effect only in the event of his daughter dying without leaving lawful issue her surviving, and that these legatees cannot take until that event happens. They are very large legacies in amount and would exhaust the testator's estate, and could therefore have only been intended to be given in case the daughter died without issue her surviving. The fact that a safe and his law library are bequeathed to legatees in this alternative portion of the will does not, I think, overcome the clear expression of intention. Nor does the fact that in the case of the homestead and farm as well as in the case of the personal property other than the stocks there is no provision as to the intermediate period before the event happens, namely the death of his daughter without issue her surviving.

I think that a passage in 4 Kent's Commentaries, p. 284, covers this matter:

"Where there is an executory devise of the real estate, and the freehold is not in the meantime disposed of the inheritance descends to the testator's heir until the event happens. So where there is a preceding estate limited with an executory devise over of the real estate, the intermediate profits between the determination of the first estate and the vesting of the limitation over, will go to the heir-at-law if not otherwise appropriated by the will.

The same rule applies to the executory devise of the personal estate and the intermediate profits as well before the estate is to vest as between the determination of the first estate and the vesting of a subsequent limitation will fall into the residuary personal estate."

From this it is clear that the plaintiff as the heir is entitled to receive the rents and income from the homestead and farm until it is sold and after it is sold she is entitled to receive during her lifetime the income derived from the investment of the proceeds.

I think it is clear that the trustees may sell the homestead and farm. There is a power given to the executors to sell such portions as she may decide upon for the reduction of the testator's liabilities and for the purposes of the estate and of the will. The will contemplates in one alternative the ultimate distribution of this land in pecuniary legacies and therefore a sale of the land.

Subject to the plaintiff's rights as heir, and also to the right to reside on this land, which she may forego if she elects to do so, I think that the executors may sell, and that purchasers would take a good title to the homestead and farm, the plaintiff concurring in the sale.

The answers to the questions as given by the learned Judge at the hearing will be varied to the extent I have intimated.

The costs of the plaintiff and Mr. Robertson's costs, one bill, will be paid out of the proceeds of the real estate in the hands of the trustees.

NOVA SCOTIA.

SUPREME COURT.

TRIAL.

DECEMBER 23RD, 1910.

REID & ARCHIBALD v. JOHN TOBIN & CO.

Shipping — Contract — Charter of Steamer for Certain Voyage—Deviation at Instance of Charterer—Damage to Ship—Liability of Charterer.

Action claiming damages for injuries to plaintiffs' steamer resulting from a deviation from her voyage made at defendants' instance.

J. J. Ritchie, K.C., for plaintiffs.

H. Mellish, K.C., for defendants.

GRAHAM, E.J.:—The contract as ultimately concluded between Mr. Gould, acting for the plaintiffs and Mr. Hetherington, acting for the defendants was, in my opinion, that the "Liberty" was to call at the ports of River Bourgeois, Irish Cove, St. Anne's and Ingonish with cargo shipped by the defendants in the plaintiffs' steamship; that the port or place Big Pond was not included in the voyage. The defendants' counsel very plausibly contends that the contract first concluded included that place (and I agree with that view); then when one master, Murphy, was negotiated with to go in the ship and objected to Big Pond, Hetherington assented to that place being left out, but when Murphy declined to go and Heater was employed as master, that the original contract was resumed and Big Pond was included; that Murphy's objection was a personal thing and was off when he declined to go. I think, however, that this was not so. That is a difficult question when it is so largely a matter of inference. But apparently Mr. Hetherington writing immediately afterwards did not infer that. Of course he might be mistaken himself as to what was really concluded between them but people have to stand the consequences of such an admission.

This letter was written and delivered to the master on the night of 14th December, 1909, and the ship sailed at noon the next day. The letter is as follows:—

"Although it was not in the agreement that steamer 'Liberty' was to call at Big Pond, yet we would be very much pleased if you could arrange to do so. We understand that the difference between Irish Cove and Big Pond is seven miles but the roads at this time of year are in very bad condition. If at all possible arrange to land the Big Pond stuff there and any freight that you have for north side of East Bay you will also land at Big Pond."

Then I find as a fact that the ship struck the bottom in going into Big Pond and that her subsequent leaking was due to that. There is according to the evidence something in the physical condition of the ship which leads me to conclude that the injury was due to stranding rather than to the mere action of the sea. It is a matter between others that the defendants obtained their insurance for goods damaged only upon the basis of a stranding, but it indicates their

impression that it was the fact that there had been a stranding.

Then the defendants by their letter having asked the master to go into Big Pond which, by the way, was seven miles from Irish Cove, rather than transport the goods by land from the latter place to the former, and the ship having stranded going in, are the defendants answerable in damages for the injury to the ship?

The statement of claim seems to proceed on the theory that there was an agreement that the ship should not call at Big Pond and the breach of that agreement is relied upon. I think there was no such agreement. The parties failed to agree about going to Big Pond and it was left out of the proposed voyage. At the argument the cause of action which was put forward was that the agreement between the plaintiffs and the master to go upon this voyage was violated at the instance of the defendant and upon the authority of Bowen v. Hall, 6 Q. B. D. 333, an action on the case lies for that act.

There is difficulty here about the facts. It is the law that the master cannot (with trifling exceptions) change the terms of a charter made by the owners in respect to route when the owners are present. Now they had been changed and River Bourgeois had been added by arrangement between the master and the shippers and this was afterwards assented to by Gould. But Gould says he was on the wharf. He saw some goods addressed to Big Pond and he mentioned the fact to the master or the mate—they were both there—and he said "Remember they are to go to Irish Cove."

I think that the master in going in to Big Pond was violating his duty to his owners. He went in to oblige the defendants and in consequence of the letter already quoted. His going in was the natural and probable consequence of such an appeal. It was a benefit to the defendants at the expense of the plaintiff to have the goods landed at Big Pond and they for this benefit asked him to go there. They knew it was contrary to his duty because that port had been discussed and omitted from the agreement.

The cases (including the one cited) from Lumley v. Gye, 2 El. & Bl. 216, down to South Wales Federation v. Glamorgan Coal Co. (1905), A. C. 239, seem to have expressions which cover this case and would make the defendants liable. I first thought that the injury might be remote.

People so often ask the conductor of a railway train to stop at a station to let them off knowing it is not on the time table for that train; or ask a shipmaster to call in at a place which they know is not on his route to take on a passenger regardless of the consequences of an accident in the course of such departure from duty, that one naturally shrinks from that view. But the wrongful deviation was still operative although the injury was directly due to the accident. It was more dangerous to go there than not to do so. I refer to Davis v. Garrett, 6 Bing. 716.

There will be judgment for the plaintiffs and I assess the damages for injury to the ship and for detention at the sum of $200 and I allow costs.

The other claims are dismissed.

The statement of claim should be amended to cover the view put forward in this judgment.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT DECEMBER 3RD, 1910.

D'HART v. McDERMAID.

Sale of Land—Agreement—Construction—Instalment Payments—Insolvency of Vendee—"Due"—Extrinsic Evidence.

Appeal from the judgment of GRAHAM, E.J., in favour of defendant in an action claiming damages for breach of an agreement to convey land.

Reported, 8 E. L. R. 229.

F. McDonald, in support of appeal.

W. B. A. Ritchie, K.C., contra.

DRYSDALE, J.:—The question here turns upon the proper interpretation of the following agreement made between plaintiff and defendant:—"Agreement made this 3rd day of July between John McDermaid and F. A. D'Hart, both of Sydney. The said J. McDermaid agrees to sell to the

said D'Hart that lot of land and buildings thereon situated on the north side of Centre street, Coke Ovens, Sydney, now occupied by D'Hart for $800, said price to be paid as follows. $20 on account has already been received this day, $20 shall be payable on the third day of each month for 11 months to and including the 3rd day of June, 1906, thereafter $15 per month shall be paid till this debt is entirely discharged.

"At the expiration of five months from this date the said McDermaid agrees to give to the said D'Hart a deed of this property and to obtain and give to the said D'Hart a release of the mortgage in favour of Hugh Ross which now stands against this property; the said McDermaid also agrees that all taxes up to the end of 1904 shall be paid by the said McDermaid, it is understood that the said D'Hart shall pay, as they come due, all insurance, taxes and repairs necessary for the protection of the building or required by the Yarmouth Loan Society, who hold the first mortgage. The rate of interest chargeable by all parties concerned on the balance of this purchase-price, which may from time to time be due, shall be 7 per cent. per annum.

" The said F. A. D'Hart hereby agrees to carry out all his obligations alluded to in the foregoing.

" The said McDermaid hereby authorises A. M. Crofton to accept all moneys payable under this agreement and authorises him to discharge out of the said moneys the first mortgage and $30 on account of the second mortgage, and costs of obtaining release and deed and taxes which are now in arrears against this property, balance, if any over and above these debts to be retained by the said A. M. Crofton as commission for making this sale, and the said John McDermaid hereby declares that the two mortgages herein alluded to and the taxes are the only incumbrances against this property.

"(Sgd.) F. A. D'Hart and J. A. McDermaid."

At the time of the making of this agreement defendant, the owner of the property was in insolvent circumstances and there were incumbrances on the land as follows: On a first mortgage to the Yarmouth Loan Co. $708, second mortgage to Hugh Ross $30 and taxes $9. The first mortgage was payable by instalments of $9 a month, and at the time of the making of the agreement in question there were instalments overdue amounting to $312. Crofton, the agent of the Yarmouth Loan Co., although not a party to the agreement, is thereby made the agent of defendant to re-

ceive the money payable thereunder and therewith to discharge such incumbrances any balance over the moneys necessary for this purpose to be retained by himself. The contest here is over the interest chargeable to plaintiff. The plaintiff's contention is that $800 is the sum total payable by him in instalments as specified, that this sum was arrived at as an amount that would discharge all the encumbrances including interest, sue on any overdue instalments to the loan company, and would still include a small commission for Crofton; a calculation shews this amount would cover all these purposes, and that the clause about payment of interest was only intended to apply to overdue instalments. The defendant admits he was handing over the property to plaintiff for the incumbrances against it and was to receive nothing beyond that. Crofton, who was made a party at the trial raises the contention that interest is not only payable on overdue instalments but that it was the true intention of the agreement that interest should be paid on the whole unpaid balance of the $800, the principal sum mentioned in the agreement. If this contention were to prevail Crofton would be receiving not merely a reasonable sum for drawing the agreement, but a sum equal to $134, and on a construction that is not contended for by the defendant. If I were obliged to give such a construction to this writing I would hold it to be a very plain case for reformation on McDermaid's admissions; but looking at the whole agreement and taking therefrom the intentions of the parties in the light of the circumstances existing at the time, I think $800 was the price agreed upon and payable in instalments without interest. That is the plain reading of the first portion of the agreement which says that defendant is selling for $800, said price to be paid as follows, $20 this day, $20 on the their of each month for 11 months, and thereafter $15 per month, till this debt is entirely discharged. There is no stipulation here about interest, but simply the $800 to be paid in instalments. Then follows details about the transfer, payment of taxes, insurance, &c., &c., and at the bottom of this clause the phrase "the rate of interest chargeable by all parties concerned on the balance of this purchase price, which may from time to time be due, shall be 7 per cent. per annum." The purchase price is payable in instalments without interest, and this interest clause must, I think, be read as applying only to instalments.

When I find that $800 is ample to discharge all incumbrances against the property, that McDermaid admits he was handing over the property under an arrangement to provide for the discharge of these incumbrances only, that the instalments as stipulated for would accomplish this, and that Crofton is merely made defendant's agent to receive the moneys for this purpose, I think before any construction of this writing is had that would throw an additional burden of $134 on the plaintiff, and put it into Crofton's pocket for practically nothing, the writing should be so plain as to admit of no doubt. But reading this agreement as I do I think the real intention of the parties as disclosed by the agreement is being carried out. If it could not be so read, on McDermaid's admissions it would, it seems to me, be a very plain case for reformation.

I am of opinion the appeal should be allowed with costs.

LONGLEY, and LAURENCE, JJ., concurred.

TOWNSHEND, C.J.:—I cannot agree with the construction put on the agreement in this case by the learned trial Judge. (The learned Judge here quoted from the agreement as set out in full above.) At the time the land was mortgaged to the Yarmouth Loan Society on which $708 was then due, $43.62 was due for arrears of interest, $9 for taxes, and $30 was due on a second mortgage to Ross, making in all $796.68, which would leave a balance of $9.32 to go to Crofton as provided by the agreement, making a total of $800. D'Hart actually paid Crofton $825 by monthly instalments as agreed. So assuming the plaintiff's contention the correct one, he had actually overpaid the amount of the purchase. But Crofton, agent for the Yarmouth Company claimed $103.25 more, which plaintiff was compelled to pay to get a release of the mortgage and this sum he now claims to be repaid by the defendant Crofton. Crofton makes this claim under a clause in the agreement to which I will now refer:

"The rate of interest chargeable by all parties concerned on the balance of this purchase price which may from time to time be due shall be seven per cent. per annum."

The defendant contends, and the learned Judge has adopted his contention, that this means that interest at the rate of seven per cent. was to be payable on the whole $800,

or on such part as from time to time remained unpaid, the result of which would be that in addition to the $800 agreed purchase price plaintiff must pay $134 for interest which would go into Crofton's pocket.

Now I am of opinion that the true construction of the contract is entirely opposed to this view, and that it can only be interpreted that interest at that rate is to be paid on such part of the $800 as may from time to time be due and not paid. The learned Judge thinks the word "due" as used here means "owing" or "unpaid" and not as "payable," but he seems to have overlooked the effect of the words immediately preceding, "which may from time to time be due." The contract specifies distinctly the "times" at which each payment is to be made, and it would appear to be much more consonant to reason and agreeable to other parts of the contract to apply the seven per cent. on those amounts which become due and payable at these different times. Some light may be gathered from the use of the word "due" in a previous part of the contract where it provides that "said D'Hart shall pay as they come 'due' all insurance, taxes and repairs necessary, &c."

There can be no doubt "due" in this sentence means when it is payable, and I see nothing in the contract to give a different signification when used further on.

The learned Judge further says:

"If the parties meant interest on the instalments they would have said so, and not spoken of interest on the balance of the purchase price."

With all respect I submit that this is exactly what the parties have said: "Interest on the balance of this purchase price which may from time to time be due, &c." That is, interest on that portion of the balance which may from time to time be due, that is, payable.

The most satisfactory commentary I have found on the subject is to be found in vol. 10, p. 277 of the Am. & Eng. Enc. which is stated as follows:

"The word 'due' has a variety of meanings depending on the connection in which it is used. It has been generally defined to be that is owed, that which custom, statute or law requires to be paid. The question which the Courts have most frequently had to deal with in regard to the meaning of this term is whether it signifies that a debt is owing and payable or merely owing. In the commercial and popular

acceptance of the word, when employed participially or adjectively after 'debt' without adding some verb or participle denoting future time it is equivalent to 'payable at the present time,' i.e., 'due' is a synonym of 'payable.' The term in its usual acceptation signifies not only that the time of payment has expired, but that the debt is unpaid."

Of course, as stated, it is sometimes used in the sense of simple indebtedness without reference to the time of payment as being equivalent to "due."

This explanation is supported by a large number of American cases and some English, and it is evident in arriving at the sense in which it is used we must have regard to the whole document in which it is used. I do not think this is a case in which oral evidence is admissible to explain its meaning, nor is it necessary, as, in my opinion, it can be gathered from the circumstances under which it was made and the writing itself that "due" here was used by the parties in the sense of "payable" or "overdue" payments from time to time on the purchase price. In the cases cited by the learned Judge of Hall v. Brown, 15 U. C. Q. B. 419, and Dederick v. Ashdown, 4 Man. 139, I think the contracts materially differed. In the Upper Canada Queen's Bench case it specifically said: "with interest on the principal sum remaining due at each payment." These words make it perfectly clear that interest is to be paid on the whole sum, which is very different from making it payable on "what may from time to time be due." The Manitoba case refers to the circumstances under which the whole sum may be due, as a bill of sale when default is made, in no view similar to the case we have here.

I do not think the case In re Lucas, 55 L. J. Ch. 101, helps one way or the other although, so far as it has any bearing, it assists plaintiff.

In conclusion I wish to point to the fact that the $800 agreed as the purchase price was sufficient to pay off all the encumbrances on the property at the time with interest on all arrears accruing during the time payments were to be made, and left a balance for Crofton as commission. This of itself seems to me a very strong circumstance in plaintiff's favour.

In my view this appeal should be allowed with costs and judgment entered for plaintiff for the amount overpaid to Crofton with interest and costs of trial below.

MEAGHER, J.:—I have only to say that I agree with the result of the judgments read allowing the appeal, which deal with the only question raised below or raised here.

RUSSELL, J., read a dissenting opinion concurring with the trial Judge.

NOVA SCOTIA.

SUPREME COURT.

CHAMBERS. DECEMBER 7TH, 1910.

DENNIS v. THE CITY OF HALIFAX.

Municipal Corporations—Water Supply—Meters—Removal by Owner of Premises — Order to Restrain Municipal Authority from Replacing Meters—Halifax City Charter —Construction—Dismissal of Restraining Order.

Motion to continue a restraining order to restrain defendant from turning off the water supply to plaintiff's premises, pending the trial of the action.

E. P. Allison, for plaintiff.

F. H. Bell, K.C., for defendant.

GRAHAM, E.J.:—The city engineer of the city of Halifax, under authority of the statute, as is contended, and duly authorized in that behalf, on the 4th of April, 1908, placed on the plaintiff's premises numbered respectively 96 and 106 Granville street, water meters. They have been there for upwards of two years. The front walls of both premises are on the street line. The building No. 96 consists of a shop and offices having two closets and two taps, and No. 106 consists of an office and rooms on the next floor occupied by the janitor of the Herald building, and rooms on the one above occupied by a Mrs. Yetman. It has one closet and two taps.

The plaintiff, complaining that the meters were inaccurate, had them removed. It appears that the water rates

previous to the introduction of the meters by assessment had been for six months for No. 96, $6.70 and for No. 106, $6.50. While for six months in 1910 the cost by the meter rates, including rent of the meter was for No. 96 $2.06 and for No. 106 it was $1.69.

The meters, in my opinion, correctly indicated the consumption of water. They were tested and were found to be accurate. The evidence shews this fact.

On the 11th November the city engineer addressed to the plaintiff the following letter:

"The foreman of the water department reports to me that the meter has been removed from the service pipe through which water is supplied at the premises 96 Granville street. In the performance of my duty as city engineer I am obliged to notify you that I have instructed Mr. Morrison, foreman of the water department, to replace the meter, and further that if he is prevented from placing the meter in service again he is to turn off the water from the premises 96 Granville street."

A similar letter was addressed to the plaintiff in respect to No. 106.

The right to do this and to write this letter is indicated by the city charter, section 479, which I shall cite presently.

Upon the strength of receiving these letters and a visit from the official to replace the meters plaintiff applied for a restraining order.

The right to place the meters on the service pipe inside of the plaintiff's premises is, it is contended, conferred by the city charter, 1907.

Section 464 provides that the city engineer "may at any time he deems proper, cause a water meter to be placed on any service pipe supplying water to any premises."

Plaintiff's counsel contends that this means on the service pipe outside of the limits of the water taker's premises, or if, as here, the wall is on the street line, then no further within than in the wall of the premises.

The defendant contends that it means on the service pipe as long as it is a service pipe, a supplying pipe that is up to the point where the pipes of distribution on the plantiff's premises begin.

I agree with the latter contention. By section 469: "The occupant of the premises shall be responsible for the care of any water meter installed in respect to the same. And if any person injures or tampers with a meter in any

way such occupant shall be liable upon summary conviction to a penalty of not less than $10 nor exceeding $100, or, in default of payment to imprisonment for a term of ten days to three months."

Section 470: "Anyone wishing to supply a meter for his own property may do so upon the approval of such meter by the city engineer and the sanction in writing of the committee on works."

Section 479: "Any official of the city shall have the right to enter into any house, building or premises in the city, and every part of such house, &c., in which he supposes there are any water pipes or fittings, between the hours of, &c., and remain there for such reasonable length of time as is necessary for the purpose. . . ."

"(h) for fixing, examining or reading any water meter."

"2. Every person who (after notice) prevents his entry into any such house, or interferes with him in the discharge of his duty . . shall be liable to a penalty . . And the city engineer may in addition cause the water to be turned off from the premises of such offender."

Section 610: "The lakes, &c., water mains, service pipes, hydrants and all other property or works connected with the water supply, &c., shall continue to be the property of the city for all purposes."

Section 612: "In the laying down, construction, repairing and alteration of any main pipe or service pipe the committee on works, &c., may from time to time as occasion requires enter upon any lands or tenements in the city whether occupied or not, any may remain thereon . . for the proper execution of the work and may make any such excavation on the premises as is deemed expedient and take up and remove any floor, &c., or any wall, fence or erection whatsoever, &c., &c."

"No such entry shall be made . . without permission of the occupant, if resident on the premises, being first requested, &c."

Section 613: "The owner of any dwelling house situated on any portion of a street through which a main pipe is shall be entitled on application, &c., to a service pipe one-half inch in diameter to such house.

(2) Such service pipe shall be laid at the expense of the city from the main pipe to the line of the street and through the wall of the house if the wall is on the line of the street.

(3) The cost of laying such service pipe beyond the line of the street shall be borne by the applicant.

(4) When the service pipe has been put into any house or premises without objection by the owner to the position of the same, no subsequent removal or alteration of the position of the pipe shall be made except at the expense of the owner."

Section 614: "If any house so situate stands back from the line of the street the owner hereof may apply to the committee on works to do the work of extending such service pipe from the line of the street to the house."

(Provision for defraying the cost out of a deposit to be made by the applicant).

Section 615: "The owner of any dwelling-house so situated may request that: (a) More than one such service pipe, or (b) A service pipe more than one-half inch in diameter shall be laid to such dwelling."

(Provision for defraying the cost out of a deposit to be made by the applicant.)

From these provisions I think it is clear that a pipe from the main pipe in the street extended to and inside of the wall of the house supplying water is called a "service pipe," and whether the house is on the line of the street or back from it. It is a service pipe even "beyond the street line." I use the words of a section just quoted. It is not a "service pipe" at one stage and a "supply pipe" at another. Even the dictionary does not make any such distinction. In some of the old legislation those terms may have been used, but they meant the same thing.

That the owner of a property back from the street bears the cost of putting the service pipe from the line of the street to the premises is not very material. Take the sidewalks of the city and their construction for an illustration. Who owns them; who is obliged to keep them clean; who bears the cost of putting them in asphalt or concrete? All different persons. If a citizen's residence is an eighth of a mile from the main it would not be fair to the other citizens that the city should bear the whole expense of the convenience afforded to him by connecting him with the main. No matter at whose cost the pipe is put in, or even to whom it belongs, it is called a "service pipe" within the wall of the premises. The elaborate provisions in connection with the laying down of or repairing of the service pipes permitting the entry

on the premises, and whether occupied or not, and at reasonable hours, and for remaining there a reasonable time, and for making excavations there, and for removing the floor, wall, &c., all shew that such a statutory license was necessary but it could only be necessary if the service pipe was upon the premises and within its walls. Merely to insert it in the wall would not require all that kind of work.

It must go a reasonable distance on the inside of the wall for the purpose of connection and use. That is a necessary incident if not expressly said. If the city is to lay a pipe to his premises, that does not mean outside of the wall of his premises. That would not be carrying water to his house. The legislator is so accustomed to gas meters and electric light meters on his premises that he would reasonably think that the water meter was to be there also.

Then if the meter is not to be placed on the service pipe within the wall, why is there the elaborate provision giving the city official license to enter the house, building or premises at reasonable hours and remain there a reasonable time for fixing, examining or reading any water meter? The meter could not be fixed, examined or read in the house if it was fixed outside of the house and necessarily under ground. I cannot restrict that provision to apply only to meters laid before the legislation was passed. No rule of construction would permit that. The city charter must be construed as a whole.

Then why is the occupant of the house to be made responsible for the care of the meter and liable in a penalty for any tampering with the meter by third persons, if the meter is not in the house? I think all of the legislation points one way.

In this case I think the position in which the meters had been before they were removed was reasonably close to the wall. But the plaintiff did not put forward in his letter any such ground as that. In his affidavit he says:

"No attempt has been made to place said meters on any service pipe but Ewen Morrison, the foreman of the water department of said defendant city of Halifax, requested me to allow him to replace said meters on the inside plumbing of my said two premises which I refused to do."

That was a sufficient interference with the official in the discharge of this duty to justify the engineer in writing the letter which he did and which I have already quoted, and

proceeding to turn off the water if the official was prevented from placing the meters in the premises.

But apart from that I think that the plaintiff is not entitled to use the water of the city without paying for it, which he is doing when he has prevented the measurement of the quantity he uses, and that the city may turn off the water from these premises. Of course both of these gentlemen will act reasonably. They only want the question settled.

In my opinion the application to continue the restraining order should be dismissed, the costs of both parties to abide the event.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 3RD, 1910.

SAM CHAK v. CAMPBELL.

False Arrest and Imprisonment—Verdict "No Damages, $1" —Unreasonableness—Misdirection—No Defence of Mitigation Pleaded—Evidence—Costs.

Motion on behalf of plaintiff to set aside the verdict of the jury and for a new trial in an action claiming damages for false imprisonment, &c.

W. F. O'Connor, K.C., and F. McDonald, in support of appeal.

R. T. Macilreith, K.C., contra.

LAURENCE, J.:—An action for damages for false arrest and imprisonment tried before MR. JUSTICE GRAHAM and a jury at Sydney on the 12th of April last.

The learned Judge gave to the jury the following questions to be answered:

(1) Q. Did the defendant on the 30th day of August, 1907, cause the plaintiff to be imprisoned? A. Yes.

(2) Q. Did he keep him imprisoned for an unreasonable time before bringing him before a magistrate? A. No.

(3) Q. In respect to the arrest and imprisonment on the information and warrant of the 6th September, 1907, did the defendant actively interfere in any other way than in laying the information? A. No.

(4) Q. If so, what did he do?

(5) Q. In respect to the arrest and imprisonment on the information and warrant of the 13th September, 1907, did the defendant actively interfere in any other way than in laying the information? A. No.

(6) Q. If so, what did he do?

Damages: No. damages, $1.

(Sgd.) Alexander McVarish, Foreman.

The jury having answered the questions, and after the word "damages" inserted "no damages," returned into Court and handed in the questions answered as above. The learned Judge then instructed the jury that under their findings or answers to the questions there should be damages for the arrest on August 30th, loss of time and expenses occasioned in procuring release from custody. The jury then assessed the damages at $1, inserting that sum in figures in the proper place on the paper containing the questions, but evidently omitted to strike out the words "no damages," previously inserted.

The plaintiff appeals and asks for a new trial on the grounds that the damages are so small as to render the verdict unreasonable and that the learned Judge misdirected the jury as to the second question or should have decided that himself as a matter of law, and should not have submitted it to the jury.

As to the latter objection the learned Judge very clearly instructed the jury that this was a matter of law and directed them to answer "yes."

"Now, the second question is, 'Did he keep him imprisoned an unreasonable time before bringing him before a magistrate?' Insofar as that is a question of law I think I may direct you that the period between the 30th of August and the 6th of September when he was discharged, that that was an unreasonable length of time, and probably on a question of fact you would come to the same conclusion, because all the defendant would have to do was to have this man brought up before a magistrate and some evidence of a formal character given and have him remanded. I think I can in-

struct you that Sam Chak was kept an unreasonable time in prison before he was brought before a magistrate, and that would make the defendant liable in respect to the whole period of time from the arrest until the 6th of September, that is, seven or eight days, would make him responsible for that period of imprisonment. I think you are safe, gentlemen, in answering both these questions in the affirmative, that is 'Yes.'"

In his instructions to the jury in respect to the assessment of damages, he clearly disregards the answer of the jury to that question, as he could do if it be a matter of law only. If the question involves only a matter of fact the finding has not prejudiced the plaintiff in view of the learned Judge's directions as to damages. He says:—

"Sam Chak is entitled to be compensated for his loss of time between the 30th of August and the 6th day of September, some seven days," and, again, after the jury had handed in their answers, as appears by the prothonotary's record of trial:—

"They were again instructed to return to their room and assess the damage occasioned by the arrest on August 30th, 1907, loss of time and expenses occasioned in procuring release."

The other objection to the verdict is the smallness of the damages, $1. There is in the statement of claim a considerable claim for damages:

Particulars for damages:—

Solicitor's bill in habeas corpus proceedings...	$ 50
Solicitor's bill before magistrate and County Court	50
Solicitor's bill on reserved case	100
Amount of fine	100
Loss of business from August 30th to October 10th, 1907.	225
Amount paid for suitable food in gaol	25

For some unexplained reason the plaintiff did not appear at the trial and offer his evidence in support of this bill of damages, which he certainly could have done if he had paid these sums or was liable for them, or had sustained the loss of business alleged. His solicitor was left to do the best he could in the absence of his client, to prove damages. The jury, no doubt, properly, considered this circumstance in

assessing damages. The solicitor, in stating the expense incurred by plaintiff in procuring his release put the amount at something like $50, and there is no evidence that plaintiff could have earned anything during the period August 30th to September 6th had he been out of jail. This is all the evidence before the jury as to special damages.

Then there is a great deal of evidence given in mitigation of damages, respecting the circumstances under which plaintiff entered this country just before his arrest. The efforts made by him and on his behalf to evade the law relating to his entry into Canada, and his liability to arrest on suspicion of violating the law, &c.

It was contended on the argument that all this evidence in mitigation of damages was inadmissible because there was no defence in mitigation pleaded. I am of opinion such a plea in defence is unnecessary and the evidence was properly received. Chinn v. Morris, Ryan & Moody 424, in which it was held by Best, C.J., that evidence in mitigation of damages can be given under the general issue. Wood v. Earl of Durham, 21 Q. B. D. 501; Odgers on Pleading, pp. 99, 101.

"Only material facts should be pleaded. A material fact is one essential to the plaintiff's cause of action or to the defendant's defence which each must prove or fail. Facts in mitigation of damages are not material on the main issue whether defendant should succeed or not."

"The law on the point is not clear but the better opinion is (in spite of Millington v. Loring, 6 Q. B. D. 190), that matters which tend to increase or diminish the amount of damages and which do not concern the right of action are strictly not material facts within the meaning of the rules, and these ought not to be pleaded."

"It would seem to follow that the decisions in Wood v. Earl of Durham, 21 Q. B. D. 501, and Wood v. Cox, 4 Times Law Reports 550, practically overrule the decision of the Divisional Court in Millington v. Loring, 6 Q. B. D. 190, and that neither matters in aggravation nor matters in mitigation of damages are material facts, and that therefore, strictly, neither should be pleaded."

Evidence given in mitigation is directed and intended to reduce special as well as general damages, and in this case it was a proper consideration for the jury in fixing the damages, and they had a right to give weight and effect to this consideration, and so far as I can see, were not subject to

limitation or control in the degree of effect they should give to it. I cannot say reasonable men could not reach the conclusion reached by the jury.

The trial Judge has deprived the plaintiff of the costs of action and trial, and in a memorandum has given his reasons for doing so very fully. Under the authorities it cannot be said he has improperly exercised his discretion or failed to act upon good cause in doing so. Jones v. Curling, 13 Q. B. D. 262; Hartnell v. Vyse, 3 Ex. D. 307; Bostock v. Irving (1900), 1 K. B. 357, &c., &c.

The appeal should be dismissed with costs.

LONGLEY and DRYSDALE, JJ., concurred.

MEAGHER, J. (dissenting), was of the opinion that defendant was entitled to be brought to trial within a reasonable time, and when that was not done, his detention was unlawful, and he was entitled to recover damages. He thought the damages awarded insufficient and that they should be increased or a new trial ordered. Also plaintiff should have costs of action and trial. Further it was no answer to plaintiff's claim to recover costs incurred in obtaining his discharge that a fund was raised for his defence, and that he was not put to any expense. In the case of Mader v. The Halifax Electric Tramway Co., 37 N. S. R. 546, plaintiff recovered as part of his damages compensation for the medical practitioners who attended him, notwithstanding an arrangement among medical practitioners that they would attend one another free of charge.

RUSSELL, J., concurred in the latter opinion.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 5.

NOVEMBER 8TH, 1910.

ACKERMAN v. MORRISON.

Sale of Goods—Goods Ordered from Third Party and Supplied by Mistake by Plaintiff—Knowledge of Defendant before Using or Disposing of the Goods—Evidence.

Rogers, Milner & Purdy, for plaintiff.

C. R. Smith, K.C., for defendant.

PATTERSON, Co.C.J.:—The facts in this case are of the simplest character. The defendant ordered some evaporated apples of one Graham. By a mistake of the storage company who had stored with them plaintiff's apples as well as Graham's, those of plaintiff were sent him. Before he had done anything with them plaintiff made him aware that the apples were plaintiff's and asked either that he return them or pay for them. He did neither, but disposed of them as his own, and this action is brought for goods sold and delivered upon the implied contract arising from defendant's conduct. It is too clear for argument that it must succeed, and were it not for an interesting question of evidence that arises, nothing further would need to be said.

Plaintiff lives in Ontario and a commisson was issued to take his evidence and that of one of his witnesses at Belleville in that province. The defendant was not represented at the taking of the evidence and the commissioner received without objection and returned a whole lot of irrelevant matter, and some bits of hearsay. With these I have no difficulty. It is clearly my duty to reject them. (Jacker & International Cable Co., 5 T. L. R. 13). But besides the irrelevant matter and the hearsay there is much secondary evidence. Indeed the plaintiff's whole case is made out by secondary evidence—copies of letters and copy of a bill of lading, given without laying the grounds for it, and if it is to be rejected he must fail. No objection was made to this evidence before the commissioner—nor when it was being read in Court by plaintiff's counsel, not until the argument at the close of the trial was any exception taken. According to the old and as Sir Wm. Young, C.J., said in delivering the judgment of the Court in Smith & Smith, 2 Old 303, "the obviously sound" rule an objection taken then would be too late. But that rule was especially for trials with a jury, and there is language in the books from which it might be inferred that it does not apply in a trial by a Judge alone. On such a trial, says Phipson (4th ed. pp. 636-7): "if inadmissible evidence has been received whether with or without objection it is the duty of the Judge to reject it when giving judgment, and if he has not done so it will be rejected on appeal as it is the duty of the Courts to arrive at their decisions upon legal evidence." From this it is clear I think that I should reject anything received that was not evidence whether objection was taken or not. But secondary

evidence is evidence though not the best evidence. I know it is only allowed to be given under certain conditions and that until these conditions are fulfilled, as they were not in the present case, it is not usual to regard it as evidence at all. Still there is a difference between what is evidence under certain conditions and what under no conditions can be a difference that should be recognized. I do not forget that in the case which Phipson cites as authority for the proposition I have quoted (Jacker and International Cable Co., supra), it was a document that had been wrongly admitted, but there is nothing in the report to shew why it was wrongly admitted by the trial Judge, or why it was rejected by the Court of Appeal, and all the indications are that it was rejected not because it was a copy, let us say, but because it was inadmissible under any circumstances. That is the way I think we should read Phipson's rule—making it inadmissible under any conditions.

I will allow the secondary evidence to remain. If I were not to do that I would give the plaintiff leave to furnish additional evidence—to furnish the best evidence where now we have only secondary or establish his right to give secondary. But this it seems to me would only mean making the costs greater to no good purpose for the result would unquestionably be the same.

The plaintiff will have judgment with costs.